STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE DICKMAN,

Petitioner,

vs. NO: 14 WC 1793

CITY OF ELGIN/ELGIN POLICE DEPARTMENT.

Respondent.

21IWCC0082

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 29, 2019, is hereby affirmed and adopted.

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

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

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(F)(2).*

21IWCC0082

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

DATED: MAR 1 - 2021
o022321
KAD/as
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DICKMAN, LAWRENCE
Employee/Petitioner

Case# 14WC001793

CITY OF ELGIN/ELGIN POLICE
Employer/Respondent

21IWCC0082

On 7/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1380 LAW OFFICE OF DANIEL J MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

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

21IWCC0082

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lawrence Dickman
Employee/Petitioner

v.

City of Elgin/Elgin Police
Employer/Respondent

Case # **14**WC **1793**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **Geneva**, on **December 13, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 12, 2014,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$90,354.68**; the average weekly wage was **$1,737.59**.

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

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

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

To date, Respondent has paid **$0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

Respondent shall be given a credit of **$28,629.03** for TTD/maintenance, and **$0** for other benefits, for a total credit of **$28,629.93.**

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

ORDER

Temporary Total Disability

Respondent owes and has paid temporary total disability from January 13, 2104 to April 27, 2014; July 24, 2014 to August 20, 2014 and September 30, 2014 to November 7, 2014, which is 24-4/7 weeks @ $1,158.39 per week.

Medical Benefits

Respondent shall pay $2,455.36 to ATI Physical Therapy for the FCE of November 20, 2014 subject to the fee schedule and pursuant to §8 and §8.2 of the Act and subject to credit for any payments made by respondent directly or pursuant to §8j of the Act.

Permanent Disability

Respondent shall pay Petitioner the sum of **$721.66**/week for a period of **71.5** weeks, as provided in **§8 (e) 12** because the injury caused **5% loss of use of the left leg** and **5% loss of use of the right leg** and as provided in **§8 (d) 2** of the Act, because the injuries sustained caused **10% loss of use of person as a whole.**

Respondent's Credit

Respondent's claim for credit for holiday pay is denied.

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

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

Christine M Casey

Signature of Arbitrator

July 23, 2019

Date

ICArbDec p. 2

JUL 29 2019

21IWCC0082

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lawrence Dickman	)
Petitioner,	)
vs.	) **No. 14 WC 1793**
City of Elgin/Elgin Police Dept.	)
Respondent.	)

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Geneva on December 13. 2018. The parties agreed that on January 12, 2014 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree Petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent and petitioner gave notice to respondent of the accident within the time limits stated in the Act. The parties agree petitioner earned $90,354.68 in the year predating the accident and that his average weekly wage, calculated pursuant to §10, was 1,737.59.

At issue at this hearing was as follows:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills.
3. Whether petitioner is due temporary total disability, temporary partial disability and maintenance benefits.
4. The nature and extent of petitioner's injury.
5. Whether respondent is entitled to credit for $1,666.77 holiday pay.

STATEMENT OF FACTS

Petitioner claims temporary total disability from January 13, 2014 to April 27, 2014; July 24, 2014 to August 20, 2014 and September 30, 2014 to January 15, 2015; maintenance benefits from January 16, 2015 to November 14, 2015 and from May 1, 2018 to October, 2018; and temporary partial disability from November 15, 2015 to April 30, 2018.

Respondent stipulated the only benefits petitioner is entitled is temporary total disability benefits from January 13, 2104 to April 27, 2014; July 24, 2014 to August 20, 2014 and September 30, 2014 to November 7, 2014.

Petitioner testified he now is employed by Abbott Protection, which is a company he started in July, 2018, along with two other partners. He has taken $2700 to date as the company is still growing. He expected to take another $2,000 to $3,000 in salary before the end of the year. They install security cameras and other security related items. Previous to starting Abbot Protection, he was employed by Montfort Electronics as an outside sales representative from November 15, 2015 until April 30, 2018, when he was laid off. He received payment from Monfort Electronics (PX.33). From April 30, 2018 to July, 2018 petitioner was paid unemployment and was looking for work.

Before working for Montfort Electronics he was employed by respondent. He was hired on April 7, 2004 as a police officer and worked until he was terminated in December, 2016. He worked as a patrol officer. On January 12, 2014, petitioner was on a call to a shooting. When he arrived, petitioner found the police tape had fallen down that was around the scene. As he walked over to secure the tape, he slipped on ice that was not visible; he fell almost into the splits. His left leg went out and he fell on his right knee. He broke is fall with his hands. He felt pain in his left knee.

At Acting Sergeant Ericson's insistence, an ambulance was called and petitioner was transported to St. Joseph Hospital in Elgin, where he was given a brace for his leg. He then was seen at respondent's occupational clinic. Petitioner reported the day after the accident he awoke with pain in his right hip and lower back.

He received treatment from Fox Valley Orthopaedics by Dr. Sostak, Dr. Popp and Dr. Siodlarz from January 15, 2014 to April 29, 2016. During the period petitioner received treatment at Fox Valley Orthopaedics his knee pain resolved, but his back got worse.

Prior to his employment with respondent, he injured his lower back while working in Costco's warehouse. He received physical therapy only for that injury.

He also received chiropractic treatment from Dr. McGowan in 2013. He had some dull ache in his back. After the January 12, 2014 accident, the pain was located at the waist level that radiated into the left buttocks.

Petitioner had MRIs done on April 15, 2014, October 9, 2014 and April 27, 2016. He had an arthrogram and a MRI of the right hip on April 15, 2014. On November 20, 2014, he underwent a functional capacity evaluation at ATI.

Petitioner also came under the care of Dr. Aruna Ganju of Northwestern from May 12, 2016 to December, 2016. Dr. Ganju performed surgery to petitioner's lower back on June 23, 2016. Petitioner was discharged from Dr. Ganju's care on December 28, 2016 with the restrictions of no physical altercations. Petitioner also was not to sit in a vehicle for any length of time.

Petitioner testified he did not believe he could perform the duties of a police officer safely the way he feels. He would not be able to sit in the patrol car wearing a duty belt, or chase after people or take down anyone.

He acknowledged he received the termination letter (RX.26). However, he was never released to return to work as a police officer by his treating physicians.

Petitioner was seen by Dr. Jeffrey Coe on January 5, 2016 at his attorney's request. He was seen by Dr. Rodarte at respondent's request for a fitness for duty examination on November 25, 2014 pursuant to the collective bargaining agreement. Dr. Rodarte did not find petitioner capable of working as a police officer. On January 28, 2015 Dr. Popp stated petitioner could not return to work as a police officer.

After petitioner applied for a pension, he was seen by various doctors. He was examined by Dr. Theodore Suchy on May 11, 2014 (sic), who said he could not return to work as a police officer. He was examined by Dr. Mark Levin on April 17, 2015, who felt petitioner could return to work as a police officer.

At respondent's request, he was seen by Dr. Jay Levin on October 15, 2014, who believed petitioner could return to work as a police officer.

Petitioner has pain in his back at waist-level, especially after doing installation work in his new company. He had relief after surgery; the pain then started within one month after working for his new company. He worked six days in a row doing a heavy job with his new company and

had real problems with his back. Petitioner confirmed his knee and hip pain resolved within months after the accident.

On cross-examination, petitioner confirmed he does lifting of tool boxes and materials as well as going up and down ladders to perform the installation of security systems.

Petitioner confirmed he had received treatment by Dr. McGowan of AccuCare, during the summer of 2013. He also confirmed how his back felt at the time of the treatment.

Petitioner testified he asked Dr. Ganju to provide a restriction note as Dr. Ganju was not involved with the work comp case at all and wasn't part of any of the paper work.

Gail Cohen January 26, 2015 Letter (PX.1 & RX.21)

Ms. Cohen's letter confirms petitioner has permanent restrictions according to Dr. Rodarte's exam of November 25, 2014 and the November 20, 2014 FCE that prevents him from returning to work as a police officer.

Dr. Richard Rodarte May 22, 2016 Deposition (PX.2)

Dr. Richard Rodarte, board certified in preventative and occupational medicine, testified in behalf of petitioner. Dr. Rodarte performed a fitness-for-police duty of petitioner on November 25, 2014 at respondent's request.

Dr. Rodarte, in strong reliance of the FCE, concluded petitioner was not fit for duty as a police officer as he could not be involved with physical altercations or in emergency evacuation situations (11-12). He was not asked to give a causal connection opinion as to the work accident of January 12, 2014 and, therefore, did not offer an opinion on causation (12).

November 20, 2014 ATI Functional Capacity Evaluation (PX.3)

Petitioner underwent a valid FCE on November 20, 2014 which showed he was not capable of tolerating prolonged sitting beyond 50 minutes and not likely able to apprehend and arrest subjects as this would be in the very heavy physical demand level.

Dr. Theodore Suchy May 1, 2018 Deposition (PX.4)

Dr. Theodore Suchy, board certified in orthopedic surgery and as an independent medical examiner, testified in behalf of petitioner.

Dr. Suchy examined petitioner at the request of respondent's police pension board on May 11, 2015, and reviewed medical records relative to the petitioner's January 12, 2014 work accident.

Dr. Suchy concluded petitioner suffered a left knee and right hip injury that had resolved. Dr. Suchy also indicated petitioner had pre-existing degenerative disc disease of the lumbar spine, and scoliosis, that had been exacerbated. Dr. Suchy believed the back injury was preventing petitioner from returning to work as a police officer.

Although petitioner advised Dr. Suchy that he had a prior back injury claim with Costco, which according to petitioner had resolved, he failed to advise Dr. Suchy of similar low back complaints for which he sought treatment from a chiropractor in July and August, 2013.

Dr. Jeffrey E. Coe August 5, 2016 Deposition (PX.5)

Dr. Jeffrey Coe, board-certified specialist in occupational medicine, testified in behalf of petitioner. At the request of petitioner's attorney, Dr. Coe performed an exam of petitioner on January 5, 2016. In conjunction with the exam, Dr. Coe reviewed medical records and other

materials. Petitioner reported a back injury in 2003 that had resolved with physical therapy. He reported he was pain free from 2003 until the fall on January 12, 2014.

Based upon petitioner's history and the medical records provided, Dr. Coe determined petitioner continued to need work restrictions as a result of the work accident of January 12, 2014. Dr. Coe believed the additional treatment received after his exam on January 5, 2016, including the June 23, 2016 surgery by Dr. Ganju, was reasonable and necessary to treat petitioner of his work injury.

On cross-examination, Dr. Coe confirmed he had not seen any chiropractic records regarding petitioner. Dr. Coe also confirmed he had not reviewed any actual diagnostic studies, including MRIs or X-rays. Dr. Coe agreed the synovial cyst had developed between the October, 2014 MRI and the 2016 MRI. Dr. Coe agreed the synovial cyst had reduced from the April 15, 2014 MRI to the October 9, 2014.

Presence St. Joseph Hospital Records (PX.6)

Petitioner presented at the emergency room on January 12, 2014 after falling while working. He reported doing the splits and falling on his left knee. His complaints were limited to his left knee.

Petitioner was seen on January 13, 2014 by Occupational Health. He had complaints of pain in his left knee and mild low back complaints. The diagnosis was acute sprain of the left medial knee and mild strain to the left low back; slowly healing.

The records also include a September 15, 2014 bone scan.

Fox Valley Orthopaedic Records (PX.7)

Petitioner was first seen on January 15, 2014 by Dr. James Sostak with left knee complaints. The diagnosis was left knee medial collateral ligament sprain. Petitioner was kept off work.

On January 28, 2014, he was seen again by Dr. Sostak in follow up to his left knee. He now complained of lower left back and buttock and right groin pain for two to three weeks after the fall. Petitioner admitted he had pain in his low back in the past, but it is now worse. Diagnosis was lower back sprain, sprain/strain knee medial collateral and bilateral hip strains. Physical therapy was prescribed. Petitioner continued off work.

Petitioner was seen again by Dr. Sostak on February 25, 2014. He was continuing physical therapy and was to transition to work conditioning.

He returned to Dr. Sostak on April 21, 2014 to discuss the result of the right hip MRI.

On April 24, 2014, petitioner was first seen by Dr. Craig Popp for low back and left leg pain. Dr. Popp noted the CT scan showed osteophytes around the facet joint that was aggravated by the accident/fall. SI injections were recommended.

Petitioner was seen on May 5, 2014 by Dr. Siodlarz, who performed lumbar facet injections on May 15, 2014.

Petitioner was seen by Dr. Sostak on June 4, 2014 in follow up to his left knee sprain and right hip flexor strain. Petitioner received a cortisone injection for his right hip on June 17, 2014 by Dr. Siodlarz. Petitioner was seen again by Dr. Sostak on June 30, 2014.

Petitioner was seen by Dr. Siodlarz on August 20, 2014 after completing work conditioning. A steroid injection was offered.

He was seen by Dr. Popp on August 29, 2014 as follow up for low back pain. A bone scan was recommended. On September 30, 2014 petitioner followed up with Dr. Popp. Dr. Popp recommended petitioner obtain another MRI and kept petitioner off work.

Petitioner underwent another MRI on October 9, 2014 which showed no evidence of the synovial cyst at the L3-L4 level. There was no focal nerve root displacement.

On October 13, 2014, Dr. Popp concluded surgery was not the answer and recommended a functional capacity evaluation to determined petitioner's restrictions.

Petitioner was seen by Dr. Popp on December 4, 2014, after undergoing a FCE and fit for duty evaluation. Dr. Popp noted petitioner could not return to work as a police officer as he could not sit continuously. Dr. Popp though petitioner had suffered a significant contusion of the bone, or possible micro fracture. Dr. Popp also determined the myofascial type injury had healed. Dr. Popp further stated petitioner's preexisting degenerative condition had become aggravated following the accident, but believed petitioner had reached MMI.

Fox Valley Orthopaedic Records (PX.8)

Petitioner was seen by Popp on August 28, 2015. Dr. Popp reported no change since he last saw petitioner.

Petitioner was next seen by Dr. Popp on April 21, 2016. Petitioner reported spending a lot of time in the car as he was now employed as an outside sales representative. He complained of numbness down his left leg and into the top of the foot. A new MRI was ordered.

The April 26, 2016 showed a return of the synovial cyst at the L3-L4 level. Dr. Popp noted on April 29, 2016 there was progression of the synovial cyst at the L3-L4 level and recommended decompression and fusion surgery at the L3-L4 and L4-L5 level.

Fox Valley Orthopaedic Disability Notes (PX.9)

According to the disability notes, petitioner was completely disabled from January 15, 2014 to May 16, 2014; from June 10, 2014 to June 17, 2014; from September 30, 2014 to December 4, 2014. All other periods after January 12, 2014, petitioner was released to restricted work only.

ATI Physical Therapy Bill (PX.10; PX. 15; PX.16; PX.25)

$2,455.36-FCE 11/20/2014
$3,382.62- P.T. 08/19/2016-09/06/2016

Northwestern Medicine/Dr. Aruna Ganju Records (PX.11)

Petitioner was first seen by Dr. Ganju on May 12, 2016 for low back pain which he related back to accident of January, 2014. Dr. Ganju's impression was lumbar stenosis secondary to synovial cyst at L3-4. An EMG was ordered. The May 12, 2016 EMG was normal. On May 19, 2016, Dr. Ganju recommended a minimally invasive decompression at L3-4 that was carried out on June 23, 2016. On July 7, 2016, CNP Noel Burks reported petitioner was doing well.

Dr. Aruna Ganju December 28, 2016 Certification to Return to Work (PX.12)

On December 28, 2016, Dr. Ganju wrote restrictions for petitioner not to be subjected to physical altercations, no lifting greater than 100 pounds, allow breaks from sitting in car and allow breaks from wearing belt weighing 10 pounds or more.

AccuCare Total Health (PX. 13)

Petitioner was seen from July 16, 2013 to August 21, 2013 for low back and cervical complaints.

Fox Valley Orthopaedics Bill (PX.14; PX.20; PX.22; PX.24)

The bill for services rendered from April 21, 2016 to May 10, 2016 totals $2,658.00. Notice from collection agency of balance due on Fox Valley Orthopaedics bill of $750.18

May 9, 2015 Email from Murphy to Beer (PX.23)

On May 9, 2015, Attorney Murphy sent an email to Attorney Beer demanding vocational rehabilitation.

Northwestern Medicine Bill (PX.17; PX.18; PX.21; PX.26)

Physicians and hospital charges for services rendered from May 12, 2016 to June 23, 2016 totaled $53,245.04

There is an additional bill totaling $357.06 for services rendered May 12, 2106 to June 23, 2016.

Ballert Orthopedic Bill (PX. 19 & PX. 27)

Pharmacy bills totals $849.37.

Petitioner's Bill for Health Insurance (PX.28)

Bills from respondent to petitioner for health insurance from June, 2016 to June, 2017.

Notice from Cigna of Out of Network Claim (PX.29)

Notice of bill from Stephanie Crail that was out of Cigna's network.

Conduent Payments (PX.30 & PX.32)

Payments made by the petitioner's wife's insurance.

Respondent Payment to Petitioner (PX.31)

Petitioner's payment by respondent from January 3, 2014 to February 13, 2015.

Monfort Electronic Paycheck (PX.33)

Petitioner's paycheck was in the gross amount of $3,000.00.

AccuCare Total Health (RX.1)

Same records as Petitioner's Exhibit 13.

Dr. Jay Lawrence Levin Curriculum Vitae (RX.2)

Dr. Jay Levin's CV reports his education and practice and indicates he is board certified in orthopaedic surgery and as an independent medical examiner.

October 1, 2014 letter to Dr. Jay Levin and Dr. Levin October 14, 2014 Report (RX.3 & 4)

Dr. Jay Levin examined petitioner on October 15, 2014 and reviewed medical records and diagnostic studies; the diagnosis was multilevel degenerative arthritis of the lumbar spine with

lumbar myofascial strain. Dr. Jay Levin concluded petitioner had reached maximum medical improvement and was capable of returning to work without restrictions. However, Dr. Jay Levin agreed a functional capacity evaluation was in order.

April 22, 2016 letter to Dr. Jay Levin; Dr. Levin April 27 & May 16, 2016 Reports (RX5& 6)

Petitioner returned to Dr. Jay Levin at respondent's request on April 27, 2016. Dr. Levin's opinions remained the same relative to petitioner's lower back and right hip.

Dr. Jay Levin May 17, 2016 AMA Rating Report (RX.7)

Dr. Jay Levin performed an AMA rating evaluation of petitioner on April 27, 2016 and determined petitioner had 1% whole person impairment, as well as a zero percent of both the right lower and left lower extremity.

October 2, 2016 letter to Dr. Jay Levin & Dr. Jay Levin October 17, 2016 and November 1, 2016 Reports (RX. 8, 9 & 10)

Petitioner was seen again by Dr. Levin on October 17, 2016. At that time, petitioner was post-L3-L4 laminectomy/cyst removal of June 23, 2016. Dr. Levin did not believe petitioner's laminectomy was necessitated by any injury suffered to petitioner's lumbar spine in the January 12, 2013 work accident.

Dr. Jay Levin's AMA rating of petitioner's disability remained at 1% whole person as of October 17, 2016.

Dr. Jay Lawrence Levin February 10, 2017 Deposition (RX.11)

Dr. Jay Levin, board certified orthopedic surgeon, testified in behalf of respondent. Dr. Jay Levin testified consistently with his findings and opinions stated in his reports (RX.4, 6, 7, 9, 10).

Dr. Mark Levin Curriculum Vitae (RX.12)

Dr. Mark Levin's CV reports his education, practice and board certifications.

April 9, 2015 and May 9, 2015 Pension Board Letters to Dr. Mark Levin; Dr. Mark Levin April 27, 2015 and June 25, 2015 Reports and History of Present Illness by Petitioner (RX. 14-17)

Dr. Mark Levin examined petitioner at the Pension Board's request and reviewed medical records and diagnostic studies and concluded petitioner was capable of returning to work as a police officer.

Petitioner's Application for Disability Form to The Elgin Police Pension Fund (RX.18)

Petitioner applied for a duty pension on January 15, 2015 due to his claimed back injury on January 12, 2014.

Dr. Mark Levin April 25, 2018 Deposition (RX.19)

Dr. Mark Levin testified in behalf of respondent after his exam in behalf of the pension board. Dr. Mark Levin testified consistently with what was contained in his April 27, 2015 and June 25, 2015 reports.

Fred Beer's November 7, 2014 Email to Daniel Murphy (RX.20)

Respondent's attorney's email to petitioner's attorney advised benefits were being terminated based upon the findings of Dr. Levin, who determined petitioner's ongoing problems were non-work related.

Emails (RX.22)

Emails between petitioner's and respondent's attorneys whereby petitioner demanded vocational rehabilitation and respondent's response to same.

Daniel Murphy August 17, 2015 Letter (RX.22)

Attorney Murphy's letter to Beer of August 17, 2015 advised petitioner was willing to try and return to work as a police officer.

Respondent's Secondary Employment Form (RX.23)

Petitioner advised he was taking a position as the regional sales manager with Monfort Electronics Marketing.

Fred Beer May 20, 2016 Letter (RX.24)

Beer's May 20, 2016 letter to Murphy advised petitioner to report to work.

Richard Kozal December 23, 2016 Letter to Petitioner (RX.25)

Respondent's city manager letter to petitioner advising his employment had been terminated for abandoning his job as he had not responded to the May 20, 2016 demand to return to work and had not completed respondent's secondary employment form.

May 12, 2016 EMG and June 23, 2016 Operative Report (RX.27)

Petitioner's May 12, 2016 EMG was normal. Dr. Aruna Ganju June 23, 2016 operative report confirmed petitioner underwent a left hemilaminotomy at L3-4 due to left L4 radiculopathy from a left L3-L4 synovial cyst.

Respondent's Payments (RX.28)

Respondent's payments to petitioner from June 30, 2014 to January 29, 2015.

ATI November 20, 2014 FCE Bill and Payment (RX.29)

The FCE $2,455.36 bill and respondent's reconciliation of payment.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner failed to prove that his present back condition, for which he underwent surgery on June 23, 2016, was caused by the work accident of January 14, 2013. In reaching this conclusion, the Arbitrator considered the following facts:

Petitioner had complaints in the lumbar region five months prior to the claimed accident, for which he underwent chiropractic treatment, that brought him no relief.

Petitioner's treating orthopedic surgeon, Dr. Charles Popp opined on December 4, 2014, that although petitioner had suffered a significant contusion of the bone, or possible micro fracture, he believed petitioner's myofascial type injury had healed and that petitioner had reached MMI for the aggravation of the pre-existing condition.

The October 9, 2014 MRI showed no evidence of the synovial cyst at the L3-L4 level.

Although Dr. Rodarte, who performed a fitness-for-duty-exam of petitioner on November 25, 2014, determined petitioner was not fit for duty, Dr. Rodarte was not asked to give a causal connection opinion to the work accident. Accordingly, he had no opinion as to the cause of petitioner's inability to return to work.

Although Dr. Suchy, who examined petitioner on May 11, 2015, opined petitioner's back injury was the cause of petitioner's inability to return to work as a police officer, petitioner failed to disclose to Dr. Suchy the fact that he had similar complaints five months prior to the work accident.

Both Dr. Jay Levin, who examined petitioner on October 15, 2014 and April 27, 2016, was of the opinion petitioner was able to work as a police officer despite the work injury, and Dr. Mark Levin, who examined petitioner on April 27, 2015 at the pension board's request, did not find petitioner disabled.

After petitioner began employment as an outside sales representative in November, 2015, that, by his own admission, required him to spend a lot of time in his vehicle, he returned to Dr. Popp with radiating pain down his left leg and into his foot on April 26, 2016. The April 29, 2016 MRI showed a progression of the L3-L4 synovial cyst that had dissipated according to the October 9, 2014 MRI.

Petitioner underwent a laminectomy by Dr. Ganju on June 23, 2016 for removal of the synovial cyst at the L3-L4 level. Petitioner testified Dr. Ganju's treatment was not part of the workers' compensation case.

Finally, although Dr. Coe offered the opinion as to the causal connection of the problems petitioner was having with his back in 2016, for which he eventually underwent the laminectomy by Dr. Ganju, Dr. Coe relied upon petitioner's representation that his back had been pain free from 2003 until the January 12, 2014 work accident. Dr. Coe was unaware petitioner had received chiropractic treatment for similar complaints in July and August, 2013. As Dr. Coe's opinion was based upon miss-information, and thereby flawed, the Arbitrator gives little to no value to Dr. Coe's opinion.

J. With respect to the issue regarding medical bills incurred, the Arbitrator makes the following conclusions of law:

As Dr. Jay Levin agreed that a functional capacity evaluation was in order, the Arbitrator awards only the costs of the Functional Capacity Evaluation from ATI Physical Therapy of November 20, 2014 in the amount of $2,455.36, to be paid in accordance with the fee schedule and §8 and §8.2 of the Act, with credit to be given for any payments made by respondent directly or pursuant to §8j.

K. With respect to the issue regarding temporary total disability, temporary partial disability and maintenance benefits, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner is entitled to temporary total disability from January 13, 2014 to April 27, 2014; July 24, 2014 to August 20, 2014 and September 30, 2014 to November 7, 2014, which is 24-4/7 weeks @ $1,158.39 per week.

L. With respect to the issue regarding the nature and extent of injury, the Arbitrator makes the following conclusions of law:

As a result of the January 12, 2014 accident, petitioner sustained a left knee and right hip strain, as well as myofascial strain and temporary aggravation of the multilevel degenerative arthritis of the lumbar spine.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

With regard to subsection (i) of §8.1b (b) the Arbitrator noted Dr. Jay Levin provided an AMA impairment rating of 0% for the left knee injury, 0% of the right leg for the right hip injury and 1% of the whole person. The Arbitrator gives some weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a police officer, which is physically demanding. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 51 years of age at the time of the occurrence. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, although petitioner claims his earning capacity has been diminished as a result of the injury, the Arbitrator finds petitioner failed to prove that his diminished earning capacity was the result of the work injury. Therefore, the Arbitrator gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical evidence, indicate petitioner has no lasting affect from his left knee and right hip. Although petitioner claims he is permanently restricted due to his back injury, the medical evidence fails to support petitioner sustained any permanent injury to his back, but rather was the result of his pre-existing degenerative condition. The Arbitrator therefore gives little weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the left leg, pursuant to §8 (e) 12, and 5% loss of use of the right leg pursuant to §8 (e) 12, and 10% loss of use of person as a whole § 8 (d) 2 of the Act, and awards 71.5 weeks PPD @ $721.66 per week.

N. With respect to the issue regarding credit due respondent, the Arbitrator makes the following conclusions of law:

The respondent failed identify the provisions of the Act that makes it entitled to credit for $1,666.77 holiday payment to petitioner. Therefore, respondent's claim for credit is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0083

vs.

NO: 13 WC 15398

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

The decision of the Arbitrator delineates the facts of the case in detail. As relevant to the issues on review, the Commission writes additionally to address the Arbitrator's denial of causation with respect to Petitioner's cervical condition.

The Commission acknowledges Petitioner's preexisting cervical treatment, which was ongoing prior to the undisputed May 4, 2012 motor vehicle accident at work. One day prior, Petitioner's treating physician, Dr. Dickhut, noted that Petitioner had not yet plateaued regarding his cervical spine. Subsequent to the accident, Petitioner testified to headaches and increasing cervical symptoms that are corroborated by the treatment records.

The medical records reflect that Petitioner informed Dr. Bersch in Dr. Dickhut's office of the accident four days after the car accident, complaining of discomfort and concerned about

whiplash. On May 14, 2012, Petitioner complained of right lower neck pain. The following day, Petitioner informed Dr. Dickhut's office that during the motor vehicle accident he was shoved forward and then his head whipped back towards the seat. He also stated his hands were on the steering wheel and that he braced himself in that position during impact. Petitioner had nausea and headaches that night and complained of re-occurring headaches since. Dr. Bersche noted a positive cervical compression test on the right and tightness during cervical extension. Decreased cervical range of motion ("ROM") was noted. Dr. Bersche diagnosed Petitioner with cervical facet syndrome and a sprain. He also advised that current therapy would be placed on hold in order to get Petitioner's neck back on track.

Thereafter, Petitioner continued treating for his cervical spine through August 20, 2012 when it was noted that his cervical condition was doing much better and his ROM was near levels tested prior to the motor vehicle accident. On September 6, 2012, Dr. Dickhut noted that Petitioner's cervical condition was doing well. Subsequently, treatment was diverted to different body parts which were symptomatic at the time. Dr. Nardone, Petitioner's orthopedic surgeon, opined that the mechanism of injury could cause headaches and neck pain related to whiplash.

Petitioner also underwent a Section 12 examination at Respondent's request with Dr. Hsu, a board certified orthopedic surgeon on May 2, 2014. He reviewed medical records including a May 2011 cervical MRI, a January 2013 cervical MRI, a January 2013 EMG, and a July 20, 2013 cervical MRI. Petitioner informed him of his May 4, 2012 MVA. Dr. Hsu opined Petitioner had suffered a resolved cervical strain.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Arbitrator found that Petitioner failed to prove a causal connection between his May 4, 2012 accident and condition of ill-being in the cervical spine. In so doing, he noted that Petitioner had preexisting cervical issues which required further treatment, whether the undisputed motor vehicle accident had occurred or not. The Arbitrator also noted that there was a 10-day gap between the accident and Petitioner's first reports of cervical symptomatology. While it is clear that Petitioner had preexisting cervical issues, which had not plateaued and did require additional treatment leading up to the unrebutted May 4, 2012 car accident, the Commission finds that Petitioner's preexisting cervical condition was temporarily aggravated by the accident, thus proving causation by a preponderance of evidence.

In pre-existing condition cases, recovery depends on the employee's ability to show that a work-related accident aggravated or accelerated the pre-existing disease such that the employee's current condition can be said to be causally connected to the work injury and not simply the result of a normal degenerative process. *Sisbro v. Industrial Comm'n*, 207 Ill. 2d. 193, 204-05 (2003). "It is axiomatic that employers take their employees as they find them." *Sisbro*, 207 Ill. 2d. at 205. "[E]ven though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* An employee need only prove that some act or phase of his employment was a causative factor of the resulting injury, the mere fact

that he might have suffered the same disease, even if not working, is immaterial. *Twice Over Clean, Inc. v. Industrial Comm'n*, 214 Ill.2d 403, 414 (2005).

The record reflects that just four days after the car accident, Petitioner complained to Dr. Dickhut's office of discomfort and was concerned about whiplash. Petitioner's symptoms persisted, and on May 15, 2012, Dr. Bersche diagnosed cervical facet syndrome and a sprain. At that time, Dr. Bersche advised that all other current therapy would be put on hold in order to get Petitioner's neck "back on track." This language is a clear indication that there had been a change in the condition of Petitioner's neck, which necessitated diverse treatment from what Petitioner had been receiving pre-accident. The medical records and testimony indicate that the accident was the provocateur for this change. Dr. Dickhut testified that the car accident caused a cervical sprain, an opinion corroborated by both Dr. Nardone and Respondent's Section 12 examiner, Dr. Hsu.

Thereafter, Petitioner continued treating for cervical complaints and, on August 20, 2012, Dr. Dickhut noted that Petitioner's cervical condition was doing much better and his ROM was near levels tested prior to the accident. As of September 6, 2012, Dr. Dickhut discontinued further cervical spine treatment and began focusing on Petitioner's complaints in other body parts.

Based on the foregoing, the Commission disagrees with the Arbitrator's denial of causation as it pertains to Petitioner's cervical condition. The record reflects that Petitioner had a pre-existing cervical spine condition that worsened as a result of the motor vehicle accident at work. This conclusion is buoyed by the medical records, as well as corroborating diagnoses and causation opinions from both Petitioner's and Respondent's physicians. Thus, the Commission reverses the Arbitrator's denial of causation as it relates to Petitioner's cervical condition, but affirms all else.

B. Medical Expenses

In contemplation of the above-analyzed causation issue, the Commission also reverses the Arbitrator's denial of medical expenses insofar as they relate to Petitioner's cervical condition through September 6, 2012 when Dr. Dickhut discontinued further cervical spine treatment. Accordingly, the Commission awards all reasonable and necessary medical expenses for treatment related to Petitioner's cervical spine from May 4, 2012 through September 6, 2012.

C. Permanent Disability

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria.

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Id. However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v). Considering these factors in light of the evidence submitted at the hearing, the Commission addresses the factors delineated in the Act for determining permanent partial disability as indicated below:

With regard to subsection (i) of §8.1b(b), the Commission notes that neither party submitted an AMA impairment rating report, thus no weight is given to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner was employed as an Auto Mechanic, which is a physically demanding position requiring heavy lifting. Petitioner continued working in this capacity while treating for the instant cervical strain, and afterward when his condition returned to pre-accident baseline. Moderate weight is given to this factor.

With regard to subsection (iii) of §8.1b(b), Petitioner was 52 years old at the time of accident. At this age, and with a cervical strain, the instant accident likely had a lesser effect on his ability to perform his duties. Some weight is given to this factor.

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

With regard to subsection (v) of §8.1b(b), Petitioner's condition required conservative care and ultimately improved approximately four months post-accident. Substantial weight is

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given to this factor.

Based on the above analysis, the Commission finds that the injuries sustained caused Petitioner a 2.5% loss of use of his person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's cervical strain is causally connected to the May 4, 2012 accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to all reasonable and necessary medical expenses related to his cervical spine from May 4, 2012 through September 6, 2012. Respondent shall be given credit for all medical benefits that have been paid, and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is seeking this credit, pursuant to section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits, as the accident resulted in a 2.5% loss of use of Petitioner's person as a whole (12.5 weeks), pursuant to section 8(d)(2) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 1 - 2021
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0083

BUFFANO, DAVID
Employee/Petitioner

Case# 13WC015398

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

21IWCC0083

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **13 WC 15398**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/4/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $48,524.84; the average weekly wage was $933.17.

On the date of accident, Petitioner was 52 years of age, ***single*** with 2 dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Statement of Facts

Petitioner testified that he was a mechanic with certificates in auto, air and welding. (T. 18-20) Petitioner testified his job duties for Respondent included heavy engines, brakes, computers and everything else for a car or truck. (T. 28) On May 4, 2012, Petitioner testified he was test driving a customer's vehicle, a mustang, was parked at the light outside the shop waiting to make a left -hand turn and was rear ended by a Durango with a push bar. Petitioner stated at the time, his hands were at 10 and 2, he was looking left and did not see the car before impact. (T. 33 – 38) Petitioner testified he could not define how hard he was hit but there was no damage to her vehicle. He testified that the bumper of his vehicle had spidering of the paint. State Farm reflects a check was issued to the vehicle owner for $579.39. (RX 16) Perez, the office manager, testified that she assisted filling out the police report and Petitioner had a headache and did not look good immediately following the incident. (T. 173-174) The police report completed that day indicates there were no injuries. (PX 6)

Petitioner testified he had no pain when the vehicle was struck. (T. 36) Petitioner testified he worked the rest of the day until 6 p.m. and then an hour after he was home, noticed pain in his shoulder, experienced headache and nausea. (T. 39) He stated when he woke the next day, he had a little bit of pain and headaches. (Id.) Petitioner testified the headaches went away after a few days but the left shoulder and neck pain stayed and became more pronounced going from a pain scale of 3 to 6 or 7. (T. 40 -42) Petitioner testified he was seeing chiropractor Dickhut for his back from 5/21/12 – 6/18/12 as they were done with his neck. (T. 45 – 46) Petitioner testified on June 25, 2012 he told chiropractor Dickhut he was in a car accident and he had left shoulder and neck pain. (T. 46) Petitioner testified on August 20, 2012 he began experiencing pain in his right shoulder as he was favoring the left. (T. 50)

Petitioner also stated in that time, he had right arm, fingers, back and leg pain. (T. 52) Petitioner testified he was referred to Dr. Li, completed an MRI on September 7, 2012 during which time his neck was sore. (T. 54) Petitioner testified his right hand was cold as it had been, but also had aching in the wrist, middle, ring and small fingers with peeling skin. Petitioner testified he has left shoulder surgery with Dr. Eubanks and he felt a lot better. (T.88 and 158) Petitioner testified in a previous deposition related to the civil aspect of this accident and stated the parts of body injured were left shoulder, headaches, ear ringing and nausea. (T. 130) Petitioner acknowledged he continued to work between May 4, 2012 through January 2, 2013. (T. 132) Petitioner acknowledged the civil claim filed against the driver was dropped (T. 131) Petitioner acknowledged when he became employed with Respondent, benefits were offered but he declined because they were too expensive. (T. 153)

Petitioner sought treatment for his cervical spine pre-dating his employ for Respondent. On April 19, 2011 Petitioner was seen by Dr. Liu providing a history of falling on his left side while walking in the wind and experiencing numbness in the neck and shoulder, with shooting pain down the arm. (RX 7) On May 9, 2011, Petitioner presented to chiropractor Dickhut with sharp neck and low back pain, numbness and tingling that goes down both arms noting he had double carpal tunnel surgery and the right wrist was operated twice. The left hand felt better, but stated the right hand was much worse and ruined his life for past 4 years. He reflected that he had been off work for the past 4 years and went to get his CDL but couldn't get a job due to pain. He also said he hurt biceps years ago in a work injury at GM where he tore a biceps muscle. Chiropractor Dickhut stated symptoms related to cervical segmental dysfunction muscle deconditioning and atrophy as well as CTS in both wrists. (RX 6) Petitioner returned to OSF on 5/12/11 with pain intensity of 9/10 indicating his neck hurts all the time, down the right arm and hand. He also needed a DOT physical as 3 months ago had high blood pressure so only allowed 3 months. On 5/31/11 an MRI of cervical spine was completed due to R arm and shoulder pain with onset 2007. It demonstrated severe degenerative changes from C5 through C7 including osteophyte complexes and bilateral facet joint osteoarthropathy. (RX 7) As of May 3, 2012, it was noted he had not yet plateaued with care to his cervical spine. (RX 6)

Fred Groves testified on behalf of Respondent, stating he was 80 years old, had retired and had closed his shop as of March 2019. Mr. Groves testified that when Petitioner quit in January 2013, they had a conversation in the office in which Petitioner advised him he brought his problems with him and not to worry about worker's compensation. (T. 218-220)

Chiropractor Dickhut was deposed on September 24, 2013. As of May 15, 2012, Dickhut stated Petitioner complained of frequent aching, burning, numbness, tightness and tingling in the right thigh and the right knee. He stated the exam demonstrated a positive compression test and he diagnosed him with cervical facet syndrome, sprain. (PX 2, pp. 8-9). As of May 21, 2012, he had some complaints into his left trapezius, which Dickhut stated was increased muscle tone, in the area of the upper mid-back. Dickhut re-evaluated him on June 13, 2012, finding left cervical spasm, restrictions on segmental motion of the upper back, as well as some findings in the right low back at L2. He also had complaints of left neck pain into the left shoulder noting he could not pinpoint anything he was doing differently at work. He also complained of getting pain in his tailbone, swelling into his feet and having a hard time getting his boots on. (PX 2, pp. 10-11). Exam on June 25, 2012 noted complaints of left neck pain and low back pain which switched from right to left. His right knee was bothering him and his left shoulder. As of July 2, 2012, Petitioner complained of pain in the low back, right thigh, right knee and left shoulder. Exam demonstrated increased muscle tone at the left trapezius and right lumbar region. As of August 13, 2012, he continued to complain of low back, right thigh, right knee and back of the left shoulder as well as the left side of the neck. (PX 4, p.13). He had left trapezius spasm and shoulder abduction was restricted with spasm on palpation of he left pectoral of the minor muscle. Dickhut testified that as of August 20, 2012, Petitioner complained of low back, right sided, right knee, left shoulder and right low back, with numbness in the toes all the time, that he was taking Ibuprofen but felt like he was making slow improvement. On August 20, 2012, Petitioner associated his left shoulder injury with this motor vehicle collision. Also, on this date, Dickhut testifies that his neck is doing a lot better and range of motion is returning to level seen prior to the motor vehicle collision on May 4, 2012. (PX 2, p.16). Dickhut testified that Petitioner's neck was doing significantly better as of August 20, there is no thought of referring him to a surgeon, and he did not have "drop hand" on that visit. (PX 2, pp. 17-18). As of September 24, 2012, Dickhut said Petitioner was frustrated with his left shoulder as he needed to keep working to pay bills after being off for so long. (PX 2, p.20). As of October 15, 2012, Dickhut testified that he had improvement with respect to his neck, his right low back was bothering him, and he had aching, tingling, numbness and dullness in the right palm which Dr. Dickhut attributed to his neck but acknowledged it could have come from the neck, shoulder, elbow or wrist. (PX 2, pp. 22-23). As of November 7, 2012, Petitioner complained of right hand, left shoulder and low back, and on November 13, had left shoulder and buttock complaints. As of December 10, 2012, Dickhut testified he had complaints in the left shoulder, upper back, right hand, wrist, forearm and low back. He had a sharp pain in his right shoulder that got worse with motion and felt like he had carpal tunnel in the right hand again. He said shoulder was just sore. As of December 10, 2012, Dickhut said that he possibly is experiencing right arm pain due to overuse, that there was a new injury to his right shoulder or perhaps his neck. He testified that in prior visits he had not complained of discomfort in the right wrist or right forearm. (PX 2, p.28). He testified that on January 7, 2013, he was having a lot of trouble with the right side of his neck and right shoulder, feeling his right arm was heavy and weak, could not sleep, and Dickhut opined he had been compensating for the left shoulder. As of January 31, 2013, Petitioner advised Dickhut that he had a new injury on November 26, 2012.

Dickhut next saw him on June 25, 2013, with complaints of right hand, buttock, left shoulder and indication that he wore gloves a lot because his hands got cold, and he had atrophy in his right arm, fingers and palm. He saw him again on July 29, 2013 noting worsening in his right hand and wrist, skin drying out, strength getting worse and he had skin hanging on his right upper arm. He complained of fingernail itching, fingertips itching, having a hard time eating, getting into cars, and he was doing everything left-handed. Testing demonstrated atrophy of the right triceps, nail changes on the second and third fingers, dried out skin on his right radial forearm and

hands and into his first, second and third digits. When Petitioner reached with his right arm you can see spasm, he could make a fist, but when he went to open it, the first, second and third fingers extend, and his wrist goes into flexion. He went on to testify to various weaknesses and noted this was significant because when he had been examined early on after the car collision, he had overall maintenance of strength, but nothing was significantly decreased as on this date. Dickhut testified that his left shoulder complaints were causally related to the May 4, 2012 auto accident because Petitioner stated he was holding the steering wheel with his left arm, he had new complaints in the left shoulder compared to prior care. Dickhut testified that in addition to same he associated the cervical sprain to the auto accident as well. (PX 2, pp. 40-41). Dickhut testified that the cervical complaints could be related to the November 26, 2012 accident. (PX 2, p.42). Dickhut acknowledged that he had pre-existing degeneration in the neck that was not caused by the injury on May 4 or November 26, 2012, but that it *could have been* aggravated from similar forces. (PX 2, p.42). Dickhut testified that his opinion with respect to causal connection to the left shoulder, even though there was no mention of same until June 13, 2012, could have been explained by several scenarios including pain from the right neck and right shoulder were overriding the same, he may not have stressed the area until that time, or that he injured it and it gradually became weaker as he continued to use it at work. (PX 2, pp. 43-44). Dickhut testified that prior to May 4, 2012, Petitioner did not have a "drop hand" and had been working as a mechanic and had full use of his hand. (PX 2, pp. 45-46). He noted that it could be the result of the injury of November 26, 2012 because lifting things puts a strain on the cervical spine and the right upper extremity. (PX 2, pp. 46-47). Dickhut testified on cross-exam that he did not have his complete chart in preparation for the deposition, and went to get same following which, he testified that the first time he saw Petitioner was on May 9, 2011. At that point, he presented with sharp neck and low back pain. He had numbness and tingling going down both arms especially in the right, had no strength in his arms and could not hammer a nail into the wall without pain. He states his right hand had ruined his life for the past four years. He had not been sleeping well, laying down hurts his neck, he had seen 13 doctors in the past four years trying to figure out what was wrong with him. (PX 2, pp. 51-53). He stated Petitioner could not get a job even though he got his CDL because he could not due to the pain in the hand and the neck. His history indicated that he used to be a mechanic and a commercial airline mechanic but cannot do that any longer due to surgery. He also hurt his bicep years ago in a work injury at GM where he tore it. An MRI ordered from May 31, 2011 of the cervical spine demonstrated degenerative disc disease. Dickhut acknowledged that on July 28, 2011, Petitioner indicated he was wearing gloves at night because his hands were cold. (PX 2, p.58). He further stated that the coldness in his hands had never resolved. (PX 2, p.61). Dickhut testified that Dr. Bersche saw Petitioner on May 8, 2012, and the history provided was continued low back, right thigh and knee pain, but also a car accident of May 4, 2012 and he was worried about whiplash. He had a headache later that night, but no neck or upper back pain. (PX 2, pp. 63-64). On May 3, 2012, Dickhut acknowledged his note indicated Petitioner had not yet plateaued with respect to care for his neck or low back. (PX 2, p.65). Dickhut acknowledged that on May 10, 2012, Petitioner did not have complaints of left shoulder or left neck pain. (PX 2, p.68). On cross-exam, Dickhut testified as of May 14, 2012 when he saw Petitioner, he could not differentiate between the neck pain he had already been treating him for prior to May 4, 2012. (PX 2, pp. 68-69). Dickhut testified that on November 28, 2012 Petitioner did not describe a new injury. (PX 2, p.82). He noted he was in treatment again on December 4, 2012, and then seen on December 10, 2012 and December 12, 2012 at which point, he still made no mention of the new accident of November 26, 2012. (PX 2, p.86). On December 19, 2012, Dickhut testified there was a phone call relative to new injures from a motor vehicle collision. (Id.) He again did not mention the November 26, 2012 accident. He was seen for treatment on December 20, 2012 and seen by Dickhut on December 26, 2012 again with no mention of the November 26, 2012 accident. (PX 2, pp. 86-87). Petitioner completed a motor vehicle collision personal injury questionnaire per Dickhut's records and testimony as well as a workers' compensation questionnaire for the November 26, 2012 accident which he completed on January 8, 2013. Dickhut testified that the chart notes following May 4, 2012 all indicate they were being forwarded to State Farm. (PX 2, p.100)

On September 4, 2012, Petitioner saw Dr. Li stating on that on 05/04/12 he was in a car accident, continued to have left shoulder pain, limited range of motion, weakness and stiffness. Strength testing of left shoulder was 4/5, active flexion 120, abduction 80, external rotation and internal rotation normal. Dr. Li diagnosed probable rotator cuff tear and referred for MRI. Same was completed the following day demonstrating full thickness tear involving anterior supraspinatus signal changes at the biceps labral anchor, subdeltoid/subacromial bursitis and small effusion with osteoarthritic change. Petitioner continued with chiropractic care and was next seen by Dr. Li on January 11, 2013 at which time surgery was recommended. (PX 20)

The deposition of Dr. Li was obtained on September 23, 2013. Dr. Li first examined him on September 4, 2012 and noted left shoulder pain and limited range of motion. (PX 1, p.9) Dr. Li diagnosed inferior subluxation, rotator cuff subluxation which he attributed to the way the muscle was hanging. (PX 1, p.10) The only other medical record he possessed other than diagnostic testing in his own chart is that of Dr. Dickhut of 08/20/12. (PX 1, p.25) Dr. Li testified that Petitioner relayed he had ongoing shoulder pain from the auto accident and based upon same, he believed it was causally related, but upon review of the Dickhut's June 13, 2012 chart note, he stated this may impact his opinion. (PX 1 pp.30-31) Dr. Li testified Petitioner's cervical symptoms were similar to his old complaints on 06/12/11. (PX1, p.46)63 Dr. Li opined causal connection of the cervical spine to pulling the 40 lb cylinder, not the auto accident (PX 1, p.63). 69-70Dr. Li compared the 05/31/11 MRI to the post-accident MRI and indicated that they were similar with severe degenerative disc disease at C5 through C7. Agreed that stenosis could progress, and that impingement could further regress. (PX1, pp.69-70)

Dr. Li testified he had no knowledge of when cubital tunnel complaints began but they must have begun as of the EMG as they were documented on same (PX1, p.53). Dr. Li stated decreased sensation C8 to T1 supports cubital tunnel. (PX 1, p.54)72The 03/03/11 Fort Jesse record demonstrated diabetic peripheral neuropathy which Dr. Li acknowledged and further conceded diabetic neuropathy can impact cubital tunnel. (PX1, pp.72-74)

The evidence deposition of Dr. Eubanks was obtained on February 19, 2015. Dr. Eubanks testified he was licensed in the State of Illinois in 2008 and has been Board Certified in Orthopedic Surgery since 2011. He testified that at the first evaluation on May 9, 2014, Petitioner provided a history of pain, weakness and numbness in the upper extremity mostly the right arm, in addition to wrist drop. (PX3, p.7). Stated his exam demonstrated weakness of the radial nerve distribution with wrist extension, as well as numbness in the median nerve distribution and tenderness over the lateral epicondyle and forearm. He further stated that tenderness over the lateral epicondyle demonstrated epicondylitis, and he had a positive Tinel and Phalen sign demonstrating carpal tunnel. (PX3, p.13). He stated that a surgery was completed on August 20, 2014 consisting of epicondylitis release, carpal tunnel release and posterior interosseous release. He testified that as of the October 14, 2014 visit, Petitioner complained of left shoulder pain pointing to the bicep tendon as the primary source. He testified that he completed a partial rotator cuff repair and biceps tenodesis. (RX3, pp.21-22). Dr. Eubanks testified that he was doing well postoperatively and as of November 13 he would have allowed him to return to light duty work. (PX3, p.23). Dr. Eubanks testified that on January 22, 2015, Petitioner continued to have some tenderness in the shoulder and slight loss of range of motion. He imposed a 30-pound lifting restriction for the left arm. Dr. Eubanks noted he was intended to return in three months for anticipated final check of the left shoulder. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description), these job duties may have been the cause for the disease process in the left shoulder. He further stated that the automobile accident may have been the cause of an aggravation to the left shoulder. (PX3, pp.29-30). Dr. Eubanks testified that evaluation of the shoulder included exam such as Empty Can test, part of which was objective, and part subjective based on the examiner and also the patient's response. (PX3, pp.34-35).

Dr. Eubanks admitted that he was unfamiliar with the mechanism of injury for the auto accident. (PX3, p.35). Dr. Eubanks acknowledged that his opinions with respect to causation were based solely on what Petitioner's counsel advised him at the deposition as well as his discussion with Petitioner about doing things like taking large parts out of cars. He also acknowledged that he had not reviewed any medical records documenting pre-existing conditions related to the ailments which he provided care for and that this may impact his opinion. (PX3, pp.41-42). When presented with the information relative to the automobile accident completed by Dickhut's office, he testified that a 7 to 10 mph collision is unlikely to have caused the injury in the left shoulder given the very slow speed, low velocity and low impact collision. (PX3, p.43).

Dr. Brent Johnson testified on February 19, 2014, noting that he was an orthopedic surgeon specializing in the treatment of knee and shoulder injuries. Dr. Johnson testified that the history provided to him by the Petitioner was that he was in a motor vehicle accident on May 4, 2012, was rear-ended, and initially experienced pain in the left shoulder and neck that evening. Dr. Johnson testified that examination demonstrated positive findings of the bilateral shoulders including tenderness over the mid-clavicle and trapezius and coracoid on the right and tenderness over the clavicle, distal clavicle, AC joint and acromion posterior joint line, anterior joint line, supraspinatus, coracoid and trapezius on the left. He opined that he believed these were exaggerated pain behaviors as with repeat examination he did not have consistent areas of pain. He noted he had 5/5 strength but for left forward elevation which was 4/5 and testing was limited secondary to pain. He noted he had severely exaggerated pain on muscle testing and "was going to fall over because of exaggerated movements during shoulder strength testing." Exam demonstrated orthopedic testing to be negative, including Speed's and O'Brien's tests. He did note that impingement syndrome was difficult to test due to pain. Exam of the left shoulder specifically demonstrated forward elevation to 90 degrees, but passively, it was 150 degrees. Dr. Johnson opined that he was actively resisting. Dr. Johnson testified that he reviewed medical records, including the chiropractic records of Dr. Dickhut and Dr. Bersche, and noted that there were 18 visits prior to his complaints of shoulder pain following the May 4, 2012 accident. (RX 2, p.18) Dr. Johnson opined that his left shoulder complaints were not causally related to a May 4, 2012 accident, because the mechanism of injury was not a typical mechanism for a rotator cuff tear. He also noted that there were no complaints of shoulder problems after it. (RX 2, p.20)

Dr. Verma testified on June 21, 2017 indicating he is a board-certified orthopedic surgeon who's practice included shoulder, elbow and knee. (RX 4) He testified that he evaluated Petitioner on March 8, 2017 at which point Petitioner provided a history of having been employed as a mechanic for 16 to 18 months with an injury on May 4, 2012 when he was rear-ended with multiple injuries including the left shoulder. He noted he underwent shoulder surgery and was placed under permanent restrictions of 25-pound lifting. He also noted he had ongoing other medical issues that included numbness, tingling and weakness as well as difficulty lifting both arms. He did report improvement in his left shoulder. Dr. Verma testified that he examined Petitioner noting no atrophy or deformity, well-healed incisions, preserved cervical range of motion which did not produce any shoulder symptoms, shoulder exam demonstrated full and symmetric range of motion compared to the opposite side without pain, strength was normal, there was no instability, although he had some subjective complaints of numbness in the left hand. Dr. Verma opined his shoulder exam was normal. (RX 4, p.7) Dr. Verma opined he had reached maximum medical improvement and indicated that based upon the procedure he had undergone, MMI would typically occur after six months. Dr. Verma further opined that Petitioner could have returned to his full-duty occupation with regard to the shoulder. (RX 4, p.8)

Dr. Nardone testified on February 20, 2015 that he is a board-certified neurological surgeon for the past 15 years. He indicated he completed 529 surgeries the year prior to the deposition. He testified that the history provided to him by the Petitioner in this matter was a 2012 car accident which resulted in worsening pain, headache and nausea, which went on to develop right arm pain and weakness for which he was seen by several

physicians and tests were done. He then testified to another injury Petitioner advised him when he was lifting an engine and that aggravated his person. When he first saw him on May 7, 2014, he noted there was some diffuse muscle bulk that was decreased on the right arm, he had diffused weakness including the intrinsic muscles, wrist extension, finger extension and triceps weakness as well as sensory deficits throughout the entire right arm. He did not believe there were any signs of myelopathy. He reviewed the MRI which demonstrated spondylotic changes at multiple levels from C5 to T1. An additional CT and MRI of the cervical spine confirmed severe degeneration from C5 to T1 causing stenosis. It was at that point he recommended a fusion. He noted surgery became delayed due to cardiac issues. (PX 4, p.12). Dr. Nardone testified that at the time of the last visit, he would have placed him on a 10-pound lifting restriction for the diagnosis which was cervical spondylosis with radiculopathy. (PX 4, p.13). Petitioner's counsel provided Dr. Nardone a hypothetical based upon notes in Dr. Dickhut's records, indicating that the Petitioner was driving the same direction as the person who rear ended him at approximately 10 miles per hour, both hands were on the steering wheel and he used his arms to brace himself during the impact. He did not have pain at the time of the collision but then later that night experienced nausea and headache. The headache lasted about three hours and when the nausea subsided, he felt lightheaded. Since then he has been experiencing recurring headaches. Dr. Nardone testified that the incident described including headache and probably neck pain as part of a whiplash injury *could be* related to the accident. (PX 4, pp. 14-15). Dr. Nardone testified in response to the hypothetical of lifting a 40-pound cylinder, experiencing pain from the elbows and the fingertips that the remarkable osteophyte could have been aggravated and caused more radiculopathy. On cross examination, Dr. Nardone testified he did not recall whether he reviewed any other medical records when he evaluated Petitioner, nor does he recall whether he reviewed any prior diagnostic studies. (PX 4, pp. 16-17). He noted he had some EMGs in Dr. Pegg's notes. Dr. Nardone acknowledged that Petitioner's condition was degenerative, and that degenerative conditions can wax and wane. (PX 4, p.17). Dr. Nardone testified that in comparison with the May 31, 2011 MRI pre-dating the accident, and the MRI completed on May 19, 2014, the MRIs did not change much. Dr. Nardone testified that knowledge of the chiropractic treatment prior to May 4, 2012 would be significant with respect to his opinion regarding causal connection as would a pain rating of 9/10 in May of 2011. (PX 4, pp. 20-21). Dr. Nardone testified that with respect to C6, Dr. Eubank's testimony supports his opinion that there was not a true C6 radiculopathy, but rather, that it was a more local problem in the elbow. (PX 4, pp. 24-25). Dr. Nardone testified that with respect to the auto accident, 10 miles an hour when one is braced for impact would not be a major accident. (PX 4, pp. 28-29). Dr. Nardone also acknowledged that uncontrolled hypertension can cause headache. (Id.) Dr. Nardone testified that the EMG findings did not demonstrate a lot of evidence of cervical radiculopathy. (PX 4, p.30). He further acknowledged there was nothing acute on the MRI he reviewed. (PX 4, pp. 30-31).

Dr. Wellington Hsu testified on July 22, 2015 that he is a board certified orthopedic surgeon and completed an initial evaluation on May 2, 2014 at which point he reviewed medical records, inclusive of records complaining of hand pain since 2008, an MRI of the cervical spine on May 31, 2011 as well as a lumbar MRI and chiropractic visits as well as another MRI of the cervical spine in January, 2013, an EMG in January of 2013, and MRI of the cervical spine on July 30, 2013. (RX 3) Dr. Hsu testified he does not utilize EMG in his practice as he believes they are somewhat unreliable and operator-dependent, but he did consider it as they were completed in this case. He stated at the time of his evaluation, Petitioner's complaints included neck pain, right-sided hand, wrist and elbow pain, and some hand weakness. He provided a history of a May 4, 2012 automobile accident and then a November 20, 2012 accident when lifting a cylinder out of a vehicle injuring his right arm and neck again. He testified that the physical exam demonstrated full range of motion of the cervical spine with positive Spurling's sign on the right, with no other positive findings, except weakness in the right hand that was evidenced with abductor pollicis brevis weakness. Dr. Hsu opined that he had suffered a cervical strain which had resolved and had pre-existing cervical spondylosis. (RX 3, p.11) Dr. Hsu opined that both injuries which were described were of low impact, and therefore he may have suffered cervical strains for each.

The MRI reports demonstrated cervical spondylosis, which were in no way related. (RX 3, p.13) Dr. Hsu opined that at the time of his evaluation, although his symptoms were unrelated to the work accidents, that a steroid injection as well as physical therapy would be reasonable to treat his pain. He noted that this was related to the pre-existing cervical spondylitic condition. (RX 3, p.15) Dr. Hsu testified that he evaluated Petitioner again on April 29, 2015, reviewed records of the cervical spine from May 19, 2014, records of Dr. Nardone and Dr. Eubanks and elicited complaints of numbness and tingling of the right hand as well as neck pain. Exam on this occasion demonstrated full range of motion of the cervical spine, normal neurologic exam and negative Spurling's test compared to the prior time. Dr. Hsu opined at this time, he had no necessity of additional care for his cervical spine, as there was no functional disability on physical exam. (RX 3, p.18) He opined he could return to work without restriction. (Id. at 19)

Petitioner went on to have a C4-C7 fusion on 4/12/18. (PX 43) Petitioner alleged an allergic reaction to the hardware. The initial allergy testing was negative. (PX 46) On June 13, 2018 Petitioner advised Dr. Nardone of his request for additional testing and also complained his fingers were curling. Dr. Nardone commented that all of his muscle groups demonstrated good strength and there was a discrepancy between what Petitioner reported and what he was able to observe. (RX 13) Petitioner then transferred his care Dr. Boyer who removed the hardware on June 17, 2019.

Conclusions of Law

The Arbitrator finds as follows with respect to (F) Is Petitioner's current condition of ill-being related to the accident of May 4, 2012:

Petitioner was undisputedly driving a customer's mustang on this date when another vehicle struck him from behind at an estimated 7 to 10 miles per hour. The police report (PX 6) reflects there were no injuries and the State Farm damage payment (RX 16) reflect $579.39 paid to reimburse what Petitioner described as spidering of the paint on the bumper.

Petitioner testified that following the accident, he aided the police officer in completing the report. He testified at the time he had no symptoms. Petitioner testified that within a couple of hours of going home, he experienced nausea, headache and vomited. Petitioner saw chiropractor Berkey on May 8, 2012 advising of the accident, concern about whiplash but indicated he had no neck or upper back pain. Adjustment was provided on the right at C3 and left at C6. (RX 6) Petitioner was seen in therapy on May 10, 2012 with no mention of neck pain. Petitioner was seen in therapy again on May 14, 2012 with notation of pain in right lower neck. On May 15, 2015, he was examined by chiropractor Berkey who noted a positive compression test on the right and tightness during cervical extension. He advised Petitioner they would put other care on hold to get the neck back on track. Petitioner had 8 therapy visits which included ultrasound to his cervical spine although there were no subjective complaints noted after 5/21/12. (RX 6) On 6/11/12, he underwent manipulation at right C3 and left C6 with reported soreness in the *left* neck. He continued therapy through August 20, 2012 for multiple parts of body including the cervical spine at which point he was noted to have reached approximately his pre-injury state and focus changed to his left shoulder in addition to other parts of body under active care.

Petitioner suffers from diabetic neuropathy. This is documented in prior records such as EMG and blood work. (RX 5, 7, 9, 10 and 15) Petitioner's symptoms of headache and nausea can be explained by this condition, as can the symptoms of cold in the hands, feet, peeling skin near the fingernails and dryness. Petitioner had no complaints of neck pain until May 14, 2012. Drs. Li, Nardone and Hsu all testified that pathology in his cervical spine was degenerative in nature. Dr. Nardone and Hsu stated symptoms as a result may wax and wane. Dr. Li stated that his cervical symptoms were similar to his complaints in 2011, and that he attributed causation

to an 11/26/12 lifting incident. Dr. Hsu testified that the mechanism of injury for May 4, 2012 would be compatible with a strain. Dr. Nardone stated his cervical complaints *could* be related to the accident but went on to state he had reviewed no outside records, there was no radiculopathy, there was nothing acute on the MRI and an incident at this rate of speed would not be considered a major accident. The Arbitrator finds that based upon the records pre-dating the accident, including the fact that chiropractor Dickhut indicated he was still planning to administer additional care to the cervical spine, and the fact that no neck pain is mentioned until ten days following the incident, that there is no causal connection between the cervical spine complaints and this date of accident.

With respect to the left shoulder, the first mention of same was on June 13, 2012 in therapy at which point he stated he did not know what he did at work or at home that had caused same. It should be noted that Petitioner's first visit with chiropractor Dickhut in 2011 mentions a torn biceps which occurred while he worked for GM. When he ultimately saw Dr. Eubanks, his initial complaints were not left shoulder, but on October 14, 2014, following hand and elbow surgery, he complained of left shoulder pain specifically pointing to the bicep. Dr. Li opined it was causally related but also acknowledged this was solely based upon Petitioner having told him he had left shoulder pain since the May 4, 2012 accident; he had reviewed no other related records. Chiropractor Dickhut stated it was related as he *could* have pulled his shoulder while bracing for the impact, and the cervical problems were more prominent. Firstly, Petitioner testified he did not brace for impact as he was not looking and did not know he was going to be hit. Secondly, his pain rating with initial cervical complaint was a 3/10. Dr. Brent Johnson opined there was no causal connection as the mechanism of injury would not cause a rotator cuff problem and there were 18 visits before there was any complaint to the shoulder. The Arbitrator notes the treating physicians' opinions with respect to causation which were "may have" or "could have" do not meet the standard of evidence required; more probable than not. The Arbitrator finds the opinions of Dr. Johnson and evidence of treatment and complaint, or lack thereof, most persuasive and denies any causal connection between the left shoulder and the May 4, 2012 accident.

As the Arbitrator finds no causal connection between Petitioner's complaints and date of accident, the issues of medical bills and permanency are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0084

vs.

NO: 15 WC 2124

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0084

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

DATED: MAR 1 - 2021
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0084

BUFFANO, DAVID
Employee/Petitioner

Case# 15WC002124

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

21IWCC0084

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 02124**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/15/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $50,561.68; the average weekly wage was $972.34.

On the date of accident, Petitioner was **52** years of age, ***single*** with **2** dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Findings of Fact

Petitioner testified he had previously been employed as an airline and auto mechanic, with various licenses and certifications. He testified that he had previously sustained an injury to his hands while working for Paul and Mike's Transmission resulting in carpal tunnel. Thereafter, he did not work for four years but for 1 position for 2 -3 months. Petitioner briefly worked marking lines for Julie but could not do it. He also obtained a CDL license but stated he had too much pain in his neck to drive. (T120-122) Petitioner became employed with Respondent on August 8, 2011as a mechanic. As of October 15, 2012, Petitioner stated he began to experience right shoulder pain which he attributed to favoring his injured left shoulder. He also had coldness in his right hand and difficulty moving his middle, ring and small fingers with issues of peeling and loose skin which he said occurred on and off. Petitioner testified he may have mentioned this to Sam. (T. 55-57) The Application for Adjustment for this matter was filed 1/22/15. Petitioner testified when he ceased working in January of 2013, Groves offered him a position as a service writer which he refused. (T. 249 -250) Petitioner testified he sold his own parts, called his own customers and completed extended warranties. (T. 251–252) Petitioner has the same symptoms in his right hand at present and that his right shoulder was okay.

Allied Health records from 10/17/12 – 10/24/12 discuss complaints of low back, right thigh and knee and left shoulder. (PX 33) On 10/29/12 he adds complaint of numbness in the right pinky finger. He is seen 10/31/12 and 11/1/12 with the same complaints. As of 11/7/12 he notes coldness in his right hand. On 11/13/12, Petitioner complains of discomfort in his back and neck as well as numbness in his hands. He continues with the same complaints through 11/20/12. On 11/26/12, Petitioner alleges a new lifting accident in which he injured his right hand, elbow, neck and low back.

Petitioner testified his job duties were engine repair, rebuild and replace, transmission repair and replace, computer repair approximately 55 hours per week. (T. 28–30) He testified that he worked with his hands overhead about half the day, used air and hand tools and used his hands the entire day. (T.30-33) Petitioner testified he does not have diabetes anymore. (T.122) Petitioner testified he never had high blood pressure until before the neck surgery. (T. 123) Petitioner testified he never had the peeling of his fingers before his employ with Respondent. (T. 139) Petitioner testified that he had no restrictions as a result of his work injury at Paul and Mikes. (T. 163)

Samuela Perez testified on behalf of the Petitioner. She stated she became the office manager sometime in 2012 or 2013. She had previously worked on an as needed basis. She testified she filled out the job description. (T. 193) She faxed a copy to Petitioner's attorney seeking approval of same prior to sending to the workers' compensation carrier. (RX 17) Petitioner testified that she quit working there in 2018 and after various employment issues, believed she had no loyalty from the owner. (T.204- 205) She testified that she turned in papers to AFLAC and also the paperwork for the accidents of May 4, 2012 and November 2012. (T. 207) She confirmed she had borrowed money from Groves.

Mr. Groves testified on behalf of the business as owner for forty years. He stated he was not a mechanic but could perform some work such as oil changes. He stated if someone has an accident in the shop, they take care of it then. (T.215-216) He stated the job description was completed by Sam. Groves stated he may not have realized the importance of it as she asked him to sign many things and he did affix his signature to same. Groves stated the description is not accurate. (T. 223-225) Groves testified he distributed the work and had Petitioner work on timing belts, air conditioners etc. but gave all the heavy work to Gary. (T. 225-226) Groves confirmed he continued to pay for AFLAC and child support on Petitioner's behalf after he was no longer working there. (T. 229-230)

Gary Woods testified on behalf of Respondent. Mr. Woods stated he began working for Respondent in 1977 and learned most of his trade on the job. By 1987, he was made shop foreman. He testified he got everyone their work and then he did all the exhaust work, welding, engine pulling, box trucks and motor homes. Woods testified Petitioner was primarily hired to do diagnostic work. (RX 14 at 8) Woods stated he personally worked on about 10 cars per day. He stated Groves would start the schedule and he would work the rest of it out. He would have someone else test drive them which was often Petitioner, and sometimes Groves or the alignment mechanic. Woods stated Petitioner was assigned light work like air conditioning and brakes. Woods stated Petitioner left early 3 days a week to go to a back physician and he was aware he had prior carpal tunnel. (RX 14 at pp. 11-12) Woods testified that Petitioner would have the tire guys pull the tires off and put them back on for him and that he did not remember Petitioner pulling a cylinder but said that was a two-person job. Woods stated Petitioner typically worked on 2 – 3 cars per day. (RX 14 at 14) Woods testified Petitioner also used the diagnostic scanner, put on electric motor windows which weighed about a pound, had a stool to sit on and do brake jobs, would go downstairs for periods of time to talk and likewise into the office, and after the diagnostics were complete, he would provide to Groves for pricing and then may call the customer with the information. Woods testified most of the tools Petitioner worked with were within the range of 5 to ten pounds. The parts were frequently light but could weigh up to 15 pounds. He stated a cylinder head could weigh up to 60 pounds and Petitioner would have asked for help either from himself or one of the tire guys who were always around as he was trying to train them. (RX 14 at 25-26) Woods testified that despite his name being on the bottom of the job description, his deposition was the first he had ever seen same.

Dr. Li rendered no opinions relative to the parts of body for this date of alleged accident. His comments with respect to repetitive trauma were restricted to the ulnar nerve. Dr. Li ordered and MRI of the right shoulder which demonstrated no pathology but was also considered non-diagnostic.

Dr. Eubanks (PX 3) testified he was licensed in the State of Illinois in 2008 and has been Board Certified in Orthopedic Surgery since 2011. He testified that at the first evaluation on May 9, 2014, Petitioner provided a history of pain, weakness and numbness in the upper extremity mostly the right arm, in addition to wrist drop. (PX3, p.7). Dr. Eubanks stated his exam demonstrated weakness of the radial nerve distribution with wrist extension, as well as numbness in the median nerve distribution and tenderness over the lateral epicondyle and forearm. He further stated that tenderness over the lateral epicondyle demonstrated epicondylitis, and he had a positive Tinel and Phalen sign demonstrating carpal tunnel. (PX3, p.13). He testified that weakness of the wrist was strictly the radial nerve. (Id.) He stated that a surgery was completed on August 20, 2014 consisting of epicondylitis release, carpal tunnel release and posterior interosseous release. He testified that as of that date, he would have restricted him from work for six weeks until he could return to light duty. (PX3, pp.14-15). He testified that as of the September 9, 2014 visit, he demonstrated improvement with respect to the radial nerve function. (PX3, p.16). Dr. Eubanks testified that on the October 14, 2014 visit, he did not spend a lot of time documenting his right arm because the primary purpose at that point was left arm pain. Dr. Eubanks testified that on January 22, 2015, Petitioner had improved with respect to the right arm and had full strength and resolved wrist drop. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description), these job duties may have been the cause of his right upper extremity ailment. Dr. Eubanks again testified that he did not recall anything other than minimal complaints with respect to the epicondyle release as of January 22, 2015. (PX3, p.38). Dr. Eubanks acknowledged that his opinions with respect to causation were based solely on what Petitioner's counsel advised him at the deposition as well as his discussion with Petitioner about doing things like taking large parts out of cars. He also acknowledged that he had not reviewed any medical records documenting pre-existing conditions related to the ailments which he provided care for and that this may impact his opinion. (PX3, pp.41-42).

Dr. Williams testified that he is a board-certified orthopedic surgeon specializing in upper extremity and that he evaluated Petitioner in this matter on October 9, 2013. The history Petitioner provided Dr. Williams was that he began to work for Fred Grove Service Center August 8, 2011, and his last date of employ was January 2, 2013 with a date of injury of November 26, 2012. He testified that his position as a Service Technician involved doing all types of auto repair including engine work, transmission work, brake work and diagnostics. He worked from 7:30 to 5:00, Monday through Friday, used engine lifts, hand tools, air impact tools, AC equipment, and transmission equipment. He used wrenches, screwdrivers, hammers, and socket wrenches. He stated that he previously had a right carpal tunnel release done twice as well as left carpal tunnel release. He noted that on May 4, 2012 he injured his left shoulder in an automobile accident. He then stated that on the date of injury for this problem, November 26, 2012, he was working doing cylinder work. He was pulling a cylinder over the fender and he felt pain from the elbow to the fingertips getting it out. He said he kept working but the pain got worse. (RX 1, pp. 7-8) He inquired as to whether the Petitioner had problems with his neck, and Petitioner denied same. Petitioner described lack of strength, pain in the right wrist, numbness, tingling, pins and needles in the ring and small fingers only. He also said his hands got ice cold, and he wore gloves at night for sleeping. He had pain when he fully straightened or extended the right elbow. He complained of nighttime waking due to right arm as well as left arm pain, complained of bilateral weakness, noted he dropped things and stated he had gone to physical therapy. He completed a questionnaire, which included the fact that he had been a diabetic since 1997 and had diabetic neuropathy. He also experienced hypertension. (RX 1, p.11) He noted he had not been taking medication for the last four to five months because he could not afford them. His hobbies included building old cars, and he was right-hand dominant. Dr. Williams testified he reviewed the medical records forwarded before the exam, with the Petitioner himself, in order to allow the individual to correct anything that was inaccurate, as well as after in order to get complete detail. Dr. Williams testified he completed an exam, Petitioner had a BMI of 32.1, which placed him at increased risk for peripheral neuropathy, he had full cervical range of motion and complained of no radiculopathy, had some atrophy at the right triceps but not on the left, as well as atrophy on the right hypothenar eminence on the right and the first dorsal interosseous on the right. (RX 1, p.15) Dr. Williams explained that atrophy occurs over a long period of time, not simply days, weeks or months, but long-term compression. (RX 1, pp. 16-17) He noted he had no evidence of complex regional pain syndrome, range of motion of the elbows was full, range of motion of the right wrist had -40 degrees of extension, which indicated weakness in the radial nerve and this had been noted on previous nerve study. Manual muscle testing of the elbow flexion strength on the right which he noted was innervated by C5-C6, was only 3+ to 4-/5. On the left it was 4+/5. Elbow extension on the right was only 4/5 compared to 4+/5 which was due to weakness in the triceps. Wrist extension strength on the right was 0/5, and Dr. Williams opined he was giving good effort. (RX 1, p.19) Petitioner had decreased range of motion on the left compared to the right. (RX 1, p.19) He had tenderness over the lateral epicondyle on the right, and wrist extension strength could not be tested as he could not actively extend the wrist. It was negative on the left. Positive Tinel's sign on the right, negative on the left, equivocal Phalen's on the right, negative on the left, and positive median nerve compression test on the right, negative on the left. He did have some evidence of carpal tunnel on the right but not on the left. Dr. Williams opined that review of records was significant for the fact it showed he had a long history of complaints with respect to his right arm. (RX 1, p.21) He noted the records of Dr. Dickhut, in which during September 18, 2008 he was complaining of pins and needles in his hands, stabbing pinch strength had improved since surgery as did his grip strength. He again complained in 2011 of frequent sharp, aching, burning, numbness, shooting, tingling and discomfort in right wrist, forearm, palm and so he noted these complaints predated his employ. (RX 1, pp. 21-22) Dr. Williams noted that per Dr. Dickhut's records, Petitioner had various complaints with respect to his right hand, ruining his life, causing inability to sleep, had seen 13 doctors in four years trying to figure out what was wrong and had been off of work, that at the same time, noted he was enjoying riding four-wheelers on his five acres and playing with his dogs and doing yard work. (RX 1, p.24) Dr. Williams testified that diabetes predisposes one to developing carpal tunnel, and that Petitioner had been diagnosed with diabetic neuropathy, which notes the severity of the diabetes and the

fact that the nerves had already been affected. He also noted that individuals with diabetes who undergo carpal tunnel surgery do not do as well because the nerves affected with diabetes is due to the blood supply is the outer layer of nerves, therefore, those in the periphery get poor blood supply. (RX 1, pp. 25-26) He further noted that a diabetic who is not taking medication could expect their symptoms to increase. Dr. Williams also discussed the note of Dr. Liu of January 13, 2011, noting that the Petitioner presented with hand pain which felt like a rock in his palm, he slept wearing gloves, and he had been out of work at that point for three years because he could not do anything with his restrictions. They had been trying to use a calcium channel blocker to increase the blood supply. (RX 1, p.27) Dr. Williams also noted another visit with Dr. Liu on February 28, 2011 in which the Petitioner presented with bilateral hand pain, had an EMG which confirmed bilateral carpal tunnel, had a redo of the right three weeks after the initial one and was experiencing right wrist radiating into the forearm and palm with his last two digits being the ring and small fingers. He also felt cold constantly and there was a slight temperature difference between the right and left hand. Dr. Williams testified that six months prior to his employment with Respondent, he had significant problems affecting his ring and small fingers as well as the whole right hand due to diabetic peripheral neuropathy. (RX 1, p.29) Dr. Williams opined that Petitioner had evidence of diabetic peripheral neuropathy, cervical radiculopathy, and evidence of left shoulder problems and evidence of radial nerve palsy. (RX 1, p.34) He had high radial nerve palsy because he could not extend the wrist which meant it affected the nerves above the elbow. Dr. Williams testified that he completed an addendum report of November 27, 2013 after review of additional records. Dr. Williams testified the records described polyneuropathy, for which one of the main causes is diabetes, causing multiple nerves to be affected. (RX 1, p.39) He noted that the review of those additional records did not change his opinions relative to causal connection which was that Petitioner's right upper extremity problems pre-date his employment and are not causally related to his work. He also noted that those job duties could not cause a radial neuropathy, firstly, due to absence of an injury which would require direct impact to the radial nerve and secondly, that the diagnosis of same was not determined on exam until July 29, 2013. This was over six months following end of his employment. (RX 1, p.44)

Dr. Johnson opined that considering the MRI of the right shoulder, Petitioner's minimal complaints of the right shoulder, and his clinical exam on the date of his evaluation, he would not recommend arthroscopic surgery for the right shoulder. He also noted it demonstrated no acute traumatic pathology. (RX 2, p.24)

Conclusions of Law

The Arbitrator renders the following with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

Petitioner testified to complaints of right shoulder and right-hand pain without specific accident. The Application for Adjustment suggests "arms, hand and other body parts." Petitioner testified that he did multiple types of repair, in addition to calling customers. Groves testified he tried to assign Petitioner the lighter work. Woods gave a fairly thorough description of Petitioner's work, also noting most was of light weight of less than 10 or 15 pounds, that assistance was available for heavier or more difficult tasks, to which Petitioner availed himself, and also that Petitioner was responsible for test driving vehicles as well as procuring rental cars for customers. He also noted Petitioner spent time chatting with the mechanics below and the ladies in the office. A job description form was completed by Perez, office manager, purportedly with the assistance of Groves, who denies same and indicates it is inaccurate. Perez' bias is clearly for the Petitioner, having quit her position under circumstances for which she blamed her employer and having sent the job description to Petitioner's attorney for review in advance of sharing with the insurance carrier. The Arbitrator determines that firstly, the written

job description appears inaccurate per the testimony of all witnesses, and that Petitioner's job duties appeared to be generally varied, with breaks from working as a mechanic and were predominantly of light weight.

The Arbitrator also notes that the symptoms expressed in treatment notes immediately following this accident do not correlate with the body parts alleged on this date and that Petitioner's treating physician rendered no opinion relating symptoms to this date. The Arbitrator determines Petitioner did not sustain a work injury on October 15, 2012 arising out of and in the course of employ and that notice was not provided the Respondent within 45 days of the accident, as Petitioner testified he did not tell Groves. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0085

vs.

NO: 15 WC 9126

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0085

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

DATED:
o: 2/4/21
BNF/wde
45

MAR 1 - 2021

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0085

BUFFANO, DAVID
Employee/Petitioner

Case# **15WC009126**

FRED GROVES SERVICECENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

21IWCC0085

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 09126**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0085

FINDINGS

On **6/25/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $49,060.44; the average weekly wage was $943.47.

On the date of accident, Petitioner was **52** years of age, ***single*** with **2** dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Statement of Facts

Petitioner became employed with Respondent on August 8, 2011. Prior to same, Petitioner had not worked for several years following a work injury at Paul and Mike's transmission other than a brief period J.U.L.I.E. which he estimated was 2 months duration when he realized he physically could not do it. Petitioner testified that he was a mechanic with certificates in auto, air and welding. (T. 18-20) Petitioner testified his job duties for Respondent included heavy engines, brakes, computers and everything else for a car or truck. (T. 28) Petitioner had been involved in a minor automobile collision on May 4, 2012. He was allegedly actively seeking medical attention with chiropractor Dickhut on June 25, 2012. Petitioner had been seeing chiropractor Dickhut for various complaints since May 9, 2011. Petitioner does not allege a specific injury on June 25, 2012 to the left shoulder, but states he probably mentioned this complaint to Perez, the office manager. According to Perez, injuries were supposed to be reported to her and Groves. (T. 176-177) She further stated that on June 25, 2012, if Petitioner advised her of shoulder problems, she would not necessarily have reported to Groves, as he has been having problems for a while and she did not believe it was impacting his work. (T. 178) Groves testified work accidents were to be reported directly to him.

Gary Woods testified on behalf of Respondent. Mr. Woods stated he began working for Respondent in 1977 and learned most of his trade on the job. By 1987, he was made shop foreman. He testified he got everyone their work and then he did all the exhaust work, welding, engine pulling, box trucks and motor homes. Woods testified Petitioner was primarily hired to do diagnostic work. (RX 14 at 8) Woods stated he personally worked on about 10 cars per day. He stated Groves would start the schedule and he would work the rest of it out. He would have someone else test drive them which was often Petitioner, and sometimes Groves or the alignment mechanic. Woods stated Petitioner was assigned light work like air conditioning and brakes. Woods stated Petitioner left early 3 days a week to go to a back physician and he was aware he had prior carpal tunnel. (RX 14 at pp. 11-12) Woods testified that Petitioner would have the tire guys pull the tires off and put them back on for him. Woods stated Petitioner typically worked on 2 – 3 cars per day. (RX 14 at 14) Woods testified Petitioner also used the diagnostic scanner, put on electric motor windows which weighed about a pound, had a stool to sit on and do brake jobs, would go downstairs for periods of time to talk and likewise into the office, and after the diagnostics were complete, he would provide to Groves for pricing and then may call the customer with the information. Woods testified most of the tools Petitioner worked with were within the range of 5 to ten pounds. The parts were frequently light but could weigh up to 15 pounds. He stated a cylinder head could weigh up to 60 pounds and Petitioner would have asked for help either from himself or one of the tire guys who were always around as he was trying to train them. (RX 14 at 25-26) Woods testified that despite his name being on the bottom of the job description, his deposition was the first he had ever seen same.

Chiropractor Dickhut evaluated him on June 13, 2012, noting complaints of left neck pain into the left shoulder indicating he could not pinpoint anything he was doing differently at work. The note on June 25, 2012 indicated "his left shoulder bothers him," but were only a passing mention in a plethora of other symptoms. (PX 33). As of July 2, 2012, Petitioner complained of an aching in the left shoulder which he rated 7/10. Exam demonstrated increased muscle tone at the left trapezius. There was no mention of left shoulder pain on 7/9/12, 7/12/12, 7/26/12, 7/30/12 but on 8/13/12 he mentioned aching and burning which was 8/10 and exam demonstrated reduced abduction with pectoral minor spasm. (PX 33) On August 15, 2012 he complained of shoulder pain with lateral raise. On August 20, 2012 due to ongoing complaint chiropractor Dickhut orders an MRI. As of September 24, 2012, Dickhut said Petitioner was frustrated with his left shoulder as he needed to keep working to pay bills after being off for so long in the past. (PX 2, p.20).Dickhut testified that his left shoulder complaints were causally related to the May 4, 2012 auto accident because Petitioner stated he was holding the steering wheel with his left arm, he had new complaints in the left shoulder compared to prior care.

Dr. Li first evaluated Petitioner on September 4, 2012 and due to exam, that demonstrated 4/5 strength and limited range of motion, he recommended an MRI. (PX 26) The MRI demonstrated a full thickness rotator cuff tear, increased signal at the biceps labral anchor and osteoarthritic change. On January 11, 2013 Dr. Li recommended arthroscopic surgery. Dr. Li testified that the left shoulder related to the auto accident of May 4, 2012 and noted that he relied on the history provided by Petitioner. He stated the only other medical record he possessed other than diagnostic testing in his own chart is that of Dr. Dickhut of 08/20/12. PX 1 at 25)

Dr. Eubanks testified he was licensed in the State of Illinois in 2008 and had been Board Certified in Orthopedic Surgery since 2011. He testified that at the first evaluation on May 9, 2014, Petitioner provided a history of pain, weakness and numbness in the upper extremity mostly the right arm, in addition to wrist drop. (PX3, p.7). He testified that as of the October 14, 2014 visit, Petitioner complained of left shoulder pain pointing to the biceps tendon as the primary source. He testified that he completed a partial rotator cuff repair and biceps tenodesis. (RX3, pp.21-22). Dr. Eubanks testified that he was doing well postoperatively and as of November 13 he would have allowed him to return to light duty work. (PX3, p.23). Dr. Eubanks testified that on January 22, 2015, Petitioner continued to have some tenderness in the shoulder, slight loss of range of motion, some stiffness in the neck, but had improved with respect to the right arm and had full strength and resolved wrist drop. He imposed a 30-pound lifting restriction for the left arm. Dr. Eubanks noted he was intended to return three months for anticipated final check of the left shoulder. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description) these job duties may have been the reason for the disease process in the left shoulder. He further stated that the automobile accident may have been the cause of an aggravation to the left shoulder. (PX3, pp.29-30). Dr. Eubanks testified that evaluation of the shoulder included exam such as Empty Can test, part of which was objective, and part subjective based on the examiner and also the patient's response. (PX3, pp.34-35). Dr. Eubanks acknowledged that his opinions with respect to causation were based solely on what Petitioner's counsel advised him at the deposition as well as his discussion with Petitioner about doing things like taking large parts out of cars. He also acknowledged that he had not reviewed any medical records documenting pre-existing conditions related to the ailments which he provided care for and that this may impact his opinion. (PX3, pp.41-42).

Dr. Brent Johnson evaluated Petitioner on behalf of Respondent on March 27, 2013 and testified on February 19, 2014, noting that he was an orthopedic surgeon specializing in the treatment of knee and shoulder injuries. Dr. Johnson testified that the history provided to him by the Petitioner was that he was in a motor vehicle accident on May 4, 2012, was rear-ended, and initially experienced pain in the left shoulder and neck that evening. Dr. Johnson testified that examination demonstrated positive findings of the bilateral shoulders including tenderness over the mid-clavicle and trapezius and coracoid on the right and tenderness over the clavicle, distal clavicle, AC joint and acromion posterior joint line, anterior joint line, supraspinatus, coracoid and trapezius on the left. He opined that he believed these were exaggerated pain behaviors as with repeat examination he did not have consistent areas of pain. He noted he had 5/5 strength but for left forward elevation which was 4/5 and testing was limited secondary to pain. He noted he had severely exaggerated pain on muscle testing and "was going to fall over because of exaggerated movements during shoulder strength testing." Exam demonstrated orthopedic testing to be negative, including Speed's and O'Brien's tests. He did note that impingement syndrome was difficult to test due to pain. Exam of the left shoulder specifically demonstrated forward elevation to 90 degrees, but passively, it was 150 degrees. Dr. Johnson opined that he was actively resisting.

Dr. Verma testified on June 21, 2017 that he is an orthopedic surgeon specializing in sports medicine which included shoulder, elbow and knee. He testified that he evaluated Petitioner on March 8, 2017 at which point Petitioner provided a history of having been employed as a mechanic for 16 to 18 months with an injury on May 4, 2012 when he was rear-ended with multiple injuries including the left shoulder. He noted he underwent

shoulder surgery and was placed under permanent restrictions of 25-pound lifting. He also noted he had ongoing other medical issues that included numbness, tingling and weakness as well as difficulty lifting both arms. He did report improvement in his left shoulder. Dr. Verma testified that he examined Petitioner noting no atrophy or deformity, well-healed incisions, preserved cervical range of motion which did not produce any shoulder symptoms, shoulder exam demonstrated full and symmetric range of motion compared to the opposite side without pain, strength was normal, there was no instability, although he had some subjective complaints of numbness in the left hand. Dr. Verma opined his shoulder exam was normal. (RX 4, p.7) Dr. Verma opined he had reached maximum medical improvement and indicated that based upon the procedure he had undergone, MMI would typically occur after six months. Dr. Verma further opined that Petitioner could have returned to his full-duty occupation with respect to the shoulder. (RX 4, p.8)

Conclusions of Law

The Arbitrator renders the following with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

The Arbitrator determines with respect to notice, that timely notice of the accident was not provided within 45 days of the accident as the Application was filed in March of 2015. Petitioner did not tell Groves, but rather only Perez, who admitted she did not share this information with Groves as it had been going on for some time. The Arbitrator determines per Groves and Perez, notice was to be tendered to Groves and therefore proper notice of an accident was not provided.

The Arbitrator notes a specific accident is not alleged for 6/25/12, but rather, it simply coincides with a passing complaint of shoulder discomfort by Petitioner to his chiropractor who is rendering care for a number of other body parts. The Arbitrator notes that Dr. Johnson was not presented a scenario of repetitive trauma by Petitioner at the exam, or Petitioner's counsel at the deposition, and the Application alleging same had yet to be filed. Dr. Johnson does express some concern for Petitioner's exaggeration of symptoms on exam. The Arbitrator finds in best light, Petitioner is a poor historian, as Petitioner testified and advised various physicians he no longer suffered from diabetes, despite testing to the contrary, that he did not have high blood pressure, which was noted by Dr. Thain in 2014 as well as on other occasion, and contradicted himself and the medical records regarding imposition of restriction as a result of his work accident at Paul and Mikes. The Arbitrator considers the physician opinions with respect to repetitive trauma and notes Chiropractor Dickhut associates the complaints with the 5/4/12 accident. The Arbitrator notes the opinions of Dr. Eubanks regarding repetitive trauma are based solely on a conversation with Petitioner that suggests he does heavy work, and preparation by counsel regarding the written job description. Dr. Eubanks opines there may be causation which is not the evidentiary standard. The Arbitrator specifically finds the job description unreliable and notes same was prepared by Perez, the office manager, who acknowledged she is not only friends with the Petitioner, but also forwarded it for approval first to Petitioner's attorney. Woods signature also appears at the bottom and he testified this was not his signature. The Arbitrator also determined the job description inaccurate based upon testimony by Woods and Groves and even Petitioner himself to some extent, which depict lighter weight involved, minimal overhead work with light weight and variance of tasks. The Arbitrator determines that the job duties and medical evidence do not support a finding of an accident arising out of and in the course of Petitioner's employ on June 25, 2019. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0086

vs.

NO: 15 WC 2126

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0086

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

MAR 1 - 2021

DATED:
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0086

BUFFANO, DAVID
Employee/Petitioner

Case# 15WC002126

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

21IWCC0086

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 02126**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24, 2019 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/11/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $50,953.76; the average weekly wage was $979.88.

On the date of accident, Petitioner was **53** years of age, ***single*** with **2** dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Statement of Facts

Petitioner testified he was employed as a mechanic for Respondent beginning August 8, 2011. Petitioner testified he saw Dr. Li on January 11, 2013 and provided notice to Sam, though he did not state notice of what. (T. 66-69) On cross exam. Petitioner stated he did not know what accident was being referenced and it is clear notice was not provided. (T. 135) Perez, office manager, acknowledged she was aware of no claimed accidents after Petitioner ceased working. (T. 197-198) Petitioner testified he ceased working for Respondent on January 2, 2013 and never returned to work. Dr. Li's chart note of January 11, 2013 is an exam and recommendation for surgery at Petitioner's request for the left rotator cuff tear. (PX 14) Petitioner had left shoulder complaints and an MRI of the left shoulder pre-dating this office visit. Dr. Li attributed the left shoulder complaints to the auto accident of May 4, 2012. Dr. Johnson evaluated Petitioner at request of Respondent on March 27, 2013 and was provided a history of left shoulder complaints as the result of an auto accident on May 4, 2012.

Dr. Eubanks testified that as of the October 14, 2014 visit, Petitioner complained of left shoulder pain pointing to the bicep tendon as the primary source. (RX 3) He testified that he completed a partial rotator cuff repair and biceps tenodesis. (RX3, pp.21-22). Dr. Eubanks testified that he was doing well postoperatively and as of November 13 he would have allowed him to return to light duty work. (PX3, p.23). Dr. Eubanks testified that on January 22, 2015, Petitioner continued to have some tenderness in the shoulder, slight loss of range of motion, some stiffness in the neck, but had improved with respect to the right arm and had full strength and resolved wrist drop. He imposed a 30-pound lifting restriction for the left arm. Dr. Eubanks noted he was intended to return three months for anticipated final check of the left shoulder. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description), these job duties may have been the cause of his right upper extremity ailment. He further testified that the job description may have also been the reason for the disease process in the left shoulder. He further stated that the automobile accident may have been the cause of an aggravation to the left shoulder. (PX3, pp.29-30). Dr. Eubanks testified that evaluation of the shoulder included exam such as Empty Can test, part of which was objective, and part subjective based on the examiner and the patient's response. (PX3, pp.34-35). Dr. Eubanks admitted that he was unfamiliar with the mechanism of injury for the auto accident. (PX3, p.35). Dr. Eubanks acknowledged that his opinions with respect to causation were based solely on what Petitioner's counsel advised him at the deposition as well as his discussion with Petitioner about doing things like taking large parts out of cars. He also acknowledged that he had not reviewed any medical records documenting pre-existing conditions related to the ailments which he provided care for and that this may impact his opinion. (PX3, pp.41-42). When presented with the information relative to the automobile accident completed by Dr. Dickhut's office, he testified that a 7 to 10 mph collision is unlikely to have caused the injury in the left shoulder given the very slow speed, low velocity and low impact collision. (PX3, p.43).

Conclusions of Law

The Arbitrator renders the following with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

Petitioner did not testify to a specific accident on this date. If Petitioner is claiming this as a manifestation date for repetitive trauma, the Arbitrator notes the testimony of Woods and Groves were that Petitioner did lighter work and that overhead work was limited to occasional. Additionally, Petitioner's treating physician, Dr. Li, attributes no causation to this date nor did Petitioner make mention of repetitive trauma to the examining physician, Dr. Johnson. Dr. Eubanks, who acknowledged he had not reviewed any outside records other than diagnostics, testified that the written description of job duties may have been the reason for the disease process in the left shoulder but does not specify a date this would have been evident, utilizes the job description which the Arbitrator finds unreliable and additionally, Dr. Eubank's opinion is not in the required standard of evidence. The Arbitrator determines an accident did not occur on this date which arose out of and in the course of Petitioner's employ and notice of an accident was not provided within 45 days of the alleged accident. All other issues are therefore moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0087

vs.

NO: 15 WC 2127

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0087

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

DATED: MAR 1 - 2021
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0087

BUFFANO, DAVID
Employee/Petitioner

Case# 15WC002127

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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21IWCC0087

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 02127**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/24/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $50,953.76; the average weekly wage was $979.88.

On the date of accident, Petitioner was **53** years of age, ***single*** with **2** dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Findings of Fact

On January 24, 2013, Petitioner underwent an EMG with Dr. Pegg, neurologist due to complaints of discomfort radiating down the right arm. Petitioner Described it being on the underside and then extending to the medial aspect of the forearm; he found it difficult to do things and his grip getting was weak. Dr. Pegg noted MRI of cervical spine failed to reveal evidence supporting C8-T1 radiculopathy. Petitioner felt there is a difference over the 4th/5th fingers with pin prick but no difference in ulnar distribution. The EMG demonstrated evidence of ulnar nerve entrapment and residual slowing from prior carpal tunnel.

Petitioner did not testify to a specific injury for this date and in fact, stated that he was unaware of an accident. Petitioner had ceased working for Respondent as of January 2, 2013 and testified he never returned to work. Perez also testified she was provided no notice for accidents after he ceased working. Groves testified the only accident for which he received notice was May 24, 2012.

An EMG was completed on 1/24/13 with Dr. Pegg which demonstrated cubital tunnel on the right. (PX 23)
A subsequent EMG complete by chiropractor Berkey on 8/1/13 no longer demonstrated evidence of cubital tunnel.

Dr. Li did not testify to a manifestation for cubital tunnel on this date. He did testify that he believed the lifting accident of 11/26/2012 could have aggravated his pre-existing condition. He also testified that based upon the written job description, these were the types of activities which could cause cubital tunnel; specifically, continuous reaching overhead and at shoulder level as well as air tools. Dr. Li said his diagnosis of cubital tunnel was based upon the EMG, and acknowledged they are not always accurate, as well as his physical exam which demonstrated decreased sensation at C8-T1 which is the ulnar nerve. (PX 1, p.54) Dr. Li acknowledged that diabetes could impact the ulnar nerve. (PX 1, p.74)

Dr. Eubanks testified he was licensed in the State of Illinois in 2008 and has been Board Certified in Orthopedic Surgery since 2011 (PX 3). He testified that at the first evaluation on May 9, 2014, Petitioner provided a history of pain, weakness and numbness in the upper extremity mostly the right arm, in addition to wrist drop. (PX3, p.7). Stated his exam demonstrated weakness of the radial nerve distribution with wrist extension, as well as numbness in the median nerve distribution and tenderness over the lateral epicondyle and forearm. He further stated that tenderness over the lateral epicondyle demonstrated epicondylitis, and he had a positive Tinel and Phalen sign demonstrating carpal tunnel. (PX3, p.13). He testified that weakness of the wrist was strictly the radial nerve. (Id.) He stated that a surgery was completed on August 20 consisting of epicondylitis release, carpal tunnel release and posterior interosseous release. He testified that as of that date, he would have restricted him from work for six weeks until he could return to light duty. (PX3, pp.14-15). He testified that as of the September 9, 2014 visit, he demonstrated improvement with respect to the radial nerve function. (PX3, p.16). Dr. Eubanks testified that on January 22, 2015, Petitioner continued to have some tenderness in the shoulder, slight loss of range of motion, some stiffness in the neck, but had improved with respect to the right arm and had full strength and resolved wrist drop. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description), these job duties may have been the cause of his right upper extremity ailment. Dr. Eubanks testified that the primary causes of radial nerve palsy include fracture, traumatic injuries including surgical procedures, and acknowledged that he was aware the Petitioner had undergone prior carpal tunnel surgery, but he did not have the specifics. (PX3, pp.32-33). Dr. Eubanks testified that he did not evaluate the wrist after he began examining the shoulder as his right wrist and

elbow were doing very well. (PX3, p.37). Dr. Eubanks again testified that he did not recall anything other than minimal complaints with respect to the epicondyle release as of January 22, 2015. (PX3, p.38).

Dr. Williams testified Petitioner's cubital tunnel was not supported by physical exam. Petitioner provided no history of repetitive trauma to Dr. Williams.

Gary Woods testified on behalf of Respondent. Mr. Woods stated he began working for Respondent in 1977 and learned most of his trade on the job. By 1987, he was made shop foreman. He testified he got everyone their work and then he did all the exhaust work, welding, engine pulling, box trucks and motor homes. Woods testified Petitioner was primarily hired to do diagnostic work. (RX 14 at 8) Woods stated he personally worked on about 10 cars per day. He stated Groves would start the schedule and he would work the rest of it out. He would have someone else test drive them which was often Petitioner, and sometimes Groves or the alignment mechanic. Woods stated Petitioner was assigned light work like air conditioning and brakes. Woods stated Petitioner left early 3 days a week to go to a back physician and he was aware he had prior carpal tunnel. (RX 14 at pp. 11-12) Woods testified that Petitioner would have the tire guys pull the tires off and put them back on for him. Woods stated Petitioner typically worked on 2 – 3 cars per day. (RX 14 at 14) Woods testified Petitioner also used the diagnostic scanner, put on electric motor windows which weighed about a pound, had a stool to sit on and do brake jobs, would go downstairs for periods of time to talk and likewise into the office, and after the diagnostics were complete, he would provide to Groves for pricing and then may call the customer with the information. Woods testified most of the tools Petitioner worked with were within the range of 5 to ten pounds. The parts were frequently light but could weigh up to 15 pounds. He stated a cylinder head could weigh up to 60 pounds and Petitioner would have asked for help either from himself or one of the tire guys who were always around as he was trying to train them. (RX 14 at 25-26) Woods testified that despite his name being on the bottom of the job description, his deposition was the first he had ever seen same.

Groves testimony with respect to Petitioner's job duties included diagnostics and lighter work. He stated the written job description was not accurate.

Petitioner testified to use of his hands constantly but also noted he made calls, provided warranties etc. He did not testify, as had the others, as to the amount of time he spent driving cars, chatting or that heavy work was completed by other employees.

Conclusions of Law

The Arbitrator finds as follows with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

The Arbitrator notes that notice was not provided within 45 days of the alleged accident as admitted by Petitioner and Perez and confirmed by Groves. The Arbitrator notes Petitioner was unaware of a manifestation date of January 24, 2013 and a specific injury was not alleged for this date. The Arbitrator notes that although Dr. Li provides a causal connection opinion, it is based upon a written job description which the Arbitrator finds to be inaccurate per witness testimony as his job duties were lighter and more varied than depicted on the form. Additionally, Dr. Li attributes the cubital tunnel diagnosis to the EMG, which he acknowledged is not always accurate, as well as decreased sensation on exam at C8-T1, which was in fact not detected on the EMG. The Arbitrator notes that Dr. Eubanks opined relative to the same job description, but also diagnosed epicondylitis, *not* cubital tunnel. A later EMG of August 1, 2013 no longer demonstrated cubital tunnel, which calls into question the accuracy of the earlier test. Dr. Williams did not appreciate any findings of cubital tunnel on exam and commented on the second negative EMG. The Arbitrator, after considering the aforementioned, determines an accident did not arise out of and in the course of Petitioner's employ on January 24, 2013. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0088

vs.

NO: 15 WC 9139

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0088

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

DATED: MAR 1 - 2021
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0088

BUFFANO, DAVID
Employee/Petitioner

Case# 15WC009139

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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21IWCC0088

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 09139**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **PAUL SEAL**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

21IWCC0088

On **1/29/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

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

On the date of accident, Petitioner was 53 years of age, ***single*** with 2 dependent children.

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

MAR 11 2020

Findings of Fact

On January 29, 2013, was evaluated by Dr. Li following an EMG with Dr. Pegg, neurologist due to complaints of discomfort radiating down the right arm. Petitioner described it being on the underside and then extending to the medial aspect of the forearm; he found it difficult to do things and his grip getting was weak. Dr. Pegg noted MRI of cervical spine failed to reveal evidence supporting C8-T1 radiculopathy. The EMG demonstrated evidence of ulnar nerve entrapment and residual slowing from prior carpal tunnel. Dr. Li therefore recommended ulnar nerve transposition and decompression.

Petitioner did not testify to a specific injury for this date and in fact, stated that he was unaware of an accident. Petitioner had ceased working for Respondent as of January 2, 2013 and testified he never returned to work. Perez also testified she was provided no notice for accidents after he ceased working. Groves testified the only accident for which he received notice was May 24, 2012.

An EMG was completed on 1/24/13 with Dr. Pegg which demonstrated cubital tunnel on the right. (PX 23) A subsequent EMG complete by chiropractor Berkey on 8/1/13 no longer demonstrated evidence of cubital tunnel.

Dr. Li did not testify to a manifestation for cubital tunnel on this date. He did testify that he believed the lifting accident of 11/26/2012 could have aggravated his pre-existing condition. He also testified that based upon the written job description, these were the types of activities which could cause cubital tunnel; specifically, continuous reaching overhead and at shoulder level as well as air tools. Dr. Li said his diagnosis of cubital tunnel was based upon the EMG, which he acknowledged were not always accurate, as well as his physical exam which demonstrated decreased sensation at C8-T1 which is the ulnar nerve. (PX 1, p.54) Dr. Li acknowledged that diabetes could impact the ulnar nerve. (PX 1, p.74)

Dr. Eubanks testified he was licensed in the State of Illinois in 2008 and has been Board Certified in Orthopedic Surgery since 2011 (PX 3). He testified that at the first evaluation on May 9, 2014, Petitioner provided a history of pain, weakness and numbness in the upper extremity mostly the right arm, in addition to wrist drop. (PX3, p.7). Stated his exam demonstrated weakness of the radial nerve distribution with wrist extension, as well as numbness in the median nerve distribution and tenderness over the lateral epicondyle and forearm. He further stated that tenderness over the lateral epicondyle demonstrated epicondylitis, and he had a positive Tinel and Phalen sign demonstrating carpal tunnel. (PX3, p.13). He testified that weakness of the wrist was strictly the radial nerve. (Id.) He stated that a surgery was completed on August 20 consisting of epicondylitis release, carpal tunnel release and posterior interosseous release. He testified that as of that date, he would have restricted him from work for six weeks until he could return to light duty. (PX3, pp.14-15). He testified that as of the September 9, 2014 visit, he demonstrated improvement with respect to the radial nerve function. (PX3, p.16). Dr. Eubanks testified that on January 22, 2015, Petitioner continued to have some tenderness in the shoulder, slight loss of range of motion, some stiffness in the neck, but had improved with respect to the right arm and had full strength and resolved wrist drop. Dr. Eubanks testified that based upon the job description tendered by opposing counsel at the deposition (inaccurate description), these job duties may have been the cause of his right upper extremity ailment. Dr. Eubanks testified that the primary causes of radial nerve palsy include fracture, traumatic injuries including surgical procedures, and acknowledged that he was aware the Petitioner had undergone prior carpal tunnel surgery, but he did not have the specifics. (PX3, pp.32-33). Dr. Eubanks testified that he did not evaluate the wrist after he began examining the shoulder as his right wrist and elbow were doing very well. (PX3, p.37). Dr. Eubanks again testified that he did not recall anything other than minimal complaints with respect to the epicondyle release as of January 22, 2015. (PX3, p.38).

Dr. Williams testified Petitioner's cubital tunnel was not supported by physical exam. Petitioner provided no history of repetitive trauma to Dr. Williams.

Gary Woods testified on behalf of Respondent. Mr. Woods stated he began working for Respondent in 1977 and learned most of his trade on the job. By 1987, he was made shop foreman. He testified he got everyone their work and then he did all the exhaust work, welding, engine pulling, box trucks and motor homes. Woods testified Petitioner was primarily hired to do diagnostic work. (RX 14 at 8) Woods stated he personally worked on about 10 cars per day. He stated Groves would start the schedule and he would work the rest of it out. He would have someone else test drive them which was often Petitioner, and sometimes Groves or the alignment mechanic. Woods stated Petitioner was assigned light work like air conditioning and brakes. Woods stated Petitioner left early 3 days a week to go to a back physician and he was aware he had prior carpal tunnel. (RX 14 at pp. 11-12) Woods testified that Petitioner would have the tire guys pull the tires off and put them back on for him. Woods stated Petitioner typically worked on 2 – 3 cars per day. (RX 14 at 14) Woods testified Petitioner also used the diagnostic scanner, put on electric motor windows which weighed about a pound, had a stool to sit on and do brake jobs, would go downstairs for periods of time to talk and likewise into the office, and after the diagnostics were complete, he would provide to Groves for pricing and then may call the customer with the information. Woods testified most of the tools Petitioner worked with were within the range of 5 to ten pounds. The parts were frequently light but could weigh up to 15 pounds. He stated a cylinder head could weigh up to 60 pounds and Petitioner would have asked for help either from himself or one of the tire guys who were always around as he was trying to train them. (RX 14 at 25-26) Woods testified that despite his name being on the bottom of the job description, his deposition was the first he had ever seen same.

Groves testimony with respect to Petitioner's job duties included diagnostics and lighter work. He stated the written job description was not accurate.

Petitioner testified to use of his hands constantly but also noted he made calls, provided warranties etc. He did not testify, as had the others, as to the amount of time he spent driving cars, chatting or that heavy work was completed by other employees.

Conclusions of Law

The Arbitrator finds as follows with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

The Arbitrator notes that notice was not provided within 45 days of the alleged accident as admitted by Petitioner and Perez and confirmed by Groves. The Arbitrator notes Petitioner was unaware of a manifestation date of January 29, 2013 and a specific injury was not alleged for this date. The Arbitrator notes that although Dr. Li provides a causal connection opinion, it is based upon a written job description which the Arbitrator finds to be inaccurate per witness testimony, with Petitioner's job duties consisting of lighter weights, less frequency and more variation. The Arbitrator notes that Dr. Eubanks opined relative to the same job description, but also had diagnosed epicondylitis, *not* cubital tunnel, and there existed no diagnosis for epicondylitis on this alleged date of accident. Additionally, Dr. Li attributes the cubital tunnel diagnosis to the EMG, which he acknowledged is not always accurate, as well as decreased sensation on exam at C8-T1, which was in fact not detected on the EMG. A later EMG of August 1, 2013 no longer demonstrated cubital tunnel, which calls into question the accuracy of the earlier test. Dr. Williams did not appreciate any findings of cubital tunnel on exam and commented on the second negative EMG. The Arbitrator, after considering the aforementioned, determines an accident did not arise out of and in the course of Petitioner's employ on January 29, 2013. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Buffano,

Petitioner,

21IWCC0089

vs.

NO: 15 WC 27175

Fred Groves Servicenter d/b/a Fred Groves,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

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

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

21IWCC0089

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

DATED: MAR 1 - 2021
o: 2/4/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0089

BUFFANO, DAVID
Employee/Petitioner

Case# 15WC027175

FRED GROVES SERVICENTER D/B/A FRED GROVES
Employer/Respondent

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

21IWCC0089

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BUFFANO,
Employee/Petitioner

Case # **15 WC 27175**

v.

Consolidated cases:

FRED GROVES SERVICENTER, D/B/A FRED GROVES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **WILLIAM GALLAGHER**, Arbitrator of the Commission, in the city of **BLOOMINGTON**, on **September 24 and October 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/26/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $51,287.08; the average weekly wage was $986.29

On the date of accident, Petitioner was **52** years of age, ***single*** with **2** dependent children.

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

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

Denial of benefits

No benefits are awarded.

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

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

Signature of Arbitrator

March 6, 2020
Date

Findings of Fact

21IWCC0089

Petitioner testified that he began working for Respondent on August 8, 2011. Petitioner testified he had previously been employed as an airline and auto mechanic, with various licenses and certifications. He testified that he had previously sustained an injury to his hands while working for Paul and Mike's Transmission resulting in carpal tunnel. Thereafter, he did not work for four years but for 1 position for 2 -3 months marking lines for J.U.L.I.E. but could not do it. He also obtained a CDL license but stated he had too much pain in his neck to drive. (T120-122) Petitioner testified that on November 26, 2012, he was pulling a cylinder on a Ford truck that weighed between 75 and 80 pounds. His body was bent over the fender at the waist and he pulled with both hands when he felt a snap in his right elbow as well as experienced neck, shoulder and hand pain. (T. 59-60) Petitioner testified he told Sam and that it was his understanding that he was to report it to her as the office manager. Perez testified that she was friends with the Petitioner, witnessed the accident and that it occurred prior to Thanksgiving (T. 180). She testified he injured his left shoulder, neck and had cold in his hands. (T. 179) Groves testified on behalf of Respondent advising he was never provided notice of an accident on this date. Woods testified he worked in the same area and talked with Petitioner every day and was never made aware of the accident. The Application for Adjustment in this matter was not filed until 8/21/15.

Petitioner testified that his diabetes had long been controlled. Petitioner testified that he went periods of time without medication. (T. 122-123) This is contrary to the medical records. (RX 5, RX 7, RX 15) Petitioner testified he was never diagnosed with high blood pressure prior until just prior to his neck surgery. (T. 123) This is contrary to the medical records. (RX 5 and RX 10) Petitioner stated Dr. Henry was an opinion only physician, but yet he had several visits and stellate ganglion blocks. (T. 115, RX 5) Petitioner testified he never had peeling around his fingernails before May 4, 2012 but this appears to be inaccurate. (T. 139, RX 5) Petitioner testified he had no restrictions before starting his employ with Respondent. (T. 118, 164). This is contrary to the medical records. (RX 5)

Petitioner had already been complaining of symptoms in his right hand with pain 6/10, coldness and advised chiropractor Dickhut on 11/7/12 that he believed his carpal tunnel was coming back. (PX 33) On November 13, 2012 he had complained of increased discomfort in the neck and increased numbness in his hands. (Id.) He rated his right-hand pain as an 8/10 on November 15, 2012 and a 6/10 on November 20, 2012.

Petitioner had a long history of right-hand pain dating back to a carpal tunnel diagnosis in the early 1990 per Dr. Steffan on 1/19/07. At that time Petitioner advised his physician he did not want permanent restrictions as there were no other options for work. (RX 5) Petitioner underwent carpal tunnel release with Dr. Dustman on July 9, 2007 and due to ongoing complaints, re-exploration on July 25, 2007 at which time Dr. Dustman commented concern that he was diabetic and had been unable to take care of it due to insurance problems. (Id.) As of October 29, 2007, Petitioner advised Dr. Dustman he had burning and coldness in all fingers on the right hand and was using hot water and a glove. (Id.) He was referred to a pain clinic for possible development of complex regional pain syndrome and as of August 4, 2008, was advised he should undergo an FCE and recommended against return to is job. (Id.) He returned to Dr. Dustman on October 30, 2008 noting both hands and feet were cold, turned white, had dry eczema and he was referred to rule out systemic disease. (Id.) On January 14, 2009, Petitioner was evaluated at Illinois Regional Pain Institute complaining of cold and pain in fingers and toes, right wrist pain, burning pain in right neck and shoulder with radiation to the hand. Dr. Brown opined he had neuropathic pain in the right upper extremity and administered right stellate ganglion blocks which were unsuccessful. He was recommended to try Mayo Clinic. (Id.) Petitioner completed an FCE on October 19 and 20, 2009. Petitioner failed 12 of 20 tests for maximal effort and tested in the light to medium demand level which was not a match for his position as a mechanic. (Id.) On February 2, 2010, per request of

his attorney in that case, he was seen by Dr. David Brown who obtained a history, noted pain with Tinel over the volar aspect of the wrist and recommended and EMG. (Id.) On March 25, 2010 Petitioner was evaluated by Dr. Phillips noting he was diagnosed with diabetes in 1997 but he states his blood sugar normalized. He denied numbness in his feet. The EMG demonstrated some slowing of the forearm and elbow, right median neuropathy but now recordable as opposed to previously absent. Lower extremity exam demonstrated reflexes that were depressed in stocking glove pattern. The impression was diabetic peripheral neuropathy. (Id.) Following same, Dr. Brown opined that he would not benefit from additional surgery but indicated the restrictions in the FCE would be reasonable given the deficit in the median nerve distribution and weakness; he did not recommend he return as a mechanic. (Id.)

On June 12 and 25, Petitioner was seen at OSF St. Joseph for elevated blood pressure and sugar, noting he could not fill his medication. (RX 9) Petitioner was seen at OSF Fort Jesse on January 13, 2011 noting he had been out of work for 3 years as he could not do anything with restrictions he had. He was complaining of cold hands. (RX 7) He was again evaluated on March 3, 2011 complaining of bilateral wrist pain with right pain into the forearm and last 2 digits as well as cold; medication and injection were discussed. (Id.) On March 14, 2011 he went for a DOT physical and was advised to follow up with his physician for hypertension. (Id.) On April 19, 2011, he complained of neck and shoulder numbness with shooting pain down the right arm. (Id.)

On May 9, 2011, Petitioner presented to chiropractor Dickhut with sharp neck and low back pain, numbness and tingling that goes down both arms noting he had double carpal tunnel surgery and the right wrist was operated twice. The left hand felt better, but stated the right hand was much worse and ruined his life for past 4 years. He reflected that he had been off work for the past 4 years and went to get his CDL but couldn't get a job due to pain. He also said he hurt biceps years ago in a work injury at GM where he tore a biceps muscle. Chiropractor Dickhut stated symptoms related to cervical segmental dysfunction muscle deconditioning and atrophy as well as CTS in both wrists. (RX 6) An MRI of the cervical spine on May 31, 2011 demonstrated severe degenerative change from C5-7 including osteophyte complex and facet joint arthropathy. (RX 7) According to Petitioner, his cervical symptoms improved as of July 2011, but records reflect he continued to receive DRX and adjustments for same through 10/4/11 at which point DRX was moved to low back. (RX 6) On 10/15/12 Petitioner stated his neck was doing better.

Petitioner continued to have right hand complaints throughout 2011 and into early 2012. (RX 6) As of January 11, 2012 his low back complaints became more prevalent and care focused on same with notation on January 16, 2012 that he was seen in the ER and was recommended emergency surgery but was concerned he would lose his job.

Petitioner continues to be seen at Allied Health on a regular basis between November 26, 2012 and January 31, 2013, which was the first time Chiropractor Dickhut seemed to be aware of an incident on November 26, 2012, though it is not specifically described and he states that the right shoulder complaints could come from this as opposed to overcompensating for the left. (RX 6) Petitioner had been complaining of right hand and left shoulder pain before this date. The first mention of right wrist, shoulder and forearm pain is December 10, 2012 and the first mention of elbow pain is December 20, 2012. The first complaint to the cervical spine following same is December 26, 2012. (RX 6) On January 7, 2013 Petitioner is seen at OSF Fort Jesse with a history of right shoulder pain when lifting a tire. (RX 7) On January 11, 2013 he is seen by Dr. Li and reports lifting a heavy object on November 26, 2012 resulting in neck pain and radiation down the arm. Dr. Li orders a right shoulder and cervical MRI. Same are completed on January 15, 2013 with results from the cervical demonstrating severe osteophyte complex contributing to foraminal stenosis C4-7. (PX 22) The right shoulder is non-diagnostic. Dr. Li testified that the lifting accident of November 26, 2012 aggravated the cervical spine and right shoulder.

Dr. Nardone testified on February 20, 2015 that he is a board-certified neurological surgeon and has been for the past 15 years. He testified that the history provided to him by the Petitioner in this matter was a 2012 car accident which resulted in worsening pain, headache and nausea, which went on to develop right arm pain and weakness for which he was seen by several physicians and tests were done. He then testified to another injury Petitioner advised him when he was lifting an engine and that aggravated his person. When he first saw him on May 7, 2014, he noted there was some diffuse muscle bulk that was decreased on the right arm, he had diffuse weakness including the intrinsic muscles, wrist extension, finger extension and triceps weakness as well as sensory deficits throughout the entire right arm. He did not believe there were any signs of myelopathy. He reviewed the MRI which demonstrated spondylotic changes at multiple levels from C5 to T1. An additional CT and MRI of the cervical spine confirmed severe degeneration from C5 to T1 causing stenosis. It was at that point he recommended a fusion. He noted surgery became delayed due to cardiac issues. (PX 4, p.12). Dr. Nardone testified in response to the hypothetical of lifting a 40-pound cylinder, experiencing pain from the elbows and the fingertips, Dr. Nardone testified the remarkable osteophyte complex could have been aggravated and caused more radiculopathy. On cross examination, Dr. Nardone testified he did not recall whether he reviewed any other medical records when he evaluated Petitioner, nor does he recall whether he reviewed any prior diagnostic studies. (PX 4, pp. 16-17). He noted he had some EMGs in Dr. Pegg's notes. Dr. Nardone acknowledged that Petitioner's condition was degenerative, and that degenerative conditions can wax and wane. (PX 4, p.17). Dr. Nardone testified that in comparison with the May 31, 2011 MRI pre-dating the accident, and the MRI completed on May 19, 2014, and noted that grossly, the MRIs did not change much. Dr. Nardone testified that knowledge of the chiropractic treatment prior to May 4, 2012 would be significant with respect to his opinion regarding causal connection as would a pain rating of 9/10 in May of 2011. (PX 4, pp. 20-21). Dr. Nardone testified that with respect to C6, Dr. Eubank's testimony supports his opinion that there was not a true C6 radiculopathy, but rather, that it was a more local problem in the elbow. (PX 4, pp. 24-25). Dr. Nardone also acknowledged that uncontrolled hypertension can cause headache. (Id.) Dr. Nardone testified that the EMG findings did not demonstrate a lot of evidence of cervical radiculopathy. (PX 4, p.30). He further acknowledged there was nothing acute on the MRI he reviewed. (PX 4, pp. 30-31).

Dr. Johnson testified that examination demonstrated positive findings of the bilateral shoulders including tenderness over the mid-clavicle and trapezius and coracoid on the right and tenderness over the clavicle, distal clavicle, AC joint and acromion posterior joint line, anterior joint line, supraspinatus, coracoid and trapezius on the left. He opined that he believed these were exaggerated pain behaviors as with repeat examination he did not have consistent areas of pain. He noted he had 5/5 strength but for left forward elevation which was 4/5 and testing was limited secondary to pain. He noted he had severely exaggerated pain on muscle testing and "was going to fall over because of exaggerated movements during shoulder strength testing." He also had some slight atrophy of his triceps on the right arm compared to the left. (RX 2, p.13) Dr. Johnson opined that taking into account the MRI of the right shoulder, and his clinical exam on the date of his evaluation, March 27, 2013, he would not recommend arthroscopic surgery for the right shoulder, as he was not having any significant complaints at that point and had a normal exam. He also noted it demonstrated no acute traumatic pathology. (RX 2, p.24) Dr. Johnson testified Petitioner only provided a history of a motor vehicle accident and made no mention of an injury on November 26, 2012.

Dr. William testified he is an orthopedic surgeon who specializes in upper extremity and that he evaluated Petitioner in this matter on October 9, 2013. The history Petitioner provided Dr. Williams was that he began to work for Fred Grove Service Center August 8, 2011, and his last date of employ was January 2, 2013 with a date of injury of November 26, 2012. He testified that his position as a Service Technician involved doing all types of auto repair including engine work, transmission work, brake work and diagnostics. He worked from 7:30 to 5:00, Monday through Friday, used engine lifts, hand tools, air impact tools, AC equipment, and transmission equipment. He used wrenches, screwdrivers, hammers, and socket wrenches. He stated that he previously had a right carpal tunnel release done twice as well as left carpal tunnel release. He then stated that

on the date of injury for this problem, November 26, 2012, he was working doing cylinder work. He was pulling a cylinder over the fender and he felt pain from the elbow to the fingertips getting it out. He said he kept working but the pain got worse. (RX 1, pp. 7-8) Dr. Williams inquired as to whether the Petitioner had problems with his neck, and Petitioner denied same. Petitioner described lack of strength, pain in the right wrist, numbness, tingling, pins and needles in the ring and small fingers only. He also said his hands got ice cold, and he wore gloves at night for sleeping. He had pain when he fully straightened or extended the right elbow. He complained of nighttime waking due to right arm as well as left arm pain, complained of bilateral weakness, noted he dropped things and stated he had gone to physical therapy. He completed a questionnaire, which included the fact that he had been a diabetic since 1997 and had diabetic neuropathy. He also experienced hypertension. (RX 1, p.11) He noted he had not been taking medication for the last four to five months because he could not afford them. His hobbies included building old cars, and he was right-hand dominant. Dr. Williams testified he reviewed the medical records forwarded before the exam, with the Petitioner himself, in order to allow the individual to correct anything that was inaccurate, as well as after in order to get complete detail. Dr. Williams testified he completed an exam, Petitioner had a BMI of 32.1, which placed him at increased risk for peripheral neuropathy, he had full cervical range of motion and complained of no radiculopathy, had some atrophy at the right triceps but not on the left, as well as atrophy on the right hypothenar eminence on the right and the first dorsal interosseous on the right. (RX 1, p0 15) Dr. Williams explained that atrophy occurs over a long period of time, not simply days, weeks or months, but long-term compression. (RX 1, pp. 16-17) He noted he had no evidence of complex regional pain syndrome, range of motion of the elbows was full, range of motion of the right wrist had -40 degrees of extension, which indicated weakness in the radial nerve and this had been noted on previous nerve study. Manual muscle testing of the elbow flexion strength on the right which he noted was innervated by C5-C6, was only 3+ to 4-/5. On the left it was 4+/5. Elbow extension on the right was only 4/5 compared to 4+/5 which was due to weakness in the triceps. Wrist extension strength on the right was 0/5, and Dr. Williams opined he was giving good effort. (RX 1, p.19) He had decreased range of motion on the left compared to the right. (RX 1, p.19) He had tenderness over the lateral epicondyle on the right, and wrist extension strength could not be tested as he could not actively extend the wrist. It was negative on the left. Positive Tinel's sign on the right, negative on the left, equivocal Phalen's on the right, negative on the left, and positive median nerve compression test on the right, negative on the left. He did have some evidence of carpal tunnel on the right but not on the left. Dr. Williams opined that review of records was significant for the fact it showed he had a long history of complaints with respect to his right arm. (RX 1, p.21) He noted the records of Dr. Dickhut reflect during September 18, 2008 he was complaining of pins and needles in his hands, stabbing pinch strength had improved since surgery as did his grip strength. He again complained in 2011 of frequent sharp, aching, burning, numbness, shooting, tingling and discomfort in right wrist, forearm, palm and so he noted these complaints predated his employ. (RX 1, pp. 21-22) Dr. Williams noted that per Dr. Dickhut's records, Petitioner had various complaints with respect to his right hand, ruining his life, causing inability to sleep, had seen 13 doctors in four years trying to figure out what was wrong and had been off of work, that at the same time, noted he was enjoying riding four-wheelers on his five acres and playing with his dogs and doing yard work. (RX 1, p.24) Dr. Williams testified that diabetes predisposes one to developing carpal tunnel, and that Petitioner had been diagnosed with diabetic neuropathy, which notes the severity of the diabetes and the fact that the nerves had already been affected. He also noted that individuals with diabetes who undergo carpal tunnel surgery do not do as well because the nerves affected with diabetes is due to the blood supply is the outer layer of nerves, therefore, those in the periphery get poor blood supply. (RX 1, pp. 25-26) He further noted that a diabetic who is not taking medication could expect their symptoms to increase. Dr. Williams also discussed the note of Dr. Liu of January 13, 2011, noting that the Petitioner presented with hand pain which felt like a rock in his palm, he slept wearing gloves, and he had been out of work at that point for three years because he could not do anything with his restrictions. They had been trying to use a calcium channel blocker to increase the blood supply. (RX 1, p.27) Dr. Williams also noted another visit with Dr. Liu on February 28, 2011 in which the Petitioner presented with bilateral hand pain, had an EMG which confirmed bilateral carpal tunnel, had a redo of the right three weeks after the initial one and

was experiencing right wrist radiating into the forearm and palm with his last two digits being the ring and small fingers. He also felt cold constantly and there was a slight temperature difference between the right and left hand. Dr. Williams testified that six months prior to his employment with Respondent, he had significant problems affecting his ring and small fingers as well as the whole right hand due to diabetic peripheral neuropathy. (RX 1, p.29) Dr. Williams opined that Petitioner had evidence of diabetic peripheral neuropathy, cervical radiculopathy, and evidence of left shoulder problems and evidence of radial nerve palsy. (RX 1, p.34) He had high radial nerve palsy because he could not extend the wrist which meant it affected the nerves above the elbow. Dr. Williams testified that Petitioner did not attribute his hand complaints to the May 4, 2012 incident, but rather, solely his left shoulder. In regard to the November 26, 2012 injury he complained mainly of his right hand with numbness and tingling which had been there previously, and therefore, Dr. Williams opined that neither of the accidents had caused or aggravated any type of problem of which he currently complained. (RX 1, p.35) Dr. Williams testified that cubital tunnel was not supported by his physical exam. (RX 1, Id.) Dr. Williams testified that he completed an addendum report of November 27, 2013 after review of additional records. Dr. Williams testified the records described polyneuropathy, for which one of the main causes is diabetes, causing multiple nerves to be affected. (RX 1, p.39) He noted that the review of those additional records did not change his opinions relative to causal connection. Dr. Williams testified on cross exam; the job duties described by Petitioner could cause cubital tunnel syndrome in the absence of his other previous complaints. (RX 1, p.43) He also noted that those job duties could not cause a radial neuropathy, firstly, due to absence of an injury which would require direct impact to the radial nerve and secondly, that the diagnosis of same was not determined on exam until July 29, 2013. This was over six months following end of his employment. (RX 1, p.44)

Dr. Wellington Hsu testified on July 22, 2015 that he is a board certified orthopedic surgeon and completed an initial evaluation on May 2, 2014 at which point he reviewed medical records, inclusive of records complaining of hand pain since 2008, an MRI of the cervical spine on May 31, 2011 as well as a lumbar MRI and chiropractic visits as well as another MRI of the cervical spine in January, 2013, an EMG in January of 2013, and MRI of the cervical spine on July 30, 2013. Dr. Hsu testified he does not utilize EMG in his practice as he believes they are somewhat unreliable and operator-dependent, but he did consider it as they were completed in this case. He stated at the time of his evaluation, Petitioner's complaints included neck pain, right-sided hand, wrist and elbow pain, and some hand weakness. He provided of a November 20, 2012 accident when lifting a cylinder out of a vehicle injuring his right arm and neck again. He testified that the physical exam demonstrated full range of motion of the cervical spine with positive Spurling's sign on the right, with no other positive findings, except weakness in the right hand that was evidenced with abductor pollicis brevis weakness. Dr. Hsu opined that based upon the mechanism of injury he may have suffered a cervical strain which had resolved; he had pre-existing cervical spondylosis. (RX 3, p.11) Dr. Hsu opined that both injuries which were described were of low impact, and therefore he may have suffered cervical strains for each. The MRI reports demonstrated cervical spondylosis, which were in no way related. (RX 3, p.13) Dr. Hsu opined that at the time of his evaluation, although his symptoms were unrelated to the work accidents, that a steroid injection as well as physical therapy would be reasonable to treat his pain. He noted that this was related to the pre-existing cervical spondylitic condition. (RX 3, p.15) Dr. Hsu testified that he evaluated Petitioner again on April 29, 2015, reviewed records of the cervical spine from May 19, 2014, records of Dr. Nardone and Dr. Eubanks and elicited complaints of numbness and tingling of the right hand as well as neck pain. Exam on this occasion demonstrated full range of motion of the cervical spine, normal neurologic exam and negative Spurling's test compared to the prior time. Dr. Hsu opined at this time, he had no necessity of additional care for his cervical spine, as there was no functional disability on physical exam. (RX 3, p.18) He opined he could return to work without restriction. (Id. p.19)

Petitioner ultimately underwent cervical fusion with Dr. Nardone and alleged an allergic reaction, so had hardware removed by Dr. Boyer. Petitioner states his neck feels the same, pointing to the left side of his neck, parallel to his ear.

Conclusions of Law

The Arbitrator renders the following with respect to (C), did an accident occur which arose out of Petitioner's employ and (E), notice:

The Arbitrator notes that there is a discrepancy as to when the alleged accident occurred as Perez stated prior to Thanksgiving and Petitioner testified November 26, 2012 which was after Thanksgiving. She also alleges this involves the left shoulder, which is not the contention of Petitioner. The Arbitrator notes bias which is reflected in the acknowledgement not only of their friendship, but also her more recent disgruntlement with Respondent. Petitioner repeatedly advises his physicians he needs to continue working due to financial concerns from his long stint of unemployment following his work accident with Paul and Mike Transmission. Petitioner alleges a specific incident and therefore is required to establish time, place and location. Petitioner at best, is a poor historian. He testifies to various conditions and denies they pre-dated his employ which is directly contradicted by medical records. He further testifies that when he presented to Respondent for work, he had no restrictions, which is again contrary to the medical records. Petitioner is aware of same as he discussed them with Chiropractor Dickhut. Woods who works in the same area as Petitioner, testified he did not know anything about this alleged work injury. Woods testified that he knew about Petitioner's ongoing medical care when Petitioner started including his prior hand problems and tried to steer him lighter work. He also noted Petitioner routinely asked for assistance with heavier work either from him or the other employees. Although Petitioner had routinely been seeing Chiropractor Dickhut, there is no mention of this incident until the end of January to him and until January 11, 2013 to Dr. Li. Petitioner's symptoms immediately pre-date the injury but for the elbow and cervical spine for which complaints do not appear until weeks following the alleged incident and are recurrences of conditions previously alleged in other accidents. The Arbitrator also notes there were several comments about Petitioner's veracity of effort and symptoms, both in contemporary exams such as Dr. Johnson and Dr. Pegg, as well as in the FCE completed in 2009. The Arbitrator determines based upon a preponderance of the evidence, Petitioner failed to prove an accident an accident arose out of and in the course of his employ on November 26, 2012. All other issues are moot.

The Arbitrator finds the following with respect to (F) causal connection:

Petitioner was diagnosed with diabetic neuropathy prior to his employ with Respondent and despite denial of same, clearly has symptoms associated with ongoing nerve damage resulting in circulatory issues in both the hands and feet. Petitioner had been under active care for the right hand immediately prior to this alleged injury. Petitioner did not voice complaint with respect to the right elbow, shoulder and neck until two weeks after the incident, and had been under active care in recent months for all these symptoms. Dr. Dickhut only attributes the right shoulder to this incident which he had previously opined was from overuse and there was no mention of the incident until January 31, 2013. Dr. Li, who had reviewed no outside records, opined the incident aggravated the neck and right shoulder. Dr. Hsu testified the mechanism of injury could be consistent with a strain but did not aggravate the underlying disease. Dr. Nardone acknowledged no acute findings on MRI, and in fact no real change compared to the pre-employ and no radicular component. Dr. Johnson opined he had exaggeration of symptoms but a normal exam and MRI of the right shoulder. Dr. Williams testified that the accident did not cause or aggravate his previous condition which was caused by diabetic neuropathy. The Arbitrator finds that based upon the totality of the medical records, and the opinions of the physicians, that Dr. Johnson and Williams are the most persuasive and therefore that there is no causal connection between Petitioner's symptoms and alleged work injury. The Arbitrator so finding, renders all other issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Novak, Sr.,

Petitioner,

vs.

No. 19 WC 539

21IWCC0090

MVP Plumbing,

Respondent.

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

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

On June 22, 2018, Petitioner, a 61 y/o plumber foreman, sustained an injury to his right knee as a result of traversing staircases multiple times while carrying tools and equipment weighing up to 70 lbs. Petitioner's treating orthopedic physician, Dr. Fuentes, recommended he undergo a total knee replacement. Petitioner's retained expert, Dr. Tonino, agreed that procedure would be appropriate, and opined that Petitioner's stair climbing activities at work aggravated his pre-existing condition.

21IWCC0090

Respondent's retained expert, Dr. Lieber, opined Petitioner had reached MMI a few weeks after his work injury, and that his subsequent knee symptoms were causally related to his pre-existing knee conditions. The Arbitrator found the opinions of Dr. Tonino more persuasive than the opinions of Dr. Lieber, awarded Petitioner 16 weeks of TTD (July 18, 2018 through November 5, 2018), his unpaid medical bills, and prospective medical care in the form of a total right knee replacement.

While affirming and adopting the Decision of the Arbitrator, the Commission also notes that after the Arbitrator rendered a Decision in this case, and after the parties submitted their arguments to the Commission, the Illinois Supreme Court issued an opinion in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828. In that case, the supreme court found the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of his occurrence, his injury was caused by a risk distinctly associated with his employment as a sous-chef. *Id.* ¶ 47. The court further ruled that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribed the proper test for analyzing whether an injury "arises out of" a claimant's employment, when the claimant is injured while performing job duties involving common bodily movements, or routine "everyday activities." *Id.* ¶ 60. The court found that, "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

In this case, Petitioner injured his right knee on June 22, 2018, while traversing stairs in a commercial building without elevators, while carrying heavy tools and equipment. That activity was incidental to his assigned duties, and was an act which his employer would have reasonably expected him to perform. Accordingly, the Commission finds and affirms that Petitioner's injury arose out of his employment because it was caused by a risk distinctly associated with his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 26, 2019, is hereby affirmed and adopted with the changes stated herein.

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

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

21IWCC0090

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

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

DATED: MAR 4 - 2021
o-02/04/2021
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
8 (A)

NOVAK SR, JAMES
Employee/Petitioner

Case# **19WC000539**

MVP PLUMBING
Employer/Respondent

21IWCC0090

On 11/26/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0247 HANNIGAN & BOTHA LTD
RICHARD D HANNIGAN
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

2389 GILDEA COGHLAN & REGAN LTD.
RYAN REGAN
901 W BURLINGTON SUITE 500
WESTERN SPRINGS, IL 60558

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

21 IWCC0090

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

JAMES NOVAK, SR
Employee/Petitioner

v.

MVP PLUMBING
Employer/Respondent

Case # **19** WC **539**

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

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **November 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **June 22, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**102,259.23**; the average weekly wage was $**2,018.20**.

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

Respondent ***has in part*** paid reasonable and necessary charges for reasonable and necessary medical services. RX 3.

Respondent shall be given a credit of $**21,527.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,527.52**.

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

ORDER

The Arbitrator finds the care rendered by Parkview Orthopaedic Group (Dr. Fuentes) to be causally related to the accident as well as reasonable and necessary. The bills in PX 6 reflect balances of $145.00 and $157.65. The Arbitrator awards the Parkview Orthopaedic Group bills, subject to the fee schedule and with Respondent receiving credit for any payments it has made. RX 3. The Arbitrator declines to award the claimed bills from Greater Chicago Specialty Physicians (PX 6) because they relate to rheumatological treatment rendered before the accident.

The Arbitrator finds that Petitioner was temporarily totally disabled from July 18, 2018 (the day after his initial visit to Dr. Fuentes) through November 5, 2018, a period of 16 weeks. Respondent is entitled to credit for the $21,527.52 in temporary total disability benefits it paid. Arb Exh 1.

The Arbitrator awards prospective care in the form of the right total knee replacement recommended by Dr. Fuentes.

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

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

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

21IWCC0090

Molly C Mason

Signature of Arbitrator

11/26/19
Date

ICArbDec19(b)

NOV 2 6 2019

21IWCC0090

Summary of Disputed Issues

Petitioner, a 61-year-old plumbing foreman who made an "excellent recovery" from accident-related right knee surgery in 2004 and saw a rheumatologist for arthritis in 2017 and 2018, claims a right knee cumulative trauma injury of June 22, 2018. Petitioner testified he began experiencing right knee stiffness and swelling while using stairs at a multi-story jobsite on a Thursday and Friday in late June 2018. He testified there was no elevator at this jobsite. He was required to use stairs to travel between floors six and eight, carrying heavy items such as his tool bucket and a propane tank on some of his trips. He began working at a different site, where he did not have to use stairs, the following Monday. On July 9, 2018, he saw Dr. Wrona, his primary care physician, for a previously scheduled annual examination and reported right knee symptoms secondary to overuse ten days earlier. He began seeing Dr. Fuentes, an orthopedic surgeon, on July 17, 2018, with the doctor taking him off work and ultimately recommending a right total knee replacement on October 11, 2018. He underwent a Section 12 examination by Dr. Lieber on October 24, 2018. He resumed working for Respondent after temporary total disability benefits were discontinued in early November 2018. At his attorney's request, he underwent an evaluation by Dr. Tonino in March 2019. He was still working for Respondent as of the hearing. He testified that, as a foreman, he is able to pick and choose which physical activities he performs.

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

Arbitrator's Findings of Fact

At the beginning of the hearing, Petitioner's counsel amended the Application on its face to change the date of accident from June 23, 2018 to June 22, 2018. Respondent did not object to this amendment.

Petitioner testified he began working as a plumbing foreman for Respondent in 2001. He primarily works in commercial and industrial settings.

Petitioner acknowledged injuring his right knee at work on January 6, 2004. He felt a pop in his right knee at the time of this injury. He subsequently saw Dr. Burra, who operated on his right knee on January 22, 2004. Dr. Burra documented chondromalacia in his operative report. Petitioner underwent therapy for his right knee postoperatively. Dr. Burra released Petitioner to full duty in March 2004. Petitioner testified he resumed his usual duties for Respondent and continued performing those duties thereafter.

Dr. Burra's note of January 9, 2004 describes Petitioner as a new patient. A "patient encounter form" reflects that Petitioner reported feeling a pop and pain in his right knee while working on January 6, 2004. Petitioner identified Respondent as his employer on a separate form. PX 1, pp. 3-4.

In his initial note of January 9, 2004, Dr. Burra described Petitioner's gait as antalgic. On right knee examination, he noted a moderate effusion, significant lateral joint line tenderness and limited flexion. He obtained right knee X-rays, which showed a very well preserved joint space and no loose

bodies or fractures. He diagnosed a lateral meniscus tear. He prescribed Ibuprofen, physical therapy and a right knee MRI. PX 1, pp. 5-7. The MRI, performed the same day, showed a complex, bucket-handle type tear of the lateral meniscus, a horizontal oblique tear of the posterior horn of the medial meniscus, a medial Baker's cyst, a central distal femoral contusion, a joint effusion and synovitis and "deep chondral erosions with subtle subchondral osseous edema" on the weightbearing surface of the lateral femoral condyle. PX 1, p. 8.

Petitioner returned to Dr. Burra on January 12, 2004, having started therapy in the interim. The doctor discussed the MRI results and various treatment options with Petitioner, noting that Petitioner elected to undergo surgery. PX 1, p. 9.

In his operative report of January 22, 2004, Dr. Burra documented a complex lateral meniscus tear, a minor radial tear of the medial meniscus, a linear area of Grade III chondromalacia involving the center of the trochlea, Grade II and III changes involving the lateral femoral condyle and scattered Grade II changes on the lateral tibial plateau. He indicated that the quality of the tissues did not permit him to repair the meniscal tears. PX 1, pp. 10-11.

At Dr. Burra's direction, Petitioner underwent physical therapy and work conditioning postoperatively. On March 7, 2004, Dr. Burra noted that Petitioner denied any symptoms. On re-examination of both knees, he noted no effusion, a symmetric range of motion, no instability and no joint line tenderness. He described Petitioner as having made an excellent recovery. He released Petitioner to full duty. He released Petitioner from care on a PRN basis. PX 1, p. 14.

There is no evidence indicating that Petitioner returned to Dr. Burra after March 7, 2004.

Petitioner testified he settled his January 6, 2004 right knee injury claim with West Bend Insurance on June 17, 2004. He represented himself in this claim. West Bend contacted him via telephone and letter. The settlement was in the amount of $19,266.45. It represented 17.5% loss of use of the right leg.

Petitioner testified he was fully recovered and working for Respondent as of June 2004.

Petitioner testified he typically underwent annual physical examinations by his primary care physician. At those examinations, he alerted his primary care physician to any problems he was experiencing. He is diabetic and takes medication for that condition.

Petitioner offered into evidence records from Dr. Wrona, his primary care physician. PX 4. These records date back to June 2002. With the exception of a handwritten entry dated February 26, 2004, which mentions the recent right knee surgery, none of the notes predating July 9, 2018 mention any knee problems. They document treatment for various health conditions, including diabetes, hypertension and gout. PX 4, pp. 13-27. The note concerning Dr. Wrona's June 12, 2017 examination describes Petitioner as feeling "okay." Dr. Wrona noted a full range of motion on extremity examination. He did not record any knee-related complaints. PX 4, pp. 13-16.

Petitioner testified that, in September 2017, his primary care physician referred him to a rheumatologist because he was experiencing swelling and stiffness in his hands.

Records in PX 3 reflect that, on September 14, 2017, Petitioner saw Dr. Claudia Vergara as a "new patient referred by Dr. Wrona for evaluation of pain in joints and stiffness." Dr. Vergara noted that Petitioner complained of non-radiating aching and stiffness in his hands and knees of one year's duration. She described Petitioner's knee pain as "worse with kneeling." She noted that Petitioner reported taking Advil for pain. She also noted a history of gout in both feet, for which Petitioner reported taking Allopurinol.

On examination, Dr. Vergara noted swollen and tender joints in both hands, a limited range of motion in both wrists, a good range of motion in the elbows and shoulders, "bony changes and crepitus in [both] knees," with "no effusions, warmth or tenderness" and no hip pain on "log rolling." She ordered laboratory studies, indicating her differential diagnoses included gout, hyperthyroidism, rheumatoid arthritis and other inflammatory arthritis. She also obtained bilateral hand and knee X-rays. The bilateral knee X-rays, obtained on September 30, 2017, showed no acute fractures or dislocations, mild tricompartmental degenerative changes, chondrocalcinosis, small ossific bodies at the posterior aspect of the right knee and a small right knee joint effusion. PX 3, p. 17. The radiologist found the bilateral hand X-rays, performed the same day, "concerning for a pyrophosphate arthropathy." He recommended follow-up. PX 3, p. 18.

Petitioner returned to Dr. Vergara on October 3, 2017. The doctor's note of that date documents complaints of chronic joint pain in the hands, "not improved with Meloxicam." Her examination findings were unchanged. She reviewed the results of the laboratory studies and X-rays with Petitioner. She described the X-rays as showing "evidence of significant DJD with chondrocalcinosis at wrists, MCPs and knees." She prescribed Colchicine and additional laboratory studies. She encouraged Petitioner to exercise. PX 3, pp. 11-13.

Petitioner saw Dr. Vergara again on January 24, 2018. The doctor noted that Petitioner complained of mild aching in his back and hands. She also noted that Petitioner reported some relief of morning stiffness in his hands secondary to the Colchicine. Her examination findings were unchanged. She recommended a trial of Prednisone but noted that Petitioner wished to wait on this. She performed ultrasounds of both hands. She refilled the medication and directed Petitioner to return in two months. PX 3, pp. 8-10.

Dr. Vergara started Petitioner on Prednisone on March 7, 2018, after noting persistent symptoms in both hands. PX 3, pp. 5-7.

On March 29, 2018, Dr. Vergara noted that Petitioner's hands remained symptomatic but that he reported slight improvement with the Prednisone taper. She started Petitioner on Plaquenil and Sulfasalazine. PX 3, pp. 2-4.

No subsequent notes authored by Dr. Vergara are in evidence. PX 3.

Petitioner testified that Dr. Vergara prescribed medication for arthritis but that he did not take it due to side effects. Petitioner further testified that Dr. Vergara did not recommend any specific treatment for his knees.

Petitioner testified that, during the year preceding June 22, 2018, he typically worked for Respondent at single-story structures.

Petitioner testified that, in late June 2018, he worked for Respondent for two days at an eight-story structure consisting of four stories of parking and four stories of retail. The job started on a Thursday. He set up on floor seven and performed work on the sixth, seventh and eighth floors. The structure lacked an elevator so he had to use the stairs. On both Thursday and Friday, he used the stairs between the three floors between three and five times. On some of these trips, he carried his tool bucket, which weighed between 45 and 50 pounds. On other trips, he carried both the bucket and a propane torch that weighed 20 pounds.

Petitioner testified that, as he worked on Thursday and Friday, he began noticing swelling and stiffness in his right knee. He denied experiencing similar symptoms between the time he recovered from the knee surgery in 2004 and that Thursday and Friday.

Petitioner testified he finished the multi-story job on Friday. The following Monday, he began working at a different jobsite where there were no stairs.

Petitioner testified he applied ice to his right knee during this time period but the swelling did not go down.

Petitioner testified he saw his primary care physician for purposes of an annual physical examination on July 9, 2018. He had scheduled this appointment before the accident. He complained of right knee pain to his primary care physician and told him what he thought the pain stemmed from.

Dr. Wrona's note of July 9, 2018 reflects that he saw Petitioner for an annual examination and medication refill. In contrast with the previous year, he noted that Petitioner admitted to feeling "terrible." He described Petitioner as complaining of "chronic R knee pain" and requesting an orthopedic referral. He indicated that Petitioner was applying ice and taking Ibuprofen but not finding these measures helpful.

On examination, Dr. Wrona noted mild right knee warmth and positive compression testing. He indicated these findings seemed consistent with a meniscal injury. He refilled Petitioner's medication for hypertension, diabetes and gout and prescribed a right knee MRI.

Dr. Wrona noted that Petitioner described his right knee problem as an "an overuse injury" that "occurred 10d ago." PX 4, p. 11.

Petitioner testified that, after he saw Dr. Wrona, he completed an accident report using an accident date of June 23, 2018. He now recognizes that June 23rd fell on a Saturday. He is sure he used the stairs at a jobsite on a Thursday and Friday although he is not sure of the exact dates.

On July 17, 2018, Petitioner saw Dr. Fuentes, an orthopedic surgeon affiliated with Parkview Orthopaedic Group. Petitioner testified that his primary care physician referred him to Dr. Fuentes. Dr. Fuentes described Petitioner as a 62-year-old plumber "who complains of pain about the anterior medial and lateral aspect of the right knee since about 3 weeks ago, associated with swelling and a limp." He noted that Petitioner had undergone a right knee arthroscopy in 2004.

On initial right knee examination, Dr. Fuentes noted mild swelling, a mild effusion, pain on patella compression, medial and lateral joint line tenderness, positive McMurray's and Apley testing and no instability. He obtained right knee X-rays. He interpreted the films as showing marked degenerative

changes of the lateral joint compartment "with almost bone-on-bone deformity", mild degenera tive changes of the patellofemoral joint and intraarticular loose bodies. He diagnosed osteoarthritis of the right knee with patellofemoral pain and possible medial/lateral meniscal tears. He administered a cortisone injection. He prescribed physical therapy and took Petitioner off work. PX 1, p. 21.

Petitioner testified he began receiving temporary total disability benefits after seeing Dr. Fuentes on July 17, 2018.

Petitioner underwent an initial physical therapy evaluation at Functional Therapy & Rehabilitation on July 19, 2018. The evaluating therapist noted a complaint of right knee pain since June 24, 2018. He recorded the following account of the work accident:

> "Patient states the knee swelled significantly with pain after working at a job site in which he was ambulating 7-8 flights of stairs while holding bags of tools multiple times per day for at least 3 days."

PX 1, p. 46.

Petitioner returned to Dr. Fuentes on August 9, 2018 and reported no improvement from the injection and therapy. The doctor ordered an MRI and placed therapy on hold. He directed Petitioner to remain off work. PX 1, p. 25.

The right knee MRI, performed without contrast on August 14, 2018, showed advanced osteoarthritis, especially of the lateral tibiofemoral compartment, extensive complex tears of both the medial and lateral menisci, with extrusion, a joint effusion, a Baker's cyst, multiple loose bodies and mucoid degeneration of the cruciate ligaments. PX 1, pp. 28-29.

On August 16, 2018, Dr. Fuentes informed Petitioner of the MRI results and recommended a series of Orthovisc injections. He indicated he planned to obtain approval from the carrier to start these injections. He directed Petitioner to remain off work. PX 1, p. 30.

Dr. Fuentes administered Orthovisc injections on August 23, August 30, September 6 and September 13, 2018. On September 13, 2018, he released Petitioner to light duty as of Monday, September 17, 2018, with no kneeling, squatting or ladder climbing until the following office visit. PX 1, p. 38.

Petitioner testified that the Orthovisc injections did not help.

Petitioner returned to Dr. Fuentes on October 11, 2018. The doctor noted that Petitioner described his knee as feeling "only somewhat better" after the four injections. He also noted an upcoming independent medical examination. He recommended a total knee replacement and continued the work restrictions. PX 1, p. 40.

At Respondent's request, Dr. Lieber conducted a Section 12 examination of Petitioner on October 24, 2018. In his report of that date, the doctor noted a history of the 2004 right knee surgery and a work event of June 22, 2018. He indicated that Petitioner reported developing increasing right knee pain while using stairs at a multi-story jobsite for three days.

On right knee examination, Dr. Lieber noted a range of motion from 0 to 150 degrees, with pain at the extremes, no effusion, no atrophy, 5/5 strength, no medial joint line tenderness, lateral joint line tenderness, positive McMurray's and negative instability testing.

Dr. Lieber interpreted the July 17, 2018 right knee X-rays as showing "valgus deformity with bone-on-bone degeneration of the lateral joint line." He interpreted the MRI as showing evidence of degenerative joint disease. He indicated he reviewed Dr. Burra's operative report, Dr. Wrona's note of July 10, 2018, physical therapy notes and records from Dr. Fuentes.

Dr. Lieber assessed Petitioner as having bone-on-bone degenerative osteoarthritis of the right knee. He found Petitioner's history of injury to be consistent with the complaints noted in the treatment records. He found no causal relationship between Petitioner's degenerative condition and the alleged events of June 22, 2018. He related Petitioner's complaints solely to pre-existing degenerative osteoarthritis. He saw no need for treatment relative to the alleged work injury although he indicated that Dr. Wrona's initial evaluation might have been of benefit. He found that, with respect to the work injury, Petitioner reached maximum medical improvement as of the July 9, 2018 visit to Dr. Wrona and could resume full duty. He twice stated that Petitioner "sustained no isolated injury to the right knee." Lieber Dep Exh 2, p. 4. He agreed that Petitioner required treatment for his degenerative condition but indicated this need had no relationship to the alleged work event. He did not specifically comment on Dr. Fuentes' surgical recommendation. Lieber Dep Exh 2.

Petitioner testified that, on November 5, 2018, he received a letter indicating his temporary total disability benefits were being discontinued as of that date.

Petitioner testified he resumed working for Respondent at this point. As a foreman, he can pick and choose what work he performs.

Petitioner returned to Dr. Fuentes on November 29, 2018. The doctor noted that workers' compensation did not approve the recommended knee replacement based on Dr. Lieber's causation opinion. He told Petitioner he would have to use his private health insurance if he wanted to undergo the replacement. He allowed Petitioner to continue full duty, noting he was doing so at Petitioner's request. PX 1, p. 42.

Dr. Tonino testified by way of evidence deposition on July 15, 2019. PX 5. Dr. Tonino identified Tonino Dep Exh 1 as his current Curriculum Vitae.

Dr. Tonino testified he has been board certified in orthopedic surgery for about thirty years. He is chief of sports medicine at Loyola. Most of the surgeries he performs involve the knee and shoulder. PX 5, p. 5. He teaches residents about knee and shoulder surgery. PX 5, p. 5. He performs approximately four knee surgeries and four shoulder surgeries per week. PX 5, p. 6.

Dr. Tonino testified he does not independently recall Petitioner and thus needs to rely on his notes while testifying. PX 5, p. 6. In connection with the examination he performed, he reviewed records from Dr. Burra, Parkview Orthopaedics, Primary Care Health and DuPage Medical Group. PX 5, p. 7.

Dr. Tonino testified that Petitioner reported having worked as a plumber for thirty years. Petitioner also reported experiencing right knee pain on June 23, 2018, while climbing up eight stories

approximately seven times a day for a couple of days. Petitioner indicated he was not typically expected to perform this kind of climbing. PX 5, p. 7. The event was not witnessed. Petitioner reported seeing his primary care physician on July 9, 2018 and then seeing Dr. Fuentes, an orthopedic surgeon, on July 17, 2018. Dr. Fuentes administered an injection on that date. PX 5, pp. 7-8.

Dr. Tonino testified that he reviewed the right knee MRI performed on August 14, 2018. He usually reviews the images as well as the report. He interpreted the MRI as showing tears of the medial and lateral menisci, loose bodies and some arthritis of the lateral compartment. PX 5, p. 8.

Dr. Tonino testified that Petitioner complained of right knee pain and weakness. He suspected that Petitioner had some sort of mechanical symptoms, such as a meniscal problem or a loose body "kind of catching" in his knee. PX 5, p. 8.

Dr. Tonino testified he obtained weightbearing X-rays which showed "some degenerative changes but not any bone-on-bone changes." He recommended an arthroscopy based on the fact that Petitioner had "some but not terrible arthritis in his knee." PX 5, p. 9.

Dr. Tonino testified that the symptoms Petitioner reported were, at least in part, related to the activity of stair climbing. He has not seen Petitioner since March and would have to re-examine him to comment on the question of whether physical therapy is appropriate. PX 5, p. 10. A total knee replacement would be a reasonable alternative to the arthroscopy he recommended. PX 5, p. 11. Dr. Burra's 2004 operative report documented chondromalacia. That condition can be purely degenerative, traumatic or degenerative aggravated by trauma. PX 5, p. 12. The stair climbing and carrying Petitioner described aggravated his pre-existing condition. PX 5, p. 13.

Dr. Tonino noted that, in March 2004, Dr. Burra described Petitioner as making an excellent recovery from the knee surgery. There is no evidence that any physician prescribed an MRI, therapy, injections or a replacement for Petitioner's right knee between March 17, 2004 and June 23, 2018. PX 5, p. 14. Dr. Vergara did not recommend any knee treatment in September 2017. PX 5, p. 16. The right knee X-rays of September 30, 2017 did not show pathology requiring knee replacement. PX 5, p. 16. At least part of Petitioner's right knee MRI findings of August 2018 predated the stair climbing incident. PX 5, p. 18.

Dr. Tonino testified he does not recall seeing any records between 2004 and June 2018 documenting significant right knee swelling. PX 5, p. 19. He is not sure whether Petitioner's arthritis was truly rheumatoid arthritis. PX 5, p. 21.

Dr. Tonino testified that the changes shown on the August 2018 MRI would not have developed within two months but that the stair climbing Petitioner described would have placed forces on the knee joint equivalent to three to four times Petitioner's body weight. Those forces could have aggravated Petitioner's condition. PX 5, p. 21.

Under cross-examination, Dr. Tonino testified he is in the process of recertifying. He was last certified in orthopedic surgery nine or ten years ago. PX 5, p. 22. He acknowledged that Petitioner has Type 2 diabetes and gout. He also acknowledged that Petitioner is obese. He is not aware of any link between diabetes and knee pain. Gout and obesity can affect the knees. Rheumatoid arthritis can affect the joints. PX 5, pp. 23-24. Petitioner was 62 years old as of his examination. Advancing age can be a risk factor for knee pain. PX 5, p. 24. Chondrocalcinosis is a condition in which calcium forms

crystals that build up in the cartilage of a person's joints, including the knee joints. Chondrocalcinosis can cause a person's knee to become red, hot, swollen and stiff. Chondrocalcinosis is sometimes called "pseudo gout." PX 5, p. 25. Dr. Burra's 2004 operative report shows that Petitioner had Grade II and Grade III changes. It is possible but not necessarily likely that these changes would worsen over time. PX 5, p. 26. The 2004 MRI did not show loose bodies but the 2018 MRI did. He does not specifically recall whether he reviewed the images of Petitioner's 2018 MRI. PX 5, pp. 27-28. If loose bodies get caught up in the knee joint, they can cause pain, swelling and reduced motion. PX 5, p. 28. The 2018 MRI showed a Baker's cyst. A Baker's cyst is "kind of like a ganglion cyst of the knee joint." It results from degeneration of the meniscus. PX 5, p. 30. The right knee X-rays he obtained did not show bone-on-bone changes. PX 5, p. 30. When he examined Petitioner, he did not note any right knee effusion or instability. He noted a symmetric range of motion in both knees. PX 5, p. 31.

Dr. Tonino acknowledged it is difficult to say which part of Petitioner's chondromalacia was aggravated. If a doctor had a patient with an MRI like Petitioner's, he would probably want to have the patient avoid a lot of stair work because going up and down stairs can aggravate the chondromalacia under the kneecap. PX 5, p. 32. Hypothetically, Petitioner's right knee pain could have gone away a couple of days after the stair usage. Some of the chondromalacia pre-existed the stair usage. PX 5, pp. 32-33. He noted no right knee warmth or redness when he examined Petitioner. PX 5, p. 33. Absent any history of trauma, Petitioner's complaints could be just the chondrocalcinosis acting up. PX 5, p. 34. He does not know what type of equipment Petitioner carried while using the stairs. Plumbing equipment could consist of a wrench. PX 5, p. 34. From his perspective, just going up and down stairs was enough. Stair usage creates forces on the knee joint equivalent to three to four times a person's body weight. PX 5, p. 35. He did not impose any work restrictions on Petitioner. A sensation of weakness or giving way in the knee can be caused by meniscal tearing or loose bodies. PX 5, p. 36. He charged $1,500 for examining Petitioner. PX 5, p. 36. He also treats patients pursuing workers' compensation claims. He charges $2,000 for a two hour deposition. PX 5, p. 37. When he examines an individual he typically does not operate on that individual. PX 5, p. 38. He sent his report to Petitioner's counsel and no one else. PX 5, p. 38. He did not speak with any physician affiliated with Greater Chicago Specialty Physicians relative to Petitioner. PX 5, p. 40. Petitioner was taking several medications, including Allopurinal for gout, before June 2018. PX 5, p. 40. The stair usage could have caused a temporary aggravation. PX 5, p. 41.

On redirect, Dr. Tonino testified that Petitioner's symptoms did not improve after June 2018. Gout can be anywhere in the body, including the feet and hands. PX 5, p. 42. Loose bodies can go inside a Baker's cyst. In Petitioner's case, some of the loose bodies are inside the cyst and some are outside it. PX 5, p. 43. If Petitioner carried a 40-pound bucket on the stairs, that would increase the stress on the knees. PX 5, p. 45. The higher the stress, the more likely the aggravation. PX 5, p. 46. About 70% of the examinations he performs are for insurance companies. PX 5, p. 46. When it comes to rendering a causation opinion, it makes no difference to him who is paying him. PX 5, p. 47. He informed Petitioner that there no physician-patient relationship existed. PX 5, p. 47.

Respondent's counsel made several Ghere-based objections during Dr. Tonino's testimony. The Arbitrator was unable to rule on those objections since Dr. Tonino's examination report is not in evidence.

Petitioner returned to Dr. Fuentes on August 1, 2019. The doctor noted that Petitioner complained of persistent right knee pain, mostly over the lateral aspect of the knee. He described Petitioner as exhibiting a moderate limp. On examination, he noted mild swelling and effusion. He

obtained repeat right knee X-rays which showed marked narrowing of the lateral joint compartment "with almost bone-on-bone deformity." He administered a repeat cortisone injection into the right knee joint and again recommended a total knee arthroplasty. PX 2, p. 8.

Dr. Lieber testified by way of evidence deposition on August 7, 2019. Dr. Lieber testified he obtained board certification in orthopedic surgery in 1990. He has since been recertified. RX 1, p. 6. In 1987 and 1988, he underwent fellowship training in sports medicine, arthritis and joint replacements, specifically the hip and knee. RX 1, p. 6. He has privileges at Good Samaritan and Elmhurst Hospitals. RX 1, p. 7. He identified Lieber Dep Exh 1 as his current CV. RX 1, p. 7.

Dr. Lieber testified he examined Petitioner once. He identified Lieber Dep Exh 2 as the report he prepared on October 24, 2018. He does not independently recall Petitioner or the examination. RX 1, p. 9. When he conducts an examination, it is his practice to have one of his assistants interview the examinee. He then goes in, repeats the questions and reviews the examinee's subjective complaints. He then performs a physical examination. He reviews whatever records have been provided, formulates a diagnosis and typically responds to questions. RX 1, p. 11.

Dr. Lieber testified he was able to obtain a history from Petitioner. Petitioner related developing right knee pain after climbing stairs at a jobsite six or seven times a day for three days. Petitioner indicated he was previously pain free. RX 1, p. 11-12.

Dr. Lieber testified that Petitioner denied pain with walking but indicated he experienced pain when using stairs and at night. Petitioner also complained of knee swelling, stiffness, weakness and popping. He indicated his plumber job required him to walk, bend, push and pull heavy objects, climb stairs and ladders, work overhead, kneel and lift up to 75 pounds. RX 1, pp. 12-13.

Dr. Lieber testified that, on right knee examination, he noted a full range of motion, with pain at the extremes, no evidence of swelling, erythema, atrophy or effusion, good strength in the quadriceps and hamstrings, tenderness about the lateral joint line, positive McMurray's and Steinmann's, normal stability testing and no tenderness about the patellofemoral joint. Petitioner's gait and hip motion were normal. RX 1, p. 13. X-rays taken on July 17, 2018 confirmed a valgus deformity with bone-on-bone degeneration of the lateral joint line. The MRI images showed degenerative joint disease. The MRI report documented multiple findings, including degenerative osteoarthritis of the lateral tibial femoral joint space, complex tearing of the lateral and medial menisci and a Baker's cyst. RX 1, pp. 14-15. He reviewed the actual X-rays and MRI images. RX 1, p. 15. He also reviewed Dr. Burra's 2004 operative report, Dr. Wrona's note of July 10, 2018, physical therapy records and Dr. Fuentes' records. Dr. Burra's report documented a pre-existing abnormality. RX 1, p. 16.

Dr. Lieber testified he diagnosed degenerative bone-on-bone osteoarthritis of the right knee. Petitioner's subjective complaints correlated with this diagnosis and with the objective testing he performed. RX 1, p. 16.

Dr. Lieber found no causal relationship between Petitioner's subjective complaints and the work-related stair climbing he performed in June 2018. He found no evidence of anything objective occurring while Petitioner was using the stairs plus there was evidence of significant pre-existing right knee abnormalities. RX 1, p. 17. Dr. Lieber also found no causal relationship between Petitioner's degenerative osteoarthritis and the stair climbing. Dr. Burra's operative report, along with the 2018 X-

rays and MRI confirmed the existence of abnormalities that would cause a person to be symptomatic on a regular basis. RX 1, p. 17.

Dr. Lieber testified he found no objective evidence that the stair climbing permanently aggravated the structural pathology in Petitioner's right knee. He has no real problem with Dr. Wrona's initial evaluation of July 9, 2018, since Petitioner complained of symptoms associated with the stair climbing and "deserved an evaluation by a physician." No treatment was warranted beyond that evaluation, however, relative to the stair climbing. By the time he examined Petitioner, Petitioner had "reached his pre-injury state and could go back to work without restrictions." Petitioner reached maximum medical improvement after his July 9, 2018 visit to Dr. Wrona.

Under cross-examination, Dr. Lieber testified that Dr. Burra documented chondromalacia in his 2004 operative report but he (Dr. Lieber) did not make a note as to the grade or extent of that condition. Even if Dr. Burra did not assign a grade to the chondromalacia, the finding was very significant. There is no treatment for chondromalacia although Dr. Burra "might have debrided it slightly." RX 1, p. 21. The chondromalacia was not Grade IV, for sure, but it could have been Grade I, II or III. RX 1, p. 21. He is not aware of Petitioner having been released to full duty as a plumber on March 17, 2004 but this would not surprise him. RX 1, pp. 21-22. He did not see any records between March 17, 2004 and July 17, 2018 indicating that a physician assessed Petitioner as having osteoarthritis of the right knee with patellofemoral pain and possibly meniscal tears. Nor did he see any records from the same time period indicating a physician offered Petitioner a right knee cortisone injection. RX 1, p. 22. He saw no records between March 17, 2004 and July 19, 2018 indicating that a provider noted significant right knee pain and swelling secondary to working at a job requiring walking up and down flights of stairs. He has no evidence that Petitioner underwent care for right knee swelling during the two years before the accident. He has no reason to doubt Petitioner's statement that he developed right knee swelling during that particular three-day job. RX 1, p. 24. There is no evidence indicating any physician offered Orthovisc injections or recommended a right knee replacement before June 23, 2018. He does not know whether there was anything in the records from 2004 showing that a doctor told Petitioner he would have right knee problems in the future. RX 1, p. 24.

Dr. Lieber testified he retained the cover letter he received but not the records. RX 1, p. 26. He felt it was reasonable for Petitioner to see Dr. Wrona on July 9, 2018. He does not recall what Petitioner's symptoms were the day before or the day after this visit. He assumes Petitioner was pain free as of June 19, 2018. RX 1, p. 27.

Dr. Lieber opined that osteoarthritis cannot be aggravated by trauma. Aggravation is a legal, not a medical, term. RX 1, p. 27. Osteoarthritis that is quiescent can become symptomatic with trauma. RX 1, p. 28. When Petitioner was using the stairs, he may have been carrying nothing or objects weighing up to 75 pounds. It is more difficult to control your body weight when you are stepping down as opposed to up because the muscles are not trained to fire in the same way. Osteoarthritis and degenerative joint disease can become symptomatic due to overuse. Degenerative joint disease can also become symptomatic when paired with trauma. RX 1, p. 29.

Dr. Lieber testified he received no information from co-workers indicating that Petitioner had a right knee problem between January 1, 2017 and June 20, 2018. He is aware that Petitioner worked as a union plumber but he does not know how long Petitioner worked in this capacity. RX 1, p. 29. No one provided him with evidence indicating Petitioner could not perform his job due to right knee problems prior to June 20, 2018. RX 1, p. 30.

Dr. Lieber testified he did not evaluate Petitioner for the purpose of determining the propriety of the recommended knee replacement. He evaluated Petitioner to address causation. He knows Petitioner had a weight problem and that might or would have prevented him from recommending a replacement. He feels uncomfortable addressing the need for a replacement at this point. From a textbook standpoint, Petitioner certainly had some pathology which could potentially benefit from a total knee replacement. RX 1, p. 31.

On redirect, Dr. Lieber testified he noted no right knee swelling when he examined Petitioner. Petitioner was still complaining of pain at the time of his examination. RX 1, p. 32.

Petitioner testified his right knee pain is progressively worsening. He wears a knee brace all the time. He has to hold the railing while using stairs. He denied having to do this before the accident. He now tries to work off of lifts so that he can avoid having to climb ladders. He was able to climb ladders before the accident. He is able to kneel but his right knee hurts when he does this and he has to pull himself back up to a standing position. He is able to mow his lawn because he has a riding mower. He has to pay someone to edge his lawn. His wife is disabled and in a wheelchair. They have a ramp at their house but someone else has to push her on this ramp. He is able to drive but now uses his left foot to brake. He feels pain if he tries to move his right foot from the gas pedal to the brake. He did not use his left foot to brake before the accident. He saw Dr. Tonino on March 18, 2019, at the request of his attorney. He wants to undergo the knee replacement that Dr. Fuentes recommended. Before the work accident, no one recommended a knee replacement. He is also experiencing back issues but has not filed a claim. He reviewed Dr. Lieber's report and noted that the doctor described his knee as not swollen. From his own perspective, his right knee looked swollen on the day he saw Dr. Lieber. Dr. Lieber had him walk, sit at a table, bend his knee and twist his foot. He experienced pain when he bent his knee and twisted his foot. Before June 2018, no one diagnosed him with osteoarthritis. His left knee is fine. He is right-handed.

Under cross-examination, Petitioner testified that the settlement he received in connection with his 2004 injury represented 17.5% of his right leg. He has no idea whether there are other terms that mean the same thing as osteoarthritis. If his 2004 operative report showed changes consistent with chondromalacia, he would not dispute this but no one explained this to him. He was born on June 26, 1956 and is now 63 years old. He is currently a member of Local 130. His union benefits have not been suspended during the last five years. He has group health insurance through Blue Cross/Blue Shield. He is diabetic and has been diagnosed with gout. He denied having bilateral knee pain during the last three years. He does not specifically recall his September 2017 appointment with Dr. Vergara. He remembers seeing a female rheumatologist for his hands. He would not disagree with the doctor's records if they show she noted crepitus in his knees. He underwent right knee X-rays on September 30, 2017. He does not understand the various medical terms, including chondromalacia, loose bodies and effusion, that appear in the X-ray report. Dr. Fuentes released him to full duty work in November 2018. Dr. Tonino did not impose any restrictions in March 2019. The building where he worked on June 22, 2018 was in Chicago, near O'Hare, but he cannot recall the exact address. He was a foreman before the accident and still works in that capacity.

On redirect, Petitioner testified he saw a rheumatologist in September 2017 because he was experiencing swelling in his hands. The rheumatologist ordered X-rays of his hands and knees. After he underwent these X-rays, the rheumatologist did not recommend any knee treatment. The doctor performed ultrasounds of his hands but not his knees. He last saw the rheumatologist on March 29,

2018. She did not recommend any right knee treatment or restrictions on that date. He was not wearing a brace on his right knee at that time. Before the accident, he was 6 feet, 1 inch tall and weighed 235 pounds. He rode a stationary bicycle for exercise before the accident. He has gained 15 pounds since the accident. He is less active and no longer rides the stationary bicycle.

Under re-cross, Petitioner was asked about a note dated March 7, 2018 that described him as weighing 269 pounds. He has no recollection of being at this weight.

In addition to Dr. Lieber's deposition, Respondent offered into evidence a response it filed to Petitioner's petition for penalties and fees (RX 2) [Petitioner did not place penalties and fees at issue at the hearing, Arb Exh 1], a print-out of the medical payments it made (RX 3) and a letter its counsel sent to Petitioner's counsel on September 10, 2019, denying payments relating to Petitioner's August 1, 2019 visit to Dr. Fuentes (RX 4).

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure and supervisory role at Respondent weigh in his favor, credibility-wise.

The Arbitrator finds credible Petitioner's description of the stair usage and carrying he performed at a multi-story construction site in late June 2018. No one affiliated with Respondent contradicted Petitioner's testimony that this site lacked an elevator and that he was thus required to frequently climb stairs while working on three levels, sometimes while carrying his tool bucket and/or a propane tank. Also credible was Petitioner's testimony that he started a new job that did not involve this unusual activity the following Monday and that, as a longtime foreman, he was able to limit some of his physical tasks during the period between the accident and the hearing.

Dr. Vergara's initial, pre-accident note of September 14, 2017 reflects that Petitioner complained of his knees as well as his hands. PX 3, p. 14. At the hearing, Petitioner recalled seeing Dr. Vergara for hand rather than knee complaints. He did not, however, take issue with the knee complaints documented in the doctor's records.

Two examining physicians, Drs. Tonino and Lieber, commented on causation in this case. The Arbitrator finds some deficiencies in their understanding of the underlying facts. On direct examination, Dr. Tonino was asked to assume more intense stair usage and more consistent carrying than Petitioner ultimately testified to. This had the potential of undermining the validity of his causation opinion but, under cross-examination, he clarified that stair climbing alone places force equivalent to three to four times one's body weight on the knees and could aggravate an underlying degenerative condition. PX 5, p. 35. Petitioner questioned some of the notations his doctors made about his weight but no one would dispute that he is a larger individual. Dr. Lieber testified that Petitioner reported traversing stairs at a multi-story structure six or seven times per day over a three-day period. RX 1, p. 11. He expressed no awareness of Petitioner carrying anything on some of these trips. For the most part, he based his causation opinion on a legal rather than medical concept. In his report, he emphasized that Petitioner "sustained no isolated injury to the knee." Lieber Dep Exh 2. The absence of a specific traumatic event does not preclude the Arbitrator from finding causation. Under cross-examination, Dr. Lieber conceded that overuse can cause an underlying osteoarthritic condition to become symptomatic.

Overall, the Arbitrator found Dr. Tonino more persuasive than Dr. Lieber. As noted above, Dr. Lieber premised his causation opinion on a concept outside his area of expertise, i.e., the lack of evidence of an isolated injury to the knee. Dr. Lieber conceded that it was reasonable for Petitioner to seek care with Dr. Wrona on July 7, 2018 yet opined that somehow Petitioner "returned to his preinjury status" and was capable of resuming full duty as a plumber. While there is evidence indicating Petitioner resumed his supervisory duties in early November 2018, after Respondent discontinued his benefits, he credibly testified to significant, ongoing right knee complaints that require him to wear a brace and modify his work activities. The Arbitrator is unable to find that Petitioner regained his previous level of function after the accident.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on June 22, 2018 arising out of and in the course of his employment? Did Petitioner establish a causal connection between the accident and his claimed current right knee condition of ill-being?

The Arbitrator finds that Petitioner sustained an accident on June 22, 2018, secondary to cumulative trauma. No one contradicted Petitioner's testimony that the multi-story structure where he worked lacked an elevator and that he was required to traverse several sets of stairs, sometimes while carrying heavy materials, to perform his assigned tasks on the days in question. The Arbitrator finds that these circumstances created a risk of injury unique to Petitioner's employment.

Respondent maintains that Petitioner's activities were not sufficiently repetitive to constitute a compensable accident. While it is true that Petitioner did not testify to using stairs throughout each of the days, Dr. Tonino testified that stair usage alone, with no associated carrying, places a force equivalent to three to four times one's body weight, on the knees. He went on to testify that carrying objects while using stairs increases that force. The climbing, descending and carrying Petitioner performed during a compressed period was cumulative rather than repetitive in nature.

As for causation, Petitioner is a larger, older individual who, while able to perform his regular plumber duties for years before the accident, had a degenerative condition in his right knee prior to June 2018, as Dr. Tonino acknowledged, based on the August 2018 MRI. It is axiomatic that employers take their employees as they find them. Baggett v. Industrial Commission, 201 Ill.2d 187, 199 (2002). Petitioner credibly testified that the activities he performed at the multi-story structure caused his right knee to become painful and swollen. He was able to get by, before Dr. Fuentes took him off work on July 17, 2018, because he began working at a different jobsite, where there no stairs, the following Monday, and because, as a foreman, he had the authority to limit his physical tasks. The Arbitrator views the accident as aggravating an underlying condition and causing a change in Petitioner's ability to function. As the Appellate Court recently noted in Schroeder v. IWCC, 2017 Ill. App. LEXIS 350 (4th Dist. 2017), if the Illinois courts were to hold that the chain-of-events principle "only applied where a claimant is in a condition of absolute good health, that holding would contradict years of Illinois precedent concerning pre-existing conditions."

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims $2,533.34 in medical expenses. It appears he arrives at this figure by combining the amount his group carrier paid ($1,070.69) toward the treatment he underwent with

Greater Chicago Specialty Physicians (Dr. Vergara) with a claimed unpaid balance of $1,462.65 relating to several visits to Parkview Orthopaedic Group (Dr. Fuentes) in 2018 and 2019. PX 6.

The Arbitrator declines to award any expenses associated with Dr. Vergara's care. Dr. Vergara is a rheumatologist who treated Petitioner on several occasions before the work accident. PX 3, 6.

The Arbitrator finds the treatment underlying the claimed bills from Parkview/Dr. Fuentes to be causally related to the accident as well as reasonable and necessary. The Arbitrator notes, however, that the bills in PX 6 show balances of $145.00 and $157.65, not $1,462.65. It is not clear to the Arbitrator how Petitioner arrived at a balance of $1,462.65. The Arbitrator awards Petitioner the expenses associated with the care Dr. Fuentes provided, subject to the fee schedule and with Respondent receiving credit for the payments reflected in RX 3.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from July 17, 2018 (the date of his first visit to Dr. Fuentes) through November 5, 2018 (the date Respondent stopped paying benefits). Respondent disputes this claim based on its accident and causation defenses. The parties agree that Respondent paid $21,572.52 in temporary total disability benefits. Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. The Arbitrator finds it reasonable for Dr. Fuentes to have taken Petitioner off work on July 17, 2018, given his examination findings (PX 1, p. 21) and the nature of Petitioner's job. Dr. Lieber's October 24, 2018 opinion that Petitioner returned to baseline and was capable of resuming full duty was not persuasive, as noted above. Petitioner did resume working after Respondent stopped paying him, in reliance on Dr. Lieber, but his credible testimony establishes he is relying on a brace and modifying his activities, as his foreman status permits him to do.

The Arbitrator finds that Petitioner was temporarily totally disabled from July 18, 2018, the day after he saw Dr. Fuentes, through November 5, 2018, a period of 16 weeks. Pursuant to the parties' stipulation, Respondent is entitled to credit for the $21,572.52 in benefits it paid. Arb Exh 1.

Is Petitioner entitled to prospective care?

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. The Arbitrator finds that Petitioner is entitled to prospective care in the form of the right knee replacement surgery recommended by Dr. Fuentes. In so finding, the Arbitrator relies on Petitioner's failure to respond to conservative care, Petitioner's credible testimony concerning his worsening right knee symptoms and brace usage and Dr. Fuentes' examination findings. The Arbitrator also notes that Dr. Tonino viewed replacement surgery as a reasonable treatment option. While Dr. Lieber was initially hesitant to comment on the need for this surgery, he ultimately conceded that Petitioner's knee pathology is consistent with that of individuals who can potentially benefit from replacement. RX 1, p. 31.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM J. LESNIAK,

Petitioner,

21IWCC0091

vs.

NO: 18 WC 13557

VILLAGE OF BEDFORD PARK,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 10, 2019, is hereby affirmed and adopted.

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

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

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

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2).* The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 4 - 2021
o020921
KAD/as
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

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

LESNIAK, WILLIAM J
Employee/Petitioner

Case# 18WC013557

VILLAGE OF BEDFORD PARK
Employer/Respondent

21IWCC0091

On 7/10/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0507 RUSIN & MACIOROWSKI LTD
JEFFREY T RUSIN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

21IWCC0091

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

WILLIAM J. LESNIAK
Employee/Petitioner

v.

VILLAGE OF BEDFORD PARK
Employer/Respondent

Case # **18** WC **13557**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **OCTOBER 9, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **DECEMBER 6, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,739.72**; the average weekly wage was $**1,225.76**.

On the date of accident, Petitioner was **32** years of age, *single* with **0** dependent children.

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

Respondent shall be given a credit of $**9,572.52** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**3,000.00** for other benefits, for a total credit of $**12,572.52**.

Respondent is entitled to a credit of $**7,134.60** for paid medical expenses under Section 8(j) of the Act.

ORDER

As detailed in the attached memorandum discussing Findings of Fact and Conclusions of Law:

The Arbitrator finds the Petitioner failed prove his current condition of ill-being is causally related to his December 6, 2017 accident and that his condition after April 13, 2018 is not causally related to his accident date.;

Based upon the previous paragraph, the Arbitrator finds the Respondent is not liable for medical expenses after April 13, 2018 and shall be given a credit for all medical expenses paid after April 13, 2018.;

Based upon the first paragraph above, the Respondent is not liable for TTD benefits after April 13, 2018 and shall be given a credit for a 14-day TTD overpayment.;

Based upon the first paragraph above, the Petitioner's claim for prospective medical care after April 13, 2018 is denied.;

The Petitioner's Petition for Penalties and Attorney's Fees is denied. and,

The Respondent shall be given credit for those figures noted above under Section 8(j) of the Act.

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

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

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

Signature of Arbitrator

July 9, 2019
Date

JUL 10 2019

WILLIAM J. LESNIAK v. VILLAGE OF BEDFORD PARK

18 WC 13557

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on October 9, 2018. The issues in dispute were causal connection, medical bills, TTD, penalties and attorney's fees, prospective medical care, and the Respondent's credit, if any. (Arbitrator's Exhibit 1 and Transcript at 4-6). The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. (Arbitrator's Exhibit (*hereinafter*, Ax) 1 and Transcript (*hereinafter*, T.) at 8).

FINDINGS OF FACT

Petitioner testified that he is currently single with no children and lives in Bedford Park. Petitioner stated that he is currently 33 years of age and has a high school equivalency education level. Petitioner did admit to prior related injuries, including a prior work injury to the left fifth finger, as well as a prior tumor removed from his right biceps dating back to 1998. Petitioner testified that he had been employed as a Public Works/maintenance employee since June of 2012. Petitioner testified that his job duties included filling potholes, cutting grass, decorating buildings, and snow removal. Petitioner testified that he performed the same types of jobs from the date of hire through the date of his accident.

Petitioner testified that on December 6, 2017, he began his shift at 7:00 a.m., and would have completed his shift at 3:30 p.m. Petitioner testified that on workdays, he and his coworkers would first go to a Village hall in which they were then assigned their job tasks for the day. Petitioner testified that once they were assigned job tasks for the day, they would transport themselves to those jobsites. Petitioner testified that there were certain job activities that he would perform alone, and other jobs that he would perform with a coworker. Petitioner stated that they would utilize Village vehicles to perform their various jobs.

Petitioner testified that on his alleged accident date, he was assigned to hang Christmas lights on trees at the Veteran's Memorial Building. Petitioner testified that as part of the job, he had to use a ladder to hang the lights on the trees. Petitioner testified that they arrived at

the jobsite at approximately 8:30 a.m., and the accident subsequently occurred at around 9:00 a.m. Petitioner testified that they had set the ladder up near a 15-foot evergreen tree that they were going to hang Christmas lights on.

Petitioner testified that he was utilizing a Werner 8-foot aluminum ladder with steel steps. (Petitioner's Exhibit 12). It was an A-frame type ladder that folds open and stands. Petitioner testified that the ladder weighed approximately 30 pounds. Petitioner testified that prior to the accident; the ladder was approximately four feet behind him. Petitioner testified that the ladder was not brand new, but he did not know its age.

Prior to the accident, Petitioner testified that he was untangling Christmas lights with a coworker. Petitioner stated that while untangling the Christmas lights, a gust of wind knocked the ladder over striking the Petitioner on the back and right side of his shoulder. Petitioner could not specifically recall what part of the ladder struck him. He believed that it was the top part of the ladder but could not confirm or deny considering that he did not see the ladder fall. Petitioner could not specify the amount of force that the ladder has when it struck him.

Petitioner confirmed on cross examination that just prior to the incident; he was untangling Christmas lights with his co-worker, in which Petitioner's arms were at a 90-degree level, around waist level. Petitioner admitted that his arms were not extended upward and/or out in front of him at the time that the ladder hit him. Petitioner admitted that after the ladder struck him, he did not fall to the ground and did not lose consciousness. Although Petitioner testified at trial that he "believed" his shoulder popped forward out of place, the medical records simply do not support the same.

Petitioner testified that after the ladder struck him on the back, he felt a trauma to his right shoulder and upper back. He testified that he yelped in pain and tried to catch his breath after the incident. Petitioner testified that he developed pain in the right shoulder and upper back. Petitioner testified that after about 30 minutes of catching his breath, he continued to work, hanging Christmas lights until his shift ended at 3:30, approximately six additional hours of work after the alleged incident. Petitioner admitted that he did not report any accident to his supervisor on December 6, 2017. Petitioner admitted that he did not seek any medical treatment immediately after the incident.

Petitioner testified that when he got home that night, he took Naproxen, as well as Ibuprofen. He testified that his pain got worse. The following day, on December 7, 2017, he was scheduled to go to work. Petitioner stated that when he showed up to work, he reported a work injury to his supervisor. An injury report was completed at that time.

After completion of the injury report, Petitioner went to the company clinic for treatment. Petitioner testified that he was examined on December 7, 2017. He testified that

he provided a truthful representation and description of his accident and condition. Petitioner testified that he was authorized return to light duty work on December 12, 2017. Petitioner admitted that he did return to work at that time.

Petitioner further admitted to undergoing physical therapy during that period. Petitioner claimed that the light duty job duties were being accommodated, but he still felt that he was doing too much, and he continued to have ongoing pain. Petitioner was then recommended to undergo an MRI. Petitioner continued to follow up with Dr. Pillar. He claimed that he was not doing too much at the job, and his employer told him to just relax.

According to the Petitioner, in February of 2018, he was authorized off work because he was prescribed medications that would have a sedation-type effect, and therefore, would prevent him from working. Petitioner did admit that he worked from December of 2017 until he was authorized off work due to his medications in February of 2018.

Thereafter, Petitioner testified that he sought treatment with an orthopedic physician, Dr. Maday on March 6, 2018. Petitioner testified that he provided Dr. Maday with a consistent history of his accident and condition that he testified to at trial. Dr. Maday authorized Petitioner off work. Eventually, Petitioner was recommended to undergo surgery.

Petitioner testified as to the examination he attended with Dr. Thangamani on April 13, 2018. Petitioner admitted that he provided a consistent history of his accident and symptoms to Dr. Thangamani. Petitioner admitted that Dr. Thangamani performed a physical examination on him at the time of the appointment.

Ultimately, Petitioner did undergo surgery on the right shoulder on May 17, 2018. Petitioner testified that he continued to follow up with Dr. Maday in May and June of 2018, as well as undergoing regular and consistent physical therapy. Petitioner noted that his pain began to increase in physical therapy and he began to have a radiating pain, numbness and tingling down the right arm, into the hand and fingers. Petitioner testified that he treated with Dr. Maday in July, August and allegedly in September 2018. Petitioner did admit that in July of 2018, he had almost reached full range of motion of the right shoulder, but since that time, his shoulder has worsened. Petitioner testified that he underwent therapy through October of 2018.

Petitioner testified that he did follow up with Dr. Maday on September 25, 2018. There was no evidence of that visit in the submitted trial exhibits. Petitioner testified that he was allegedly diagnosed with severe biceps tendinitis and was still undergoing physical therapy. Petitioner continued to be authorized off work. Petitioner testified that he also previously underwent an injection to the back of the shoulder and the front of the shoulder. Petitioner testified that he underwent an updated MRI which allegedly revealed severe biceps tendinitis

and a 2-millimeter cyst. Petitioner testified that he was told to stop performing physical therapy, as it was causing more pain than relief.

Despite his follow up with Dr. Maday in September of 2018, Petitioner admitted that there was not any specific recommended medical treatment plan for him, other than taking various medications.

Petitioner testified that he currently lives at home with his brother and his mom. Petitioner stated that he receives a lot of help at home from his younger brother who takes care of everything around the house, including cleaning, lawn care and laundry. Petitioner testified that he can drive but driving with his right arm causes pain.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue F: *Causal connection*

The Arbitrator finds that the Petitioner failed to meet his burden of proof in that his condition of ill-being as it relates to the right shoulder is causally related to his work accident on December 6, 2017. The Arbitrator finds that Petitioner did sustain an accident that day which resulted in a sprain/strain and a contusion to the right shoulder and upper back. The Arbitrator finds that the Petitioner underwent and received reasonable and necessary medical care through April 13, 2018. However, based upon the testimony, medical evidence and expert opinions rendered by Dr. Thangamani, the Arbitrator finds that Petitioner's surgical intervention in May of 2018 and postoperative care is not causally related to the accident on December 6, 2017. The Arbitrator finds that Petitioner reached MMI as a result of his work accident and did not require medical care related to the accident after April 13, 2018.

Based upon the testimony, medical evidence and deposition of Dr. Thangamani, the Arbitrator finds the opinions of Dr. Thangamani as to causation as persuasive and credible. The Arbitrator finds that Petitioner's accident caused a contusion to the neck and right shoulder. However, based upon the medical evidence and testimony of Dr. Thangamani, the Arbitrator finds that Petitioner's MRI findings and/or any tearing and/or shoulder instability would not have been caused, aggravated or accelerated by the incident that occurred when the ladder struck Petitioner on the shoulder on December 6, 2017.

At his deposition, Dr. Thangamani testified that Petitioner provided a history of the accident on December 6, 2017 wherein he was struck by a ladder on the posterior right shoulder and back region. Petitioner reported pain but did not fall to the ground or dislocate his shoulder. (Respondent's Exhibit 2).

Dr. Thangamani testified that he reviewed the contemporaneous and relevant medical records at the time of his initial evaluation in April of 2018. Dr. Thangamani testified that he reviewed Petitioner's MRI which documented a shallow tear within the posterior-superior glenoid labrum, mild distal supraspinatus tendinosis, and mild intra-articular long head biceps tendinosis. (Respondent's Exhibit (*hereinafter*, Rx.) 2). Dr. Thangamani testified that he reviewed Petitioner's EMG/NCV study which revealed no evidence of cervical radiculopathy or brachial plexopathy. Dr. Thangamani testified as to his physical examination of the Petitioner in April of 2018. Dr. Thangamani noted that Petitioner guarded his shoulder quite significantly, thus it was difficult to perform a full examination.

After Dr. Thangamani's examination and review of the medical records in April of 2018, he diagnosed the Petitioner with a right shoulder and neck contusion. (Rx. 2). Dr. Thangamani opined that based upon the mechanism of injury, with a ladder striking his posterior right shoulder/back, said accident would not cause a labral tear, shoulder instability or rotator cuff tendinitis. (Rx. 2). Dr. Thangamani further noted that the MRI did not reveal any significant findings, let alone any findings in the specific region where Petitioner was allegedly struck by the ladder. Dr. Thangamani opined that the findings on the MRI, specifically the mild posterior superior labral tear and the alleged tendinosis would not have been caused by a strike to the back of the shoulder on the right side. (Id.). Based on the same, Dr. Thangamani opined that the recommended surgery, and any labral or rotator cuff pathology would not be related to the accident. As of April 13, 2018, Dr. Thangamani opined that no further treatment was necessary for Petitioner's right shoulder/neck contusion. Dr. Thangamani opined that Petitioner would have reached MMI within six weeks after the incident, arguably in February of 2018. (Id.). Dr. Thangamani went as far as to say that any treatment after 6 weeks post-accident would not reasonable, necessary and causally related to the December 6, 2017 incident. (Id.).

However, despite the opinions of Dr. Thangamani, Petitioner still underwent surgery with Dr. Maday on May 17, 2018. Dr. Thangamani reviewed said operative report and postoperative records. On July 10, 2018, Dr. Thangamani authored an addendum report regarding the updated records. After review of the records, Dr. Thangamani opined that the surgery was not reasonable, necessary and/or related to the Petitioner's December 6, 2017 accident. Based on the operative report, Dr. Thangamani noted that there was no evidence of posterior or inferior instability and no evidence of arthritis. Dr. Thangamani opined that the operative findings were preexisting and unrelated to the Petitioner's accident.

On July 10, 2018, Dr. Thangamani opined that the mechanism of simply getting struck in the back of the right shoulder by a ladder would not cause a dislocation or labral tear, nor would it cause shoulder impingement. (Rx. 2). Dr. Thangamani opined that a shoulder dislocation causing a labral tear would require the arm to be in a flexed, adducted, and/or externally rotated position. We know that was not the case here, as confirmed by the medical records and Petitioner's own testimony. Further, Dr. Thangamani opined that shoulder impingement syndrome is not caused by an acute injury. Dr. Thangamani opined that the postoperative diagnosis rendered by Dr. Maday was unrelated to the Petitioner's work injury. (Rx. 2). Dr. Thangamani testified that the alleged diagnosis of posterior-superior labral tearing and parting tearing of the rotator cuff were preexisting conditions, and not caused by the December 6, 2017 accident.

During his deposition, Dr. Thangamani testified that without an acute shoulder dislocation because of the accident, Petitioner's intra-articular pathology (labral tear) would not been caused by this accident. (Rx. 2 at 11). Dr. Thangamani testified that the mechanism of injury, position of his arms, and the fact that he did not fall to the ground were all inconsistent with the findings of any major intra-articular pathology that would have been caused by getting struck in the back of the shoulder by a ladder. (Rx. 2 at 19, 28). Based upon the mechanism of injury, Dr. Thangamani confidently and credibly testified that the accident caused a right shoulder/neck contusion and would not have caused any of the intra-articular findings on MRI. (Id. at 27). Dr. Thangamani opined that if Petitioner sustained such a significant trauma to his right shoulder due to the accident, enough so to potentially cause a dislocation and labral tear, Dr. Thangamani testified that there would also be significant swelling and bruising to the same region, which was not documented on the diagnostic scans. (Id. at 29). Additionally, Dr. Thangamani testified that the mechanism of injury and location of the ladder striking the Petitioner on the back of the right shoulder would not cause a labral tear because the scapula and shoulder blade would be protecting said area. Further, Dr. Thangamani noted that the operative report documented a positive "drive-through" sign, which coincides with shoulder laxity or instability. However, a positive drive-through sign is not indicative of a shoulder dislocation, but rather laxity and/or degeneration.

Moreover, Dr. Thangamani provided ample and credible evidence as to how and why he came to his opinions that the accident did not cause any intra-articular pathology. First, Dr. Thangamani confidently testified that a traumatic/acute tear of the labrum would require a dislocation. Dr. Thangamani then provided multiple examples of what would need to happen for a labral tear and/or dislocation to occur based upon Petitioner's mechanism of injury. (Rx. 2 at 61). Dr. Thangamani testified that if Petitioner's right arm was up, extended and externally rotated and/or Petitioner fell forward onto an outstretched arm after the accident, then arguably the mechanism of injury could cause a potential labral tear. (Rx. 2 at 61-63).

Dr. Thangamani was provided numerous "hypothetical" situations in which Petitioner's mechanism of injury could potentially cause the diagnostic findings on Petitioner's MRI. However, none of the hypothetical inquiries raised at the deposition are consistent with Petitioner's testimony as to the events surrounding his accident. (Rx. 2 at 61–66).

Based upon the history provided to Dr. Thangamani by the Petitioner, the medical records, and Petitioner's testimony at trial, the facts establish that when the ladder struck the Petitioner on December 6, 2017, he did not have his right arm up in the air, extended and/or externally rotated. Despite the Petitioner's testimony, there is no objective or diagnostic evidence that he sustained a dislocation of the shoulder. The facts show that Petitioner did not fall to the ground, let alone fall onto an outstretched arm. Petitioner confirmed that after the accident, he was able to continue working for the remaining 6 hours of his shift. Per Petitioner's testimony, at the time he was struck by the ladder, he was untangling Christmas lights with his arms at his waist, at a 90-degree level.

The Arbitrator notes that Dr. Thangamani's testimony is further supported by the contemporaneous medical records. The December 7, 2017 initial treating records from Dr. Pillar from the day after the accident document no ecchymosis, swelling or bruising. (Rx. 4). The record noted that there was no joint instability or increased laxity in the right shoulder. (Rx. 4). Petitioner had full active range of motion in the bilateral upper extremities. Strength was 5/5 bilaterally. Further, x-rays revealed no obvious fracture or dislocation. Petitioner was diagnosed with a right neck and shoulder contusion. (Id.).

Dr. Pillar never provided an opinion as to causation in this matter. In fact, during Petitioner's January 12, 2018 visit with Dr. Pillar, Dr. Pillar noted that supraspinatus and O'Brien's testing were negative. Dr. Pillar did not note any focal weakness in the shoulder. Dr. Pillar stated that he was not certain that the small labral tears were causing Petitioner's pain complaints. (Rx. 4). Despite the MRI findings, Dr. Pillar continued to diagnose the Petitioner with a right shoulder/neck contusion. (Rx. 4).

Moreover, the Arbitrator finds the opinions and treatment recommendations of Dr. Maday, as they relate to the Petitioner's accident, as non-persuasive in terms of causation. Dr. Maday recommended Petitioner pursue surgical intervention due to instability of the shoulder and labral pathology found on the MRI. (Rx. 3). However, the operative report documented no evidence of posterior or inferior instability and no significant chondrosis of the glenohumeral joint. The biceps tendon and subscapularis were intact. There was tearing of the anterior labrum and fraying of the superior labrum. There was also a superficial undersurface tear of the supraspinatus. (Rx. 3).

The Arbitrator finds that said surgery was not reasonable, necessary or causally related to the accident and mechanism of injury on December 6, 2017. The Arbitrator finds that Dr. Maday provided no basis for his opinion that the alleged mechanism of injury caused Petitioner's labral pathology and instability. The Arbitrator notes that Dr. Maday's opinions are further discredited by the lack of evidence of pathology found in the operative report.

After review of the totality of the evidence and testimony, the Arbitrator finds that Petitioner did sustain an accident on December 6, 2017 which resulted in a contusion to the right shoulder and neck. The Arbitrator finds that the Petitioner sustained reasonable and necessary medical care, related to his accident, through April 13, 20188. However, as of that date, the Arbitrator relies on the expert opinions and credible testimony of Dr. Thangamani in that Petitioner's condition of ill-being, and any intra-articular pathology is NOT causally related to the accident and mechanism of injury from December 6, 2017. The Arbitrator notes that the testimony of Dr. Thangamani is credible and persuasive in that the accident that occurred and the mechanism of injury on December 6, 2017 would not, and did not cause, Petitioner's right shoulder pathology, and/or need for surgery. The Arbitrator notes that any diagnoses and recommendation for treatment after April 13, 2018 is not reasonable, necessary and causally related to the accident. The Arbitrator notes any treatment beyond April 13, 2018 is not causally related to the work accident.

Issue J: *Medical bills*

The Arbitrator finds that Petitioner's condition of ill-being after April 13, 2018 is not causally related to the date of accident on December 6, 2017. Therefore, the Arbitrator finds that Respondent is not liable for any medical expenses after April 13, 2018. The Arbitrator finds that the Respondent is owed a credit for any medical expenses paid after April 13, 2018. The Arbitrator also notes that the Respondent did issue $7,134.60 in medical payments in this matter. (T. at 5).

Issue K: *Prospective medical care*

Prospective medical care is denied on the basis that Petitioner's condition of ill-being after April 13, 2018 is not causally related to the original accident. Any current condition of ill-being and recommended future medical treatment to the right shoulder is not causally related

to his accident. Therefore, the Arbitrator finds that Respondent is not liable for any prospective medical care in this matter. Further, the Arbitrator notes that the medical records submitted into evidence do not support any allegation for ongoing or future care. Petitioner testified as to a recent MRI and recent injections, but there is no evidence supporting the same. The only records documenting care with Dr. Maday postoperatively are prescription notes recommending Petitioner follow up with Dr. Maday. There are no records documenting any recommended and/or ongoing prescribed care. (Px. 7). Further, Petitioner testified at trial that there was no specific recommended care. All in all, the Arbitrator finds that any prospective medical care is unrelated to the December 6, 2017 accident.

Issue L: *TTD benefits*

The arbitrator finds that the Petitioner was paid TTD benefits from February 5, 2018 through April 27, 2018 by the Respondent. The Arbitrator notes that the Respondent paid $9,572.52 in TTD benefits, which was stipulated. (Ax. 1). The Arbitrator notes that despite suffering his December 6, 2017 accident, Petitioner worked a light duty position from December 12, 2017 through February 5, 2018. The Arbitrator finds that after April 13, 2018, Petitioner's condition of ill-being is not causally related to the date of accident. Therefore, the Arbitrator finds that any claim for TTD benefits after April 13, 2018 is not causally related to the work accident and is denied. The Arbitrator also finds that the Petitioner shall credit the Respondent 14 days of TTD overpayment from April 13, 2018 through April 27, 2018.

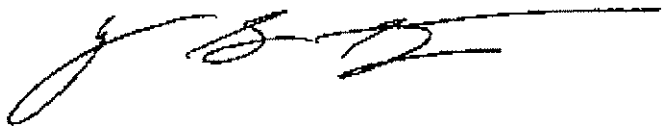
Issue M: *Penalties and attorney's fees*

The Arbitrator does not award penalties and fees in this matter. The Arbitrator finds that the Respondent's basis for denial is supported by the credible and persuasive testimony of Dr. Thangamani. Therefore, Respondent's denial of medical treatment and TTD after April 13, 2018 was not unreasonable and/or vexatious. Thus, the claim for penalties and fees is denied.

Issue N: *Respondent's credit*

The parties entered a stipulation during trial by which the Respondent would be allowed to assert a Section 8(j) credit. (T. at 5). That credit is noted in **Issue J**, above and totals $7,134.60. Furthermore, the parties also stipulated to the Respondent's payment to the Petitioner of an "advance" totaling $3,000.00 for which a credit shall be allowed under Section 8(j) of the Act. (Ax. 1 and T. at 6-7).

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



Signature of Arbitrator

July 9, 2019
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIA REECE,
Petitioner,

vs. NO: 17 WC 8280

STATE OF ILLINOIS,
ILLINOIS STATE UNIVERSITY,
Respondent.

21IWCC0092

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

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

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

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

DATED: MAR 4 - 2021
O: 2/16/21
MP/tdm
068

Marc Parker

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REECE, TIA
Employee/Petitioner

Case# **17WC008280**

17WC013001
17WC013002

ST OF IL/ILLINOIS STATE UNIVERSITY
Employer/Respondent

21IWCC0092

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

0000 ASSISTANT ATTORNEY GENERAL
LOIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 2 - 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tia Reece,
Employee/Petitioner

v.

Case # 17 WC 8280

Consolidated cases: 17 WC 13001
17 WC 13002

State of Illinois / Illinois State University,
Employer/Respondent

21IWCC0092

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **February 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

21IWCC0092

On February 23, 2017, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of her employment.

Timely notice of this accident ***was*** not given to Respondent.

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

In the year preceding the injury, Petitioner earned $ **30,351.28**; the average weekly wage was $**583.68**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

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

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

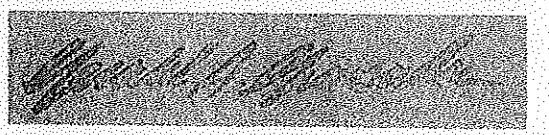
Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove the issue of accident. Therefore all benefits are denied on this claim. See companion case 17 WC 13001 for more details.

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

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



Signature of Arbitrator Gerald Granada

4/1/20
Date

APR 2 - 2020

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIA REECE,
Petitioner,
vs.

NO: 17 WC 13001

STATE OF ILLINOIS,
ILLINOIS STATE UNIVERSITY,
Respondent.

21IWCC0093

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

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

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

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

DATED: MAR 4 - 2021
O: 2/16/21
MP/tdm
068

Marc Parker

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REECE, TIA
Employee/Petitioner

Case# **17WC013001**

17WC008280
17WC013002

ST OF IL/ILLINOIS STATE UNIVERSITY
Employer/Respondent

21IWCC0093

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

0000 ASSISTANT ATTORNEY GENERAL
LOIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 2 - 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tia Reece,
Employee/Petitioner

v.

Case # 17 WC 13001

Consolidated cases: 17 WC 8280
17 WC 13002

State of Illinois / Illinois State University,
Employer/Respondent

21IWCC0093

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **February 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

21IWCC0093

On February 16, 2017, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **30,351.28**; the average weekly wage was $**583.68**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit for any benefits it may have paid on this claim.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,880.00 to Advocate Medical Group, $10,489.00 to McLean County Orthopedics, $7,686.00 to Eastland Medical Plaza Surgicenter, $1,495.00 to McLean County Anesthesia, and $185.19 to OSF Occupational Health, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $389.12/week for 9 weeks, commencing 4/17/17 through 6/19/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $350.21/week for 30.75 weeks, because the injuries sustained caused the 7.5% loss of each hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator Gerald Granada

4/1/20
Date

APR 2 - 2020

21IWCC0093

FINDINGS OF FACT

This case involves Petitioner Tia Reece, who alleges injuries sustained on three different accident dates while working for Respondent, the State of Illinois / Illinois State University. Petitioner has filed three separate Applications for Adjustment of Claim for the following accident dates: 1) February 23, 2017 (17 WC 8280); 2) February 16, 2017 (17 WC 13001); and 3) February 21, 2017 (17 WC 13002). All three claims have been consolidated and involve allegations of bilateral carpal tunnel syndrome due to repetitive trauma. The issues in dispute on all three claims are the same: 1) accident; 2) notice; 3) causation; 4) average weekly wage; 5) medical expenses; 6) TTD; and 7) nature and extent. This decision is on the February 16, 2017 claim.

Petitioner works for Respondent as a food service sanitation laborer and has been employed with Respondent for approximately eleven or twelve years. She has been in her current position around five or six years, and was in her second year when the alleged injury occurred. Prior to working as a food service sanitation laborer, Petitioner worked for Respondent as a food service worker. Her sanitation laborer duties included: loading and unloading a dish washer; spraying the dishes and pots and pans before they go into a dish washer; lifting dishes, pots and pans; sweeping; mopping; taking out the trash; cleaning ovens, fryers, walls, shelves, and charbroilers; and cleaning out freezers when necessary. Petitioner testified that she used both hands to perform these tasks. She described cleaning off the dishes by using an overhead sprayer that required Petitioner to use both hands to forcefully grip the sprayer in order to activate it. She would hand wash industrial sized pots and pans that weighed 7-10 pounds by forcefully scrubbing with a pad or scraper. Her job of loading and unloading the dishwasher was performed 7 hours per day. She would mop the floors 10-12 hours per week, which required Petitioner to forcefully push down on a mop wringer in order to wring out the mop.

Petitioner testified that she complained of pain in both hands while performing her work duties that involved gripping and grasping. Although she is right handed, her job required her to use both hands while performing her job tasks.

On January 20, 2017, Petitioner saw her family doctor, Dr. Artur Djagarian, with complaints of bilateral hand numbness and neck pain. Petitioner testified that she had been experiencing this pain on and off prior to this doctor's visit. Dr. Djagarian thought the problem was cervical and ordered an x-ray of her spine. An EMG/NCV examination was also ordered. (PX 3)

On February 16, 2017, Dr. Hermann Dick performed the EMG/NCV examination. Dr. Dick assessed Petitioner with bilateral carpal tunnel syndrome. Although there were no signs of radiculopathy in the EMG/NCV, an MRI was ordered. Petitioner was then instructed to see her family physician to discuss carpal tunnel treatment options. (PX 4)

Petitioner testified that she verbally told her supervisor about her February 16, 2017 diagnosis of bilateral carpal tunnel syndrome but did not remember exactly when. Respondent offered into evidence the Illinois Form 45, Employer's First Report of Injury completed on March 14, 2017, which indicated that Petitioner was claiming an accident on February 16, 2017 involving both her hands, and that sweeping, mopping, and doing dishes caused carpal tunnel in both hands. (RX 1)

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On February 21, 2017, while Petitioner was sweeping and mopping, she felt a pop in both of her wrists, which was followed by pain and a "pins and needles" sensation. She subsequently tried to limit her work, but doing dishes and sweeping and mopping caused her swelling. Petitioner reported this to her supervisor, Jim Burress, that day. On March 3, 2011, she completed a written notice of injury for this February 21, 2011 injury, and a Supervisor's Report of Injury or Illness for this incident was also completed on March 3, 2011. (RX 1)

On February 27, 2017, Petitioner went to OSF St. Joseph Medical Center Occupational Health, where she was given bilateral wrist restrictions including no repetitive pushing, pulling, gripping, or twisting of wrists. She was also prescribed wrist splints for one week together with moist heat and gentle range of motion exercises and continued Naproxen sodium. Petitioner was instructed to return to occupational health in seven to 10 days for recheck. (PX 2)

On March 4, 2017, Petitioner returned to see Dr. Djagarian, who noted that Petitioner had a history of bilateral carpal tunnel syndrome confirmed by EMG study. Dr. Djagarian noted that Petitioner's symptoms were exacerbated with physical activities, especially with raising arms above her shoulder line. Dr. Djagarian referred Petitioner to an orthopedic surgeon consult for her bilateral carpal tunnel. (PX 3)

On March 20, 2017, Petitioner saw Dr. Joseph Newcomer of McLean County. (PX 5) Dr. Newcomer noted Petitioner's complaints of bilateral hand/wrist pain, radiating into her forearms, and noted that she recently twisted her left wrist which now presented with much greater pain and swelling than the right. Dr. Newcomer reviewed Petitioner's medical records and his impression was early bilateral carpal tunnel syndrome. He recommended Petitioner wear splints and braces at work. He planned to see Petitioner back in four weeks if she was still symptomatic, and noted that after four weeks of conservative management, decompression could be considered. Petitioner returned to Dr. Newcomer on April 17, 2017 with continued complaints for which Dr. Newcomer recommended carpal tunnel release surgery and restricted Petitioner from work beginning April 17, 2017 through June 19, 2017. (PX 8) Petitioner testified that she was not paid for this time off work, and that she had to use her accrued sick time.

On April 26, 2017, Dr. Newcomer performed right carpal tunnel release on Petitioner. (PX 6) On May 17, 2017, Dr. Newcomer performed left carpal tunnel release on Petitioner. (PX. 7) Dr. Newcomer saw Petitioner June 15, 2017, and noted that she was doing well with no numbness and tingling. He released her to return to work without restrictions and to return as needed. (PX 5)

Dr. Newcomer testified via evidence deposition on January 5, 2018. (PX 1) Dr. Newcomer went over Petitioner's various job duties, noting the time spent on each job and how she used her hands for the various jobs. He opined that he believed the duties she described could have aggravated her condition of bilateral carpal tunnel syndrome. He explained that the aggravation of Petitioner's condition was permanent and required surgery to avoid permanent nerve damage.

On February 15, 2018, Dr. James Williams saw Petitioner at Respondent's request for an Independent Medical Exam. Dr. Williams testified via evidence deposition on December 12, 2018. (RX 2) Dr. Williams testified that he diagnosed Petitioner with bilateral carpal tunnel syndrome, and that the treatment she received for that was reasonable and necessary. (RX 2, p. 7) However, Dr. Williams did not believe Petitioner's carpal tunnel syndrome was caused or aggravated by her work activities because: he did not feel her duties required

21IWCC0093

repetitive, forceful, sustained pinching and/or gripping; her activities were varied; her work did not involve any sustained awkward positions of her hands or wrists for sustained periods of time; and none of her activities were vibratory in nature. (RX 2, p.11) Dr. Williams also referenced records preceding Petitioner's earliest accident date in which she complained of problems with her hands indicative of carpal tunnel syndrome. He believed that Petitioner had an increased risk of developing carpal tunnel syndrome because she was obese, female, and smoked. (RX 2, pp. 9-10)

Petitioner testified about her current condition at trial. She indicated that she was good and fully recovered. She confirmed that she returned to work full duty with no restrictions following her release by Dr. Newcomer on June 15, 2017. She was not paid TTD and used her sick days for the time period Dr. Newcomer took her off work.

When asked about her concurrent employment, Petitioner testified that she also worked part time as a bartender at the American Legion for approximately two years. She informed her supervisor of this part time job when she told her supervisor that she could not work overtime for the Respondent due to her bartending job. She testified that in 2016, she earned $3,158.13 annually from her bartending job and $27,193.15 annually from her job with Respondent.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proving that she sustained an accident arising out of and in the course of her employment with Respondent on February 16, 2017. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the medical evidence from Petitioner's treating physicians. The Illinois Supreme Court held in Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524 (1987), that the date of injury in a repetitive trauma case is the date on which the injury "manifests itself," meaning the date on which both the fact of the injury and its causal relationship to the claimant's employment would have become plainly apparent to a reasonable person. In Durand v. Industrial Commission (RLI Ins. Co.), 224 Ill. 2d 53 (2006), the Supreme Court emphasized that the standard to determine the manifestation date for a repetitive trauma injury remained flexible, and that the Workers' Compensation Act should be liberally construed to accomplish its purposes. In the present case, Dr. Dick, following an EMG/NCV test, diagnosed Petitioner's bilateral carpal tunnel syndrome on February 16, 2017. Petitioner reported that diagnosis to her supervisor, which was later memorialized in the Respondent's March 14, 2017 Form 45 First Report of Injury, wherein the Petitioner's condition is attributed to her work activities. The Arbitrator further finds that the other accident dates alleged by Petitioner are of less significance on this issue: the February 21, 2017 incident (17 WC 13002) involving a pop in Petitioner's wrist while mopping/sweeping appears to have been a temporary aggravation of Petitioner's previously diagnosed carpal tunnel syndrome; and there was no evidence to show Petitioner had any sort of accident on February 23, 2017 (17 WC 8280).

2. Regarding the issue of notice, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the Respondent's First Report of Injury form. Petitioner testified that after her February 16, 2017 diagnosis of carpal tunnel syndrome, she verbally told her supervisor of her condition. An accident report was completed on March 14, 2017 documenting Petitioner's bilateral carpal tunnel syndrome and attributing the condition to Petitioner's work

21IWCC0093

activities. (RX 1) The accident report was well within the 45-day notice requirement of the Act.

3. On the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible, unrebutted testimony and the medical evidence. The Arbitrator finds the testimony of treating orthopedic surgeon Dr. Newcomer persuasive on this issue. The evidence shows that Petitioner was engaged in repetitive work activities requiring her to use both hands for an extended period of time to forcefully grip or hold things such as a dish sprayer, industrial-sized pots and pans, a scrub pad/scraper, or while wringing out a mop – all of which contributed to aggravating her bilateral carpal tunnel syndrome, and required her to seek medical treatment and ultimately surgery. The Arbitrator notes the Respondent's defense on this issue is based on the opinions of its IME, Dr. Williams – who did not believe Petitioner's job required any of the factors that he believed would cause carpal tunnel syndrome, including forceful gripping/pinching, awkward hand positioning for extended periods of time, vibration, etc.; and who points to Petitioner's increased risk factors of developing carpal tunnel syndrome due to her obesity, gender or smoking. However, the records do not show that Petitioner had any prior problems with her hands that either kept her off work or required the extent of medical treatment that was prescribed after her February 16, 2017 diagnosis. Also, the evidence shows that Dr. Williams was not provided a fully accurate picture of the physical activities required in Petitioner's jobs. Accordingly, the Arbitrator concludes that the Petitioner's condition of bilateral carpal tunnel syndrome is causally related to her employment with Respondent.

4. Regarding the issue of average weekly wage, the Arbitrator finds that Petitioner's average weekly wage was $583.68. This finding is based on Petitioner's unrebutted testimony on this issue and the documentary evidence, including the 2016 W-2 from BOT Illinois State University and her 2016 W-2 from Joe Williams Post#55 of the American Legion. (PX 10) Petitioner testified that in 2016, she earned $3,158.13 annually from her bartending job and $27,193.15 annually from her job with Respondent – which adds up to a combined annual earning of $30,51.28 in the year preceding her date of accident. The Arbitrator notes that the wage statement offered by Respondent (RX 1) states wages very similar to those set forth on Petitioner's 2016 W-2 from BOT Illinois State University. There was no testimony offered to rebut Petitioner's testimony that Respondent was aware of her concurrent employment, and no evidence offered to rebut the amount earned in that concurrent employment.

5. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment as set forth in the medical evidence has been reasonable and necessary in addressing her work-related injury. Specifically, the Arbitrator finds that treatment, surgery, and rehabilitation from Advocate Medical Group, McLean County Orthopedics, Eastland Medical Plaza Surgicenter, McLean County Anesthesia, and OSF Occupational Health, as well as medication relative to Petitioner's condition was reasonable, necessary, and causally related to the accident in question. Petitioner's Exhibit 9 show payments due to Advocate Medical Group of $1,880.00, McLean County Orthopedics of $10,489.00, Eastland Medical Plaza Surgicenter of $7,686.00, McLean County Anesthesia of $1,495.00, and OSF Occupational Health of $185.19. There was no evidence offered to the contrary. Accordingly, the Arbitrator awards Petitioner all outstanding, reasonable, related and necessary medical expenses as set forth in Petitioner's Exhibit 9, subject to the Fee Schedule and Respondent shall receive a credit for any expenses it has already paid.

6. Consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner was temporarily totally disabled from April 17, 2017 through June 19, 2017. This finding is supported by both the Petitioner's unrebutted testimony and the medical records of Dr. Newcomer, who provided an off duty note for

21IWCC0093

this time period. Petitioner testified that she used her sick days and was not paid TTD for this time period. Respondent shall pay Petitioner temporary total disability benefits for 9 weeks, commencing April 17, 2017 through June 19, 2017, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any benefits paid to the Petitioner during this time period.

7. Regarding the issue of nature and extent, the Arbitrator applies the factors set forth in Section 8.1b of the Act and notes the following: (i) no AMA rating was introduced into evidence, so the Arbitrator gives this factor no weight; (ii), Petitioner was a food service sanitation laborer who returned to this job with no restrictions following her work-injury - a factor to which the Arbitrator gives considered weight; (iii) Petitioner was 35 years old at the time of injury, a factor to which the Arbitrator gives some weight; (iv) there was no evidence of future earnings and the Arbitrator gives no weight to this factor; (v), there was evidence of disability which show that the Petitioner sustained bilateral carpal tunnel syndrome which required diagnostic testing, conservative treatment and surgical intervention, and has resulted in a full recovery with no further subjective complaints - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 7.5% loss of each hand.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIA REECE,
Petitioner,
vs.

NO: 17 WC 13002

STATE OF ILLINOIS,
ILLINOIS STATE UNIVERSITY,
Respondent.

21IWCC0094

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

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

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

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

DATED: MAR 4 - 2021
O: 2/16/21
MP/tdm
068

Marc Parker

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REECE, TIA
Employee/Petitioner

Case# **17WC013002**

17WC013001
17WC008280

ST OF IL/ ILLINOIS STATE UNIVERSITY
Employer/Respondent

21IWCC0094

On 4/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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801 S SEVENTH ST 8M
PO BOX 19208
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PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 2 - 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tia Reece,
Employee/Petitioner

v.

State of Illinois / Illinois State University,
Employer/Respondent

Case # **17** WC **13002**

Consolidated cases: **17 WC 13001**
17 WC 8280

21IWCC0094

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **February 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0094

On February 21, 2017, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **30,351.28**; the average weekly wage was $**583.68**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner has failed to prove her condition of ill-being is causally connected to this accident as this was a temporary aggravation of Petitioner's pre-existing condition from a prior accident. Therefore all benefits are denied on this claim. See companion case 17 WC 13001 for more details.

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

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

Signature of Arbitrator Gerald Granada

4/1/20
Date

APR 2 – 2020

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIC PETERSON,

Petitioner,

vs. NO: 17 WC 17839

TOLTECH PLUMBING,

Respondent.

21IWCC0095

DECISION AND OPINION ON REVIEW

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

Since the Arbitrator's decision of May 21, 2020, the Illinois Supreme Court has issued its decision in *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848. Based upon the holding in *McAllister,* the Commission affirms and adopts the Arbitrator's decision but writes to provide a new analysis consistent with *McAllister.*

In *McAllister,* the Illinois Supreme Court noted three categories of risks recognized by case law: "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162; *Baldwin*, 409 Ill. App. 3d at 478; *First Cash Financial Services*, 367 Ill. App. 3d at 105.

McAllister explained that "the first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment." *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill. Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill. Dec. 359, 67 N.E.3d 571. As noted above, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill. Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204.

Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling." *First Cash Financial Services*, 367 Ill. App. 3d at 106. If it is established that the risk of injury falls within one of the three categories of employment-related acts delineated in *Caterpillar Tractor*—risks that are distinctly associated with employment—then it is established that the injury "arose out of" the employment. See, *e.g., Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, ¶ 18, 990 N.E.2d 901, 371 Ill. Dec. 713

McAllister further explained that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶ 18; [**25] *Sisbro*, 207 Ill. 2d at 204.

Sisbro and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill. 2d at 58.

Here, the Petitioner was changing out a water meter inside a customer's basement. Upon completion, he moved his tool bucket over to a chair and sat down. While holding the channel locks in his left hand, Petitioner leaned over to put his tools in the bucket when the chair went

backwards causing him to move forward to catch his balance. T.17. He grabbed the arm rest and felt a tear in his shoulder. Petitioner testified that he would sit in a chair and do installations as he was on his knees all day long. T.34.

Mark Munoz, assistant field manager for Professional Meters, testified that he occasionally supervised the Petitioner and was present when the accident occurred. T.48. Mr. Munoz stated that it was common for the plumbers to use assistive devices such as a stool or chair to perform their job. T.58. Virginia Reyes, owner of Toltech Plumbing, testified that the plumbers were instructed not to touch the homeowner's property and not sit in chairs. T.65. Ms. Reyes, however, stated there were no written rules to that effect and she did not know if Toltech's policy and procedure manual stated that plumbers were not to sit in chairs. T.68-69. She stated that taking tools out and putting them back in the bucket was part of their job duties. T.70.

The Commission agrees with the Arbitrator that Petitioner's testimony was credible and was corroborated by Mr. Munoz's testimony. The evidence establishes that part of Petitioner's job duties included putting their tools in the bucket and that they would use a chair to perform their job duties. The Commission finds that sitting in a chair to put away their tools represents an act incident to Petitioner's assigned duties and, as such, the injury occurred due to a risk distinctly associated with his employment. Based upon the above, the Commission agrees with the Arbitrator that Petitioner's injury arose out of and in the course of his employment.

The Commission further finds that Petitioner was a traveling employee at the time of injury.

> The determination of whether an injury to a traveling employee arose out of and in the course of employment is governed by different rules than are applicable to other employees. A "traveling employee" is one whose work requires him to travel away from his employer's office. A traveling employee is any employee for whom travel is an essential element of his employment. A traveling employee is deemed to be in the course of his employment from the time that he leaves home until he returns. An injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable, *i.e.*, conduct that "might normally be anticipated or foreseen by the employer." *Kertis v. Ill. Workers' Comp. Comm'n*, 2013 IL App (2d) 120252WC, P14-P17.

Petitioner's duties qualify him as a traveling employee as he was required to travel away from Respondent's office to install water meters. Ms. Reyes testified that the job duties of a plumber included putting their tools in the bucket. Petitioner's testimony that he would use a chair to perform his job duties was confirmed by Mr. Munoz. The Commission finds that it was reasonable and foreseeable that the Petitioner would sit in a chair to put away his tools. Therefore,

21IWCC0095

Petitioner also established that his injury arose out of and in the course of his employment under the traveling employee theory of recovery.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 1, 2020 is hereby affirmed and adopted.

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

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

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

DATED: MAR 4 - 2021

Marc Parker

MP/tdm
O: 1/6/21
068

Stephen Mathis

DISSENT

I respectfully dissent. I find Petitioner failed to prove he sustained an accidental injury which arose out of his employment.

The matter of *Noonan v. Illinois Workers' Compensation Commission*, 2016 IL App (1st) 152300WC, is directly on point and dispositive. In *Noonan,* the claimant was employed as a clerk whose employment duties required him to fill-out forms and answer phones. While working, he dropped a pen; while reaching for the pen, the chair upon which he sat rolled from underneath him. *Id.* at ¶ 5. The Arbitrator found the claimant failed to prove he sustained an accident which arose out of his employment, and benefits were denied. The Commission affirmed and adopted the decision. (Following the entry of the Commission's decision, certain procedural matters occurred which are irrelevant to the ultimate holding of the Appellate Court as to accident). The Appellate Court affirmed the decision of the Commission.

In so holding, the Court employed the risk analysis subsequently adopted by the Supreme Court of Illinois in *McAllister v. The Illinois Workers' Compensation Commission*, 2020 IL 124848, and utilized by the Majority. The Court categorized the risks- 1) risks distinctly associated with the employment; 2) risks personal to the employee; and 3) neutral risks which have neither employment nor personal characteristics. *Noonan* at ¶ 19. The Court defined the employment risk- "if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employer might reasonably be expected to perform incident to his assigned duties." *Id.* at ¶ 18. See *McAllister* at ¶ 46.

The Court found the claimant's injury did not result from an employment risk stating:

> He was injured at work when the rolling chair he was sitting in "went out from underneath" him as he reached to retrieve a dropped pen. Although claimant was at work, the act he was performing when injured-reaching for a dropped item while sitting in a chair-was not one he was instructed to perform or had a duty to perform. Contrary to claimant's assertions, we also find the act described was not incident to his assigned duties. In particular, the act of reaching to the floor while sitting in a chair was not required by claimant's job duties. The fact he was reaching to retrieve a dropped pen and used a pen to fill out forms does not warrant an opposite conclusion. The risk of injury at issue was simply not one "*distinctly associated*" with claimant's employment. (Emphasis added). *Noonan* at ¶ 21.

In the present matter, Petitioner testified he rocked back in a chair while loading his tools in a bucket at day's end. T. 15. This testimony was provided over two years post-accident. Immediately following the accident, Petitioner completed an incident report wherein he described the mechanism of accident as follows: "I went to sit in a chair didn't realize it was a rocking chair. I sat down and the chair rocked back and I started to catch myself my body went forward and the chair went back and I felt a rip in the left shoulder." RX5. There is no mention of tools and/or a bucket.

Again, immediately following the accident, Petitioner reported his injury to Mr. Jason Brown, the field manager for the project. RX7, p. 4. Mr. Brown testified Petitioner advised him of the accident stating that he went to sit in a chair which Petitioner did not realize was a rocking chair causing him to lean forward to right himself injuring his arm. RX7, p. 7. Mr. Brown confirmed Petitioner made no mention of tools and/or a bucket. RX7, p. 8.

On May 17, 2017, the day following the accident, Petitioner sought treatment with his primary care physician, Dr. Jurack. Dr. Jurack memorialized the following history of injury: "went to sit down in a desk chair and it rocked back. I went to catch my balance, the chair rocked back and my shoulder or body went back." PX3, p. 1. This same and consistent history of accident is memorialized in Dr. Thorsness' record of May 24, 2017- "Patient states last Tuesday he was going to sit down in a chair at work and he started to fall back and caught

himself. When he was catching himself he felt something tear in his shoulder and he felt immediate pain." PX1, p. 7. What both histories reflect as consistently conveyed by Petitioner, he sustained injury when he sat on a rocking chair unbeknown to him causing him to lose his balance and thereby injuring his shoulder. There is no mention of tools and/or bucket as those implements had absolutely no bearing on Petitioner's mechanism of injury.

The Majority focuses its analysis on Petitioner's act of storing his tools in a bucket at day's end which somehow necessitated the use of a chair. Whether Petitioner was utilizing tools and/or a bucket (a questionable fact) is irrelevant. Petitioner injured himself while sitting in a chair as outlined in detail above. Moreover, Ms. Reyes testified plumbers were instructed not to touch customer's belongings specifically including chairs. T. 65.

As in *Noonan*, Petitioner's act of sitting in a chair was not an act he had a common law or statutory duty to perform. As in *Noonan*, Petitioner's act of sitting in a chair was not an act he was instructed to perform, but to the contrary, an act he was instructed not to perform. As in *Noonan*, Petitioner's act of sitting in a chair was not incidental to his assigned duties. As in *Noonan*, "[t]he risk of injury at issue was simply not one 'distinctly associated' with claimant's employment." *Noonan* at ¶ 21.

Even if Petitioner is deemed a traveling employee, the same risk analysis applies. As the Supreme Court of Illinois noted in *Hoffman v. Industrial Commission*, 109 Ill. 2d 194, 199, 486 N.E.2d 889 (1985), courts generally treat traveling employees "differently from other employees when considering whether an injury arose out of and in the course of employment. [citations omitted]. However, a finding that a particular claimant is a traveling employee does not exempt the claimant from proving that an injury arose out and in the course of employment, and some injuries, even when incurred by traveling employees, are not compensable under the Act."

The Court went on to state:

> In each instance where this court has considered whether a particular injury arose out of and in the course of employment, it has emphasized that the Act was not intended to insure employees against all accidental injuries. [citations omitted].
> Rather, the Act was intended to compensate only those injuries which arise out of (1) acts which the employee was instructed to perform by his employer, (2) acts which he has a common law or statutory duty to perform while performing duties for his employer, or (3) as explained below, acts which the employees might be reasonable expected to perform incident to his assigned duties. [Citations omitted]. *Hoffman* at 199-200.

Incidental to the assigned duties in context of a traveling employee is discussed in terms of reasonableness and foreseeability (*Hoffman* at 200), but such does not obviate the requirement the act be distinctly associated to Petitioner's job duties. As such utilizing a traveling employee analysis, I arrive at the same result and find Petitioner failed to prove he sustained an injury arising out of his employment.

For the reasons stated above, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PETERSON, ERIC
Employee/Petitioner

Case# **17WC017839**

TOLTECH PLUMBING
Employer/Respondent

21IWCC0095

On 5/21/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4595 WHITESIDE & GOLDBERG LTD
JASON M WHITESIDE
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

6205 HEYL ROYSTER VOELKER & ALLEN
BRAD ANTONACCI
33 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eric Peterson
Employee/Petitioner

v.

Toltech Plumbing
Employer/Respondent

Case # 17 WC 017839

21IWCC0095

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **September 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 16, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$94,572.40**; the average weekly wage was **$1,818.70**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent children.

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

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

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

Respondent is entitled to a credit of **$30,088.72** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,212.47 per week for 28-2/7 weeks, commencing 5/24/2017 to 12/8/2017, as provided in Section 8(b) of the Act, and as is set forth below.

Respondent shall pay reasonable and necessary medical services of $79,989.92, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner permanent partial disability benefits of $775.18 per week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 5/16/2017 through September 13, 2019 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

May 11, 2020
Date

MAY 21 2020

FINDINGS OF FACT

Petitioner was employed by Respondent as a plumber, installing water meters in Chicago. He is right handed. He is a journeyman plumber for Local 130. Respondent had a contract with the City of Chicago, so he would have to go to residential houses for the meter installation, installing about 8 meters a day. Petitioner would assess where the pipe is located at in the house, shut off the water to the house, take the pipe apart, re-pipe the plumbing, put fittings on the pipe for the meter to attach, attach the meter, re-attach the piping, then turn the water back on. This process would take anywhere between half-hour to an hour.

On May 16, 2017, Petitioner's last job for Respondent was at a house on the south side of Chicago on Bishop Avenue. Petitioner arrived at this house between 1pm and 1:30 pm. At around 2 or 2:30 pm on May 16, 2017, he was in the basement of the residential house finishing the installation of the water meter. Petitioner had just finished the installation, and had to pick up his 5 gallon bucket of tools and move it out of the way, so his partner could complete the electrical portion of the job. Petitioner picked up his bucket, brought it over to a chair in the middle of the basement and sat down in the chair. Petitioner testified that he carried all of his tools in the bucket (including a 24 inch pipe wrench, an 18 inch pipe wrench, a 14 inch pipe wrench, two sets of channel locks, three pipe cutters, his torch, flux, pipe dope, Teflon tape, and assorted screw drivers). Petitioner leaned over his chair to his left side, while holding his channel locks in his left hand. As Petitioner leaned over to his left side to put his tools in his bucket, the chair rocked backwards, so Petitioner moved forward to try to catch his balance. He immediately felt a sharp instant heat on his left shoulder, like a zipper on his left shoulder.

The chair was a office/desk type chair owned by the homeowner. Petitioner had to move the bucket of tools out of the way so his partner could get in to the spot to complete his work. The area where they were working was a cramped space. Petitioner backed out of the space, picked up his bucket of tools with his right hand and had his channel locks in his left hand. As Petitioner sat down in the chair, he placed his bucket to his left side of the chair, reaching across his body with his right arm, leaned over to his left side to put the channel locks into the bucket. As Petitioner leaned over to put the channel locks into the bucket, the chair rocked back, so he attempted to catch himself by grabbing the armrest of the chair with his left hand and felt the immediate pain in his left shoulder.

Petitioner testified that his field manager, Mark Munoz, was present at the time of the injury. Mark Munoz is employed by Professional Meters and was Petitioner's direct field supervisor. At the time of the accident, Munoz was standing directly in front of Petitioner and witnessed the accident occur. Munoz testified that he has worked for Professional Meters for about seven years. As a field supervisor, Mark Munoz spot checks the crews every day. Munoz testified that on May 16, 2017 he was working for Professional Meters as an assistant field manager. He arrived at the jobsite where Petitioner was working at approximately 1pm. He went to the basement and said hello to Petitioner. Then he watched Petitioner cut the pipe in two different places, put the meter in between the cuts, and re-connect the pipes. Munoz then went outside and turned the water back on for Petitioner at the buffalo box. Munoz came back inside and saw Petitioner putting his tools away. Petitioner put his tools away in his bucket and then as Petitioner was putting his channel locks in the bucket, Munoz saw Petitioner lean over, saw the chair rock back, and Petitioner said "Oh, man, I think I hurt myself." As the chair rocked back, Munoz saw Petitioner reach his left hand for the arm of the chair to brace himself and pull the chair back up. Munoz confirmed that at the time Petitioner hurt himself, Petitioner was holding channel locks.

After the accident occurred, Munoz told Petitioner to complete an accident report when they arrive back at the yard. The rest of the day, Petitioner did not perform physical work. is helper, Eddie Rosato, performed

most of the work. Munoz assisted Petitioner in putting his tools away in the truck, as Petitioner was not able to pick up the bucket.

After Munoz turned the water back on for Petitioner, there was a leak, so Petitioner attempted to fix the leak, but he was unable to do so due to the pain in his left arm. Petitioner had Rosato finish the job and returned to Respondent's shop. Once at the shop, Petitioner filled out an incident report with his supervisor, Jason Brown. Jason Brown testified via evidence deposition (RX 7) Brown testified that he has been employed for seven to nine years at Professional Meters. Brown said that on May 16, 2017, he was employed as a field manager for Professional Meters. As a filed manager for Professional Meters, Brown would oversee quality control, and generally oversee employees.

In May of 2017, Professional Meters was a general contractor, and Respondent was a subcontractor. (RX7, p 5) Brown testified that he was a familiar with Petitioner and that Petitioner was working for Respondent on May 16, 2017. On May 16, 2017, Petitioner returned to the shop around 3pm or 3:30 pm and spoke to Brown regarding an accident that occurred. Brown testified that Petitioner told Brown he may have injured himself. Petitioner told Brown that when he was finished with his portion of the work, he went to sit down in a chair and didn't realize it was a rocking chair of some sort. Brown said Petitioner was surprised that the chair rocked back and Petitioner leaned forward to catch himself, feeling something tear in his left arm. Petitioner told Brown that he was going to ice the arm overnight so Petitioner could continue to work the next day. Brown had Petitioner complete an incident report that day. The report was marked as Respondent's Exhibit 5 and Brown confirmed that was the report that was completed on May 16, 2017. Petitioner wrote "I went to sit in a chair didn't realize it was a rocking chair. I sat down and the chair rocked back and I tried to catch myself my body went forward and the chair went back and I felt a rip in my left shoulder." (RX5) Brown confirmed that was written by Petitioner in his presence. (RX 7)

Petitioner iced his shoulder that evening of May 16, 2017 and returned to work the following day. He was unable to work the full day of May 17, 2017 and saw his primary care physician, Dr. Jurak on May 17, 2017. (PX 3) Petitioner completed an intake form at Dr. Jurak's office and wrote that "...went to sit down in a desk chair and it rocked backed. I went to catch my balance. The chair rocked and my shoulder and body went back." (PX 3, p 1) Dr. Jurak's noted that Petitioner felt a ripping feeling in his left shoulder the prior day when he started falling backwards in a chair and pulled his left arm behind him causing a ripping feeling in his extremity. Petitioner was in pain in his left shoulder and he was unable to pronate his arm beyond 2 degrees and could not reach his left arm overhead or behind his back. Dr. Jurak referred Petitioner to Dr. Rezin for the left shoulder. (PX 3)

Petitioner was unable to get in to see Dr. Rezin and saw Dr. Thorsness at Hinsdale Orthopaedics instead. Petitioner's initial visit with Dr. Thornsess was on May 24, 2017. (PX 4) Dr. Thorsness took a history of an injury to the left shoulder that occurred on May 16, 2017 when Petitioner was going to sit in a chair at work and he started to fall back and caught himself. The patient felt an immediate tear in his left shoulder and a burning sensation and could not finish his work that day. Dr. Thorsness also noted a prior surgery to the left shoulder at a young age for which Petitioner underwent open anterior stabilization. Dr. Thorsness recommended an MRI of the left shoulder and to stay off work. (PX 4)

Petitioner underwent an MRI of the left shoulder on June 2, 2017. Dr. Thorsness reviewed the MRI with Petitioner on June 7, 2017, and told Petitioner he suffered an upper border subscapularis tear and medial perching of the biceps tendon, as well as a near full-thickness tear of the anterior leading edge of the supraspinatus with a complex tear pattern that extends from the posterior supraspinatus and into the infraspinatus with a musculotendinous tear which is near full-thickness as well. (PX 4) Dr. Thorsness

recommended surgery immediately, due to fear of a retraction of tendons if surgery was not performed right away. (PX 4)

On June 15, 2017, Dr. Thorsness performed surgery on Petitioner's left shoulder. The operative report shows that Dr. Thorsness performed a left shoulder arthroscopy with limited debridement of glenohumeral joint involving the anterior and superior labrum; subacromial decompression with acromioplasty; rotator cuff repair and open subpectoral biceps tenodesis. (PX 2)

Dr. Thorsness examined Petitioner for his first post-op visit on June 29, 2017. (PX4) Dr. Thorsness noted that Petitioner was to start physical therapy at ATI Physical Therapy, which he began on July 6, 2017. (PX 5) Petitioner attended approximately 55 visits of physical therapy beginning July 6, 2017 and ending on October 27, 2017. (PX 5) Dr. Thorsness recommended work hardening, which Petitioner began on November 11, 2017. (PX 5) Following a 5 week program, Petitioner returned to see Dr. Thorsness on December 8, 2017 for an examination. Dr. Thorsness reviewed the work conditioning notes and performed a physical examination on Petitioner. Petitioner reported improved range of motion and strength. Dr. Thorsness released Petitioner to full duty work and instructed Petitioner to see him in about six weeks. (PX 4) Petitioner returned for a final visit on April 18, 2018. Petitioner noted pain occasionally and some intermittent tightness, but was doing well overall. Dr. Thorsness instructed Petitioner to return to work as needed and continue working without restrictions. (PX 4)

Respondent presented the testimony of Virginia Reyes. Reyes testified that she was currently employed at the law firm of Reyes Kurson and, at one time, owned Toltech Plumbing. Reyes owned Toltech Plumbing on the date of the accident, May 16, 2017. Respondent was no longer in business. During 2017, Petitioner was employed by Respondent as a plumber, hired to install water meters in residential homes. Reyes reviewed Respondent's Exhibit 3, a job description for Respondent's employees, like Petitioner. Although Reyes testified Respondent had rules for its employees that included not touching the homeowners' property, Reyes admitted there was nothing in the job description (RX 3) nor was there anything else in writing to support her assertion. Reyes said that every plumber carries their tools in a bucket. Reyes testified that the act of a plumber putting tools back into their bucket would be part of their job.

Dr. Robert Thorsness, Petitioner's treating orthopedic surgeon, testified via evidence deposition. (PX 7) Dr. Thorsness said that on June 7, 2017, he reviewed the MRI of the Petitioner's left shoulder with Petitioner, and that it showed a near full thickness tear of the supraspinatus and a musculotendinous tear of the infraspinatus. Dr. Thorsness opined that the "...mechanism of injury, very classically can cause a rotator cuff tear." (PX 7, p 10) Dr. Thorsness explained, "Often with either – when you're going to grab something and fall back, there's kind of an eccentric load to the musculotendious portion of the rotator cuff. So your rotator cuff, normally you bring up your arm. So if your body is falling away and you're trying to brace yourself, a few things can happen. The rotator cuff can tear from the bone or the biceps tendon can tear or the biceps tendon can pull on the labrum and tear the labrum. So it's a very feasible and relatively common way to have a traumatic injury to the rotator cuff." (PX 7, p 11)

Dr. Thorsness was also asked if the prior surgery to Petitioner's left shoulder involved the same type of injury Petitioner sustained on May 16, 2017. Dr. Thorsness testified, "No. He had a prior history of anterior instability, and they performed an anterior stabilization or an anterior labral repair to stabilize the shoulder which is completely different diagnosis and a completely different surgical management for that." (PX 7, p 11). That procedure had nothing to do with the injury Petitioner sustained on May 16, 2017. The tear Petitioner suffered in May of 2017 was acute in nature and very recent in nature based upon the lack of atrophy on the sagittal views (of the MRI). (PX 7, p26) If Petitioner's tear was chronic and had been there for some time, the muscle mass around the tendon will atrophy and you can quantify a rough time of when the tear occurred. (PX

7, p 26). Dr. Thorsness also opined that his care and treatment of Petitioner was related and necessary as a result of the May 16, 2017 accident. (PX7, p 18).

Dr. Nikhil Verma, an orthopedic surgeon, testified via evidence deposition at the request of Petitioner. (PX 8) Dr. Verma was retained by Respondent as a Section 12 examiner and saw Petitioner on December 6, 2017, and performed a physical examination on Petitioner. The history was of a work injury on May 16, 2017, when Petitioner was in a rolling chair while working. As Petitioner sat down, the chair started to fall backwards; he tried to catch himself with side, grabbed the handle and felt a tearing sensation in his shoulder with an onset of shoulder pain. (PX 8, p 9) Petitioner told Dr. Verma about his prior left shoulder surgery 20 years prior, and Dr. Verma agreed with Dr. Thorsness that the May 16, 2017 injury to the left shoulder involved a different area than where the surgery took place some 20 years prior. (PX 8, p 11) Dr. Verma also agreed that the May 16, 2017 accident caused the injury to Petitioner's left shoulder and that the treatment provided by Dr. Thorsness was reasonable and necessary. (PX 8, p 11-12) Dr Verma testified that Petitioner was consistent with his description of the accident to him and in the recorded statement, marked as Respondent's Exhibit 2. (PX 8, p 16)

Petitioner did not have any problems with his left shoulder in the 10 years prior to the accident. He had no medical treatment for his left shoulder in the 10 years before the accident. He feels that his left shoulder is weaker. He can't pick up things over his shoulder. He has difficulty reaching above his shoulder.

The Arbitrator redacted Petitioner's SSN from several exhibits in order to comply with SCR 138.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)).

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS:

Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on May 16, 2017.

The injury occurred in the course of Petitioner's employment, as Petitioner was in a house, having changed out a water meter, while on the clock for Respondent.

The dispute is as to whether Petitioner's injury arose out of his employment. "The 'arising out of' component is primarily concerned with causal connection" and is satisfied if the claimant shows "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203 (2003) A plumber's act of putting a tool in his tool bucket after completing a job related task after moving the tool bucket out of the way of a coworker, is a risk incidental to his employment and, therefore, arises out of his employment. The fact that Petitioner was sitting on a chair that had nothing to do with his specific job task in that it was not part of the installation and he was not instructed to sit in it (albeit an unauthorized touching of a homeowner's chair) and the chair was not defective, does not persuade the Arbitrator that the accident/injury did not arise out of Petitioner's employment.

Petitioner's testimony is found to be credible and is corroborated by Munoz's testimony. The accident occurred as Petitioner described. He had just finished a meter installation. He moved his tools over so that his partner could do the electrical portion of the install. He carried the tool bucket over to a chair and sat down. He leaned over to his left, with a channel lock in his left hand, attempting to place the channel lock into the bucket, which was to his left. The chair rocked, causing Petitioner to move forward to catch his balance. He grabbed the armrest and felt heat and a tearing in his left shoulder. The Arbitrator finds this to be a compensable accident.

The Arbitrator notes that the McAllister v. Workers' Compensation Comm'n, 2019 IL APP (1st) 162747WC is under consideration by the Illinois Supreme Court. Perhaps the holding in McAllister will provide guidance on the arising out of issue on review.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS:

Timely notice, in accordance with Section 6 of the Act, was given to Respondent.

The Arbitrator bases this finding on the testimony of Petitioner, Munoz, Reyes and Respondent's Exhibits 2, 3 and 5.

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

Petitioner's current condition of ill-being regarding his left shoulder is causally related to the injury.

This finding is based upon Petitioner's testimony, the medical records and the persuasive opinions of Dr. Thorsness and Dr. Verma.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS:

The Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary to cure or relieve the effects of the injuries.

Petitioner's claimed medical bills are set forth on Petitioner's Exhibit 1. The Parties agreed that Respondent was entitled to a Section 8(j) credit for medical bills paid by Local 130 in the amount of $20,308.72. (PX 6, Arb.X 1)

Based upon the Arbitrator's findings above on the issues of Accident and Causal Connection, the following bills are awarded, as set forth in PX 1:

Presence St. Joseph Medical Center:	**$44,317.05**
Hinsdale Orthopaedic Assoc.:	**22,627.75**
ATI:	**13,045.12**
TOTAL:	**$79,989.82**

The award of medical expenses is pursuant to Sections 8(a) and 8.2 of the Act and subject to the Section 8(j) credit as to the awarded bills. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving the Section 8(j) credit, as provided in Section 8(j) of the Act.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS:

Petitioner is entitled to TTD benefits from May 24, 2017 to December 8, 2017, a period of 28-2/7 weeks.

This finding is based upon the Arbitrator's findings above regarding Accident and Causal Connection and the records of Dr. Thorsness.

Respondent is entitled to a Section 8(j) credit of $9,780.00 per PX 6. Respondent shall hold Petitioner harmless for this credit, as is required by Section 8(j).

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.
With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. This factor is given no weight in determining PPD.

With regard to subsection (ii) of §8.1b(b), the Arbitrator notes that Petitioner was employed as a plumber and he was able to return to that occupation after the surgery to repair his injured shoulder. This factor is given substantial weight in determining PPD.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old on the date of accident and was 43 years old at the time of trial. He has several years of work life ahead of him and this factor is given moderate weight in determining PPD.

With regard to subsection (iv) of §8.1b(b), the Arbitrator notes that Petitioner was able to return to his usual occupation after surgery and no evidence was submitted regarding any future wage loss. This factor is given appropriate weight in determining PPD.

With regard to subsection (v) of §8.1b(b), the Arbitrator notes Petitioner was released to full duty work by Dr. Thorsness and was PRN as of April of 2018. He complains of some weakness of his left shoulder and difficulty with lifting above the shoulder level. These complaints are consistent with Dr. Thorsness' records and are given much weight in determining PPD.

Based on due consideration of the above factors, and the Record taken as a whole, the Arbitrator finds that as a result of the injuries sustained, Petitioner suffered permanent partial disability to the extent of 12.5% loss of use of the person as a whole, pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesus Nunez,

Petitioner,

21IWCC0096

vs. NO. 17WC 28222

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2020 is hereby affirmed and adopted.

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

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

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

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

MAR 4 - 2021

DATED:
SJM/sj
o-2/3/2021
44

Stephen J. Mathis

Thomas Tyrrell

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its order compelling Respondent to authorize medical treatment. As to this aspect, I dissent.

This issue was previously addressed by the Court in *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19.

In the recent matter of *O'Neil v. The Illinois Workers' Compensation Commission*, 2020 IL App (2d) 190427WC, the Court reaffirmed and extended its holding in *Hollywood Casino* to both penalties pursuant to Section 19(l) and attorneys' fees pursuant to Section 16 of the Act. The Court stated "Similar to *Hollywood Casino*, while Section 19(l) addresses a failure, neglect, refusal, or unreasonable delay in *payment of benefits*, the plain language of the statute contains no language authorizing an arbitrator or the Commission to assess penalties for an employer's failure, neglect, refusal, or unreasonable delay in *authorizing medical treatment*. (Emphasis in the original)." *Id.* at ¶ 22.

Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holdings in *Hollywood Casino* and *O'Neil*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

For the above stated reasons, I, respectfully, dissent.

L. Elizabeth Coppoletti

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

NUNEZ, JESUS
Employee/Petitioner

Case# **17WC028222**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

21IWCC0096

On 3/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
BRENT D KELLER
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
DANIELA ROEHM
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

21IWCC0096

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)/8(A)

Jesus Nunez
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **17** WC **28222**

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

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Does the settlement contract in case nos. 13 WC 2331 and 13 WC 8734 preclude recovery in the current claim?**

FINDINGS

On the date of accident, **June 28, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

The parties stipulated that the average weekly wage was $**1,813.36**.

On the date of accident, Petitioner was **62** years of age, *married* with **0** dependent children.

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

Respondent disputed Petitioner's claim that he was disabled from June 29, 2017 through August 16, 2017. The parties stipulated that Respondent paid temporary total disability benefits during this period. Arb Exh 1.

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

ORDER

For the reasons set forth in the attached decision, the Arbitrator finds in Petitioner's favor on the issues of accident and causation and further finds that the previous settlement (PX 7) does not bar recovery in the instant claim.

Petitioner was temporarily totally disabled from June 29, 2017 through August 16, 2017, a period of 7 weeks. Based on the stipulated average weekly wage, Petitioner's TTD rate is $1,208.90 per week. Respondent is entitled to credit for the $8,635.07 in benefits it paid, pursuant to the parties' stipulation. Arb Exh 1.

Respondent shall pay reasonable and necessary medical expenses of $442.81 (Illinois Bone & Joint Institute, PX 3, p. 63), pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for prospective care in the form of a return visit to Dr. Garelick. If, at that return visit, the doctor again recommends the resection surgery he previously recommended, in August 2018, Respondent shall authorize and pay for that surgery.

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

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

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

21IWCC0096

Molly C Mason

Signature of Arbitrator

3/4/20
Date

ICArbDec19(b)

MAR 4 - 2020

Jesus Nunez v. Chicago Transit Authority
17 WC 28222

21IWCC0096

Summary of Disputed Issues

Petitioner, a carpenter/bus repairman, claims a left collarbone injury occurring on June 28, 2017. Petitioner acknowledged having problems with his left collarbone prior to this injury. In previous filings, numbered 13 WC 2331 and 13 WC 8734, he claimed head, left shoulder and left sternoclavicular conditions stemming from a work accident of October 10, 2012. Respondent disputed this accident. Petitioner underwent treatment with Dr. Maday, Dr. Kuk and, ultimately, Dr. Sclamberg, who released him to full duty in January 2014, following a valid functional capacity evaluation and a course of work conditioning. PX 4. Petitioner testified he was still symptomatic when Dr. Sclamberg released him from care in February 2014. At that point, Dr. Sclamberg described Petitioner as "overall doing fairly well." PX 5, p. 12. Petitioner also testified he did not return to Dr. Sclamberg after being released and performed full duty for Respondent, "with help," from February 2014 to the claimed accident of June 28, 2017. After this accident, Respondent sent him to Concentra, where he treated with Dr. Taiwo. Dr. Taiwo then referred him to Dr. Garelick, an orthopedic surgeon.

Petitioner filed his Application in the instant case on September 26, 2017. The Application alleges an accident of June 28, 2017 and injuries to the left shoulder, chest and collarbone. On September 28, 2017, Arbitrator Huebsch approved settlement contracts (PX 7) in the previous claims in the amount of $10,000, with the parties agreeing that Respondent was paying this amount on a disputed basis "in full and final settlement of any and all claims . . . for all accidental injuries allegedly incurred on October 10, 2012, and including any and all results, developments or sequelae, fatal or non-fatal, allegedly resulting from such accidental injuries." Respondent specifically denied liability for any medical bills relating to the accident of October 10, 2012. PX 7.

The disputed issues include accident, causal connection, medical expenses, temporary total disability and prospective care, with Petitioner seeking a clavicle resection recommended by Dr. Garelick. Respondent also argues that the prior settlement bars the instant claim.

Arbitrator's Findings of Fact

Petitioner testified in English. His native language is Spanish. He was born on May 13, 1955.

Petitioner acknowledged having problems with his collarbone before his claimed accident of June 28, 2017. He injured his collarbone at work in the past. He saw Dr. Sclamberg for this injury. Following a valid functional capacity evaluation and a course of work conditioning, Dr. Sclamberg released him to full duty in January 2014. He performed full duty for Respondent thereafter until his accident of June 28, 2017.

Records in PX 5 include an Employee's Report of Injury on Duty that Petitioner apparently signed on January 9, 2013. This document reflects a hire date of November 30, 1987. It also reflects that, on October 10, 2012, Petitioner was using a lifting device to move a bus turntable when the turntable fell, striking his head and left shoulder. The document further reflects that Petitioner saw Dr. Maday of Midland Orthopedics the previous day, January 8, 2013. PX 5, p. 53. Dr. Maday's records are not in evidence. A separate handwritten history in PX 5 reflects that Petitioner had earlier seen a chiropractor, beginning on October 15, 2012.

At Dr. Maday's recommendation, Petitioner underwent MRIs of the sternoclavicular joints and left shoulder on February 8, 2013. The sternoclavicular joint MRI showed "mild degenerative changes of both sternoclavicular joints, more on left side," a 1.0 centimeter geode in the medial end of the left clavicle and bone marrow edema involving the proximal end of the clavicular and sternal articular surface of the left sternoclavicular joint. The left shoulder MRI showed a low lying Type III acromion, mild to moderate degenerative changes of the acromioclavicular joint with spur formation and small geodes within the humeral head. PX 5.

Records in RX 3 reflect that, on April 19, 2013, Petitioner began a course of treatment with Dr. Kuk, a chiropractor, at Rehab Dynamix. In her note of that date, Dr. Kuk indicated that, on October 10, 2012, Petitioner was using a crane to grab parts of flooring, while breaking up a floor, when the chain got stuck and the parts came off, striking Petitioner on the head and left shoulder. The doctor also noted that Petitioner reported this accident to his supervisor, rested for an hour and then resumed working. She indicated that, five days later, Petitioner had exacerbated pain to his left shoulder and saw a chiropractor for X-rays and therapy. She noted that Petitioner "did not feel better" after seeing the chiropractor "so went to see his PCP, who referred him to an ortho." She indicated that, following an MRI that demonstrated a separated clavicle, the orthopedic surgeon prescribed therapy.

On initial examination, Dr. Kuk noted left shoulder pain with range of motion and pain and tenderness in the left sternoclavicular joint. RX 3.

On April 22, 2013, Dr. Kuk reviewed the MRI report and recommended that Petitioner continue care and see an orthopedist. RX 3.

Records in PX 5 reflect that Petitioner began a course of treatment with Dr.Sclamberg, an orthopedic surgeon, on May 3, 2013. In his note of that date, the doctor recorded a history of the work accident. He also noted that Petitioner had undergone MRI imaging and physical therapy. On initial examination, Dr. Sclamberg noted a "prominence of the left sternoclavicular joint," no tenderness over the clavicle or AC joint, mild tenderness over the sternoclavicular joint, near full active and passive range of motion of the left shoulder, 4/5 strength and positive impingement signs. The doctor interpreted the left shoulder MRI as showing "some supraspinatus tendinosis." His impression was "probable left sternoclavicular anterior subluxation or dislocation." He recommended a CT scan of the sternoclavicular joint. He started Petitioner on Meloxicam and directed him to begin therapy and continue performing light duty. PX 5, pp. 26-28. RX 4.

On May 30, 2013, Petitioner returned to Dr. Kuk. The doctor noted improvement secondary to therapy but also noted a complaint of 8/10 left shoulder pain and a reduced range of left shoulder motion. She released Petitioner from care "until he is approved for surgery." She indicated that work status would be "per specialist recommendations." RX 4.

Petitioner returned to Dr. Sclamberg on June 7, 2013, having undergone the recommended CT scan in the interim. The doctor interpreted the scan as showing "left sternoclavicular osteoarthritis with inflammation." His impression was "inflamed left sternoclavicular joint from a work-related injury with underlying arthritis." He administered an injection and directed Petitioner to return in four weeks. PX 5, pp. 24-25.

At the next visit, on July 19, 2013, Dr. Sclamberg noted that Petitioner was still performing light duty and had not yet started therapy. He also noted that Petitioner's left sternoclavicular joint was "feeling a bit better." He recommended physical therapy and told Petitioner to continue light duty. PX 5, pp. 22-23.

On August 23, 2013, Petitioner returned to Dr. Sclamberg and reported that he was attending therapy and "still having a little bit of pain in his left SC joint." On re-examination, the doctor noted that the left sternoclavicular joint was still prominent but less tender. He imposed a 20-pound restriction and directed Petitioner to return in four weeks. PX 5, pp. 20-21.

At the next visit, on September 6, 2013, Dr. Sclamberg noted that Petitioner was "still having pain over his left sternoclavicular joint." On re-examination, he noted tenderness and a diminished range of motion. He recommended a functional capacity evaluation and continued the 20-pound restriction. PX 5, pp. 18-19.

Petitioner underwent the recommended functional capacity evaluation at Elite Physical Therapy on September 27, 2013. The evaluator, David O'Connell, PT, described Petitioner as right-handed. He noted that, while Petitioner was working on October 10, 2012, a heavy metal beam fell, striking his head and left shoulder. He also noted that Petitioner initially saw a chiropractor following this accident and then began seeing Dr. Sclamberg, who prescribed therapy. He indicated that "a sternoclavicular sprain was diagnosed" and that Petitioner had completed therapy two months earlier. He described Petitioner's primary complaint as that of "persistent L shoulder and sternum pain with heavy lifting, overhead reaching or side lying."

On examination, O'Connell noted moderate swelling over the left sternoclavicular joint and mild swelling over the left acromioclavicular joint. He also noted strength of 4+/5 in all planes, with mild pain limitations, and negative Neer's and Hawkins testing.

O'Connell rated the evaluation as valid, noting that Petitioner put forth "full and consistent effort." He indicated that Petitioner demonstrated the capacity to function at a light physical demand level, "indicative of a 2-hand occasional lift of 25 pounds from floor to

shoulder level." He recommended a course of work conditioning, noting that Petitioner's job description reflected he was required to lift up to 60 pounds occasionally. PX 4, pp. 5-10.

On October 4, 2013, Dr. Sclamberg noted that the evaluation was valid and that it showed Petitioner was able to work at a light physical demand level. He agreed with the evaluator's recommendation of work conditioning. PX 5, pp. 16-17.

On January 17, 2014, Petitioner returned to Dr. Sclamberg. The doctor noted that Petitioner was "doing fairly well" and "would like to attempt to return to full duty." On re-examination, he noted persistent tenderness with prominence of the left sternoclavicular joint, a near full range of motion and 5/5 strength. His impression was "left sternoclavicular anterior dislocation with residual deformity." He released Petitioner to full duty as of January 20, 2014. PX 5, pp. 14-15.

On February 28, 2014, Petitioner went back to Dr. Sclamberg. The doctor noted that Petitioner had resumed full duty and was "overall doing fairly well." His examination findings were unchanged. He released Petitioner from care on a PRN basis. He noted that Petitioner's left sternoclavicular joint deformity was of a "permanent nature." PX 5, pp. 12-13, RX 5.

Under cross-examination, Petitioner denied returning to either Dr. Kuk or Dr. Sclamberg after being released by Dr. Sclamberg.

On redirect, Petitioner testified that, after Dr. Sclamberg released him to full duty in 2014, he performed full duty for Respondent, "with help," until the accident of June 28, 2017. He did not explain what the "help" entailed.

Petitioner testified he felt "okay" before he went to work on June 28, 2017. On that date, his foreman instructed him to open the back seat of a bus so that the engine could be worked on. The seat was jammed. As he tried to move it, he felt severe pain in his left collarbone. He reported his injury to his foreman. At Respondent's direction, he went to Concentra the same day.

Records in PX 2 reflect that Petitioner saw Dr. Taiwo at Occupational Health Centers of Illinois on June 28, 2017. The doctor noted a complaint of left shoulder pain. He recorded the following history:

> "Lift a resistant heavy sit [sic] up felt pain to the left clavicle area today at 9:45 a.m. He notes discomfort with raising left arm up. The pain is moderate. He denies any history of dislocation to sternoclavicular joint."

Dr. Taiwo also noted that Petitioner had worked as a carpenter for thirty years. On left shoulder examination, he noted tenderness in the proximal clavicle. Palpation of the left sternoclavicular joint revealed no crepitus or warmth. Abduction was 70 degrees with pain.

Dr. Taiwo obtained left clavicle X-rays. No acute findings were noted on preliminary reading.

Dr. Taiwo diagnosed a sternoclavicular strain. He prescribed physical therapy and Ibuprofen. He released Petitioner to light duty with no reaching above shoulder level with the left arm and no use of the left upper extremity. PX 2, pp. 1-4.

The itemized bill for treatment rendered on June 28, 2017 includes charges for "post accident" breath alcohol testing. PX 1, p. 8.

Petitioner began a course of physical therapy at Occupational Health Centers of Illinois on June 29, 2017. The evaluating therapist, Andrew Mack, PT, DPT, noted that while Petitioner was lifting a heavy item at work, he "felt a pop in the (L) sternoclavicular region followed by pain." He noted a pain rating of 7/10. He also noted that Petitioner reported "no functional restrictions" prior to the accident. On examination, he noted that the medial end of the left clavicle was "elevated and anterior" compared to the right side. He described superior and inferior glide as hypomobile and painful. PX 2, pp. 5-9.

On June 30, 2017, Dr. Taiwo noted ongoing symptoms. He continued the work restrictions. PX 2, pp. 10-12.

Petitioner continued attending therapy thereafter. On July 5 and 7, 2017, the therapist noted that Petitioner denied pain at rest but complained of 6/10 pain with reaching above shoulder level. PX 2, pp. 16-21.

On July 7, 2017, Dr. Taiwo noted "functional improvement." He recommended an orthopedic consultation and continued the work restrictions. PX 2, pp. 22-24.

On July 11, 2017, Petitioner's therapist noted "7/10 pain with reaching above shoulder level, along with crunching/grinding at the (L) SC jt now." On re-examination, he noted severe tenderness of the sternoclavicular joint. PX 2, pp. 25-27.

Petitioner saw Dr. Garelick, an orthopedic surgeon, at US MedGroup of Illinois on July 12, 2017. The doctor noted that Petitioner felt something pop in his left shoulder while lifting the back seat of a CTA bus. He also noted that Petitioner "has never had a similar injury to this" but "has had a left shoulder injury in the past." He noted complaints of pain, some deformity at the sternoclavicular joint of the left chest wall and a clicking sensation when raising the shoulder." He indicated that Petitioner "does not have any left shoulder pain per se."

On initial examination, Dr. Garelick noted "some slight prominence of the sternoclavicular joint on the left side" along with some tenderness in the same area, an active range of left shoulder motion of 120, 30, T8, 5/5 rotator cuff strength and some apprehension with Neer and Hawkins testing.

Dr. Garelick assessed Petitioner as having an "anterior subluxation of the sternoclavicular joint, left." He indicated he reassured Petitioner that "this problem will dissipate with time." He prescribed a CT scan and anti-inflammatory medication. PX 2, pp. 28-29.

Petitioner continued attending therapy until July 14, 2017, at which point his therapist indicated that therapy was on hold pending MRI results and further orders. PX 2, p. 32.

Petitioner underwent the recommended CT scan on July 19, 2017. The radiologist interpreted the study as showing "no evidence of left clavicle fracture." He also noted "sternoclavicular and acromioclavicular joint arthropathy." PX 1, p. 39.

Petitioner returned to Dr. Garelick on July 26, 2017. Dr. Garelick interpreted the scan as showing no fracture but a "moderate amount of degenerative arthritis" in the left sternoclavicular joint. He indicated he explained to Petitioner that he was "not sure there is a whole lot that can be done for this." He indicated that a medial clavicle resection would be a "last resort." He prescribed Ibuprofen and Voltaren gel. He recommended that Petitioner return in three weeks. PX 2, p. 34.

At the next visit, on August 16, 2017, Dr. Garelick noted that Petitioner felt "a little bit better" but was still having difficulty sleeping on his left side. On left shoulder re-examination, he noted an active range of motion of 150, 30 and T8 and normal rotator cuff strength. He also noted "a slight prominence of the sternoclavicular joint on the left side, with some slight pain to palpation." He assessed Petitioner as having "sternoclavicular DJD." He recommended that Petitioner continue icing the affected area and applying the Voltaren gel. He released Petitioner to return to work and directed him to return in two weeks. He indicated that, if Petitioner was "still struggling with his job" at that point, he would consider injecting the joint. PX 2, p. 35.

Petitioner returned to Dr. Garelick on September 19, 2017. Petitioner reported that he was performing regular duty but still having pain with lifting. On re-examination, the doctor again noted slight hypertrophy of the sternoclavicular joint on the left side, with some associated tenderness, and some pain with cross-body adduction. He addressed treatment needs as follows:

> "I talked to [Petitioner] about surgical intervention which I was not a proponent of at this time based on the risks associated with a vascular injury. I explained to him that I think this would be a last resort. It sounds as if he had this problem a few years ago and he was able to get down to his baseline with rest, time and anti-inflammatories. Therefore, I have recommended ice and anti-inflammatories and the topical Voltaren gel. He will come back and see me in two months. If he is still having a lot

> of pain and he would consider surgery, then my suggestion would be to do this at Illinois Masonic Medical Center with Dr. Todd Guinn as the vascular surgeon."

PX 2, p. 36.

On September 26, 2017, Petitioner filed an Application in the instant claim, alleging injuries to his left shoulder, chest and collarbone occurring on June 28, 2017.

On September 28, 2017, Arbitrator Huebsch approved contracts in the previously filed claims. The following description of the "nature of the injury" appears on the front side of the contract: "head contusion, inflamed left sternoclavicular osteoarthritis (disputed)." [See the summary at the beginning of the decision for a discussion of the terms of the settlement.]

Petitioner returned to Dr. Garelick on November 21, 2017. The doctor noted that Petitioner was still performing regular duty. On re-examination, he noted palpable crepitus in the sternoclavicular joint on the left side. He assessed Petitioner as having "ongoing sternoclavicular instability." He indicated that, "at this time, a proximal clavicle resection is reasonable." He tentatively scheduled this surgery for December 17, 2017, indicating he would need to coordinate with the vascular surgeon. PX 2, p. 37.

On December 19, 2017, Petitioner returned to Dr. Garelick and reported that he was "about the same." The doctor noted that, "unfortunately, his case has not been approved." He also noted that Petitioner would be attending an IME in January, after he returned from Mexico. His examination findings were unchanged. He allowed Petitioner to continue regular duty and instructed him to return in five weeks. PX 2, p. 38. [There is no evidence indicating Petitioner returned to Dr. Garelick in January 2018.]

At Respondent's request, Dr. Wolin conducted a Section 12 examination of Petitioner on May 15, 2018. In his report of that date, the doctor recorded a history of the June 28, 2017 lifting-related accident and subsequent treatment. He noted that Dr. Garelick was recommending a proximal clavicle resection.

Dr. Wolin also recorded the following history of Petitioner's previous accident:

> "Of note is the fact that he incurred an injury to the same area in 2014 or 2015, while at work. He states he was attempting to participate in lifting of a machine weighing 300 pounds. It was hoisted with another machine. He relates that unfortunately a portion of the machine fell down onto his head and left shoulder region. He noted left sternoclavicular pain. He told his supervisor and was seen by a physician. He attended physical therapy and underwent a steroid injection which helped. He relates that the case was settled."

Dr. Wolin noted that Petitioner was currently complaining of pain about the region of the left sternoclavicular joint with attempted shoulder motion at and above chest level.

Dr. Wolin indicated he reviewed records from Drs. Taiwo and Garelick along with the July 2017 CT scan and physical therapy notes.

On examination, Dr. Wolin noted maxim tenderness about the left anterior sternoclavicular joint, no acromioclavicular or glenohumeral tenderness, an active arc of elevation of 160 degrees on the right and 130 degrees on the left, 90 degrees of external rotation on the right and 55 degrees on the left and pain with crossover and apprehension maneuvers.

Dr. Wolin interpreted the CT scan as showing prominence of the proximal clavicle relative to the sternum and loss of articular cartilage on both side of the sternoclavicular joint with subchondral cyst formation. He indicated that a "serendipity view" obtained that day showed "anterior migration of the left proximal clavicle relative to the sternum."

Dr. Wolin diagnosed "internal derangement of left sternoclavicular joint with osteoarthritis of sternoclavicular joint."

Dr. Wolin addressed causation as follows:

> "Previous injury of 2015 appears to represent the initial onset of this condition. However, the review of records performed by me does not reveal any 2015 records. In the absence of records, it is difficult to say with certainty. However, assuming it was in fact an injury to this timeframe in 2015, the 2017 injury represents an aggravation of a pre-existing condition."

Dr. Wolin described the treatment to date as reasonable and necessary. He recommended that Petitioner undergo a diagnostic injection of lidocaine into the sternoclavicular joint "to be sure that this is the only pathology about the left shoulder that needs to be addressed." He noted that "surgery might not be needed" if the injection provided relief.

Dr. Wolin found Petitioner capable of light duty with no lifting over 10 pounds and no repetitive or over chest use of the left arm. RX 1.

Dr. Wolin issued an addendum on August 2, 2018, after reviewing a report or document concerning the October 10, 2012 accident, Dr. Sclamberg's records and the functional capacity evaluation. He indicated that the accident-related document he reviewed showed that, according to a supervisor, Petitioner "did not want to go to the clinic on October 10, 2012 but wanted to go on January 9, 2013."

Dr. Wolin indicated that, while his review of the additional information did not prompt him to question the diagnosis or challenge Dr. Garelick's treatment, the fact that Petitioner "waited nearly three months before reporting an injury" and the lack of contemporaneous documentation of a work injury to the sternoclavicular joint prompted him to conclude that Petitioner was not credible. He went on to state: "therefore, I no longer believe that the current injury represents an aggravation of a prior injury. I also no longer believe that the current injury (namely that of sternoclavicular osteoarthritis) is related to a work injury."

Dr. Wolin added that he concurred with Dr. Garelick's surgical recommendation, "assuming the documentation of the history and physical examination by Dr. Garelick is indeed correct." He reiterated his belief that Petitioner's condition was not related to a "2012, 2013 or 2017 work injury." RX 2.

Petitioner returned to Dr. Garelick on August 13, 2018. The doctor (who was apparently aware of Dr. Wolin's addendum) noted that "Dr. Wolin, the IME doctor, suggested that we inject [Petitioner's] SC joint."

Dr. Garelick described his examination findings as unchanged. He injected Petitioner's sternoclavicular joint. He indicated he asked Petitioner to move his shoulder around after the injection "and it did not seem like he had a whole lot of relief." He released Petitioner to work and directed him to return in two weeks. PX 3, p. 30.

Petitioner testified that he did not feel different following the injection.

PX 3 includes a letter dated August 28, 2018, from a Respondent adjuster, Claudia Salgado, to an employee of Dr. Garelick's office authorizing an injection by Dr. Garelick and indicating that "any additional treatment will require authorization." PX 3, p. 13.

Petitioner returned to Dr. Garelick on August 29, 2018 and reported two days of relief following the August 13th injection. He complained of grinding and pain in the sternoclavicular joint on the left. On re-examination, Dr. Garelick noted a full range of left shoulder motion, some crepitance at the sternoclavicular joint and some tenderness to palpation in the sternoclavicular joint. The doctor again recommended a resection of the medial centimeter of the clavicle." PX 3, p. 8.

On August 31, 2018, Claudia Salgado, Respondent's claims examiner [hereafter "Salgado"], sent a note to Nicole Huffman of Illinois Bone & Joint indicating that, "per legal counsel," Respondent was not authorizing any further care for Petitioner. PX 3, p. 3.

PX 6 is a letter dated May 3, 2019 from Salgado advising Petitioner and his attorney that temporary total disability benefits "will stop as of 8/16/17 and all medical benefits going forward."

Petitioner testified he did not recall how much time he lost from work after the June 28, 2017 accident. When he resumed working, he was given a helper. Respondent assigned a carpenter to help him perform heavy lifting. He stopped working on June 6, 2019. He opted not to go through his group insurance carrier to try to have the recommended surgery because he would not be able to afford the co-payments. After his last visit to Dr. Garelick, he saw his primary care physician and obtained pain medication from him. He still has pain when he lifts his left arm.

Under cross-examination, Petitioner testified he believes he began undergoing treatment the day after his previous accident of October 10, 2012. If the records show he did not actually start treatment until January of 2013, he would not dispute them. On October 10, 2012, he was working alone, using a hoist fashioned by Respondent to move a 300-pound platform. He removed bolts. He was hit in the head by a beam weighing 400 to 500 pounds. The beam then slid to his left shoulder. He was dizzy after being struck. He got to his feet and reported the accident to his supervisor. He was diagnosed with a left clavicle problem after this accident. He does not recall anyone recommending he undergo surgery for this problem. Respondent's counsel then asked him about Dr. Kuk's note of May 30, 2013, which reflects that surgery was pending. He did not undergo surgery in connection with his October 10, 2012 accident. When Dr. Sclamberg discharged him in February 2014, he was "still in pain." He lacked range of motion and had a deformity. He has not seen Dr. Kuk or Dr. Sclamberg since February 2014. He saw his primary care physician, Dr. Becerra, twice, and obtained medication. He did not choose Dr. Garelick. Respondent sent him to Concentra and Concentra sent him to Dr. Garelick. He was given a ride from the shop to Concentra. At Concentra, he described trying to move a seat that was jammed. He does not recall mentioning his prior accident. He denied prior dislocation. His collarbone is "collapsed" on the left side. He was concerned about this collapse in July 2017. He mentioned it to the doctors. When he saw Dr. Wolin, he believed the doctor had records concerning his prior accident. Dr. Wolin might have misunderstood the chronology. The prior accident occurred in 2012, not 2015. Dr. Garelick has not taken him off work since August 2017. He last saw Dr. Garelick on August 29, 2018. Dr. Garelick told him he was awaiting approval of the surgery. He (Petitioner) waited for Concentra to call concerning the approval but no one called. He has no upcoming appointments with Dr. Garelick. He has not undergone the recommended surgery.

On redirect, Petitioner testified he was off work from June 29, 2017 until August 16, 2017. If Dr. Sclamberg said in 2013 that he had an inflamed joint with arthritis, the doctor was correct. Dr. Sclamberg released him to full duty in 2014. He performed full duty, "with help," from 2014 up to the accident of June 28, 2017. Dr. Garelick again recommended surgery at the last visit, on August 29, 2018.

No one testified on behalf of Respondent.

Arbitrator's Credibility Assessment

A document in PX 5 reflects that Petitioner began working for Respondent in 1987. Petitioner's lengthy tenure weighs in his favor, credibility-wise.

Petitioner's testimony concerning both work accidents was detailed and credible.

Petitioner disclosed his previous work accident to both Dr. Garelick and Dr. Wolin. Dr. Wolin's initial report sets forth a detailed account of this accident. The time frame is "off," with Dr. Wolin indicating this accident occurred in 2014 or 2015, but he expressed awareness that the accident involved the same body parts as the June 28, 2017 accident. He went on to find that Petitioner's current complaints "appear to be related to an aggravation of the 2015 [sic] injury by the June 2017 injury." In his addendum, however, he "flip flopped" and concluded that the June 2017 injury did not represent an aggravation based on Petitioner's apparently delayed reporting of the previous October 10, 2012 accident. In other words, he concluded, based on a review of a report concerning that accident, that no aggravation occurred because Petitioner lacked credibility as to the original event. [He noted, however, that the document he reviewed described Petitioner's supervisor as stating that Petitioner "did not want to go to the clinic on October 10, 2012 but wanted to go on January 9, 2013." RX 2.] He drew a legal rather than a medical conclusion and thus invaded the province of the Arbitrator. The Arbitrator, having considered Petitioner's demeanor and testimony, along with the exhibits, is unable to draw the same conclusion. Petitioner credibly testified he notified his supervisor of the October 12, 2012 accident the day the accident occurred. A handwritten history in Dr. Sclamberg's records (PX 5) reflects that Petitioner reported the accident to foreman "Scott," managed to finish his shift, began seeing a chiropractor on October 15, 2012 and later saw an "ortho" (presumably Dr. Maday). PX 5, p. 42. If Petitioner declined treatment on October 10, 2012 and no First Report of Injury was completed until January 9, 2013, as it appears, that does not mean that Petitioner is inherently incredible or that the accident of October 10, 2012 did not occur.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on June 27, 2018 arising out and in the course of his employment?

The Arbitrator finds in Petitioner's favor on the issue of accident. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony and the accounts of the accident set forth in the treatment records. Petitioner testified he was attempting to open a "jammed" back seat in a bus, at his foreman's direction, when he felt severe pain in his left collarbone. Petitioner also testified he promptly reported the accident to his foreman and was sent to Concentra [Occupational Health Centers of Illinois] the same day. Dr. Taiwo noted an injury date of June 28, 2017 and indicated that Petitioner felt pain in his left clavicle area at 9:45 AM while trying to lift a "resistant heavy sit [sic] up." The Arbitrator concludes that the reference to "sit" rather than "seat" is a dictation error. When Dr. Garelick first saw Petitioner, on July 12, 2017, he noted that Petitioner felt something pop in his left shoulder while lifting the back seat of a CTA bus. PX 1, p. 37. Dr. Wolin, Respondent's Section 12 examiner, also described

Petitioner as being injured while "lifting up a long back seat of a bus to do work underneath." RX 1.

Respondent did not call Petitioner's foreman or any other witness to refute Petitioner's account of the accident. Petitioner's testimony establishes that he was at Respondent's shop, attempting to perform a work-related task at the direction of his foreman, when he was injured. The accident arose out of and in the course of Petitioner's employment.

Did Petitioner establish causal connection?

The Arbitrator finds that Petitioner met his burden of proof on the issue of causation. In so finding, the Arbitrator relies on the following: 1) the fact that Dr. Sclamberg's records from 2013 and 2014 (PX 5) do not set forth any surgical recommendation; 2) the fact that Dr. Sclamberg released Petitioner to full duty in early 2014; 3) the fact that Dr. Sclamberg described Petitioner as "overall doing fairly well" when he discharged Petitioner from care on February 28, 2014; 4) the fact that Petitioner worked for Respondent between February 2014 and the June 28, 2017 accident; 5) the fact that Petitioner did not return to Dr. Sclamberg or Dr. Kuk during the interval between February 28, 2014 and June 28, 2017; 6) Petitioner's credible testimony concerning the mechanism of the June 28, 2017 injury and the abrupt onset of pain; 7) the fact that the June 28, 2017 injury brought about a change in Petitioner's ability to work; and 8) Dr. Garelick's statement that, following the previous (i.e., 2012) injury, Petitioner was "able to get down to his baseline with rest, time and anti-inflammatories" (PX 1, p. 34).

The Arbitrator acknowledges that Dr. Kuk referred to "pending surgery" when she released Petitioner from care in May 2013. RX 5. However, Dr. Kuk is a chiropractor, not a surgeon. Contemporaneous records from Dr. Sclamberg, an orthopedic surgeon, contain no mention of surgery. When Dr. Sclamberg saw Petitioner in May and June 2013, he recommended conservative care, in the form of therapy and an injection, not surgery. PX 5. Petitioner did not recall being told he needed surgery in 2013.

The Arbitrator also acknowledges that, as of February 28, 2014, when Dr. Sclamberg released Petitioner from care, Petitioner was not completely asymptomatic and had a sternoclavicular joint deformity of a "permanent nature." PX 5, p. 12. Petitioner testified he experienced ongoing symptoms and got "help" at work after he resumed working in February 2014. The fact that Petitioner was at "baseline" and not in a state of perfect health at the time of the June 28, 2017 accident does not bar recovery. In Illinois, it has long been held that a claimant with a pre-existing condition may recover where his employment aggravates or accelerates that condition. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003). The Appellate Court has also clarified that the chain-of-events principle does not apply solely to claimants who are in a "condition of absolute good health." Schroeder v. IWCC, 2017 Ill. App. LEXIS 350 (4th Dist. 2017). In the instant case, as in Schroeder, "it is undeniable" that Petitioner had a significant condition before the accident but is also undeniable that the accident resulted in a change in his ability to work. Dr. Taiwo, a physician affiliated with a medical facility of Respondent's selection, imposed significant restrictions on the date of the accident (PX 2, p. 4).

Dr. Garelick "allowed" Petitioner to return to work on August 16, 2017 but directed Petitioner to return to him, indicating he would administer an injection if Petitioner was "still struggling with his job." Petitioner remained symptomatic thereafter, with Dr. Garelick ultimately recommending a significant surgery. Petitioner testified that Respondent assigned a carpenter to him when he resumed working, so that he would have assistance with heavy lifting. No Respondent witness contradicted this testimony. Petitioner also testified he stopped working on June 6, 2019, at which point he would have reached age 65.

Does the prior settlement bar recovery in this case?

Respondent alternatively argues that the previous settlement, by its terms, precludes Petitioner from recovering in the instant case. Respondent also maintains that Petitioner engaged in subterfuge by filing his Application in the instant case after its counsel signed the contract in the previous claims and only two days before the contract was approved.

The Arbitrator has no basis for concluding that as of September 15, 2017, the date that appears next to Respondent's counsel's signature on the contract (PX 7), Respondent was unaware of Petitioner's June 28, 2017 accident and the treatment that followed. Petitioner credibly testified he reported this accident the day it occurred and was given a ride from Respondent's shop to Concentra/Occupational Health Centers of Illinois. Dr. Taiwo recorded a consistent history of the accident on June 28, 2017 and imposed significant work restrictions. The bill for services performed on June 28, 2017 includes charges for post-accident alcohol testing. Medrisk made payments to Concentra in July and August 2017. See the itemized bill in PX 1. On July 26, 2017, about two months before the settlement, Dr. Garelick broached the idea of surgery, although he described this measure as a "last resort." On August 16, 2017, about a month before the settlement, Dr. Garelick allowed Petitioner to return to work but did not release him from care, indicating he needed to return in two weeks, at which point he might require an injection. On September 19, 2017, nine days before the contract was approved, Dr. Garelick again raised the possibility of surgery and directed Petitioner to return to him in two months. PX 1, p. 34. With respect to the issues of affiliation and lines of communication, the Arbitrator again notes that it was Respondent, and not Petitioner, that selected Concentra and Concentra that selected Dr. Garelick.

The Arbitrator is also unable to conclude that the prior settlement bars recovery in the instant claim. The language on the first page of the contract describes a specific, albeit disputed, event of October 10, 2012 and injuries allegedly resulting from that event. Respondent disputed liability for medical expenses relating to that event. The terms on the second page also specifically reference an alleged accident of October 10, 2012. While they also indicate that the settlement includes "any and all results, developments or sequelae, fatal or non-fatal," that clause is modified by the language that follows, i.e., "allegedly resulting from such accidental injuries," again referencing the date of October 10, 2012. Respondent was armed with sufficient knowledge to include the subsequent accident of June 28, 2017 or, more broadly, "any and all accidental injuries occurring through the date of contract approval", in the terms but did not do so.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims a bill in the amount of $442.81 relating to treatment rendered by Dr. Garelick on August 13, 2018 and August 29, 2018. See PX 3, p. 63. Respondent disputes liability for this bill based on its accident and causation defenses.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. When Dr. Garelick administered the left sternoclavicular joint injection, on August 13, 2018, he did so at the recommendation of Dr. Wolin, Respondent's Section 12 examiner. PX 3, p. 30. Respondent's claims examiner, Claudia Salgado, authorized this injection via a facsimile sent after the fact, on August 28, 2018. PX 3, p. 13. The injection was reasonable and necessary, as was the follow-up visit of August 29, 2018.

The Arbitrator awards the claimed bill of $442.81, subject to the fee schedule.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from June 29, 2017 through August 16, 2017, a period of 7 weeks. Respondent disputes that claim, based on its accident and causation defenses. The parties agree that Respondent paid $8,635.07 in temporary total disability benefits. Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. Respondent introduced no evidence indicating it offered Petitioner work within Dr. Taiwo's restrictions during the period in question. Respondent did not obtain a Section 12 examination until 2018.

The Arbitrator finds that Petitioner was temporarily totally disabled from June 29, 2017 through August 16, 2017, a period of 7 weeks, with Respondent receiving credit for its stipulated payment of $8,635.07.

Is Petitioner entitled to prospective care?

Petitioner seeks prospective care in the form of the clavicle resection surgery recommended by Dr. Garelick. Respondent cites Dr. Wolin's addendum as a basis for disputing this surgery. In that addendum, Dr. Wolin reiterated that Dr. Garelick's surgical recommendation is reasonable but reversed himself on causation, on the basis of a document that apparently reflected that Petitioner waited several months after his previous injury of October 10, 2012 before seeking care. In reliance on this document, which does not appear to be in evidence, Dr. Wolin concluded that Petitioner is inherently not credible and failed to establish causation.

The Arbitrator has previously found in Petitioner's favor on the issue of causation. As noted above, the Arbitrator assigns no weight to Dr. Wolin's assessment of Petitioner's credibility and causation-related opinions. Dr. Wolin concurred with Dr. Garelick's surgical recommendation, regardless of his concerns about Petitioner's believability. RX 2.

The Arbitrator recognizes that Petitioner has not seen Dr. Garelick since August 2018 and that Dr. Garelick was initially hesitant about recommending a clavicle resection, due to the associated risk of vascular injury. Dr. Garelick concluded that the surgery was reasonable after Petitioner failed to respond to the injection he administered at Dr. Wolin's recommendation. The Arbitrator awards prospective care in the form of a return visit to Dr. Garelick along with the surgery, if Dr. Garelick continues to recommend it.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

21IWCC0097

Kim Ahnert,

Petitioner,

vs. NO. 17WC 30972

Pon North America,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2020 is hereby affirmed and adopted.

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

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

21IWCC0097

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

DATED: MAR 4 - 2021
SJM/sj
o-1/6/2021
44

Stephen J. Mathis

Marc Parker

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

AHNERT, KIM
Employee/Petitioner

21IWCC0097

Case# **17WC030972**
19WC006312

PON NORTH AMERICA INC
Employer/Respondent

On 2/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0203 CARROLL & AVGERINOS PC
DANIEL F CARROLL
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2542 BRYCE DOWNEY & LENKOV LLC
BRIAN A ROSENBLATT
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
) SS
COUNTY OF DuPage)

21IWCC0097

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Kim Ahnert
Employee/Petitioner

v.

Pon North America, Inc.
Employer/Respondent

Case # **17** WC **30972**

Consolidated cases: **19 WC 06312**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton**, on **5/31/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 21IWCC0097

On **10/18/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**67,678.52**; the average weekly wage was $**1,301.51**.

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

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

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

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $**2,651.80** for other benefits, for a total credit of $**2,651.80**.

Respondent is entitled to a credit of $**45,627.28** under Section 8(j) of the Act for both 17 WC 30972 and 19 WC 6312.

ORDER

Respondent shall pay reasonable and necessary medical services of $53,618.00, as provided in Sections 8(a) and 8.2 of the Act for both 17 WC 30972 and 19 WC 6312.

Respondent shall pay Petitioner temporary total disability benefits of $867.67 per week for 10 5/7 weeks covering February 1, 2018 through April 16, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $780.91 per week for a further period of 100 weeks - $78,091.00 – as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a 20% loss of a person as a whole.

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

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

Charles M Watts

Signature of Arbitrator

1/22/2020
Date

ICArbDec19(b)

FEB 14 2020

21IWCC0097

ILLINOIS WORKERS' COMPENSATION COMMISSION

KIM AHNERT,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 17 WC 30972**
	)	
PON NORTH AMERICA, INC.,	)	
	)	
Respondent.	)	

ATTACHMENT TO ARBITRATOR'S DECISION

I. Findings of Fact.

Petitioner began working for Respondent in October 2000 as a mechanic. His job requires him to maintain and repair industrial equipment such as forklifts, scissor lifts and boom lifts. Since 2006, he has also worked on rail car movers. These are large machines which are used to move rail cars around a yard. Their function is similar to that of a locomotive. According to the written job description, the physical demands of Petitioner's job require him to squat, kneel and bend frequently (more than 66% of the time) and to lift up to 100 pounds occasionally (up to 33% of the time.) (PX 4)

Many times, repairing and maintaining heavy equipment requires not only heavy lifting, but working in confined spaces at awkward angles. Petitioner introduced various photographs depicting these machines. (PX 5-10)

Petitioner had a prior workers' compensation claim for bilateral carpal tunnel syndrome and trigger fingers of the right hand. He treated with Dr. Michael Vender who released him to return to work full duty in March, 2016 and discharged him from care one month later. The Arbitrator takes judicial notice that Petitioner's claim for compensation in case 14 WC 26037 was settled on June 7, 2016 for 17.5% loss of use of each hand.

Petitioner testified that after returning to work, he was able to perform his job and was not under the care of a doctor. After a few months, however, he began to experience new and different symptoms such as cramping and spasms in his hands. On May 4, 2017, he consulted his primary care physician, Dr. Karen Eisele about these symptoms. Dr. Eisele noted that before his surgeries, Petitioner's hands were numb and he could not feel anything; now they are painful with cramping. (PX 14, p. 59) She felt that the most likely diagnosis was "osteoarthritis, given his use of hands over the years," but she also ordered a rheumatologic work-up. (PX 14, p. 61)

When Petitioner's blood work came back normal, Dr. Eisele felt that Petitioner needed a referral to an orthopedic surgeon. (PX 14, p. 64) She referred him to Dr. Brian Murphy. (PX 14, p. 66) All this time, Petitioner continued working.

On July 5, 2017, Dr. Murphy administered a cortisone injection to Petitioner's right carpal tunnel to aid in diagnosing the cause of the problem. (PX 13, p. 21) On July 26, 2017, Petitioner reported only minimal relief from the injection, leading Dr. Murphy to suspect that the spasms were not from Petitioner's prior nerve releases. He recommended a neurologic work-up. (PX 13, p. 16-18) Petitioner returned to Dr. Murphy on August 23, 2017. The bilateral hand spasms were noted to be activity related. Dr. Murphy again injected the right hand. He reiterated his recommendation for a neurologic work-up, noting that Petitioner's symptoms could stem from the prior carpal tunnel releases or some other neurologic cause. (PX 13, p. 8-11)

On August 28, 2017, Petitioner saw Dr. Barry Riskin, a neurologist, who was unable to correlate Petitioner's hand cramping with his previous neuropathy. He recommended repeat blood work and an EMG. (PX 14, p. 68-72) The EMG was done on September 11, 2017 and revealed chronic right median and ulnar neuropathy. Dr. Riskin recommended an MRI of Petitioner's cervical spine. (PX 14, p. 74-76)

On September 12, 2017, Dr. Eisele noted that Petitioner was unsure if his current symptoms were related to his prior workers' compensation case:

> That was with the carpal tunnel. He had numbness in his hands that is now better. When the numbness went away, he was left with pain and stiffness in the joints of the fingers instead of numbness. That is the issue he is trying to resolve because it causes him constant pain. Working makes it worse. Rest makes it better. (PX 14, p. 78)

By the time Petitioner returned to Dr. Murphy on September 25, 2017, additional blood work showed no evidence of autoimmune or inflammatory disorders. An MRI of the right hand was prescribed. (PX 13, p. 4-7) This test was done on October 10, 2017 and was within normal limits. (PX 13, p. 3) The MRI of Petitioner's cervical spine was also done on October 10, 2017.

Dr. Murphy spoke with Petitioner on October 12, 2017, alerting him that the MRI of his cervical spine showed pathology at the C6 nerve root which could cause numbness in the thumb and index finger. Follow up with a spine surgeon was recommended. (PX 13, p. 2)

On October 18, 2017, Petitioner was seen by Dr. Drew Spencer, a neurosurgeon at Edward Medical Group. Petitioner gave a history of working with heavy machinery for a period of 20 years and of having undergone multiple

surgeries by Dr. Vender for ulnar/median decompression and tendon releases of the right hand. Post-operatively, Petitioner's numbness improved and his ulnar pain resolved, but he soon began experiencing cramping and spasms in both hands, especially after repetitive gripping or at night. Dr. Spencer reviewed the recent cervical MRI and felt that it was difficult to determine how much of Petitioner's symptoms were related to his neck versus his complex past history. In order to better delineate this question, he prescribed an epidural steroid injection. (PX 14, p. 83-85) This injection was administered by Dr. David Pang on November 1, 2017. (PX 14, p. 95)

When he returned to Dr. Spencer on November 15, 2017, Petitioner reported significant relief from the injection for about one week, after which the symptoms returned. (PX 14, p. 97) Dr. Spencer recommended that he complete the series of injections and this was done on November 27 and December 4, 2017. (PX 14, p. 99, 107, 113)

Petitioner returned to Dr. Spencer on December 20, 2017 and reported that the second and third injections provided no relief. His hand cramping remained significant. (PX 15, p. 59) Dr. Spencer recommended a C5-6 surgical fusion. (PX 15, p. 61) This surgery was performed on February 1, 2018. (PX 17, p. 270)

On February 14, 2018, Petitioner reported to Dr. Spencer that he "has had complete resolution of his severe pre-op hand cramping and pain. He is very excited with his improvement." (PX 15, p. 309)

When Petitioner began physical therapy on March 8, 2018, he gave the following history:

> Before the surgery, on a typical week, he would be somewhat OK on a Monday but will have cramping by Wednesday and work through it by Thursday and Friday and rest the weekend. He tries to rest on weekends so that he could work by Monday. Since the surgery, he has had one episode of spasms but has not had it since. Patient states that his main complaint is that he is not working and would like to go back to work....He is a field service tech and does wrenching and taking a part off a machine and working on a machine part by being bent over with his head down. He is working on heavy machineries....He is very motivated to return to work. (PX 15, p. 367)

When Petitioner returned to Dr. Spencer on March 16, 2018, he reiterated that he wanted to return to work. (PX 16, p. 64) On April 16, 2018, Dr. Spencer released Petitioner to return to work and instructed him to return in three months for x-rays. (PX 16, p. 142) Dr. Spencer testified that Petitioner returned for those x-rays and that following his discharge from active care, Petitioner had improved neck and hand symptoms. (PX 21, p. 9) Petitioner testified that he considered his surgery a success.

Petitioner next sought treatment at the emergency room of Edward Hospital on February 22, 2019 in the wake of an alleged accident at work which is the subject of companion case 19 WC 06312.

James Appleby, Respondent's service manager, testified that Petitioner's job involved traveling to the customer and repairing forklifts, aerial lifts and rail car movers. The lifting requirements of Petitioner's job, according to Appleby, were from 10 to 20 pounds, with occasional lifting of 50 pounds or more. He agreed that the written job description for Field Service Technician (PX 4) was accurate. No record is kept of the amount of lifting done by any of Respondent's employees. Work orders, however, would reflect the particular jobs performed.

Appleby produced a total of 19 work orders for the period from January, 2017 through July, 2018 involving rail car mover jobs performed by Petitioner. (RX 4) According to Appleby, only two or three of those jobs would have involved either heavy lifting or working in a confined space at awkward angles.

On cross-examination, Appleby acknowledged that he understood the concept of repetitive trauma, although Petitioner's claim was the only one he had encountered in two and a half years in a shop of 35 mechanics. Appleby believes that Petitioner has been working on rail car movers for Respondent since 2006. None of Petitioner's work orders for the period prior to January, 2017 were produced, either for rail car movers or any of the other heavy equipment on which Petitioner worked. In addition, Appleby had no reason to believe that the work orders contained in RX 4 were comprehensive and complete.

Dr. Drew Spencer, Petitioner's treating neurosurgeon, testified by evidence deposition. Petitioner came to him on October 18, 2017 with complaints of neck pain and hand cramping/pain. When a trial of cervical epidural steroid injections did not relieve Petitioner's symptoms, Dr. Spencer performed a discectomy and fusion at C5-6. (PX 21, p. 7) Petitioner's post-operative course was uneventful and Dr. Spencer released him to return to work without restrictions as of April 16, 2018. Excepting only routine x-rays in the future, Dr. Spencer felt that Petitioner had attained maximum medical improvement as of that date. (PX 21, p. 8)

In response to a hypothetical question which incorporated Petitioner's past medical history and his work duties as a heavy equipment mechanic, Dr. Spencer stated that Petitioner's work activity contributed to the degeneration of the disc that ultimately required surgery. Dr. Spencer specifically cited lifting activity with the neck in awkward positions as an aggravating factor. (PX 21, p. 18)

On cross-examination, Dr. Spencer admitted that he could not state with 100 percent certainty that Petitioner's work activity was the sole cause of his cervical problems; but, based on his experience, "it contributed." There is no way to quantify the degree of contribution. (PX 21, p. 37)

Dr. Spencer testified at some length regarding Petitioner's alleged accidental injury of February 20, 2019. When asked to assume that such an accident did not

occur, and that Petitioner was merely complaining of neck pain after a day of working out, Dr. Spencer stated that Petitioner's cervical fusion of February 1, 2018 would have remained a contributing factor to the need for another surgery. This is because the original fusion eliminated motion at that level of the spine, thereby placing additional stress on the levels above and below the fusion. (PX 21, p. 46-47)

II. Conclusions of Law.

In support of the Arbitrator's decision regarding whether Petitioner sustained an accident which arose out of and in the course of his employment ("C") and whether Petitioner's current condition of ill-being is causally connected to that accident ("F"), the Arbitrator concludes as follows:

The central issue before the Arbitrator is whether Petitioner's need for a cervical discectomy and fusion on February 1, 2018 has anything to do with the work activity in which he was engaged during the period between March, 2016 (when Petitioner returned to full duty work as a heavy equipment mechanic following carpal tunnel, cubital tunnel and trigger finger surgeries), and October, 2017 (when Petitioner first sought treatment from Dr. Spencer for what turned out to be a cervical, not a hand or elbow, problem.) On balance, the Arbitrator concludes that it did.

In arriving at this conclusion, the Arbitrator takes note of, and is persuaded by, the following evidence.

1. Despite some quibbling by Petitioner's supervisor, James Appleby, over whether Petitioner's job was very heavy or only "moderately heavy," it is clear that Petitioner's duties as a heavy equipment mechanic were arduous and physically taxing. In general, Petitioner's testimony regarding his job duties was borne out by the written job description prepared by Respondent. That job description states that a Field Service Technician must occasionally reach above shoulder level, climb, crawl and lift, push or pull up to 100 pounds. It also states that he must frequently squat, kneel, bend, lift up to 20 pounds, and push or pull up to 25 pounds. The job description defines "occasionally" as up to 33% of the time; and it defines "frequently" as up to 66% of the time. (PX 4)

Respondent produced 19 work orders reflecting different jobs which Petitioner performed on rail car movers between January 2017 and July 2018, most of which involved jobs which were neither heavy nor performed in a confined space. (RX 4) Petitioner has not alleged that every single job which he was required to perform was physically stressful to his cervical spine. Stated differently, the existence of a certain number of lighter jobs does not rule out the existence of other jobs which require heavy lifting at awkward angles. In addition, Respondent's witness could not verify that the batch of work orders in evidence are comprehensive and complete. They do not include work performed by Petitioner

prior to January 2017; and they do not include work performed by Petitioner on heavy equipment other than rail car movers.

Various photographs in evidence provide a visual representation of the type of work required of Petitioner and the sometimes cramped work environment in which those duties were performed. (PX 1, PX 5-10) These photographs provide helpful context to Petitioner's testimony and the written job description.

Accordingly, the Arbitrator is persuaded that Petitioner's day-to-day duties as a Field Service Technician, also known as a heavy equipment mechanic, were generally heavy and sometime required Petitioner to work in confined spaces at awkward angles.

2. Petitioner had never previously suffered from or been treated for cervical disc problems. He had a history of carpal tunnel syndrome, cubital tunnel syndrome and trigger finger. He received treatment for those conditions and returned to his regular duties with Respondent. The medical evidence reflects that when Petitioner resumed treatment, his symptoms were different. While under the care of Dr. Vender prior to April 2016, Petitioner suffered primarily from numbness in his hands. When he resumed treatment, he was suffering primarily from pain and cramping of his hands, particularly his right hand. This change in symptoms was documented in the treating records of Dr. Karen Eisele, Petitioner's primary care physician. Naturally, Petitioner's doctors initially suspected a recurrence of the problem for which Petitioner had previously been treated: neuropathy stemming from compression at the wrists or elbows. It was only when the initial work-up for those problems was negative that the area of investigation expanded to include Petitioner's cervical spine. With the benefit of hindsight, we now know that Petitioners' complaints of pain and cramping in his right hand was due to compression at the C5-6 nerve root.

3. The medical records in evidence measure in the thousands of pages. Nowhere in any of those records is there a mention of any non-work trauma to Petitioner's cervical spine. Petitioner denied having sustained any such accidents, and the medical records are consistent with that denial.

4. Respondent never obtained a Section 12 evaluation of Petitioner or any expert medical opinion regarding whether Petitioner's cervical problems were related or unrelated to his duties at work.

5. The only medical testimony comes from Dr. Drew Spencer, Petitioner's treating neurosurgeon. Dr. Spencer took a measured approach. He did not state that Petitioner's work activity was the sole cause of the cervical pathology which eventually required surgery. He testified that Petitioner's work activity was a contributing factor. The precise percentage of contribution is impossible to state, but Dr. Spencer felt, to a reasonable degree of medical certainty, the work activity did contribute.

To establish medical causation, Petitioner is not required to prove that the hazards to which he was exposed constitute the sole cause of the injury, or even the principal cause. It is sufficient if the work activity was a causative factor. *All Steel, Inc. v. Industrial Com'n*, 221 Ill.App.3d 501, 164 Ill.Dec. 32, 582 N.E.2d 240 (1991); *Westinghouse Electric Co. v. Industrial Com'n*, 64 Ill.2d 244, 1 Ill.Dec. 28, 356 N.E.2d 28 (1976) This is also true if Petitioner had a preexisting condition which was aggravated or accelerated by his employment. *Sisbro, Inc. v. Industrial Com'n*, 207 Ill.2d 193, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003).

Based on the foregoing, the Arbitrator concludes that Petitioner sustained an accidental injury which arose out of and in the course of his employment. The Arbitrator further concludes that Petitioner's accident was due to the heavy work associated with his work activity as a Field Service Technician, also known as a heavy equipment mechanic; and that the injury first manifested itself on October 18, 2017, that being the date on which Petitioner first saw his neurosurgeon, Dr. Drew Spencer. The Arbitrator further concludes that Petitioner's current condition of ill-being relative to his cervical spine is causally connected to his accident of October 18, 2017.

In support of the Arbitrator's decision regarding the period of temporary total disability ("K"), the Arbitrator concludes as follows:

Petitioner began missing time from work as of the date of his cervical fusion on February 1, 2018. He remained under the active care of Dr. Spencer until Petitioner was released to return to work without restriction on April 16, 2018. The medical evidence reflects that Petitioner was totally disabled from working during that block of time. There is no evidence to the contrary.

Based on the foregoing, the Arbitrator concludes that Petitioner's period of temporary total disability extended from February 1, 2018 through April 16, 2018, a period of 10 5/7th weeks.

In support of the Arbitrator's decision regarding medical expenses ("J"), the Arbitrator concludes as follows:

Petitioner's medical expenses have been itemized and outlined in PX 23. Portions of these bills have been paid by Petitioner's union health insurance carrier, amounts for which the parties stipulate Respondent is entitled to credit. It is clear to the Arbitrator that the dispute on this case was one of compensability, not whether the treatment in question was reasonable or necessary.

Based on the foregoing, the Arbitrator concludes that Respondent shall pay such medical bills as are reflected in PX 23 subject to the limits of the Medical Fee Schedule, and shall indemnify Petitioner for any claim for reimbursement asserted by the union health insurance carrier.

In support of the Arbitrator's decision regarding the nature and extent of the injury ("L"), the Arbitrator concludes as follows:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Associations "Guidelines to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With respect to Subsection (i) of §8.1b(b) the Arbitrator notes that Respondent did not obtain an impairment rating. Consequently, the Arbitrator gives this factor no weight.

With respect to Subsection (ii) of §8.1b(b) the Arbitrator notes that Petitioner worked as a heavy equipment operator. Petitioner's job requires heavy lifting, working in awkward confined spaces and repairing heavy equipment. Petitioner has worked over 20 years in that capacity. The Arbitrator places some weight on this factor.

With respect to Subsection (iii) of §8.1b(b) the Arbitrator notes that Petitioner was 51 years old at the time of his injury at work. The Arbitrator notes that Petitioner has a long future work life and places great weight on this factor.

With respect to Subsection (iv) of §8.1b(b) the Arbitrator notes that Petitioner attained maximum medical improvement as of his release to return to work on April 16, 2018. The Arbitrator places appropriate weight on this factor.

With respect to Subsection (v) of §8.1b(b), evidence of Petitioner's disability is corroborated by the treating medical records. Petitioner underwent cervical fusion surgery after a course of more conservative care.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% loss of a person as a whole pursuant to section 8(d)(2) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kim Ahnert,

Petitioner,

21IWCC0098

vs. NO. 19WC 06312

Pon North America,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2020 is hereby affirmed and adopted.

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

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

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

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

DATED: MAR 4 - 2021
SJM/sj
o-1/6/2021
44

Stephen J. Mathis

Marc Parker

DISSENT

I respectfully dissent. I find Petitioner failed to prove he sustained an accident occurring on February 20, 2019. As such, I would vacate the award of benefits and deny the claim in its entirety.

Petitioner testified while working with an employee of FG Cardinal, he felt a pop in his neck as he lifted a cylinder. T. 39. Petitioner testified he continued to work and completed the job. *Id.* Petitioner admitted immediately following the incident, he failed to notify advise any personnel at FG Cardinal of the alleged injury nor did he advise his supervisor, Mr. James Appley of Respondent. T. 40-1. Petitioner testified he worked the next day (Thursday) at O'Hare Airport which job did not require heavy lifting. T. 41. Again, he admitted he failed to advise anyone from Respondent of his alleged injury. T. 42.

Petitioner testified he worked Friday at the United Facilities in Montgomery, Illinois; again, performing duties lighter duties. T. 43. Petitioner testified his pain worsened over the course of the day; he attempted to contact his supervisor, James Appley, by telephone but was unsuccessful. T. 44. Again, he finished his workday, but a few hours after arriving home, he sought treatment from the ER due to increased pain. T. 46. En route to the ER, Petitioner testified he contacted Mr. Appley and advised him of the alleged injury occurring two days prior at FG Cardinal. *Id.*

Mr. James Appley, Petitioner's supervisor, testified on behalf of Respondent. Mr. Appley testified he spoke to Petitioner as part of a branch/safety meeting on February 21, 2019, the day following the alleged accident. T. 116. During the conversation, Mr. Appley reminded Petitioner to utilize the younger technicians for such jobs for teaching purposes as well as providing extra assistance. *Id.* Mr. Appley testified Petitioner did not advise him of the alleged accident occurring the day prior. T. 118. Mr. Appley confirmed Respondent's policy that

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accidents should be reported as soon as possible. T. 115. Mr. Appley identified Respondent's Exhibit 3 which contained Petitioner's timecard from February 20, 2019. T. 134; RX3. The timecard memorialized that Petitioner when asked "Did you have a work-related injury today?" checked "No." *Id.*

Mr. Ray Leach, an employee of FG Cardinal, testified on behalf of Respondent. Mr. Leach testified he worked with Petitioner for approximately 45 minutes on February 20, 2019, during which time Petitioner neither advised of a work-related injury nor exhibited signs of being injured. T. 90. Mr. Leach testified Petitioner advised him that he was sore from working out with his wife. T. 91.

Mr. Todd Parlier, an employee of FG Cardinal, testified on behalf of Respondent. Mr. Parlier testified he worked with Petitioner for approximately four to six hours on February 20, 2019 replacing a cylinder weighing 100 to 150 pounds. T. 100. While working with Petitioner, at no time did he advise Mr. Parlier of sustaining an injury. T. 101. At no point did Mr. Parlier witness Petitioner injuring himself. T. 102. Mr. Parlier testified consistent with Mr. Leach that Petitioner advised he was sore due to working out with his wife. T. 103.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. [citations omitted]." *Sisbro Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). "Even before there can be a consideration of whether an accidental injury arose out of employment, claimant must prove there was an accidental injury." *Elliot v. the Industrial Commission*, 303 Ill. App. 3d 185, 188, 707 N.E.2d 228 (1999). I find Petitioner is not credible, and he failed to prove he sustained an accidental injury.

Petitioner admitted he failed to advise his supervisor, James Appley, of the alleged accident immediately following the alleged occurrence. In fact, Petitioner spoke to Mr. Appley the day following the alleged accident during a safety meeting and made no mention of the alleged accident. Moreover, Petitioner affirmatively stated on his timecard of February 20, 2019 that he did not sustain a work-related injury.

Both FG Cardinal employees who worked with Petitioner on the alleged date of accident confirmed Petitioner never complained of sustaining an injury nor exhibited any signs of being injured. Moreover, both FG Cardinal employees confirmed Petitioner complained of being sore due to working out with his wife.

I find the testimonies of Mr. Appley, Mr. Leach, and Mr. Parlier to be consistent and credible and Petitioner's not. I find Petitioner failed to prove he sustained an accidental injury.

For the above-stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

AHNERT, KIM
Employee/Petitioner

Case# **19WC006312**

17WC030972

PON NORTH AMERICA INC
Employer/Respondent

21IWCC0098

On 2/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2208 CAPRON & AVGERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2542 BRYCE DOWNEY & LENKOV LLC
BRIAN A ROSENBLATT
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

21IWCC0098

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Kim Ahnert
Employee/Petitioner

v.

Pon North America, Inc.
Employer/Respondent

Case # **19** WC **06312**

Consolidated cases: **17 WC 30972**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton, IL**, on **5/31/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 21IWCC0098

On the date of accident, **2/20/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**68,325.92**; the average weekly wage was $**1,313.96**.

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

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

Respondent is entitled to a credit of $**45,627.28** under Section 8(j) of the Act for both 17 WC 30972 and 19 WC 6312.

Petitioner is entitled to prospective medical care.

ORDER

Respondent shall pay reasonable and necessary medical services of $53,618.00, as provided in Sections 8(a) and 8.2 of the Act for both 17 WC 30972 and 19 WC 6312.

Respondent shall pay Petitioner temporary total disability benefits of $875.97 per week for 13 5/7 weeks covering February 25, 2019 through May 31, 2019, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

1/22/2020
Date

ICArbDec19(b)

FEB 14 2020

21IWCC0098

ILLINOIS WORKERS' COMPENSATION COMMISSION

KIM AHNERT,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 19 WC 06312**
	)	
PON NORTH AMERICA, INC.,	)	
	)	
Respondent.	)	

ATTACHMENT TO ARBITRATOR'S DECISION

I. Findings of Fact.

This is the second of two consolidated cases filed by Petitioner. The initial case—17 WC 30972—alleged that Petitioner injured his cervical spine owing to the heavy work required by his job duties over an extended period of time, often requiring lifting in confined spaces or at an awkward angle. As a result of those injuries, Petitioner underwent a cervical fusion on February 1, 2018 by Dr. Drew Spencer. Petitioner's post-operative course was uneventful and he was eventually released to return work without restriction on April 16, 2018. He was deemed to be at MMI at that time.

Petitioner testified that his cervical fusion surgery was a success. The spasms and cramping that had affected his right hand had improved. On February 4, 2019, Petitioner returned to Dr. Spencer for a set of routine x-rays to confirm that the fusion was solid. Petitioner continued to perform his regular duties as a Field Service Technician, also known as a heavy equipment mechanic.

On February 20, 2019, Petitioner was assigned to a job at FG Cardinal in Portage, Wisconsin. (This company was referenced by various witnesses as "FG Cardinal," "Cardinal FG," and "Cardinal Gas." For the purposes of consistency, the Arbitrator will refer to it as "FG Cardinal.") Petitioner left home at 3:30 a.m. and arrived on site between 6:30 and 7:00 a.m. His scheduled task was to change a hydraulic road arm cylinder on a rail car mover. He was able to complete this job without incident. The customer then asked Petitioner to replace the weight transfer cylinder on the same machine because the one they had was leaking.

Replacing the weight transfer cylinder required Petitioner to crawl underneath the machine into a confined space, lean over the drive shaft and remove the cylinder which weighed between 75 and 100 pounds. Petitioner received assistance from one of FG Cardinal's employees, but he did not know the person's name. The old cylinder was removed without incident. A strap was put around the new

cylinder. The assistant from FG Cardinal stood on top of the machine, held the strap, and lowered the cylinder to Petitioner. Meanwhile, Petitioner was lifting the cylinder from below in order to mount it on a pin. Petitioner testified that while doing this, he felt a "pop" in his neck and shoulder which felt like a pulled muscle. He said nothing to anyone, continued working, completed the job and left FG Cardinal by noon.

Roy Leach testified that he is the FG Cardinal employee who assisted Petitioner in changing the hydraulic road arm cylinder. Todd Parlier testified that he is the FG Cardinal employee who assisted Petitioner in replacing the weight transfer cylinder. Both men denied any knowledge of an injury sustained by Petitioner. Both men testified that Petitioner had mentioned that he was sore from working out, although no further details were discussed such as the nature of the work out or where he was sore. Petitioner denied telling either Leach or Parlier that he had been working out because he does not work out. He may have mentioned that it felt like a workout because it was hot inside the shop and the cylinders were heavy.

Petitioner testified that when he arrived home from FG Cardinal, he was sore. He thought that he had merely pulled a muscle. The next day, February 21, 2019, he assisted a co-worker in diagnosing a machine that did not run properly, a job which involved no physical work. His neck and shoulder remained sore and he noticed a bit of difficulty lifting his arm.

On Friday, February 22, 2019, Petitioner performed periodic maintenance work on forklifts at a shop in Montgomery, Illinois. This was very light work. He noticed that it was very difficult to lift his left arm, but he finished out the day. Just before noon, he attempted to call his supervisor, Jim Appleby, to report that he had injured himself at FG Cardinal. He received a text message that Appleby was not available to speak at that time.

Later in the day on February 22, 2019, Petitioner was unable to lift his arm at all, so he went to the emergency room of Edward Hospital. While en route, he again called Appleby and this time he reached him. Petitioner testified that he told Appleby about having hurt himself at FG Cardinal and that he was on his way to the hospital. Appleby responded that Petitioner should come to the shop on Monday to fill out an accident report.

Jim Appleby testified that he had seen Petitioner at a shop safety meeting on Thursday, February 21, 2019, at which time they chatted briefly about the job at FG Cardinal and the fact that Petitioner should bring apprentices on rail car repair jobs in order to break them in. No mention was made of an accident or injury.

Appleby further testified that Petitioner called him while en route to the emergency room on the evening of Friday, February 22, 2019. Petitioner reported that he awoke with pain in his neck and that he knew it was from the cylinder job he had performed on Wednesday. Appleby told Petitioner to get medical attention.

The records of Edward Hospital reflect that Petitioner was seen in the emergency room on the evening of February 22, 2019. He complained of neck and left shoulder pain. He reported that he had a history of chronic neck pain for which he had undergone surgery, but that "3 days ago at work he had to lift several very heavy items and he feels he may have strained some muscles in his neck and shoulder." (PX 18, p. 12) Petitioner was given morphine and instructed to follow up with his neurosurgeon, Dr. Spencer. (PX 18, p. 14)

Petitioner testified that he did very little over the weekend and he continued to experience pain in his neck and shoulder. On Monday, February 25, 2019, he reported to Jim Appleby's office at 7:00 a.m. and filled out an accident report.

Petitioner testified that Appleby read the accident report and accused him of "effing lying." Appleby testified that he did not make that accusation.

Petitioner's written accident report reflects that on February 20, 2019 he was pushing up on a cylinder while a Cardinal employee was lifting with two nylon straps when he felt pain in his neck and left shoulder. Petitioner added that he thought he had pulled a muscle. (RX 2)

After leaving Appleby's office, Petitioner had an appointment with Dr. Spencer. He gave a history of new left sided neck and arm pain since injuring himself on February 20, 2019 while lifting a 150 pound cylinder. (PX 17, p. 842) Dr. Spencer ordered a new MRI and instructed Petitioner to remain off work. (PX 17, p. 843)

The MRI was done on February 26, 2019 and revealed a new left paracentral disc protrusion at C6-7 with moderate to severe left neural foraminal stenosis and probable impingement of the left C7 nerve root. (PX 18, p. 63-64) Dr. Spencer testified that this matched the pattern of Petitioner's pain. (PX 21, p. 10) He thereupon referred Petitioner for an epidural steroid injection. (PX 21, p. 11)

Also on February 26, 2019, Jim Appleby traveled to FG Cardinal to investigate Petitioner's claim. Neither Dave Hillmer, the maintenance superintendent, nor Roy Leach, a maintenance tech, knew anything about Petitioner having injured himself. Leach noted that Petitioner stated he was sore from working out. One day later, Appleby spoke by phone with Todd Parlier who also denied knowing about any accident. (RX 3)

Petitioner testified that on February 26, 2019, as he was en route to his MRI, he received a call from Anthony DeAngelis, Respondent's general manager and Jim Appleby's boss. He indicated that Petitioner was on a speaker phone and that Mark Peterson, president of the company, was present. Petitioner testified that Peterson accused him of "effing lying" and stealing from the company, and that Peterson was going to fight him all the way. Petitioner ended the call because he was arriving at the MRI facility.

On February 28, 2019, Petitioner saw Dr. David Peng to discuss the epidural steroid injection. Petitioner gave a history that he had been doing well after a cervical fusion for about one year when he reinjured himself on February 20, 2019 while lifting a heavy bolt on a railroad car. (PX 17, p. 871) Dr. Peng recommended that Petitioner undergo a series of epidural steroid injections. (PX 17, p. 874)

Before the injections could be administered, Petitioner returned to Dr. Spencer on March 11, 2019 with worsening neck and arm pain, along with numbness and weakness in his left hand. (PX 17, p. 885) Given the progression of the symptoms, Dr. Spencer recommended surgery. (PX 17, p. 887) On March 12, 2019, Dr. Spencer submitted an FMLA form to Respondent reflecting that Petitioner's condition had commenced on February 20, 2019, that it was totally disabling and that it required surgery. (RX 5)

On March 21, 2019, Petitioner underwent surgery consisting of an anterior discectomy at C6-7 and fusion from C5-6 to C6-7. (PX 19, p. 21-23)

When Petitioner returned to Dr. Spencer on April 5, 2019, he reported that his severe left arm pain was gone and that he could move it comfortably. The tingling in his fingers had receded to the fingertips only. (PX 20, p. 5) Dr. Spencer felt that Petitioner could begin doing some exercises but nothing heavy or overhead. Petitioner was to remain off work. (PX 20, p. 7)

Petitioner next saw Dr. Spencer on May 13, 2019 and reported further improvement in his symptoms. (PX 20, p. 11) He was ordered to begin physical therapy and his work status was upgraded to 20 pounds or less on a part time basis. (PX 20, p. 12)

Petitioner testified that he is still in physical therapy. His next appointment to see Dr. Spencer is in June. He still has some neck pain but the cramping and spasms have gone away.

On cross-examination, Petitioner testified that he and his wife have owned a cleaning business—K & K Maintenance—for the past nine years. They have no other employees. Petitioner and his wife would perform cleaning or painting work for their clients. They had one regular customer, a warehouse in Elgin, for whom they would clean the docks with a shop vacuum about every six months. Petitioner and his wife would also sweep, mop, and clean bathrooms. The heaviest lifting involved in the business was a shop vac which weighed about 15 pounds. Petitioner last did any work for K & K Maintenance in January, 2019.

Petitioner also acknowledged that he performed some work for his church which resulted in certain photos being posted on Facebook on February 18, 2019. He and another church member performed some plumbing work to clean out a grease trap.

II. Conclusions of Law.

In support of the Arbitrator's decision relating to whether Petitioner sustained an accident which arose out of and in the course of his employment with Respondent ("C"), the Arbitrator concludes as follows:

Petitioner has testified that he sustained an accidental injury while attempting to replace a weight transfer cylinder on a rail car mover at FG Cardinal in Portage, Wisconsin on the morning of February 20, 2019. He testified that he did not report the accident immediately or mention it to anyone because he thought it was a pulled muscle. It was only when the symptoms worsened and he was unable to lift his left arm that he sought medical treatment and reported the accident.

The medical records corroborate Petitioner's testimony. The emergency room record from Edward Hospital on February 22, 2019; the record of the initial visit to Dr. Spencer on February 25, 2019; and the record of Petitioner's visit to Dr. Pang on February 28, 2019 all reflect that Petitioner sustained an accident while engaged in heavy lifting on February 20, 2019. So, too, does the written accident report which Petitioner filed with Respondent on February 25, 2019. That report also confirms that Petitioner initially thought that he had merely strained a muscle.

In opposition to Petitioner's claim, Respondent has introduced evidence which is more circumstantial than direct. For instance, Petitioner owns a cleaning business for which he performed work prior to his alleged accident. Only days before his alleged accident, Petitioner performed plumbing work for his church. Petitioner mentioned nothing about having sustained an accident to two employees of FG Cardinal, but he did mention that he was sore from working out. Jim Appleby contends that Petitioner reported waking up in pain on February 22, 2019 and stating that he was sure it was from the job in Wisconsin; then Petitioner's written report stated that the pain began while lifting the cylinder on February 20, 2019.

Stated differently, Respondent is alleging that Petitioner injured his neck in some other fashion, and that he concocted a scheme by which to defraud Respondent and to collect workers' compensation benefits.

One fact is clear. Petitioner had recovered nicely from the cervical fusion that he had undergone on February 1, 2018 and had been back to work without restriction for more than nine months. His sudden increase in symptoms gave rise to an MRI which confirmed the existence of a new herniated disc at the level immediately below the prior fusion.

On balance, the Arbitrator believes that Petitioner injured himself while performing the repair job on the rail car mover on February 20, 2019. Petitioner has testified, and Respondent has not denied, that the job Petitioner was performing at FG Cardinal was not only very heavy, but had to be performed in a confined space. Various photographs in evidence are illustrative and lend credence to the physical effort required to perform this job. (PX 1, PX 5-10)

If Petitioner initially thought that the pain in his neck and shoulder constituted nothing more serious than a muscle strain, it is easy to understand why he would make no mention of it. The medical records also lend credence to Petitioner's testimony that his condition was gradually worsening. This is the reason why Dr. Spencer abandoned the plan to administer epidural steroid injections and instead to proceed directly with surgery. The gradual worsening of the symptoms would explain why Petitioner waited to pursue medical treatment and to report the accident to Respondent. When that moment arrived, however, when Petitioner could no longer deny the existence of a serious injury, he provided histories and reports which were entirely consistent with his testimony on how the accident had occurred.

Finally, the Arbitrator is mindful that in Petitioner's companion case, he returned to unrestricted duty in a heavy occupation two-and-a-half months after undergoing a cervical fusion. Petitioner testified that he enjoyed remarkable relief from that surgery (and, indeed, from the one that took place on March 21, 2019). In other words, the Arbitrator finds Petitioner to be credible. His conduct at every turn has been reasonable. He possesses none of the hallmarks that one might expect to see from a person seeking to cheat the system, such as malingering, symptom magnification or artificially extending his time away from work.

Based on the foregoing, the Arbitrator concludes that Petitioner sustained an accidental injury on February 20, 2019 which arose out of and in the course of his employment with Respondent.

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being is causally connected to the accident at work ("F"), the Arbitrator concludes as follows:

Petitioner had a pre-existing condition. He had undergone a cervical fusion at C5-6 on February 1, 2018. Petitioner testified that this surgery provided him with great relief from his symptoms of cramping and spasms in his left hand. It is unrebutted that Petitioner was able to return to his job as a heavy equipment mechanic for a period of more than nine months.

At the time of his accident on February 20, 2019, Petitioner was not under the care of a doctor. He was able to perform his job. After the accident, everything changed. What was believed by Petitioner to be an insignificant neck strain gradually worsened over the course of the next two days until he was unable to lift his left arm. An MRI confirmed the existence of a new disc herniation at C6-7, just below the level of the earlier fusion.

The only medical evidence in this case comes from Petitioner's treating doctors. His treating neurosurgeon, Dr. Drew Spencer, testified by evidence deposition that the new pathology in Petitioner's cervical spine was caused by the accident that he sustained on February 20, 2019. (PX 21, p. 20) This resulted in the need for another cervical fusion which was perfomed on March 21, 2019. There

is no evidence to the contrary. Respondent did not obtain a medical evaluation or record review pursuant to Section 12 of the Act.

Based upon the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being relative to his cervical spine is causally connected to the accident of February 20, 2019.

In support of the Arbitrator's decision regarding the period of temporary total disability ("L"), the Arbitrator concludes as follows:

Petitioner was taken off work by Dr. Spencer on February 25, 2019. This was the date of Petitioner's initial office visit following the accident. At his evidence deposition on May 29, 2019, Dr. Spencer testified that Petitioner had not yet been released to return to work and that he remained under active medical care and treatment. (PX 21, p. 13) His next office visit was scheduled for June 24, 2019. (PX 21, p. 21)

Based on the foregoing, the period of temporary total disability is 13 5/7th weeks in duration, extending from February 25, 2019 through May 31, 2019.

In support of the Arbitrator's decision relating to past and prospective medical expenses ("J" and "K"), the Arbitrator concludes as follows:

Petitioner's medical expenses have been itemized and outlined in PX 23. Portions of these bills have been paid by Petitioner's union health insurance carrier, amounts for which the parties stipulate Respondent is entitled to credit. It is clear to the Arbitrator that the dispute on this case was one of compensability, not whether the treatment in question was reasonable or necessary.

Based on the foregoing, the Arbitrator concludes that Respondent shall pay such medical bills as are reflected in PX 23 subject to the limits of the Medical Fee Schedule, and shall indemnify Petitioner for any claim for reimbursement asserted by the union health insurance carrier. The Arbitrator further concludes that Respondent shall authorize the remaining post-operative regimen of Dr. Spencer.

In support of the Arbitrator's decision relating to penalties and attorneys' fees ("M"), the Arbitrator concludes as follows:

Although the Arbitrator has concluded that Petitioner has proven the compensability of the injury to his cervical spine, this is not to suggest that Respondent was not without reasonable suspicion on the issue. As has been noted above, Respondent had learned of a variety of facts which, taken together, constituted circumstantial evidence that Petitioner did not injure himself as claimed. Respondent was entitled to present its defenses to a trier of fact at the

Commission. Respondent's decision to contest Petitioner's claim for benefits, while ultimately wrong, was not made in bad faith.

Based on the foregoing, the Arbitrator concludes that Petitioner is not entitled to penalties and attorneys' fees under Sections 19(k), 19(l) or 16 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARY LU KRUEGER,

Petitioner,

21IWCC0099

vs.

NO: 13 WC 0011

MINOOKA CCSD #201,

Respondent.

DECISION AND OPINION ON REVIEW

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

Based on Petitioner's complete lack of credibility and the video evidence, the Commission finds that the Arbitrator's neutral-risk analysis, on page 22, is unnecessary and hereby strikes that portion of the Decision. Furthermore, the Arbitrator's analysis is no longer applicable in light of the Illinois Supreme Court's recent decision in *McAllister v IWCC*, 2020 IL 124848 (9/24/20).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 5, 2018, is hereby affirmed and adopted with the change noted above.

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

21IWCC0099

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

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

DATED: MAR 5 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell
Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 1/12/21
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KRUEGER, MARY LU
Employee/Petitioner

Case# **13WC000011**

21IWCC0099

MINOOKA CCSD#201
Employer/Respondent

On 3/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN & MACIARIELLO
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
PATRICK J JESSE
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

21IWCC0099

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mary Lu Krueger,
Employee/Petitioner

v.

Minooka CCSD #201,
Employer/Respondent

Case # **13** WC **11**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **New Lenox and Chicago**, on **October 12, 2017 and January 31, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10-30-2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**18,200.00**; the average weekly wage was $**350.00**.

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

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

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

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

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

ORDER

The Arbitrator finds that Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent on October 30, 2012. The Arbitrator further finds that Petitioner failed to prove a causal connection exists between those claimed injuries and her current condition of ill-being. Petitioner's claims for compensation are therefore denied.

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

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

Robert M. Harris

Signature of Arbitrator

March 5, 2018
Date

MAR 5 - 2018

ARBITRATOR'S FINDINGS OF FACT

Procedural History

Petitioner filed an Application for Adjustment of Claim alleging accidental injuries arising out of and in the course of her employment with the Respondent, Minooka Community Consolidated School District #201. The Application for Adjustment of Claim was filed on January 2, 2013, case number 13 WC 11. The matter was consolidated with three other prior cases that Petitioner had filed against other Respondents, case numbers 09 WC 30322, 12 WC 431, and 12 WC 433. All four cases were consolidated in September of 2013. During the pendency of case number 13 WC 11, Petitioner's three earlier claims were either settled or dismissed. Therefore, the only claim pending before the Arbitrator at the time of trial was case number 13 WC 11.

The cases proceeded to hearing on two separate dates. The matters were bifurcated due to an issue with Petitioner's appearance at the Illinois Workers' Compensation Commission in New Lenox on October 12, 2017. Proofs were opened on October 12, 2017 and the testimony of respondent's witness, Jackie Hardie, was completed. Proofs were subsequently closed on January 31, 2018 in Chicago when the proceedings were completed after Petitioner appeared and testified in this case.

The issues in dispute at arbitration were accident, causal connection, medical bills, TTD from October 30, 2012 until January 27, 2016, and the nature and extent of Petitioner's injury. Both parties were represented by counsel on each hearing date.

Testimony of Petitioner

Petitioner testified in this matter on January 31, 2018, the continued hearing date. Petitioner testified that she had worked for Respondent, Minooka Consolidated Community School District #201, since July of 2012. (Tr. 10). Petitioner testified that prior to working for the Minooka School District, she had generally been employed as a school bus driver since 1996. Petitioner testified that she worked for various bus driving companies throughout the years. Petitioner testified that she took a brief period of time from 2000 to 2004 in order to pursue a career in radio broadcasting. (Tr. 12).

Petitioner testified that prior to October 30, 2012, she underwent neck surgery. (Tr. 15). She testified that subsequent to neck surgery, she underwent physical therapy. Petitioner testified that she began experiencing right shoulder pain during physical therapy for her neck in March of 2012. (Tr. 16). Petitioner testified that she underwent treatment, including injection therapy, with Dr. Sharma for right shoulder pain prior to the October 30, 2012 work accident. Petitioner testified that after undergoing treatment with Dr. Sharma, she no longer experienced any right shoulder pain. (Tr. 17).

Petitioner testified that she was working as a bus driver in the week before her October 30, 2012 accident. She testified that she was able to do all of her duties at work before the accident. She testified that her job duties involved the use of her right hand or arm. She testified that her job duties included a pre-trip of the bus in the morning, which would require her to open the hood

and then "crawl" into the engine compartment and pull out the dipsticks for the different fluids in order to check their levels. (Tr. 20). Petitioner also testified that her job duties required her to check underneath the bus for any leaks, as well as checking the tires for accurate pressure. Petitioner testified that she would have to open and close the back door of the bus in order to make sure it worked properly. Petitioner testified that she would be required to depress all buttons and make sure that the door arms opened up. Petitioner testified that she was also required to walk up and down the aisle of the bus to make sure that all seats were secured and all windows opened. Petitioner testified that all of these duties would involve the usage of both arms. (Tr. 21).

Petitioner also testified that she would use her right arm to open the bus door manually. The door was attached to a lever that opened and swung outwards. Petitioner testified that she would perform this activity "hundreds of times" throughout the day. (Tr. 21-22). Petitioner testified that this activity would be performed at shoulder level.

Petitioner also testified that she would be required to "post-trip" the bus. Petitioner testified that this was a child safety check and that she was required to walk up and down the aisle to make sure there was no child left behind or any particular items a passenger may have left. Petitioner testified that there is a buzzer that goes off at the back of the bus. Petitioner testified that once she parked the bus, she would have to physically get up out of the drivers' seat and shut the buzzer off. This required her to walk the length of the bus. Petitioner testified that this activity would require her to lift the arm up on the back of the door near the rear of the bus and press a button, which would trigger the alarm to stop. (Tr. 23).

Petitioner testified regarding her job duties on October 30, 2012. She testified that she was able to perform her pre-trip that morning. She testified that she completed her route and returned to the garage where she parked her bus in the afternoon following the completion of her route. (Tr. 27).

Petitioner testified that after she parked her bus on October 30, 2012, she got up out of her seat to perform her post-trip check and to make sure there were no children left behind. Petitioner testified that she got up and walked towards the back of the bus to shut the buzzer off. She testified that nothing was left behind and she hit the button to stop the buzzer.

Petitioner testified that as she was returning back to the front of the bus and coming up the aisle, she "tripped and fell forward into the back of a seat." (Tr. 29). Petitioner testified that the seat was a bench with a back. She testified that the seats were padded with a frame that is covered with vinyl. Petitioner testified that the padding would be in the front of the seat. Petitioner testified that when she fell forward into the back of the seat, she came directly into contact with the corner where the metal frame is on the back of the bus seat. (Tr. 31- 32). Petitioner testified that if one was sitting in the front of the bus, they would not be able to see the "reverse of the seats."

Petitioner testified that after her shoulder came into contact with the bus seat, she then took a moment to gather herself and returned to the front of the bus. Petitioner testified she then exited the bus and walked into the office because she wanted to let someone know that she "just hurt herself." Petitioner testified that this was at approximately 4:30 p.m. and that the office was empty and no one was there. (Tr. 32-33).

Petitioner testified that when she "struck the shoulder" she experienced pain. She testified that her pain was a "10 out of 10." She related the pain to her right shoulder. Petitioner testified that the pain she experienced post October 30, 2012 was different than the pain she had experienced in her right shoulder before that date. She testified that the pain was in a "different location" post-accident. (Tr. 33-34). Petitioner gestured during trial that the pain she felt after she struck her shoulder was on the top outer edge where the shoulder meets the arm. (Tr. 35).

Petitioner testified that after the incident, she went home and told her husband and son. She testified that she iced her shoulder and took Tylenol. She testified that she returned to work the next morning on October 31, 2012. Petitioner testified that she was still experiencing pain at that time. Petitioner testified that she did not report the accident when she arrived at work on October 31, 2012 as allegedly no one was there. (Tr. 36-37).

Petitioner testified that on October 31, 2012, she was able to perform her normal bus pre-trip, but "not as well." She testified that she needed a hand with opening the hood of her bus. Petitioner testified that she performed her "A.M. route" and did not perform her afternoon route. She testified that she had difficulty with opening the door to her bus. (Tr. 37). Petitioner testified that she was experiencing pain throughout the day on October 31, 2012 and had to use "both hands to push the lever open." Petitioner testified that she would use her right hand to push the lever tab, which opens the bus door, and then her left hand in order to open the door. Petitioner denied that she performed her post-trip bus activities as she only participated in her A.M. route on October 31, 2012. (Tr. 37-38).

Petitioner testified that after she completed her morning route, she then went to the office and reported the incident from the day before. Petitioner testified that she was sent to immediate care in order to be examined. Petitioner testified that she was then instructed to "return every day to work after that just to sit down." She claimed that the employer did not "know what they were going to do next." (Tr. 37-40).

Petitioner testified that she remained at the work place until November 5, 2012. She testified that on November 5, 2012, she was sent back to immediate care for a re-check. Petitioner testified that the immediate care doctors determined that she could not fulfill her duties of driving a bus. (Tr. 39). Petitioner testified that she was in fact examined at Morris Immediate Care, but had previously been seen at Minooka Immediate Care the day following the accident, October 31, 2012. (Tr. 39-40). Petitioner testified that she was given a referral for physical therapy. She testified that post-November 5, 2012, she would "show up at work" and "drive myself to physical therapy." (Tr. 40). Later on in her testimony, Petitioner denied returning to work after November 5, 2012. (Tr. 41).

Petitioner then testified that after undergoing therapy at Minooka Immediate Care, she began treatment Dr. Blair Rhode of Orland Park Orthopedics. (Tr. 41, Pet. Ex. #6).

Petitioner testified that during the course of her treatment with Dr. Rhode, she underwent physical therapy prior to having surgery on her right shoulder. Petitioner testified that she underwent physical therapy post-surgery as well. Petitioner thought she might of undergone work

hardening as well. Petitioner testified that after the completion of post-surgery rehab, she underwent a functional capacity examination.

Petitioner testified that the therapy with Dr. Rhode eventually came to a conclusion. She testified that her right shoulder was not any better with physical therapy post-surgery. Petitioner testified that she told her therapist that some of the exercises or therapies she was doing were bothersome and "too heavy" and "too hard." (Tr. 42-43). Petitioner testified that at the conclusion of therapy, she was continuing to experience symptoms in her right shoulder and had not returned to work.

Petitioner testified that she reported to Dr. Rhode that she was still having shoulder pain and was told by Dr. Rhode that it would take "a year to resolve any issues." (Tr. 44). Petitioner testified that she then went for a second opinion to see Dr. Fuentes. She testified that Dr. Fuentes asked for the medical records from Dr. Rhode which she provided to him. Petitioner testified that Dr. Fuentes said he "did not want to touch it" when referring to her right shoulder. Petitioner testified that Dr. Fuentes indicated that Petitioner needed another shoulder surgery. Petitioner testified that she was then referred by Dr. Fuentes to Dr. Anthony Romeo. Petitioner testified that she chose to see Dr. Fuentes on her own. No medical records from Dr. Fuentes were offered into evidence. (Tr. 45).

Petitioner testified that she began treating with Dr. Anthony Romeo. She testified that she underwent two additional surgeries on her right shoulder, which were performed by Dr. Romeo. She testified that she also underwent physical therapy post-surgery. (Tr. 45).

Petitioner testified that she never received any payment for her time off from work. She testified that to the best of her knowledge, Respondent's workers' compensation carrier did not pay any of her medical bills. Petitioner testified that she utilized her husband's group insurance to pay for many of her medical services. (Tr. 47-48). Petitioner testified that she concluded her treatment with Dr. Romeo in January of 2016. She testified that at the time she completed treatment, she was still not able to return to work. Petitioner testified that she was still experiencing some pain. (Tr. 49).

Regarding her current complaints, Petitioner testified that she is still sore and tender in her right shoulder. She testified that she is no longer able to wash and dry clothes or move furniture. Regarding current pain, Petitioner testified that she experiences "a minimal amount." She rated her pain complaints at the time of arbitration as a two and "maybe a three on a really bad day" out of 10. Petitioner testified that she did not know if she would be able to return to work as a bus driver. Petitioner indicated that it would depend on different factors and the bus that she would be assigned to on a regular basis. (Tr. 50-51). Petitioner, testified that she believes she could continue to drive a bus. (Tr. 51).

Petitioner testified that driving a bus would require medical certification. She testified that she has not pursued the proper medical certification in order to return as a bus driver post-surgery with Dr. Romeo. (Tr. 52).

Petitioner denied that she was currently working. She testified that she had not worked as a bus driver since October 30, 2012. Petitioner admitted that she returned to work in another capacity post-accident. Petitioner testified that the reason she was currently not working is not related to the October 30, 2012 accident. Petitioner denied that she has sustained any other accidents involving her right shoulder since October 30, 2012. (Tr. 56). Petitioner further denied that she had aggravated her right shoulder and made it significantly worse since October 30, 2012. Petitioner testified that she was not familiar with Respondent's witness, Ms. Jackie Hardie.

Petitioner testified that her shoulder condition, as of the date of arbitration has limited her in the job she would pursue. Petitioner testified that she apparently pursued going back to driving a school bus, but "cannot perform the duties not knowing the bus" she would be given. Petitioner then testified that she had applied for a bus driving job and decided not to go through with it because "fear of what I might have to do." (Tr. 57-58). Petitioner further admitted that she had been offered a position as a bus driver, but did not take the physical examination. Petitioner testified that she had secured alternative employment in October of 2017.

Petitioner testified that she would disagree with Dr. Romeo's records pertaining to the last office visit of January 27, 2016 with respect to the absence of work restrictions. Petitioner then reviewed the last chart note from Dr. Romeo dated January 27, 2016 and admitted that the record does not make any comment or opinion regarding work restrictions. (Tr. 62-65).

Regarding her most recent employment, Petitioner testified that she began working at Amazon in "problem solving" in October of 2016. She testified that she worked in the "sortation center." She testified that her job required her to print out labels that might have gotten ripped or torn or misprinted on boxes. She admitted that she has to handle the packages. She testified that the position with Amazon is a physical job. She denied that the job requires overhead lifting, but requires her to carry items. (Tr. 71-73).

During cross-examination, Petitioner testified that she did not in fact receive a firm offer from a bus driving company. She testified that she only filled out an application and the bus company told her "we would love to have you back." This company was Illinois Central Bus Company. Petitioner then testified that she did receive an offer from a bus driving company after her release from care. She then testified that she did not pursue anything after she filled out the application for Illinois Central Bus Company. Petitioner then testified that after she completed the application, and despite allegedly receiving an offer, she did not hear back from Illinois Central Bus Company. She testified that the company should have called her and a Department of Transportation physical would have been scheduled. Petitioner testified that would be the next step in the hiring process. Petitioner then testified that she never received a call back from Illinois Central Bus Company and that she did not pursue the job further after completing the application. (Tr. 74-76). Petitioner then admitted that she apparently rejected the offer "out of fear." (Tr. 77).

On cross examination, Petitioner testified regarding the history she provided to Dr. Blair Rhode. Petitioner was unable to answer Respondent's counsel's questions regarding whether she had denied any pain or problems with her right shoulder prior to October 30, 2012. Petitioner simply testified that at the time, prior to October 30, 2012, she saw Dr. Rhode, she did not have shoulder pain. (Tr. 79-80). Petitioner agreed, however, that if the records from Dr. Rhode

indicated that she denied any prior injury to the right shoulder, that she would have no reason to disagree with the same. (Tr. 81). Petitioner could not recall if she ever reported injuring her right shoulder during physical therapy for her neck to Dr. Rhode. (Tr. 81).

Petitioner testified that after she underwent the injection with Dr. Sharma in May or June of 2012, she was not reporting right shoulder pain. Petitioner testified, however, that she continued to treat with Dr. Sharma post-shoulder injection. (Tr. 82).

On cross examination, Petitioner confirmed that she did go to immediate care on October 31, 2012. However, no records were admitted into evidence from the immediate care facility documenting treatment on or about October 31, 2012. (Tr. 87-88).

Petitioner testified that she disagreed that the first date she sought medical treatment was on November 5, 2012 at Morris Hospital occupational health care services. (Tr. 87-88). Petitioner however did not disagree with the history from Morris Immediate Care on November 5, 2012 that she alleged tripped over a seatbelt and hit her shoulder on a seat. (Tr. 88).

Petitioner testified that she sustained a direct trauma to her right shoulder when she tripped and fell and rammed her shoulder into a bus seat on October 30, 2018. (Tr. 88). Petitioner confirmed that was the history of her accident that she also provided to Dr. Blair Rhode. (Tr. 88-89).

Petitioner testified that she recalled an incident where she was tripped by her dogs in February of 2015. Petitioner testified that she did not recall reporting worsening right shoulder pain after that incident. (Tr. 91). Petitioner could not recall an incident in early 2015 where she was trying to pull two dogs apart and allegedly sustained an injury to her right shoulder. Petitioner could also not recall an incident in April of 2015 where she was raking her yard and re-injured her right shoulder. (Tr. 91).

Petitioner testified that she still continues to treat with Dr. Sharma, but only for her chronic back problems. Petitioner testified that she was taking Norco for her back problems prior to the October 30, 2012 work incident. Petitioner testified that no doctor is currently giving her any pain medication for her right shoulder. (Tr. 93).

Petitioner testified that she showed up for work after October 30, 2012, but "did not work." Petitioner testified that two days after the accident, she showed up for work on November 1, 2012, but never drove a bus. Petitioner testified that she showed up for work on November 5, 2012 and was unable to fully perform her job duties. (Tr. 95-96). Petitioner testified that she believed she continued to "show up" for work. She testified that she was not actually given any work the week following the incident on October 30, 2012. She testified that as long as she showed up, she was paid. (Tr. 97). Petitioner testified that she did not perform any job duties on November 1, 2012. Petitioner testified that she never returned to work to sit "in the office", after November 5, 2012 (Tr. 98-99).

On redirect, Petitioner testified that she would be required up to 40 pounds in her current employment with Amazon. (Tr. 104). Petitioner testified regarding Dr. Sharma's records from

September of 2012. Petitioner did not know if she had shoulder pain during the office visit in September of 2012. (Tr. 108-109). Petitioner specifically denied that she was experiencing shoulder pain in the records from Dr. Sharma leading up to the date of accident. (Tr. 112). Petitioner was of the belief that the records were mistaken if they documented right shoulder pain on September 17, 2012. (Tr. 113).

Testimony of Jackie Hardie

Ms. Jackie Hardie was called to testify by Respondent on October 12, 2017. Ms. Hardie testified that she was the transportation director for Minooka Consolidated School District #201 and #111. She testified that she was retiring from the School District effective October 13, 2017, or the day after her testimony. She testified that she was also moving to Tennessee after her retirement.

Ms. Hardie testified that her job duties as director of transportation included supervising the bus drivers, assigning routes, and investigating incidents on busses. Ms. Hardie testified that if there is an incident on a bus, she would pull the bus video from storage and distribute the video to people who have a right to see it. She testified that incidents would include students, as well as employee work accidents. Ms. Hardie testified that any incident on the bus would need to be verified and pulled from the video.

Ms. Hardie testified regarding the procedure when a bus incident is reported. She testified that any injury or incident on a bus involving a student or a driver would require a form to be filled out. She testified that once the form is completed, the video from the bus would need to be pulled. She testified that the busses are fitted with video cameras and that there is a hard drive locked into the camera. Ms. Hardie testified that she was the only one to have a key to unlock the videos in order to pull the hard drive and download the video of any incidents.

Ms. Hardie testified regarding Respondent's Exhibit #5, which was an incident report. Ms. Hardie testified that this was the form that Petitioner filled out when she had her accident on the bus. She testified that Petitioner's bus number was indicated on the form, as well as the logo for Minooka School District. Ms. Hardie testified that the completion of the bus incident report prompted the pulling of the bus video.

Ms. Hardie testified that she reviewed the videos of Petitioner's accident prior to trial. She testified that the videos are specific to a particular bus. She testified that the videos are time stamped, as well as stamped with the bus number. She testified that the time is in military hours down to the minute and second.

Ms. Hardie testified regarding Respondent's Exhibit #1, which were videos taken from inside the Petitioner's bus on the date of accident, October 30, 2012, as well as subsequent videos taken on October 31, 2012, November 1, 2012 and November 5, 2012. Hardie testified that the videos all document Petitioner's bus number, which was 82, as well as the date and time. Hardie testified that these videos are kept in storage once an incident happens. She testified that the videos are not able to be edited or doctored in any way as the videos require a certain program to be able

to see them for privacy reasons. She testified that the program prohibits anyone from doctoring the video.

Hardie testified that the videos are kept in the usual and customary course of business for the school district. She testified that she is the custodian for those videos. Hardie testified further that the date on the bus incident form (Res. Ex. #5) matches the date on the bus video (Res. Ex. #1). Hardie testified that there is a moment on the October 30, 2012 video in which Petitioner indicates to her right shoulder. Hardie denied that she was personally familiar with Petitioner. Hardie denied that she had any information regarding Petitioner's health condition prior to the October 30, 2012 date.

Bus Videos

Respondent offered several bus videos into evidence, which were marked and admitted as Respondent's Exhibit #1.

The first video offered in Respondent's Exhibit #1 is dated October 30, 2012, the date of accident, and begins at approximately 4:07 p.m. In the top left-hand corner is the number 82, which Hardie testified as Petitioner's assigned bus number. The video begins showing Petitioner driving her bus. At approximately 4:08 p.m., Petitioner is seen pulling her bus into the garage. At approximately 4:09 p.m., the lights on Petitioner's bus turn on and Petitioner is seen exiting the driver seat. Petitioner is seen walking to the back of the bus. As she walks to the back of the bus, Petitioner places both hands on each respective seat in the aisles tapping them as she moves towards the rear of the bus. Petitioner walks to the back of the bus near the exit. She is seen disabling the alarm at approximately 4:09:58 p.m. At 4:10 p.m., Petitioner is seen walking back towards the front of the bus.

At 4:10 p.m., Petitioner somewhat slightly stumbles forward. She clearly does not fall. Petitioner's shoulder clearly does not come into physical contact with or strike any part of any bus seat. Petitioner then walks to the front of the bus and gestures towards her clavicle on her right side. At no point does the video show Petitioner's right shoulder physically making contact with any objects.

After Petitioner reaches the front of the bus, she looks down appearing to be in pain somewhat, but again gestures over the side over her clavicle near her neck. The video is from the vantage point of the left-hand side of the driver seat and provides a clear view of Petitioner's alleged incident.

At 4:10 p.m., Petitioner grabs her coat from her seat. She is seen putting her coat on and then leaving the bus.

The bus incident report from October 30, 2012 was offered as Respondent's Exhibit #5. The report indicates that it was completed on October 31, 2012. The injured name is Marylu Krueger, the Petitioner. The report states that the incident occurred on bus number 82 at the end of the route in the bus garage. **The report states "driver tripped over seatbelt and rammed right shoulder into seat back." (Resp. Ex. #5).**

Respondent also offered videos of Petitioner's work activities post October 30, 2012. The second video begins at approximately 6:56 a.m. on October 31, 2012. The video, again, is marked with the number 82 correlating to Petitioner's bus. At approximately 6:56 a.m., we see the Petitioner performing her pre-trip inspection of the bus. At 6:57 a.m., we see Petitioner walk to the front of the bus. Petitioner thereafter begins driving her bus out of what appears to be the garage.

The next clip on October 31, 2012 is time stamped and begins at 8:31 a.m. At this time, Petitioner is seen with her right arm resting on her driver seat in a flexed position towards her head as students exit the bus. At 8:32 a.m., Petitioner helps guide the last student off the school bus. She then walks to the back of the bus. With her right arm, we see Petitioner tap the back of each and every seat in the aisle. She then walks all the way to the back of the bus and at 8:32 a.m. returns to the front of the bus, again, tapping the back of each seat with her arms. Petitioner performs these activities without any outright signs of disability. Petitioner walks in a fluid and normal manner and taps each seat without any outright signs of disability. At 8:32 a.m., Petitioner then starts her bus and drives away from the drop-off site. At approximately 8:33 a.m., we see Petitioner pull her bus back into the garage.

The third clip from Respondent on October 31, 2012, begins at 11:59 a.m. It again shows Petitioner performing the same activities, walking to the back of her bus as she taps each and every seat with both arms. Petitioner walks to the back of the bus then turns around towards the front. She moves her arms in a fluid manner appearing to talk to herself. She then reaches down towards a seat on the right-hand side of the bus and then picks up what appears to be an item of clothing that a student left behind with both arms. She then reaches down with her right arm in the seat adjacent to the one she picked up the loose clothing item. Petitioner then appears to grab something off the ground and sits back into her driver seat at approximately 11:59:47 a.m. At 12:00 p.m., Petitioner is seen driving her bus again. The video ends at approximately 12:00: 58 p.m. while Petitioner is still driving. Respondent did not offer any additional videos from October 31, 2012.

Respondent also offered bus videos from November 1, 2012. The first video begins at 5:53 a.m. on November 1, 2012. Petitioner is seen walking towards the back of the bus, although the picture is dark. Petitioner comes into view again at 5:53:17 a.m. and sits in the driver seat. The video goes dark at 5:55 a.m. The next video on November 1, 2012 begins at approximately 7:36 a.m. Petitioner is observed walking towards the back of the bus as she taps each and every individual seat with both arms. Petitioner bends over placing her weight on her right hand and reaching into the last seat on the bus. She does the same on the seat on her left-hand side. Petitioner also appears to pick up items as she is walking towards the front of the bus and down the aisle. She then continues to tap each seat with both arms. Petitioner comes into full view at 7:37 a.m. She then sits back in her driver seat. Petitioner is then seen driving the bus at approximately 7:37 a.m. It is clear from the video that the bus is making turns as petitioner drives. The video ends at approximately 7:38:40 a.m.

The third clip from November 1, 2012 begins at approximately 4:05 p.m. Petitioner is seen getting up from her driver seat and walking towards the back of the bus. Petitioner taps each and every seat again with both arms as she walks towards the back of the bus. She then walks to the

front of the bus. She appears to be talking to herself while walking towards the front of the bus. She appears to reach down while holding onto a seat with her right arm. At 4:05 p.m., Petitioner sits back down in the driver seat. She is then seen driving the bus at 4:06 p.m. At approximately 4:07:30 p.m., the video ends while Petitioner is driving.

Respondent also offered videos from November 5, 2012 which begins at approximately 7:09 a.m. Petitioner is seen getting up from her driver seat and walking towards the back of the bus. Petitioner walks towards the back, and again, towards the front of the bus. She is seen wearing a knit hat and jacket. Petitioner is then seen exiting her bus at approximately 7:09:33 am. The next clip on November 5, 2012 begins at 9:21 a.m. Petitioner is again seen walking towards the back of the bus. She checks the seats for any lost items. She then walks to the front of the bus. She reaches down with her right hand, grabs some trash, picks it up, and appears to deposit it in a trash receptacle (this is partially out of view). Petitioner then begins driving her bus at approximately 9:22 a.m. At approximately 9:24 a.m., the clip ends while Petitioner is driving her bus.

The Arbitrator notes that Petitioner is clearly seen driving her bus on October 31, 2012 in the morning, again on November 1, 2012 in the morning and afternoon, and again on November 5, 2012. **The Arbitrator notes that this directly conflicts with Petitioner's testimony that she was merely asked to sit in an office on those days and she did not perform her usual duties. Furthermore, the Arbitrator did not observe, on any of the bus videos, Petitioner acting in a disabled manner.** The bus videos show that Petitioner is able to walk normally and perform her job as a bus driver without any outright signs of disability. **The Arbitrator also notes that Petitioner did not testify regarding her review of the bus videos, nor were the bus videos played for Petitioner at the time of trial.**

Medical

The first medical record submitted into evidence in this matter regarding Petitioner's treatment post-accident was dated November 5, 2012 from Morris Immediate Care. While Petitioner testified that she thought she sought treatment at another Immediate Care facility on October 31, 2012, no medical records were offered regarding any treatment on that date.

According to the records offered as Petitioner's Exhibit #2, Petitioner was admitted to Morris Hospital at 10:30 a.m. on November 5, 2012. She was seen in the occupational medicine services division. The services requested indicated an "initial injury right shoulder pain." Petitioner presented according to the injury record with chief complaints of right shoulder pain. **The mechanism of injury stated that Petitioner tripped over a seatbelt and hit her shoulder on a seat on Tuesday, October 30, 2012 at 4:25 p.m.** The notes also indicate that Petitioner had pain that was worse with lifting/moving. The records indicate Petitioner had limited range of motion with pain and flexion and extension. **The history of present illness indicates that Petitioner sustained a direct blow due to tripping on a seatbelt and falling forward and hitting shoulder into a seat on a school bus.** X-rays of the shoulder were ordered and obtained on that date. A clinical indication stated "recent fall with persistent pain." The impression by the radiologist was that there was no fracture, dislocation, or acute bony abnormalities. There was some mild osteoarthritis seen within the AC joint. Petitioner was diagnosed with a right shoulder

sprain/pain. Tylenol, Motrin, and Flexeril were prescribed. Petitioner was also give a shoulder sling and advised to stretch four times a day. It appears she was given restrictions of no use of the right arm/shoulder. Petitioner was advised to follow up in three days with her family physician.

Petitioner was next seen on what appears to be November 8, 2012. It appears her diagnosis remained a right shoulder strain. She was given prescriptions of Celebrex and Ultram and told to discontinue Ibuprofen. She was instructed to make appointments for physical therapy and discontinue usage of the sling. She was advised to make a follow up appointment on November 16, 2012.

Petitioner was seen again on November 16, 2012. The notes indicate that Petitioner's diagnosis remained a right shoulder strain. It appears Petitioner was advised to follow up as needed. It appears Petitioner was also referred to an orthopedist. Her restrictions at that time were listed as "light duty" according to the progress notes. (Pet. Ex. #2).

Also contained within Petitioner's Exhibit #2 are physical therapy evaluation notes. According to the note drafted by Therapist Karen Asukas on November 8, 2012, **Petitioner reported an injury to her right shoulder when she "tripped over seatbelt, hit frame of seat." The notes indicate that this happened on October 30, 2012. The notes further indicate that Petitioner hit the anterior shoulder.** The notes indicate that Petitioner did not see the doctor until November 5, 2012. The notes indicate that Petitioner has been off work and on light duty.

Later notes from evaluating therapist, Lindsay Ashby, dated November 13, 2012, again indicate that Petitioner has been in a lot of pain, but did not see the doctor until November 5, 2012. It also appears that Petitioner underwent therapeutic exercises through November 16, 2012, the date that she was discharged from Morris Occupational Health and Hospital.

Petitioner offered the medical records of Dr. Blair Rhode. The first record of treatment with Dr. Rhode is dated November 28, 2012. Petitioner presented for a consultation of right shoulder pain. She reported that her symptoms were due to an injury at work on October 30, 2012. **Petitioner provided a history to Dr. Rhode that she was walking through the bus when she tripped over a seatbelt striking her right shoulder on the back of a seat.** The history indicates that Petitioner had subsequent pain which had worsened with decreased motion. Petitioner denied any prior injuries to the right shoulder. An ultrasound of the right shoulder was administered which revealed biceps tendonitis with an intact tendon and swelling near that area. The ultrasound noted that Petitioner's rotator cuff was intact with some inflammation. Petitioner was diagnosed with impingement and an injection to the subacromial space was administered. (Pet. Ex. #3).

It also appears Petitioner began physical therapy at Newsome Physical Therapy Network on December 7, 2012. (Pet. Ex. #4). According to the progress notes dated December 7, 2012, Petitioner was diagnosed with rotator cuff tendonitis. The history reflects that Petitioner treated on November 5, 2012 and underwent three days of therapy with no benefit. The history further states that Petitioner underwent an MRI of the shoulder on November 30, 2012, which was negative for any tears. **The history Petitioner reported to the therapist indicated that Petitioner was "checking straps in bus" when she tripped over a seatbelt on the floor and fell with her right shoulder striking a seat.** Therapy was recommended three times a week for six

weeks. It appears Petitioner was discharged on December 10, 2012. The basis for the discharge from Newson Physical Therapy Network was that no authorization was received from the workers' compensation carrier.

Petitioner followed up with Dr. Rhode on December 21, 2012. The notes reflect that Petitioner continued to have pain and that physical therapy was now refused by workers compensation. It appears Dr. Rhode reviewed the MRI study from November 30, 2012 and opined that the images revealed rotator cuff tendonitis in the right shoulder with no evidence of a full thickness tear. Petitioner was, again, diagnosed with shoulder pain and impingement. She was advised to continue therapy and follow up in four weeks. Dr. Rhode kept Petitioner off work during this time. (Pet. Ex. #3).

Seven days later on December 28, 2012, Petitioner was evaluated at Dr. Rhode's practice for an initial physical therapy evaluation. Petitioner continued therapy at Orland Park Orthopedics. She was evaluated by Dr. Rhode on January 18, 2013. The notes indicate that Petitioner had been improving, but experiencing increased anterior pain. Petitioner was, again, diagnosed with impingement syndrome and an injection to the right subacromial space was administered. (Pet. Ex. #3).

Consistent with her testimony, petitioner underwent surgery on March 5, 2013. A surgical note contained within Petitioner's Exhibit #6 indicates that Petitioner underwent a subacromial decompression and arthroscopic rotator cuff repair. The post-operative diagnosis was noted to be right shoulder impingement with a u-shaped supraspinatus rotator cuff tear. (Pet. Ex. #6).

Post-operatively, Petitioner continued to follow up and undergo physical therapy at Orland Park Orthopedics. On May 17, 2013, Petitioner was seen by Physician Assistant Mark Bordick at Orland Park Orthopedics. The records reflect that Petitioner was slowly improving with therapy with increased range of motion. Petitioner was kept off duty at that time.

Petitioner was next evaluated by Dr. Rhode on August 16, 2013. The notes indicate Petitioner continued to improve. Petitioner was released to full duty on a trial basis and MMI was anticipated in four weeks. Petitioner continued to undergo therapy at Orland Park Orthopedics.

Petitioner was next seen on October 16, 2013. The records indicate that Petitioner was continuing to report symptoms in her right shoulder. Dr. Rhode indicated that he believed Petitioner was plateauing. He recommended Petitioner complete therapy and consider an FCE. Petitioner was next seen by Dr. Rhode on November 13, 2013. Petitioner continued to report anterior shoulder pain. An updated ultrasound of the right shoulder was obtained, which demonstrated an intact rotator cuff. Dr. Rhode indicated that petitioner has plateaued and ordered an FCE.

On November 27, 2013, Petitioner underwent an FCE, which was performed at Orland Park Orthopedics by the therapist that was previously treating Petitioner. The therapist notes that based upon "perspiration and elevated heart rate" that Petitioner applied consistent effort. The therapist determined that Petitioner could function at the light physical demand level for all

activities with the exception of sedentary duty for overhead and exclusive right upper extremity usage.

Subsequent to the FCE, it does not appear Petitioner returned to Dr. Rhode for additional treatment until May 2, 2014. On that date, she was seen by Dr. Rhode's physician assistant, Mark Bordick. The records indicate that Petitioner was continuing to report moderate symptoms with continued weakness in her right shoulder. An MRI was ordered to evaluate the attachment near the rotator cuff site.

Petitioner underwent an MRI of the right shoulder on May 7, 2014. The impression by the radiologist was that Petitioner had supraspinatus tendinosis with no evidence of a recurrent rotator cuff tear with mild atrophy of the supraspinatus muscle. Post-operative changes were noted along with minimal cyst formation of the posterior aspect of the humeral head. The remainder of the study was noted to be unremarkable. (Pet. Ex. #8).

Subsequent to the updated MRI study, Petitioner retuned to Dr. Rhode on May 14, 2014. Petitioner continued to report significant pain with abduction. Another injection was administered to the right subacromial space. The notes indicate that Petitioner was diagnosed with shoulder pain and impingement. The plan indicates that Petitioner has continued symptoms, but her MRI demonstrated an intact rotator cuff repair. Petitioner was to "consider her options."

Petitioner then sought treatment with Dr. Anthony Romeo. She was evaluated on November 5, 2014. Records reflect that Petitioner was working as a school bus driver when she sustained a work-related injury to her right shoulder in October of 2012. **The history provided to Dr. Romeo indicated that Petitioner was closing up her bus for the evening when she tripped in the aisle and jammed her right shoulder into the edge of a seat.** Petitioner provided a history of her treatment, including the surgery and therapy she underwent at the direction of Dr. Rhode. Petitioner reported that she was limited in activities of daily living. Petitioner told Dr. Romeo that as a result of her restrictions, she was "unable to work as a school bus driver." Records further indicated that Petitioner was referred by Dr. Henry Fuentes.

Dr. Romeo reviewed the prior MRI studies and examined Petitioner. Dr. Romeo told Petitioner that she could either live with her ongoing symptoms or undergo a revision acromioplasty in order to smooth the transition between her posterior and anterior acromion.

Petitioner opted to undergo a second surgery, which was performed by Dr. Romeo on February 10, 2015. Dr. Romeo performed a right shoulder arthroscopy with a distal clavicle resection, along with a right shoulder acromioplasty, and a debridement including the glenohumeral joint and biceps tendon.

Petitioner returned to Dr. Romeo on February 20, 2015. She was kept off work and advised to begin therapy post-surgery. Petitioner returned to Dr. Romeo on February 8, 2015. Dr. Romeo reviewed the intraoperative photos with Petitioner and informed Petitioner that her rotator cuff was intact. Dr. Romeo believed Petitioner was continuing to report symptoms of rotator cuff tendonitis. He recommend Petitioner remain off work and to continue physical therapy.

Petitioner was next seen by Dr. Romeo on May 13, 2015. She continued to report ongoing pain complaints involving her right shoulder. Dr. Romeo was not entirely sure what the of the etiology of Petitioner's pain complaints. Dr. Romeo again reiterated that the intraoperative images demonstrated intact rotator cuff repair, as well as a fully decompressed subacromial space. Dr. Romeo indicated in his record that the mechanical symptoms could not be determined based upon the findings. An updated MRI was ordered. Dr. Romeo felt that despite Petitioner's ongoing complaints, she was capable of performing sedentary work.

An updated MRI of the right shoulder was obtained on May 20, 2015. The MRI study revealed a split full thickness tear in the distal supraspinatus tendon extending towards the musculotendinous junction. It was noted that the tear could be chronic.

Petitioner returned to Dr. Romeo on June 24, 2015. The notes, again, indicate that Petitioner's rotator cuff tendon repair from the prior surgery was fully intact at the time of the February 2015 surgery. It was noted that Petitioner was there to review the results of the MRI. Dr. Romeo agreed that there was a split tear in the supraspinatus tendon. He recommended a repeat right shoulder arthroscopy with a revision rotator cuff repair. Dr. Romeo did not offer any opinions as to the cause or etiology of the new tear.

On July 24, 2015, Petitioner underwent a third right shoulder arthroscopic surgery, which consisted of a rotator cuff tear of the supraspinatus tendon. Post-operatively, Petitioner returned to Dr. Romeo on September 9, 2015. It was noted that Petitioner was attending therapy and doing well. Petitioner was advised to continue therapy two times a week and to follow up in three months.

Petitioner was next seen by Dr. Romeo on October 9, 2015. Petitioner reported no significant pain or function loss. The notes indicate Petitioner was continuing to make gains on her own with home exercises. Petitioner reported that she was caring for her husband who recently underwent a total hip arthroplasty. Petitioner desired to continue therapy and range of motion exercises. An updated therapy prescription was provided. Petitioner was advised to return in six months.

Petitioner returned to Dr. Romeo on December 2, 2015. The notes indicate that Petitioner completed all of her physical therapy visits and had been performing home exercises. Petitioner reported improvements in range of motion, as well as strength. She continued to complain of pain predominantly in the anterior lateral aspect of the shoulder. An injection was administered to the acromion space. Petitioner was advised to continue home exercises and return in two months.

Petitioner was last seen by Dr. Romeo on January 27, 2017. The notes reflect that Petitioner reported bruising and worsening pain over the last month despite the injection. Petitioner was apparently undergoing aqua therapy on her own, which was improving her symptoms somewhat. Dr. Romeo noted that Petitioner had exhausted both surgical and non-surgical management in order to prove her symptoms. He noted that Petitioner had failed trials of physical therapy and injections and continued to report anterior lateral base pain. He recommended Petitioner seek treatment with a pain management specialist. Dr. Romeo felt that

aqua therapy would be beneficial. He advised Petitioner she could follow up on an as needed basis. (Pet. Ex. #10).

Medical Testimony

Dr. Rhode was the only doctor in this matter to testify. His deposition was offered as Petitioner's Exhibit #5. Dr. Rhode testified that he is an orthopedic surgeon with a sub-specialty in sports medicine. He testified that he performs approximately 600 surgeries per year. He testified regarding his treatment notes of the Petitioner.

Dr. Rhode testified that the history Petitioner provided to him on the initial office visit of November 28, 2012 revealed a right shoulder injury on October 30, 2012. **Dr. Rhode testified that Petitioner told him she "tripped and fell while walking through the bus."** (Pet. Ex. #5, Pg. 7). Dr. Rhode testified that he had ordered an MRI of the right shoulder. Dr. Rhode opined that the MRI revealed supraspinatus tendinopathy. Dr. Rhode testified that there was no full thickness tear visualized on the MRI. (Pet. Ex. #5, Pg. 9). Dr. Rhode testified that the diagnosis he arrived at was shoulder pain with rotator cuff tendonitis. Dr. Rhode based this opinion on the Petitioner's reported mechanism of injury. (Pet. Ex. #5, Pg. 9).

Dr. Rhode testified that he believed Petitioner's condition was related as of the last time he saw her on June 27, 2014. (Pet. Ex. #5, Pg. 11). **Dr. Rhode testified that the basis of his causal connection opinion was that Petitioner "sustained a single event injury on October 30, 2012 when she fell, striking her right shoulder."**

Dr. Rhode testified further that the "mechanism of injury for that would have been a direct blow with an upward force which injured the rotator cuff resulting in rotator cuff tendinopathy." (Pet. Ex. #5, Pg. 11).

Dr. Rhode testified that the medical treatment he prescribed, including the surgery, physical therapy, shoulder injections and functional capacity evaluation was reasonable and necessary to cure Petitioner's condition. (Pet. Ex. #5, Pg. 13). Dr. Rhode testified that he believed Petitioner was capable of working in a medium duty capacity with an overhead restriction of five pounds frequent, 10 pounds maximum. (Pet. Ex. #5, Pg. 14). Dr. Rhode testified that he had Petitioner off work from the first date of treatment, November 28, 2012, through the MMI date of December 6, 2013.

On cross-examination, Dr. Rhode testified that it was his understanding that Petitioner fell and struck her right shoulder and sustained a "direct blow." (Pet. Ex. #5, Pg. 15-16). Dr. Rhode testified that it was his understanding that Petitioner fell on something which caused an upward force from the ground transferring that force through the rotator cuff. (Pet. Ex. #5, Pg. 16).

Dr. Rhode did not believe that this was an aggravation of a pre-existing condition. He testified that Petitioner denied any prior injury to the right shoulder. Dr. Rhode could not recall whether Petitioner reported any problems relative to the right shoulder in the past. Dr. Rhode testified that the denial of any prior shoulder problems did factor into his causal connection

opinion. Dr. Rhode testified that if Petitioner had a prior right shoulder injury then his opinions could change. (Pet. Ex. #5, Pg. 15-17).

Dr. Rhode testified that he never reviewed the medical records from Dr. Sharma. Dr. Rhode denied that he was aware of any diagnosis of right shoulder pain prior to the October 30, 2012 incident. During the deposition, Dr. Rhode reviewed the June 15, 2012 record from Dr. Sharma in which the physical examination revealed a positive drop-arm test. Dr. Rhode admitted that a positive drop-arm test would be consistent with a rotator cuff tear. Dr. Rhode agreed that the examination findings by Dr. Sharma on June 15, 2012 were the same examination findings that he observed when he saw Petitioner on November 28, 2012. (Pet. Ex. #5, Pg. 18-20). Dr. Rhode also agreed that the findings by Dr. Sharma of pain in the AC joint, positive Yergason's, positive Speed's, and apprehension testing were consistent with shoulder pathology. (Pet. Ex. 5, Pg. 20).

Dr. Rhode testified that there was no way to look at an MRI and determine whether a tear in the rotator cuff was caused by an acute injury or degenerative. Dr. Rhode testified that in petitioner's case, he could not determine whether Petitioner's rotator cuff tear was caused by an acute or traumatic incident. He could not tell whether the tear was due to chronic changes. (Pet. Ex. #5, Pg. 21-23).

Dr. Rhode testified that the AC joint and acromial morphology seen on the MRI would be age related and pre-existed the work accident of October 30, 2012. Dr. Rhode admitted that this morphology would pre-dispose an individual to impingement. Dr. Rhode further conceded that the morphology seen on the MRI regarding the AC joint in the acromion, that pre-existed the work accident, could have possibly been a cause of Petitioner's impingement syndrome. (Pet. Ex. #5, Pg. 23).

Dr. Rhode testified further that the MRI did not show a rotator cuff tear. He testified that the MRI simply showed changes within the tendon, or tendinosis. (Pet. Ex. #5, Pg. 24). Dr. Rhode testified that competent causes of tendinosis would include repetitive activity, life, and degeneration. (Pet. Ex. #5, Pg. 24). Dr. Rhode testified that it was possible that all of the findings on the MRI pre-existed the work accident. (Pet. Ex. #5, Pg. 26).

Dr. Rhode testified that the operative findings revealed a small rotator cuff tear. (Pet. Ex. #5. Pg. 29). Dr. Rhode testified that he was unable to tell arthroscopically whether the tear was a result of degenerative/chronic changes or the result of an acute trauma. (Pet. Ex. #5, Pg. 29-30). Dr. Rhode also testified that the operative findings revealed a bone spur in the subacromial space. He testified that this too would be a competent cause of impingement. (Pet. Ex. #5, Pg. 30). Dr. Rhode testified that he did not review a job description. (Pet. Ex. #5, Pg. 31).

Dr. Rhode testified that he is certified in performing "Work Well FCEs." He testified that the validity measures are typically done, but he did not see any validity measures documented in the FCE petitioner underwent. Despite being qualified in these work well FCEs, Dr. Rhode did not know what an "OMPS questionnaire" was as contained within page eight of Petitioner's FCE report. Dr. Rhode was asked further if he had any idea of the amount of overhead lifting that Petitioner would need to perform as a bus driver. Dr. Rhode testified that he would suspect "it would not be much." (Pet. Ex. #5, Pg. 33-35).

Dr. Rhode testified that when Petitioner's ongoing moderate symptoms and reports of weakness post-operatively was "fairly unusual." Dr. Rhode testified that the post-operative MRI showed no evidence of failure of the previous surgery and an intact repair. (Pet. Ex. #5, Pg. 35).

Dr. Rhode testified that he was unaware of Petitioner's subsequent treatment with either Dr. Fuentes or Dr. Romeo given that he has not seen Petitioner since June 27, 2014. (Pet. Ex. #5, Pg. 36-37). Dr. Rhode further testified that he never reviewed a video of the accident. (Pet. Ex. #5, Pg. 37). He testified that he did not review any IME reports either. Dr. Rhode confirmed, again, that he did not review any medical records in this case before his first evaluation of November 28, 2012. (Pet. Ex. #5, Pg. 40).

IME Reports

Respondent submitted two IME reports, which were both authored by Dr. William Vitello. The IME reports were admitted into evidence as Respondent's Exhibits #3 and #4. According to the first IME report, dated June 19, 2013, Petitioner presented to Dr. Vitello and reported a history of an injury to her right shoulder on October 30, 2012. **Petitioner told Dr. Vitello, according to his report, that she "tripped over a seatbelt and struck her right shoulder into the back of a school bus seat."**

Dr. Vitello reviewed the video from October 30, 2012. Dr. Vitello testified that the video showed Petitioner walking from the back of the bus to the front of the bus where she appeared to "stumble." **Dr. Vitello indicated in his report that Petitioner did not trip and did not strike her right shoulder into the back of the school bus seat. Dr. Vitello did not observe Petitioner falling into any objects when he reviewed the video.**

Dr. Vitello also reviewed the subsequent videos of October 31, 2012, November 1, 2012, and November 5, 2012. It was Dr. Vitello's impression that Petitioner was observed performing her tasks on the subsequent work days without any hesitation. Dr. Vitello did not observe Petitioner favoring her right shoulder and it was his impression that Petitioner was performing her job in a full and unrestricted manner.

At the time of Petitioner's evaluation by Dr. Vitello, she reported that she was three months post-surgery and was doing "much better" with reduced right shoulder pain. Dr. Vitello examined Petitioner and opined that she had full range of motion in her right shoulder. He also believed Petitioner had full rotator cuff strength, as well as negative impingement testing. He diagnosed Petitioner with right shoulder status post arthroscopic decompression rotator cuff repair.

Dr. Vitello did not believe that Petitioner's current condition of ill-being was work related. Dr. Vitello noted the gross inconsistencies between Petitioner's version of the accident (falling and striking her right shoulder into the back of the school bus seat) versus what was observed on the October 30, 2012 video. It was Dr. Vitello's impression after watching the video that the incident appeared quite "benign." Dr. Vitello also noted that the video subsequent to the accident showed Petitioner performing her regular duties, including driving a school bus. Dr. Vitello opined that if a rotator cuff had occurred at the time of the October

30, 2012 injury, Petitioner would have been quite limited and unable to perform her regular job duties. (Res. Ex. #3).

Dr. Vitello re-examined Petitioner again on February 8, 2017. His February 16, 2017 IME report was offered into evidence as Respondent's Exhibit #4. Dr. Vitello reviewed additional records from June 2013 through the present, including the subsequent records from Dr. Rhode, the FCE of November 27, 2013, the MRI of the right shoulder of May 7, 2014, as well as the medical records from Dr. Fuentes, Dr. Sampat, and Dr. Romeo.

At the time of the February 8, 2017 evaluation, Petitioner was still subjectively complaining of persistent right shoulder pain. Petitioner reported that she had difficulty sleeping, raking leaves, doing laundry, or doing heavy overhead activities. Examination findings by Dr. Vitello revealed mild anterior lateral shoulder pain over the acromion. Dr. Vitello also noted minimal biceps tenderness. Dr. Vitello examined Petitioner's range of motion and did not find any deficiencies in Petitioner's rotator cuff strength, or any positive impingement signs.

Dr. Vitello diagnosed Petitioner with persistent right shoulder pain. Dr. Vitello opined that the Petitioner's ongoing subjective complaints were not substantiated and did not correlate with any particular pathology in the right shoulder. He opined that the Petitioner's current symptoms were not consistent with recurrent impingement or AC joint pathology and/or a new rotator cuff tear.

Dr. Vitello reiterated his prior opinions on causal connection. He continued to opine that the right shoulder and alleged rotator cuff tear was not causally related to the October 30, 2012 accident and that his prior IME opinions had not changed. He further opined that Petitioner's current subjective complaints exceeded her physical examination findings. Dr. Vitello could not explain the worsening of Petitioner's medical treatment given the fact that Petitioner was allegedly not working after she was placed at MMI by Dr. Rhode on December 6, 2013 and continued to report symptoms. Dr. Vitello also opined that absent causal connection issues, that a repeat FCE may be appropriate to determine what Petitioner's restrictions were. He did, however, believe that Petitioner was at MMI. He performed an impairment rating and arrived at approximately 8% upper impairment (5% whole person impairment). (Resp. Ex. #4).

Pre-Accident Medical Records

Respondent also offered the certified medical records from Pain & Spine Institute into evidence, which was entered as Respondent's Exhibit #2. The records document Petitioner's pre-accident medical treatment with Dr. Sharma, a pain management physician. The records document that Petitioner began treating with Dr. Sharma post cervical neck fusion sometime in early 2012.

The records dated May 16, 2012 from Dr. Sharma indicated that Petitioner was approximately 10 weeks post neck surgery and had been undergoing four weeks of physical therapy. The records indicate that Petitioner was experiencing right shoulder pain during physical therapy. Dr. Sharma examined Petitioner's right shoulder, which revealed pain at the AC joint. Petitioner also had positive Yergason's, Speed's, drop-arm testing, and apprehension testing. In

addition to several other diagnoses, Dr. Sharma diagnosed Petitioner with shoulder pain. An intra-articular joint injection of the right shoulder was recommended.

On June 15, 2012, Petitioner underwent an injection to the right shoulder. The diagnoses remained shoulder pain. The physical examination on that date continued to reveal positive Yergason's, Speed's, drop-arm testing, and apprehension testing. There were also findings of limited passive range of motion with extension, flexion, abduction, adduction, internal rotation, and external rotation. Petitioner also reported pain at the AC joint at the time of the right shoulder examination on June 15, 2012. Subjectively, Petitioner also reported that her shoulder pain was worsened with therapy.

Petitioner returned to Dr. Sharma on June 27, 2012. She reported that her symptoms had improved post glenohumeral joint injection. Petitioner reported 50% relief of her complaints.

Petitioner continued to treat with Dr. Sharma in June of 2012. She saw the doctor on July 20, 2012 and the notes reflect that the current complaints included shoulder pain. However, it appears Petitioner's treatment on that date was primarily geared towards her lumbar spine. Shoulder pain was included as one of her many diagnoses. Petitioner was also seen on August 7, 2012. Those records, again, indicate that in addition to Petitioner's post laminectomy pain syndrome in the cervical spine that Petitioner had complaints involving shoulder pain.

Before the October 30, 2012 incident, Petitioner was last seen by Dr. Sharma on September 17, 2012. The records indicate that Petitioner presented with low back pain and shoulder pain complaints. Petitioner underwent a radio frequency ablation involving her lumbar spine on that date. In addition to her lumbar complaints, Petitioner's diagnoses included shoulder pain. (Res. Ex. #2).

CONCLUSIONS OF LAW

With respect to the disputed issue of accident (C) the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner failed to meet her burden of proving by a preponderance of the evidence that she sustained a compensable accidental injury that arose out of and in the course of her employment with Respondent on October 30, 2012. The Arbitrator also specifically finds and concludes that Petitioner is not credible.

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that she has suffered a disabling injury which arose out of and in the course of her employment. *Sisbro, Inc.* v. *Industrial Commission*, 207 111. 2d 193, 203 (2003). An injury "arises out of' employment when "the injury had its origin in some risk connected with, or incidental to, the employment and the accidental injury." *Sisbro*, 207 111. 2d at 203. "There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics." *Adcock v. Elinois Workers' Compensation Commission*, 2015 IL App (2d) 130884WC, ¶ 31.

In finding that Petitioner failed to prove accident, the Arbitrator finds and concludes Petitioner is not credible based on several reasons.

First and foremost, the Arbitrator finds and concludes the evidence revealed in the surveillance videos is overwhelmingly significant, persuasive and credible. The value, weight and import of this video alone is more than sufficient to support the finding of Petitioner's failure to prove accident. The Arbitrator further emphasizes that this video evidence was never challenged, let alone rebutted. The Arbitrator also emphasizes that Petitioner's counsel had no objection to the videos (Resp. Ex. No. 1) being admitted into evidence (Tr., 10/12/17, p. 11; 21).

Specifically, the Arbitrator emphasizes Petitioner's version of the accident was completely contradicted by Respondent's Exhibit #1, the video taken in Petitioner's bus from October 30, 2012. While Petitioner testified clearly, specifically and without hesitation numerous times throughout the trial that she fell forward and physically struck her shoulder (describing a specific traumatic injury) the video of the incident shows nothing of the sort. The video does **not** show Petitioner falling. The video does **not** show Petitioner's right shoulder ever making any physical contact with the bus seat - or physical contact with any other object in the bus or the floor in the bus - despite her repeated contrary testimony. There is no room for reasonable error when viewing and interpreting this video. Petitioner had multiple opportunities at trial to explain the mechanism of injury and discuss what the video showed, but each and every time she testified, she confirmed that her shoulder struck the bus seat. **Petitioner never explained why the bus video did not show this.**

At trial, Petitioner was asked multiple times to explain the mechanism of injury. In each and every time she testified, her version of the accident remained fixed and consistent; she fell and her shoulder struck the bus seat. In each and every time Petitioner offered a history of the accident to her medical providers and other medical experts, her version of the accident remained fixed and consistent; she fell and her shoulder struck the bus seat. At all times, a physical, forceful, specific, acute trauma to her shoulder is central to her accident history. **The video unequivocally proves false her claims and assertions.**

Petitioner testified regarding the facts of her accident (the specific mechanism of injury) as follows:

"...and I was coming up the aisle and **tripped and fell forward into the back of a seat.**" (Tr. 29).

Q: "You mentioned that you fell forward into the back of the seat. Did you come into contact with the vinyl of the seat?"

A: "In the back, yes."

Q: "And so underneath that vinyl there was there padding, or **did you come into contact through the vinyl with the metal?"**

A: "Directly into the corner where the metal is." (Tr. 31-32).

Q: "Let's pay a little bit more attention when you struck the shoulder, did you feel anything?"

A: "Yes."

Q: "Now, ma'am, **if those records also indicated that you gave a history of tripping over a seatbelt and hitting shoulder on seat, would you have any reason to disagree with that?"**

A: "Nope." (Tr. 88)

Q: **"It's your testimony that you sustained a direct trauma to your right shoulder when you tripped and fell and rammed it into a bus seat on October 30, 2012?"**

A: "Yes." (Tr. 88)

Q: "And that's the history you gave to Dr. Rhode as well, correct?"

A; "Yes."

Q: "Okay. That you actually fell forward and went into the seat, correct?"

A: "I don't believe I said fell as much as **rammed**, yes."

Q: "Tripped and rammed your shoulder, correct?"

A: "Okay, yes." (Tr. 88-89).

Q: "And just so I'm clear, ma'am, **you tripped and rammed your shoulder into the back of a bus seat, correct?"**

A: **"Yes."** (Tr. 96).

Q: "And you've testified that you gave Morris – yes, Morris Immediate care a description of tripping and injuring your shoulder on a seat on a school bus, correct?"

A: "Correct."

Q: "And did you testify, did you also give the same description of the accident to Dr. Rhode?"

A: "Yes."

Q: "And do you believe you gave the same description of the accident to Dr. Romeo?"

A: "Yes." (Tr. 99-100).

In further support of the Arbitrator's lack of credibility finding, Petitioner testified that she did not actually engage in work for Respondent after the incident. Petitioner testified that she worked her a.m. route on October 31, 2012, but then appeared at work and only sat in an office as her employer needed to "figure out what to do". However, bus videos on November 1 and November 5, 2012 show Petitioner performing her normal activities as a bus driver without incident. The Arbitrator finds and concludes that Petitioner is not seen in a disabled manner on the videos nor do they show any findings of Petitioner's inability to perform her job tasks.

In addition to the same, Petitioner specifically denied to Dr. Rhode any prior problems with her right shoulder. This, however, was contradicted by the medical records of Dr. Sharma. While Petitioner testified that it was her belief that her shoulder condition was no longer symptomatic prior to the incident, the records from Dr. Sharma indicate that Petitioner was still complaining of

shoulder pain as of the September 7, 2012 visit. Dr. Sharma was never called to testify regarding his records in this case.

Petitioner Failed to Prove Accident Based on Additional Reasons Beyond the Video

Even assuming that the video of the accident does not accurately depict the incident (as Petitioner suggested in her direct examination), Petitioner still failed to prove accident. As stated *supra*, an accident must have some origin or risk associated with the employment. While there is no question that Petitioner's injury occurred "in the course of" Petitioner failed to prove that her accident "arose out of" some risk connected to her employment.

Petitioner's testimony was that she was walking back from the rear of the bus, tripped and fell forward. **The key element lacking in Petitioner's testimony is the cause of her trip.** Petitioner never established the cause of her alleged fall. While medical records submitted by Petitioner mentioned that she fell because of a seat belt, **Petitioner never testified to this fact at trial. Petitioner never once testified she tripped on a seatbelt**. In fact, Petitioner spent a great time describing the bus seats (Tr. 30-31), but inexplicably never once testified that the seats were even outfitted with seatbelts.

Petitioner did not describe any defects in the aisle. Petitioner did not testify that she tripped over a seatbelt as indicated in her contemporaneous medical records. Petitioner did not testify that she was in a rush to complete some type of employment related activity. In fact, the alleged injury occurred at the end of her shift. Furthermore, Petitioner did not testify that she was carrying anything that would have increased the risk of injury. In fact, the accident video shows that she had nothing in her hands at the time of this alleged incident.

The Arbitrator therefore concludes that Petitioner failed to meet her burden with respect to an accident that arose out of her employment. Certainly, Petitioner was within the scope of her employment at the time of the incident as she was on the clock and performing her assigned job duties. However, Petitioner did not meet her burden with respect to the "arising out of" element of compensability. It is well settled both elements need to be present in order to find compensability. Petitioner simply did not provide any credible explanation as to what caused her injury. Simply put, Petitioner was walking and slightly stumbled. There was nothing in the record in which to base a conclusion that Petitioner encountered some type of employment related risk. The Arbitrator concludes that Petitioner simply stumbled on her own, without any explanation or basis. Petitioner did not describe anything unusual regarding the aisles. Therefore, the Arbitrator finds Petitioner failed to meet her burden of proof with respect to the "arising out of" component of accident.

With respect to the disputed issue of (F) causal connection, the Arbitrator finds and concludes as follows:

Notwithstanding the issues of accident, the Arbitrator further findings Petitioner failed to prove that her right shoulder injury and rotator cuff tear were causally connected to the October 30, 2012 incident.

In so finding, the Arbitrator assigns greater weight to the Section 12 examining expert opinions and reports of Dr. William Vitello versus those of Dr. Rhode. The Arbitrator notes that Dr. Rhode and Dr. Vitello were the only physicians to provide causal connection opinions in this case. Dr. Vitello did not believe the mechanism of injury depicted on the accident video could cause a rotator cuff tear. Dr. Rhode on the other hand admitted that he never reviewed the video of the accident. Dr. Rhode further admitted that the MRI findings could either be acute or degenerative. Dr. Rhode admitted further that Petitioner denied any prior right shoulder problems and he relied upon this in rendering his causal connection opinion. This was contradicted by Dr. Sharma's medical records. Dr. Rhode further admitted during his testimony after reviewing Dr. Sharma's records that Petitioner did in fact have pre-existing right shoulder pain. Dr. Rhode further admitted that the findings by Dr. Sharma on physical examination of Petitioner's shoulder in 2012 and before the accident were the same findings that observed when Petitioner was evaluated on November 28, 2012.

Dr. Rhode relied upon Petitioner's history of the mechanism of injury. But the history provided to Dr. Rhode was flawed. The history relied upon by Dr. Rhode in rendering his causal connection opinion was completely inaccurate when compared and contrasted to the video of the accident. Dr. Rhode admitted that if the history was inaccurate, or the mechanism of injury as described to him was different, then his opinions of causal connection could change. In as much, Dr. Rhode testified that it was his understanding that Petitioner fell and sustained a direct blow or trauma to the right shoulder. The video of the accident does not show either. Dr. Rhode was never given the benefit by counsel for Petitioner of reviewing the job accident video. The Arbitrator assigns little to no weight to the doctor's causal connection opinions.

Dr. Vitello, Respondent's Section 12 examining expert, did have the benefit of reviewing the complete medical records in this case, as well as the video of the accident and the video of Petitioner's work activities post-accident. Dr. Vitello opines unequivocally that the condition was not related. The Arbitrator affords greater weight to the opinions of Dr. Vitello regarding the disputed issues of causal connection and adopts the IME's opinions over those of the treating physician, Dr. Rhode.

With respect to the disputed issues of medical expenses (J) the Arbitrator finds and concludes as follows:

The Arbitrator has already determined that Petitioner has not sustained a compensable accident and that her condition of ill-being, that of a rotator cuff tear, was not caused by the work accident. Therefore, the Arbitrator denies all medical bills in this case submitted by the Petitioner as contained in Exhibit #11.

Even assuming that Petitioner were to meet her burden of proof with respect to accident and causal connection, the Arbitrator would limit Petitioner's recovery for medical expenses to treatment up until the MMI date of December 6, 2013. Petitioner's own treating physician opined that Petitioner was at maximum medical improvement as of that date. It is clear that there is a gap in Petitioner's treatment between the time that she was released from care from Dr. Rhode and the time that she presented for additional medical treatment with Dr. Romeo and Dr. Fuentes. Dr. Romeo and Dr. Fuentes provided no medical opinion tying Petitioner's later shoulder complaints

to the original work accident almost two years earlier. Furthermore, the Arbitrator notes that Dr. Romeo indicates in his records that the MRI studies appear to indicate new pathology. Dr. Romeo did not offer any opinions tying the new pathology seen on the updated MRIs in 2015 to the 2012 work accident. Furthermore, Petitioner's expert, Dr. Rhode, was convinced that there was no evidence of any surgical failure or recurrent rotator cuff tears at the time that he examined Petitioner post May 2014 MRI.

Therefore, based upon the Arbitrator's denial of accident and causation, Petitioner's claim for medical bills is denied.

With respect to the disputed issue of the two physician rule, the Arbitrator finds as follows:

Having already found that Petitioner failed to prove accident, causal connection, and medical after December 6, 2013, the issue of whether Petitioner was within the chain of referral at the time she saw Dr. Romeo is moot. However, it appears based upon Dr. Romeo's records that there was a referral from Dr. Fuentes. The Arbitrator finds that Dr. Rhode constituted Petitioner's first choice of treating physician, and Dr. Fuentes constituted her second. Given that Dr. Romeo's records document that Petitioner had a referral from Dr. Fuentes, the Arbitrator concludes that Petitioner was within the chain. However, this medical treatment is not awarded based upon the issues of accident and causal connection, which were already decided by the Arbitrator.

With respect to the disputed issue of temporary total disability (K) the Arbitrator finds and concludes as follows:

Having determined that Petitioner failed to prove accident and failed to prove causation, the issue of TTD benefits is moot.

With respect to the nature and extent of Petitioner's injuries (L) the Arbitrator finds and concludes as follows:

Having determined that Petitioner failed to prove accident and failed to prove causation, the issue of nature and extent is moot.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: March 5, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roberto Grimaldo,

Petitioner,

21IWCC0100

vs. NO: 13 WC 022662

W. E. O'Neil Construction Co., Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2018 is hereby affirmed and adopted.

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

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

21IWCC0100

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

DATED: MAR 5 - 2021
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MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRIMALDO, ROBERTO
Employee/Petitioner

Case# **13WC022662**

21IWCC0100

W E O'NEIL CONSTRUCTION CO INC
Employer/Respondent

On 7/19/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0786 BRUSTIN & LUNDBLAD LTD
CHARLES E WEBSTER
10 N DEARBORN ST SUITE 700
CHICAGO, IL 60602

2986 PAUL A COGHLAN & ASSOC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

21IWCC0100

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Roberto Grimaldo
Employee/Petitioner

v.

W.E. O'Neil Construction Co., Inc.
Employer/Respondent

Case # **13** WC **22662**

Consolidated cases: _____

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

DISPUTED ISSUES

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

FINDINGS

On **2/05/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**73,642.20**; the average weekly wage was $**1416.20**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**57,591.93** for TTD, $**.00** for TPD, $**.00** for maintenance, and $**.00** for other benefits, for a total credit of $**57,591.93**.

Respondent is entitled to a credit of $**.00** under Section 8(j) of the Act.

ORDER

- Compensation denied. See attached findings of fact and conclusions of law.

See attached findings of fact and conclusions of law.

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

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

Charles M Watts

Arbitrator Charles M. Watts

July 19, 2018

The Arbitrator hereby makes the following findings of facts:

On February 5, 2013 petitioner was 41 years of age and employed by W.E. O'Neil Construction as a concrete construction laborer for about 18 years. (Transcript at 12). On said date petitioner alleges that he was bending over chipping concrete at a job site at DePaul University with a 30-40 pound pneumatic device when he began to experience low back pain. (Transcript at 12-16). Petitioner testified that the location of the pain was in his low back down the side of his right leg. (Transcript at 15). Petitioner also testified that the alleged February 5, 2013 injury was different than prior low back injuries because the pain was in his leg with this one and prior injuries had resolved in 1-2 days. Petitioner testified that on that date he was working with his uncle, Rafael Grimaldo. (Transcript at 15). Petitioner testified that on the date of the alleged accident he only told his uncle, who also works for the company, about the alleged accident. (Transcript at 19-20 and 84-85). Petitioner worked the rest of the day. (Transcript at 20). Rafael Grimaldo did not remember the date of the alleged injury nor witness the alleged injury but did testify that Petitioner was injured at a jobsite at DePaul University. (Transcript at 119-121).

On February 7, 2013, two days after the alleged accident, Petitioner presented to Barrington Orthopedic Specialists, and was seen by Dr. Brooke Belcher. (PX1, RX2, RX3). Dr. Belcher's history states as follows:

> [Petitioner] presents with . . . left lumbar spine pain
> Onset: 2 Weeks Ago. The problem is severe. The frequency of pain is persistent. Location of pain is left lumbar area. There was radiation of pain to the left buttock, left calf and (S1 distribution). The patient describes the pain as discomforting. Aggravating factors include changing positions and standing. Modifying factors tried include lying down and prescription medication with poor response. Pertinent negatives include bladder incontinence and bowel incontinence. Additions information: Patient notes a longstanding h/o on/off LBP. He sees a chiropractor, and has PT and MDP in the past which was helpful. Patient states that his pain suddenly flared up about 2 weeks ago. He's taking Mobic. Patient notes that his job consists of heavy labor which has been difficult due to the severity of his pain. (PX1; RX2)

Dr. Belcher testified that the customary practice at her clinic was for an assistant to record a patient's subjective history before Dr. Belcher takes her own separate history to confirm that the information is correct. (PX15 at 26-27). If the information is not correct, Dr. Belcher will change the subjective history by adding, correcting, or deleting as appropriate. (PX15 at 27). Dr. Belcher's records indicate that Petitioner reported left-sided lumbar pain which had been present for two weeks. Dr. Belcher confirmed at her deposition that the onset of petitioner's complaints was two weeks prior to February 7, 2013. (PX15 at 29). Dr. Belcher also testified that there was nothing in the medical record indicating that petitioner's complaints of two weeks prior had ever resolved. (PX15 at 29). Petitioner reported that his left lumbar pain radiated into his left buttock, thigh and calf. Dr. Belcher noted that petitioner has "a longstanding history of on/off low back pain" and that petitioner has treated with a chiropractor, *Medrol Dosepaks,* and physical therapy in the past. Petitioner indicated that he suffered a sudden flare up two weeks prior. Dr. Belcher diagnosed petitioner with a L5-S1 disc herniation and prescribed a back brace, pain medication and advised Petitioner to follow up in one week. (PX1, RX2, RX3). Petitioner testified that he remembered things a lot better on February 7, 2013 than he did on the date of trial and agreed that the history he gave Dr. Belcher was the one recorded in the records. (Transcript at 55-56).

Petitioner testified that he continued to work, albeit for only a couple of days per week because the "job started to slow down." (Transcript at 22).

On February 15, 2013, Petitioner followed up with Dr. Belcher. Dr. Belcher's history states as follows:

> [Petitioner] presents with . . . lumbar spine pain (follow-up)
> The severity of the problem is mild. The problem has improved. The frequency of pain in persistent. Location of pain is right lumbar area. There was no radiation of pain. The patient describes the pain as discomforting. Aggravating factors include changing positions and standing. Modifying factors tried include lying down and Medrol Dosepak. Additional information: Patient notes 85% overall improvement following the MDP. His previous left lumbar spine and left leg pain has resolved. Presently he notes right lumbar spine discomfort, however it's fairly tolerable. He's not taking anything for pain/NSAIDS. (PX1; RX2).

Dr. Belcher again recommended a back brace to use during work and prescribed two weeks of physical therapy. (PX1, RX2).

Petitioner reported the alleged accidental injury to respondent on February 25, 2013. (RX11).

On February 28, 2013 petitioner presented to Barrington Orthopedic Specialists to begin physical therapy. Petitioner provided a history of injury, which was not previously mentioned to Dr. Belcher. Petitioner stated that 3-4 weeks prior he was using a jackhammer and wheelbarrow at work which caused him to become "crooked." Petitioner returned on March 2, 2013 for further therapy. (PX1, RX2).

On March 8, 2013 petitioner presented to Dr. Belcher in follow up. Petitioner advised that he had completed two physical therapy sessions and taken the *Medrol Dosepak* and reported an 85% improvement of his symptoms. Dr. Belcher recommended and proceeded with a trigger point injection. Petitioner was advised to take over-the-counter pain medications and continue use of a back brace during work. Petitioner was advised to follow up in two weeks. (PX1, RX2).

On March 12, 2013, petitioner followed-up at Barrington Orthopedic Specialists, and was seen by Dr. Raymond O'Hara, an associate. Petitioner complained of severe pain in both feet which he states began four months ago. Petitioner stated that weight bearing activities aggravate his symptoms. Dr. O'Hara noted that he had treated this patient in the past for bilateral foot pain, and that he was treated with custom foot orthotics. Petitioner indicated that as the devices have worn out, his pain has returned. Petitioner was casted for a new pair of custom orthotics and advised to return in follow-up. (PX1, RX2).

On March 22, 2013, Petitioner followed up with Dr. Belcher. Petitioner again reported temporary relief from the trigger point injection but advised that he wanted to undergo an MRI. Dr. Belcher ordered a lumbar MRI and continued petitioner on physical therapy and use of a back brace during work. (PX1, RX2).

On March 28, 2013 Petitioner had an MRI of the lumber spine which showed mild diffuse disc bulge at L4-5 with a small annular tear, a small left paracentral disc protrusion, and moderate left lateral recess stenosis. Also noted was an L5-S1 mild diffuse disc bulge, small annular tear, and small central disc protrusion. The impression of Dr. DuBois was that Petitioner had mild degenerative changes in his lower lumbar spine including small protrusions at L4L5 and L5-S1. (PX1; RX2)

On April 4, 2013 Petitioner returned to Dr. Belcher review the MRI results. Petitioner reported that his symptoms had improved but still had some pain. Dr. Belcher prescribed three weeks of physical therapy and continued pain medication. Dr. Belcher's assessment was lumbar disc herniation. (PX1, RX2).

On April 8, 2013 Petitioner reinitiated physical therapy at Barrington Orthopedic. This marks the beginning of a period of PT treatment which would continue until November 14, 2013. (PX1, RX2).

On May 2, 2013 petitioner presented to Barrington Orthopedic Specialists. Petitioner reported moderate right-sided lumbar pain without radiating symptoms. Petitioner's diagnosis at this time was sciatica caused by a displaced lumbar disc. Dr. Belcher prescribed an additional 4 weeks of therapy. Petitioner was continued on various medications including *Medrol Dosepak*. Petitioner was continued on full duty work status but advised to wear a lumbar support orthosis. (PX1, RX2).

On June 19, 2013 Petitioner returned to Dr. Belcher. Petitioner reported he was improving but still had intermittent pain. Dr. Belcher recommended additional physical therapy and noted that if petitioner did not improve she would recommend an epidural steroid injection. Petitioner also picked up his custom orthotics on this date. (PX1, RX2).

On July 12, 2013, Petitioner again followed-up with Dr. Belcher. Petitioner reported pain radiating into his right buttock for the first time. Petitioner's pain was again noted to be moderate but improving. Petitioner advised that he wished to proceed with the epidural steroid injection which Dr. Belcher administered (a right-side L5 transforaminal epidural steroid injection). Petitioner was released to return work with a 30-pound lifting restriction and continued on physical therapy. (PX1, RX2).

On July 29, 2013 Dr. Belcher's records indicate that Petitioner reported a 35% improvement following the injection. Petitioner further reported "good days and bad days" but overall was improved. Dr. Belcher prescribed continued physical therapy. (PX1, RX2).

On August 9, 2013, Petitioner received a second epidural steroid injection. (PX1, RX2).

On August 28, 2013, Petitioner was again seen by Dr. Belcher. Petitioner advised that he felt no relief from the second epidural injection. Petitioner was instructed to continue physical therapy and follow up in two months. Petitioner was continued on a 30-pound lifting modified duty restriction. (PX1, RX2).

Petitioner returned to Dr. Belcher on October 16, 2013. Dr. Belcher prescribed a TENS unit and continued physical therapy. Petitioner was placed on a 40-pound lifting restriction with use of a lumbar support. (PX1, RX2).

On November 20, 2013 Petitioner returned to Dr. Belcher. Petitioner reported an increase of pain over the previous few days and was now experiencing pain and numbness radiating into his right buttock. Dr. Belcher prescribed a course of work conditioning / work hardening. (PX1, RX2).

Petitioner commenced a program of work conditioning on December 3, 2013. Petitioner's initial assessment was that he was estimated to be capable of 51.75% of his job demands. Petitioner participated in the program regularly until January 3, 2014, at which time Petitioner had reached 83.4% of his job demands. Dr. Belcher released petitioner to return to work with a 35-pound lifting restriction on said date and discontinued the work conditioning. (PX1, RX2).

On December 18, 2013, Petitioner returned to see Dr. Belcher. Petitioner reported continued low back pain, as well as radiating right buttock pain. Dr. Belcher recommended 8 further work conditioning sessions. Petitioner was taken off of work until his follow up visit. (PX1, RX2).

On January 15, 2014 petitioner returned to Dr. Belcher. Petitioner reported that he completed the additional work conditioning sessions, but reported a flare up of back pain after shoveling snow. Dr. Belcher scheduled a third epidural injection, and also recommended that Petitioner obtain a second opinion from Dr. Rabinowitz. Dr. Belcher released petitioner to return to work with a 35-pound lifting restriction. (PX1, RX2).

On January 28, 2014 Petitioner was seen for a second opinion by Dr. Richard Rabinowitz. Petitioner reported pain centered over the right gluteal area. Dr. Rabinowitz noted that petitioner's symptoms radiated into the right

leg and L5 distribution area. The doctor's records documented the prior treatment modalities including physical therapy, epidural injections, and medication. Petitioner reported that he had been working light duty but was recently laid off. Dr. Rabinowitz ordered a repeat lumbar MRI and opined that petitioner would likely need a micro-lumbar discectomy. Dr. Rabinowitz noted that if petitioner did not opt for the surgery an FCE would be recommended. (PX1, RX2).

Petitioner received the repeat lumbar MRI on February 4, 2014. The study was unchanged from the prior study in March of 2013, revealing mild spondylosis at L4-5 and L5-S1with small disc bulge and tiny annular tear. Also noted was an ongoing T10-11 central disc protrusion. (PX1, RX2).

Petitioner returned to review the MRI results on March 11, 2014 with Dr. Rabinowitz. Petitioner advised the doctor that he had decided to proceed with the proposed surgery. Petitioner was continued on a 30-pound lifting restriction and also provided with a back brace. (PX1, RX2).

On March 19, 2014 Dr. Rabinowitz performed a right L5 microdiscectomy. The surgery was performed without complication. The surgical note indicates that neovascularization and an epidural venous complex was overlying the L5 nerve root and that these vessels were cauterized. Lateral recess decompression was completed. The disc was inspected and did not reveal significant ventral compromise so no annulotomy or discectomy were performed. (PX1, RX2).

Petitioner presented for post-operative follow-up with Dr. Rabinowitz on April 1, 2014. Dr. Rabinowitz noted that petitioner was approximately two weeks post right-sided L5 nerve root microdiscectomy. Petitioner reported a 50% improvement from his pre-operative pain levels, and further stated he was no longer was experiencing right buttock pain. Dr. Rabinowitz prescribed various medications, six weeks of physical therapy, and continued Petitioner off work. (PX1, RX2).

Petitioner presented for his initial PT evaluation on April 10, 2014 at the PT department of Barrington Orthopedic. Petitioner reported that he had injured himself while shoveling snow and that prior to this he was "almost ready to return to work." This appears to be a reference to the snow shoveling injury Petitioner initially reported to Dr. Belcher on January 14, 2014. Petitioner participated in PT regularly until July 15, 2014 at which time Dr. Rabinowitz ordered an FCE. (PX1, RX2).

Petitioner followed-up with Dr. Rabinowitz on May 13, 2014. Petitioner was noted to be two months post-surgery and 40% improved from his prior pain level. Petitioner complained of mild right lower back pain and right buttock pain. Petitioner was continued on physical therapy and pain medication. Petitioner was continued off of work. (PX1, RX2).

Petitioner's PT notes of May 1, 2014 document that Petitioner stated he walked two miles the day before with minimal discomfort but then "moved awkwardly" in the shower and began to feel pain in his left lower back. (PX1, RX2).

On May 13, 2014, Petitioner returned to visit with Dr. Rabinowitz. Petitioner reported feeling 40% improvement but continued to complain of right low back and buttock pain. Dr. Rabinowitz continued with medication and physical therapy. Petitioner was continued off of work. (PX1, RX2).

On June 10, 2014, Petitioner returned to Dr. Rabinowitz. Petitioner's condition was noted to be unchanged. Dr. Rabinowitz prescribed work hardening 3-5 days per week for 4 weeks, followed by an FCE. Petitioner was continued off work until follow up. (PX1, RX2).

On July 15, 2014, Petitioner returned to visit with Dr. Rabinowitz. This appears to be the first date that an alleged injury on February 5, 2013 was reported to Dr. Rabinowitz. Petitioner also added that he experienced

left buttock pain since February of 2013, which is obviously not consistent with the above records. In any event, Dr. Rabinowitz noted that petitioner's work conditioning reports placed him at medium level work and that Petitioner reported that his job was considered heavy duty. Dr. Rabinowitz ordered an FCE and took petitioner off of work until his follow up appointment. (PX1, RX2).

On July 15, 2014 petitioner presented for work conditioning at Barrington Orthopedic. Petitioner was again classified at a medium level work duty and deemed capable of 81.4% of his job demands. (PX1, RX2).

Petitioner attended physical therapy/work conditioning approximately 2 days a week from 2/28/13 through 7/14/14.

On November 3, 2014, petitioner underwent a Functional Capacity Evaluation at PTSIR (Physical therapy & Sports Injury Rehabilitation, Ltd.). The FCE report indicated "less than full participation" and further indicated that based upon the Dictionary of Occupational Titles and the petitioner's description of non-material handling duties for his job, he does not meet the requirements for his position as a construction laborer for standing and walking to a constant level, bending to a frequent level, and climbing to an occasional level. The FCE report further states "should not be used to project current work capacity since the worker could likely have functioned higher than willing." (PX5, RX8 at p. 2). Petitioner testified that he put forth maximal effort at the FCE. (Transcript at 24-25).

Petitioner followed-up with Dr. Rabinowitz on November 18, 2014. Petitioner indicated he was about 60% improved. Dr. Rabinowitz reviewed petitioner's FCE results, and recommended petitioner be placed at permanent restrictions at the medium job demand level. Dr. Rabinowitz placed petitioner at maximum medical improvement with permanent restrictions as set forth in the FCE. (PX1, RX2).

On January 27, 2015, Dr. Rabinowitz authored a narrative report at the request of counsel for Petitioner. Dr. Rabinowitz stated that there was some discrepancy in petitioner's medical records regarding the origin of his complaints. Dr. Rabinowitz noted that petitioner did not indicate on the "History of Present Illness Form" which was filled out on February 7, 2013, that there was an injury occurred at work, or even that any specific injury was reported. Therefore, Dr. Rabinowitz declined to state there was a causal relationship with the alleged accident and stated that Dr. Belcher would be "best suited to render definitive opinion as to causation." (PX12, RX4 at p. 5).

Petitioner did not seek any further medical treatment until May 3, 2016 at which time Petitioner followed-up with Dr. Belcher. Petitioner stated that his symptoms have been chronic but mild to moderate. Petitioner described the pain as an aching type of pain which is located in the right buttock, low back, and greater on the right than the left. Petitioner stated his symptoms are aggravated with daily activities. Petitioner stated that the surgery he had in March of 2014 did help, but that he still continued to experience low back pain. Petitioner stated he takes pain medication. X-rays of his lumbar spine were taken which revealed normal alignment, mild disc space narrowing/spondylosis changes at L5-S1 greater than that at L4-L5. The x-rays were otherwise unremarkable. Dr. Belcher reviewed the x-ray results with petitioner, and discussed the importance of ongoing core work, aerobic activity, and weight loss. Petitioner advised he is interested in finding additional work since he is no longer working at the moment, but would like to find work that does not harm him. Dr. Belcher advised petitioner to just use caution when bending/lifting/twisting motions, and continue to follow restrictions as outlined previously. (PX1, RX2).

Petitioner began treatment with a different orthopedic physician, Dr. Blair Rhode on May 23, 2016. Petitioner related a history of an alleged February 5, 2013 work injury to Dr. Rhode. Petitioner advised Dr. Rhode that he treated with Dr. Rabinowitz at Barrington Orthopedics, and underwent extended conservative management which included physical therapy, epidurals, and activity modifications, and that he ultimately underwent surgery

on March 19, 2014. Petitioner further stated that he underwent physical therapy after surgery and was eventually returned to full unrestricted duty. Petitioner stated that he continued to have some mild symptoms, but was able to perform his essential job functions. Petitioner advised that he continued to work his position for approximately 1 ½ years, but was laid off on April 8, 2016, and was told that there was no more work for him. (PX10).

Dr. Rhode took x-rays which did not reveal any evidence of degenerative changes to the L5-S1 disc space. Dr. Rhode opined that the petitioner is capable of modified/medium duty work, and did not recommend any specific treatment. Petitioner was advised to follow-up on an as-needed basis. (PX10; PX16).

Dr. Belcher was deposed on February 3, 2017. Dr. Belcher is a physiatrist who was trained in physical medicine and rehabilitation and takes care of non-surgical orthopedic and neurology conditions. (PX15 at 5). Dr. Belcher testified that the small annular tears - noted on the March 28, 2013 MRI report – are disruptions of the outer fibers of the disc and could cause pain. (PX15 at 9-10). She also testified that the assumption with an annular tear is that there is an injury, probably a recent one. (PX15 at 14). On cross examination, Dr. Belcher testified that annular tears usually indicate trauma but that they can occur absent trauma and that an MRI cannot reveal whether the tear was due to trauma or not. (PX15 at 34). Dr. Belcher testified that this 2013 MRI showed a disc herniation on the left at L4-L5 and a central disc herniation at L5-S1. (PX15 at 11-12). Dr. Belcher testified that the disc herniation at L5-S1 was also present on the 2007 MRI but that the herniation at L4-L5 was new. (PX15 at 12). Dr. Belcher testified that a herniation can cause pain. (PX15 at 12). On cross, Dr. Belcher testified that herniations can occur absent trauma. (PX15 at 33). Dr. Belcher testified that bending and flexion motions are typical causes of exacerbations of preexisting back conditions as well as annular tears and disc herniations. (PX15 at 21). Dr. Belcher testified that based on the subjective information, Petitioner's description of lifting and other work activities "seemed to be what aggravated his back." (PX15 at 24-25). On cross, Dr. Belcher testified that Petitioner did not give a history to her of being injured at work. (PX15 at 32). Also on cross, Dr. Belcher testified that it is possible that the treatment Petitioner began receiving in March 2013 for right-sided radiculopathy was unrelated to the treatment he received for left-sided pain on February 7, 2013. (PX15 at 40).

Dr. Alexander Ghanayem of Loyola University Medical Center in Maywood performed a section 12 examination at the request of Respondent on September 14, 2014. Dr. Ghanayem is the Director of Spinal Surgery at Loyola University Medical Center. Dr. Ghanayem's review of three MRIs – March 2007, March 2013 and February 2014 – and opined that there were no disc herniations present in any of them, that they revealed some degenerative changes at L4-L5 and L5-S1, and that the three MRIs were consistent with each other. Dr. Ghanayem's impression was that Petitioner had subjective complaints of back pain that stated that both pre-existed his alleged injury and existed after the 2014 surgery. Dr. Ghanayem opined that petitioner did not require surgery, either after the alleged February 5, 2013 injury or after the January 2014 snow shoveling injury. Dr. Ghanayem opined that Petitioner has muscular low back pain absent any other findings and that the inability of the 5'5" 212 pound Petitioner to fully bend forward was limited by his large abdominal panus. Dr. Ghanayem stated that Petitioner could go back to his pre-February 5, 2013 work status given Dr. Ghanayem's physical findings and review of the three MRIs, that Petitioner had reached MMI from nothing more than a couple of soft tissue injuries to his back, and there was no residual disability related to factors of his employment. (RX1).

Dr. Rhode issued a narrative report on February 20, 2017 at the request of Petitioner. Dr. Rhode's report (at page 2) lists the medical records he reviewed, which consisted of: 3 MRI reports, an X-ray report, the surgery notes and the §12 IME report of Dr. Ghanayem. Dr. Rhode's narrative report confirms that he did not review any office visit records from either Dr. Belcher or Dr. Rabinowitz, including the initial office visit with Dr.

Belcher on February 7, 2013. Dr. Rhode placed Petitioner at modified medium duty work restrictions and opined that Petitioner had reached MMI. (PX16)

Ms. Lisa Helma of Vocamotive was deposed. Ms. Helma performed a vocational assessment at the request of the Petitioner. Upon the request of counsel for the Petitioner, Ms. Helma based her opinions on the November 3, 2014 FCE and also the restrictions of petitioner's treating physician, Dr. Rhode. With these assumptions, Ms. Helma testified that the most that Petitioner could expect to earn was $9-13 per hour rather than that $41.20 per hour that a union laborer then currently earned. Ms. Helma testified that if Dr. Ghanayem's assessment was correct, petitioner has no restrictions and her vocational assessment would not be applicable. Ms. Helma also admitted that the FCE she relied upon in her analysis specifically states that the petitioner did not put forth a maximal effort. (PX25).

Petitioner testified that the pain he felt on the day of trial is the same pain he felt on and after February 5, 2013. (Transcript at 103).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989).

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

The Arbitrator finds that the testimony of the Petitioner was not credible. The Arbitrator notes that his testimony as to an alleged accidental injury on February 5, 2013 was inconsistent with contemporaneous medical records, as well as the testimony of Petitioner's physician Dr. Belcher, and much of his testimony appeared insincere and rehearsed, particularly when repeating the same answer to questions from his attorney about his back pain allegedly tracing back to an alleged accident on February 5, 2013; which had not changed in type, location, or intensity since date; which is refuted by and contrary to the Petitioner's contemporaneous treating medical records. There are also multiple questions throughout the trial that Petitioner could not answer including questions about subsequent jobs and alleged injuries that occurred at these employers, questions about work status, and unemployment compensation. There were numerous responses to simple questions that were merely responded to with the answer "if the record says."

The Arbitrator renders the following findings on the issues of (C - Accident):

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of the employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hageler Zinc Co. v. Industrial Board,* 284 Ill. 378 (1918). The aggravation of a preexisting disease may be an accidental injury and compensable if it meets the requirements that the occurrence is traceable to a definite time, place, and cause. *Riteway Plumbing v. Industrial Comm'n,* 67 Ill.2d 404 (1977).

While it is true that Petitioner's employment with Respondent involved heavy duty labor and Petitioner has suffered degenerative changes to his low back, that alone does not prove accident. The Petitioner's testimony that he injured his back on February 5, 2013 while "chipping concrete" was refuted by more reliable and contemporaneous evidence including the Petitioner's treating medical records which fail to mention any specific alleged occurrence, either at work or otherwise, and which also document the onset of his back condition to approximately 2 weeks prior to February 7, 2013, which clearly does not correlate to an accident, or onset of symptoms, on or about February 5, 2013. Moreover, the relevant medical records and other evidence, including the deposition testimony of Dr. Belcher, confirm that the claimant's pain only 2 days after the alleged injury was limited to pain in his left leg and that the onset of right-sided radicular pain did not start until 2 to 3 weeks after the claimed injury and occurred in the absence of any specific event or action. There is also the matter of the great improvement Petitioner reported on February 15, 2013. Therefore, the treatment that began on February 7, 2013 with Dr. Belcher was not proven to be related to a "concrete chipping" injury on February 5, 2013. The complaints on February 7, 2013, a mere 48 hours or so after the alleged occupational injury, did not even medically correlate with his right-sided herniated disc which ultimately was the reason for surgery as his complaints on said date were documented to be limited solely on the left side and his right-sided symptomology came on weeks later. It is also very important to note that Dr. Ghanayem opined that the three MRIs – 2007, 2013, and 2014 – did not show sufficient injury to require surgery.

Moreover, the Arbitrator finds that the Petitioner's testimony was not credible and was contradicted on multiple occasions by other evidence, the most notable of which were his own treating medical records.

Therefore, based upon the above and other evidence, the Arbitrator finds that Petitioner has failed to establish that he sustained an accidental injury under the Act on or about February 5, 2013. All compensation is accordingly denied.

The Arbitrator renders the following findings on the issues of (F – Is Petitioner's Condition of Ill-being causally related to the accident?):

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. *R & D Thiel v. Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867 (2010). Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. *Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 948 (2011). An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." *Int'l Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. *Schroeder v. Ill. Workers' Comp. Comm'n*, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to sustain his burden of proving that the condition of ill being in his low back is causally connected to her employment with Respondent.

Petitioner testified that she sustained an injury on February 5, 2013 when he was "chipping concrete." Petitioner's testimony at trial admitted that the initial medical records which failed to document any specific

injury and which did not correspond to an onset of symptomology on or about February 5, 2013 were likely more reliable than his recollection.

While the medical records did contain a history that the Petitioner performs a considerable amount of lifting at work, there is no history that the onset of his pain related to his work activities, or that his pain began on or about February 5, 2013. The mere fact that a claimant may have performed lifting at work does not automatically invoke entitlement to benefits under the Act. Petitioner must establish his condition of ill-being is causally related to his employment, and the alleged accident date. Petitioner here failed to establish either one. Please see above findings as to accident.

The Arbitrator finds it significant that Petitioner's medical records confirm that while he did relate he performs lifting at work, there is nothing in the medical records which correspond s to the alleged "concrete chipping" activity which Petitioner testified to, and also that there is nothing in the medical records suggesting that the Petitioner's right sided radicular pain began coincided with a February 5, 2013 injury. Moreover, Petitioner's initial medical records contain statements by the Petitioner in which he admits that he has long-standing back problems for which he had received ongoing chiropractic treatment. Petitioner initially referred to his onset of pain as a "flare up." Moreover, when the Petitioner presented for medical care only 2 days after the alleged accident, his complaints were solely to his left side, he had no right-sided symptomology whatsoever which was ultimately the side where his complaints grew so severe that surgery was required. By February 15, 2013, the medical records indicate resolution of Petitioner's left-sided pain.

Petitioner's medical records and testimony also confirm that he has had other "flare-ups" between February of 2013 and the present date. For example, the medical records reveal that the Petitioner was approximately 85% recovered until he injured his back in approximately January of 2014 while shoveling snow, and it was not until after this snow shoveling episode that any doctor stated he was a surgical candidate. (PX1, RX2). Petitioner also testified to at least 2 post-accident episodes which exacerbated his back pain while working, and the records of one his recent employers (Perfection Plating) documents that he had an onset of back pain in June of 2017 which was so severe that he was allegedly unable to continue working. (RX7). Petitioner also testified to other events giving rise to an exacerbation of his back condition including an episode when he was "flagging" for Respondent, and also more recently while he was lifting boxes for a different employer, Superior Staffing. (Transcript at 59). According to Petitioner, the only back pain that was not a flare-up that resolved in a matter of days was the February 5, 2013 alleged injury. Noting that the February 15, 2013 medical record of Dr. Belcher indicates that Petitioner's left-sided pain had resolved, the Arbitrator finds that hypothetically if the February 5, 2013 alleged injury occurred, it also was a flare-up that resolved in a few days.

Petitioner presented the deposition testimony of Dr. Belcher as well as a medical report of Dr. Rhode. Respondent presented the IME report and opinions of Dr. Ghanayem. Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence. *Snelson v. Kamm,* 204 Ill. 2d 1, 24 (2003). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Fronabarger v. Burns,* 385 Ill.App. 3d 560, 565 (2008). If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. *Dyback v. Weber,* 114 Ill.2d 232, 244 (1986). Expert opinions must be supported by facts and are only as valid as the facts underlying them. A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. *Id.* In weighing the expert medical opinions, the Arbitrator finds the opinions of Drs. Belcher and Dr. Ghanayem more persuasive than the opinions of Dr. Rhode. Drs. Belcher and Ghanayem reviewed and relied upon the initial and contemporaneous medical records. Dr. Rhode's report, on the other hand, confirms that he never was provided with or reviewed the initial medical records and based his opinions as to causation on the history provided to him by Petitioner years after the alleged injury.

The Arbitrator also notes that in this case the opinions of Dr. Ghanayem are substantially buttressed by the records and testimony of Petitioner's treating physician, Dr. Belcher, who conceded that the history related by Petitioner in the initial treating records failed to mention a February 5, 2013 work injury, and it was not until much later that histories provided by Petitioner to various doctors attributed his condition to an alleged work injury on said date. (PX15 at 29-31).

Dr. Ghanayem's September 18, 2014 report opined that the Petitioner's low back problems did not require surgery and that he had no disability related to his employment. He stated that the Petitioner was at MMI and could return to regular work "or at least his pre-injury work status." (RX1 at 2). The Arbitrator finds these opinions credible, and also corroborated by other credible evidence including Petitioner's initial treating medical records.

The Arbitrator finds that Dr. Belcher's records and testimony, as well as the IME of Dr. Ghanayem, are credible and reveal the etiology of Petitioner's condition of ill-being as non-occupational in nature. (PX15, RX1, RX5). Both Dr. Belcher and Dr. Ghanayem had the opinion that Petitioner had subjective complaints of back pain that stated that both pre-existed his alleged injury and existed after the 2014 surgery. It is worth noting also that testimony of the Petitioner himself and his uncle, confirmed that Petitioner has long-standing and ongoing back pain issue(s) which occasionally became symptomatic and required treatment (Transcript at 125), including several episodes documented in the medical records such as shoveling snow which occurred after February 5, 2013. In fact, the most immediate cause of his back pain prior to his March, 2014 surgery, if we assume one single event must be selected, would appear to be the onset of back pain which began while the Petitioner was shoveling snow on or about January of 2014. Prior to that episode, the Petitioner was noted to have been about 85% improved and no doctor was recommending surgery. (PX1, RX2).

Finally, with regard to discrepancy between opinions of Dr. Belcher and Dr. Ghanayem, the Arbitrator finds Dr. Ghanayem persuasive. On the issue of what the MRIs of 2007, 2013 and 2014 reveal, the Arbitrator notes that Dr. Belcher is not a surgeon and that Dr. Ghanayem is an experienced surgeon who is Director of Surgery at a major academic teaching hospital. Dr. Ghanayem's review of three MRIs led him to the opinion that there were no disc herniations present in any of them, that they revealed some degenerative changes at L4-L5 and L5-S1, and that the three MRIs were consistent with each other. Dr. Ghanayem opined that petitioner did not require surgery, either after the alleged February 5, 2013 injury or after the January 2014 snow shoveling injury. Dr. Ghanayem opined that Petitioner had reached MMI from nothing more than a couple of soft tissue injuries to his back, and there was no residual disability related to factors of his employment. (RX1).

In short, consistent with *International Harvester,* Petitioner has failed to prove "[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury. . ." *Int'l Harvester*, 93 Ill. 2d at 63-64.

Therefore, based upon the foregoing, the Arbitrator finds that Petitioner's condition of ill being is not causally related to his employment with Respondent. All benefits are accordingly denied.

The Arbitrator renders the following findings on the issues of (J – Medical Expenses):

Based upon the Arbitrator's findings with respect to Accident and Causal Connection above, Petitioner's claim for medical bills is denied.

The Arbitrator renders the following findings on the issues of (K – Temporary Total Disability / Maintenance):

Based upon the Arbitrator's findings with respect to Accident and Causal Connection above, the Petitioner's claim for temporary compensation including TTD and Maintenance is denied.

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The Arbitrator renders the following findings on the issues of (L – Nature and Extent of Injury):

Based upon the Arbitrator's findings with respect to Accident and Causal Connection above, the Arbitrator finds that Petitioner's claim for permanent partial disability is denied.

The Arbitrator renders the following findings on the issues of (M – Penalties and Fees):

Based upon the Arbitrator's findings with respect to Accident and Causal Connection above, the Arbitrator finds that Petitioner's claim for penalties pursuant to sections 19(k) and 19(l); as well as attorneys' fees pursuant to section 16, are denied.

With regard to any issues surrounding Petitioner's efforts to obtain surveillance tape of Petitioner (offered as RX12), via request and subpoena, the Arbitrator finds that a Respondent has the right to cause a surveillance video to be made and not reveal its existence to Petitioner until Petitioner is cross examined in a hearing before an arbitrator. The only plausible exception would be in a case where a Respondent's IME report cites and relies upon such a surveillance tape because that would invoke the 48-Hour Rule. The 48-Hour Rule in Section 12 of the Illinois Workers' Compensation Act is intended to prevent unfair surprise in the context of medical experts. Pursuant to *Ghere v. Industrial Commission*, 278 Ill. App. 3d 840 (4th Dist. 1996), The Petitioner's physician must tender a copy of his records to the respondent no later than 48 hours prior to the arbitration hearing to prevent the Petitioner from springing surprise medical testimony on the Respondent. This rule applies equally to Section 12 reports, whether involving a physical examination of the Petitioner or a review of medical records. *Mulligan v. IWCC*, 408 Ill. App. 3d 205, 217-18 (1st Dist. 2011). The spirit of the Act itself seems clear and is also clear from reading the Illinois Supreme Court's opinion in *Ghere* that such a surveillance tape relied upon by a medical witness would likely be ordered to be produced. That is simply not the case in the present matter. The surveillance tape in this matter did not serve the basis for expert opinion and with the exception of the 48 hour Rule, there is not discovery as parties would have in circuit court under the Act. Furthermore, Petitioner was present at the trial and thus available to testify regarding whatever the surveillance tape showed. Therefore, any penalties requested stemming from Respondent's refusal to turn over the surveillance tape before trial are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SALVADOR BIURQUIS,

Petitioner,

vs.

21IWCC0101

NO: 14 WC 23608

TOTAL STAFFING SOLUTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees that Petitioner is not credible but adds the following reasoning. Although Petitioner alleges an accident on June 6, 2014, he first treated with Bridgeport Pain Clinic from June 23, 2014 and was discharged on August 30, 2014. He had actually been returned to work full duty as of August 26, 2014. Petitioner had also seen Dr. Silver at Orthopaedics Specialists of Northshore on July 25, 2014 and was given off-work restrictions until the next scheduled appointment on September 5, 2014. Petitioner never attended that appointment. Instead, there is a long gap in treatment until he returned to Bridgeport Pain Clinic on March 16, 2015. The Commission focuses on Petitioner's testimony compared to the other evidence:

Q: Okay. So you didn't finish work on June 6, 2014?
A: Negative.
Q: Okay. Did you work the next day?
A: No. When I went to the doctor, the day I went to the doctor, then they told me I had to stay out of work. *T.16.*

...

Q: Okay. So how did you feel on June 7, 2014, the day after the accident?
A: A lot of pain. I couldn't move that much my whole leg for the pain. I tried to stretch. It hurt.

...

Q: Did you call in for work on June 7, 2014?
A: No. I was given a letter saying that I couldn't work. So I took that letter -- First, I took it to the warehouse. The warehouse told me I had to take it to Total Staffing. I took it to Total Staffing. That's about it. *T.17.*

On cross-examination, he again testified:

Q: Did you keep working the rest of that whole day?
A: No.
Q: You didn't work again after that?
A: I didn't work after that. *T.48.*

However, Petitioner was shown a document he filled out for Bridgeport Pain Clinic on June 23, 2014, that indicated he last worked on June 20, 2014. Petitioner then claimed he could not remember exactly when he last worked. *T.49-51.*

Ultimately, based on Respondent's payroll records, Petitioner's brief acknowledges that he worked at Respondent "through the Fourth of July holiday 2014, drawing his final paycheck on July 11, 2014." *P-brief at 9.* However, the discrepancies go beyond Petitioner's failure to remember whether he worked in the days immediately following his alleged accident. He also testified on cross-examination:

Q: You testified earlier that you first returned to work in September of 2016, right, at El Gallo?
A: Yeah.
Q: You didn't do any work between June of 2014 and September of 2016?
A: Not that I remember.
Q: You didn't get paid for any jobs at all?
A: No.
Q: Did you apply for any jobs?
A: I did try to apply.
Q: Do you remember where?
A: Dunkin Donuts, Jimmy John's, what was the other ones? Most of them restaurants, which is light. It is not too heavy to do.
Q: Did you get job offers from those places?
A: No.
Q: Did they give you a reason or no?
A: No, they didn't tell me a reason. They just said we are not hiring. *T.63-64.*

Petitioner's testimony was that he did not work between June 2014 and September 2016. However, when Petitioner was examined by Respondent's §12 physician, Dr. Karlsson, on September 23, 2014, Petitioner told him that he was working full duty without any limitations as a dishwasher and doing prep work at Burrito Beach. *RxB.* Petitioner testified:

Q: Do you remember telling the doctor that you were working full-duty as of September of 2014?
A: No, I don't remember.

Q: You were not working anywhere? You weren't working at Burrito Beach?
A: Oh, yeah. I am sorry, yeah.
Q: When did you start working at Burrito Beach?
A: I don't remember, but I worked there for like two months only.
Q: Were you working there in the fall of 2014?
A: No. That was not in 2014.
Q: Okay. So the report is dated September 23rd, 2014. You are saying you were working at Burrito Beach in that report? But you are saying that's not right?
A: I can't remember exactly, sir. *T.67-68.*

Based on the above discrepancy, Petitioner's brief admits that he "worked for two months at Burrito Beach per his own testimony" but then claims, "Thereafter, Petitioner's uncontroverted testimony is that he did not work elsewhere until September 2016 when he started working at El Gallo." *P-brief at 9.* However, Petitioner's testimony and this claim in his brief are absolutely controverted by the March 16, 2015 record of Bridgeport Pain Clinic, which reflects:

> Since Sept 2014 (LPV) was OK in Rt knee and in Jan 2015 job involved add'l walking. 1st 2 weeks of these new duties, pain levels gradually increased. Started taking meds to control but pain cont'd to increase.
> P was walking today at work and pain became unbearable.
> Cont. wearing knee brace since Jan 15.
> Started popping last 3 weeks in Rt knee

Seemingly, Petitioner's knee was "OK" since September 2014, but started getting worse in January 2015 because his job involved additional walking. The Commission wonders what job this is. Petitioner had not worked for Respondent since July 2014. He admitted to working for Burrito Beach in September 2014 but claimed it was only for a couple of months, which gives rise to the question as to where Petitioner was working in January 2015? That question seems to be answered in the April 15, 2015 progress note:

> Work requires a lot of walking & can't now
> Popcorn factory
> No light duty
> 5/13/15 appt w/ Dr. Silver
> Started ex on bike here but stopped b/c
> Went BTW 9/14 & it got worse again over the next few months until March. Pills had been helping.

Therefore, contrary to Petitioner's testimony, this record indicates that Petitioner had returned to work at a popcorn factory that required a lot of walking.

In summary, Petitioner claimed he could not remember the details of when he stopped working at Respondent because it was so long ago. He also could not remember working at Burrito Beach until he was questioned about it. Could he also not remember that he was working in a popcorn factory that required a lot of walking, which caused his knee pain to increase? We believe that these omissions and untruths cast doubt on Petitioner's credibility entirely.

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We also note the records indicate that Petitioner had been prescribed medications including hydrocodone and tramadol by Dr. Silver. However, Petitioner had three urine tests (4/8/15, 5/13/15 and 6/27/15) which were all negative for these medications. The reports state that Petitioner's results were "Inconsistent with prescribed medication." *Px7.* The Commission questions what Petitioner was doing with the prescriptions he received from Rx Development (*Px6*) and Infinite Strategic Innovations (*Px8*), which he is claiming to be medical expenses related to his alleged accident.

Under other circumstances, some of the details upon which the Arbitrator focused might be explainable such as the delay in initial treatment and whether Petitioner was a picker versus a checker. However, when all of the discrepancies are added together, we find Petitioner was untruthful and evasive to the point of finding him completely devoid of credibility. Accordingly, we find that Petitioner failed to prove that any incident whatsoever occurred while working for Respondent on June 6, 2014. Therefore, it is unnecessary to determine whether this non-existent alleged incident arose out of and in the course of his employment. To clarify, we are not basing our decision on whether Petitioner's injury arose out of his employment. If we believed that Petitioner sustained an injury while stepping off of an electric jack, we would have analyzed that in accordance with the recent Illinois Supreme Court decision in *McAllister v. IWCC, 2020 IL 124848 (9/24/20).*

Having found that Petitioner failed to prove he sustained a compensable accident, all other issues, including causation, are moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 13, 2018, is hereby affirmed and adopted with the additional reasoning described above.

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

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

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

DATED: MAR 5 - 2021

María Elena Portela
María E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 1/26/21
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BIURQUIS, SALVADOR
Employee/Petitioner

Case# **14WC023608**

21IWCC0101

TOTAL STAFFING SOLUTIONS
Employer/Respondent

On 9/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.26% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4069 LAW OFFICES JONATHAN SCHLACK
200 N LASALLE ST
SUITE 2830
CHICAGO, IL 60601

4866 KNELL O'CONNOR DANIELWICZ
THOMAS R BOYD
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Salvador Biurquis
Employee/Petitioner

v.

Total Staffing Solutions
Employer/Respondent

Case # **14** WC **23608**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **July 27, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On **June 6, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**17,680.00**; the average weekly wage was $**340.00**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **4** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services, though not compensable.

Respondent is not responsible to pay charges for all reasonable and necessary medical services.

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

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

ORDER

Denial of Benefits

Because Petitioner failed to prove a work place injury and failed to prove an accident arose out of employment, benefits are denied.

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

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

Signature of Arbitrator

September 12, 2018
Date

SEP 13 2018

Salvador Biurquis v. Total Staffing, No. 14 WC 23608

Preface

The parties proceeded to hearing July 27, 2018, on a Request for Hearing indicating the following disputed issues: whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is causally connected to the injury; is Respondent responsible for certain unpaid medical bills; is Petitioner entitled to temporary total disability; and what is the nature and extent of the injury. Arbitrator's Exhibit 1; Salvador Biurquis v. Total Staffing, No. 14 WC 23608 Transcript of Proceedings on Arbitration at 4. The parties agreed that the only Respondent is Total Staffing. Counsel for Respondent has a proper Substitution of Attorney and Appearance on file, done without objection. Biurquis at 6, 105-106.

Findings of Fact

Salvador Biurquis (Petitioner), a 26 year old male, testified he was working for Total Staffing (Respondent) and was sent to a food warehouse, Golden Country, where he was working June 6, 2014. Petitioner's Third Amended Application for Adjustment of Claim offers no information on how the accident occurred or what is the nature of the injury. Biurquis at 9, 12; Arbitrator's Exhibit 2.

Petitioner testified he was a picker at the warehouse, looking for food items on shelves and stacking them on pallets. On June 6, 2014, he was picking an order, using an electric jack. He stepped off the jack, a height of six inches, with his right leg. Petitioner testified four times, he heard a pop in his right knee. He said he felt a lot of pain on the back and front of the bottom part of his knee. Biurquis at 10-15, 46, 48. Petitioner, on cross examination, testified that prior to this, he had regular knee pain at work. Biurquis at 54-55.

Contrary to his sworn testimony, Petitioner had previously told medical providers at Bridgeport Pain Control, about three weeks after the event, his job was a checker, checking orders in the warehouse. He told them on June 3, 2014, he was going to check an order, got off a walker, put his right foot on the floor and his knee started to hurt. Contrary to his sworn testimony at trial, Petitioner previously told Dr. Ronald Silver, he was working as a checker at a warehouse and stepped off his electronic jack. Contrary to his sworn testimony, Petitioner had previously told Dr. Troy Karlsson, at an independent medical examination, he was working as a checker and stepped down 10 inches off a stand jack. At hearing Petitioner went into some detail about the differences between being a picker and a checker, insisting he was a picker. Petitioner's Exhibit 1 at 4-5, 7; Petitioner's Exhibit 5 at 3; Respondent's Exhibit B at 1; Biurquis at 10-11.

Contrary to his sworn testimony, that he heard a pop in his knee, Petitioner denied hearing a pop in his knee to medical providers at Bridgeport Pain Control and never mentioned hearing a pop, only saying he felt a pop to Dr. Karlsson, Dr. Bassam Osman, Dr. Silver, and providers at Bridgeport Pain Control. Respondent's Exhibit B at 1; Petitioner's Exhibit 2 at 5; Petitioner's exhibit 5 at 3; Petitioner's Exhibit 1 at 5, 7.

These and other misrepresentations, which will be discussed, cast doubt on Petitioner's credibility. It bears noting that after a fairly complete direct examination, Petitioner, during cross examination, answered I don't know, or some variation of that, some 30 times.

Petitioner testified he went to tell warehouse management. They told him he had to report to the Respondent. Petitioner testified he was told that was no accident and would not be sent to a doctor. Petitioner testified he did not finish work on June 6, 2014, and did not work the next day. Petitioner testified he did not work after hurting his knee on June 6, 2014. Contrary to his sworn testimony, the Worker's Compensation & Personal Injury Questionnaire at Bridgeport Pain Control indicates Petitioner was not off work June 23, 2014, as a result of the accident and was working full time regular duty. Those notes also indicate Petitioner did not go to the doctor the day of the accident "...as he thought it would diminish." The notes reflect Petitioner had no days off since his injury and that he last worked June 20, 2014. Contrary to his sworn testimony, Petitioner told Dr. Karlsson he worked about a week after the accident. Also, significantly, the Payroll Check Master Report on Petitioner showed checks issued to Petitioner on: June 13, 2014; July 11, 2014; July 3, 2014; and June 27, 2014. This evidence casts yet more doubt on the veracity of Petitioner's testimony. Biurquis at 14, 16, 19, 20, 48; Petitioner's Exhibit 1 at 4, 5, 7, 10; Respondent's Exhibit B at 1; Respondent's Exhibit A.

Despite having his own personal doctor, presumably familiar with Petitioner's prior knee pain, Petitioner presented at Bridgeport Pain Control, which was recommended by his attorney, more than three weeks after the accident, on June 23, 2014. Petitioner complained of constant right knee pain. The working diagnosis of Petitioner was strain/sprain right knee joint and myospasm. Treatment was to be physical therapy, chiropractic manipulative therapy, and therapeutic exercises. Nicole Beavers, D.C., certified on June 23, 2014, Petitioner was able to return to work with a recommendation he be "...on lighter duty to decrease right knee pressure from standing 8+ hours." Petitioner obtained an x-ray of his right knee June 23, 2014, and it showed normal or negative findings. Respondent's Exhibit B at 1; Respondent's Exhibit A; Biurquis at 16, 20; Petitioner's Exhibit 1 at 4, 8, 9; Petitioner's Exhibit 3.

It is unclear why, but Petitioner was referred to Dr. Bassam Osman by Paul Levy, D.C. Petitioner saw Osman only once, June 26, 2014. Osman's impression was a right knee sprain and strain; right lumbar radiculopathy, lumbar spasm and sprain; and possible peripheral nerve injury. An EMG/Nerve Conduction Study was conducted. The impression was the study was compatible with mild right L4-L5-S1 radiculopathy. Petitioner's Exhibit 2 at 7, 8, 9.

There is a certification in the records of Bridgeport Pain Control by Nicole Beavers, D.C., dated June 26, 2014, indicating Petitioner could return to work June 26, 2014, full duty "...with limits on time spent in 'freezer' as conditions aggravate the pain syndrome." Petitioner testified

he did not remember what that note means. There is no evidence Petitioner was seen by any medical provider other than Osman on that day, nor any evidence Petitioner's work involved a freezer. There are at least six disability certificates and three return to work forms in the records of Bridgeport Pain Control, which offers chiropractic care. They are, as a group, conflicting and vague, mostly standing alone without evidence of treatment or visit. The disability certificates refer to Petitioner as partially incapacitated with an undetermined end date and less than explicit remarks. They have virtually no value in evaluating Petitioner's medical condition. Biurquis at 60; Petitioner's Exhibit 1 at 13, 12, 14, 18, 20, 27, 31, 9, 13, 23.

An MRI was performed on Petitioner's right knee July 16, 2014. It revealed mild peripatellar soft tissue swelling, probably post traumatic soft tissue bruising; intact menisci, collateral and cruciate ligaments. The rest of the MRI was unremarkable. Petitioner's Exhibit 4.

Petitioner testified he came under the care of Dr. Ronald Silver. He does not remember if Bridgeport Pain Control referred him. Silver's letter regarding a consult over Petitioner is directed to Dr. Mark Cohen at 1611 West Harrison, Chicago, Illinois. I take judicial notice that is Midwest Orthopaedics at Rush. There is no evidence of a connection to Petitioner, his treatment or care. Biurquis at 21, 22; Petitioner's Exhibit 5 at 8.

Petitioner saw Silver seven times, first on July 25, 2014, and last on April 1, 2016, almost two years post accident. On July 25, 2014, Silver's records indicated Petitioner stepped off his electric jack and hyperextended his right knee. Silver noted Petitioner's condition "...has been resistant to physical therapy and anti-inflammatory." Nonetheless, Silver prescribed anti-inflammatory medication and recommended Petitioner continue physical therapy. An x-ray of Petitioner's right knee was within normal limits. Petitioner's Exhibit 4 at 3, 4, 7.

A month later, in August 2014, Bridgeport Pain Control noted Petitioner "...has regained function and is capable of full duty...." On August 30, 2014, Petitioner had been released from care and was capable of returning to work at full duty as of August 26, 2014. Petitioner's Exhibit 1 at 23, 25.

Petitioner submitted to an independent medical examination on September 23, 2014. He was seen by Dr. Troy Karlsson of the DuPage Medical Group. Petitioner testified he was examined by Dr. Karlsson, he said the examination took 15 minutes, with Karlsson looking at him, measuring him, and lightly touching his knee. Even a cursory review of Karlsson's evaluation finds that testimony lacks credibility. Karlsson took a history from Petitioner and conducted a physical examination consisting of 60 components. He also reviewed records of Petitioner including an MRI of the right knee; the letter of Dr. Silver to Dr. Cohen; an x-ray report dated July 25, 2014, of the right knee; an apparent drug screen (of which we know nothing); an EMG/Nerve Conduction Study; an MRI dated July 16, 2014; and an x-ray report dated June 23, 2014. Karlsson diagnosed Petitioner as having degenerative changes at the patellofemoral joint at an early age. He found chronic changes on an MRI with cyst formation on the femoral side of the patellofemoral joint. In his view, these are not acute changes or traumatic changes, but degenerative changes that take years to develop. Karlsson believed Petitioner experienced symptoms of his degenerative disease while at work without any true injury at work. He found

Petitioner needed no further treatment. Karlsson said Petitioner's current medical status is related to his degenerative changes at the patellofemoral joint, not any injury at work. Petitioner's diagnosis is degenerative patellofemoral arthritis and patellar subluxation of the right knee. Of significance, the treatment Petitioner received was the treatment for patellofemoral degenerative change. Karlsson noted Petitioner was working full time without restrictions at Burrito Beach, and found Petitioner capable of working full duty without restrictions. Respondent's Exhibit B; Biurquis at 39.

Despite Petitioner's release from care, and full duty release in August 2014, and Karlsson's finding Petitioner could and was working full duty without restrictions, seven months later, Petitioner returned to Bridgeport Pain Control, on March 16, 2015, for his "w/c" accident complaining of moderate constant pain in his right knee. There are no examination notes of this visit. He was promptly issued a disability certificate as both totally and partially incapacitated, with Nicole Beavers D.C. remarking "pt would benefit from lighter duty on the job d/t exacerbation of r knee symptoms. Less walking with breaks (2-3) for stretching, rest." Petitioner's Exhibit 1 at 28, 29.

Petitioner returned to see Dr. Silver nine months after his last visit. Silver again writes to Dr. Mark Cohen, expressing, without any evidence whatsoever, "concern about articular cartilage damage to the patellofemoral articulation due to the aforementioned work injury." He said Petitioner "...remains temporarily disabled." Petitioner's Exhibit 5 at 13.

Petitioner testified he was given injections to his knee by Silver. Silver's records reflect an injection of the right knee on May 13, 2015. Petitioner testified that the injections helped. However, the notes of Dr. Silver indicate Petitioner got only one day of relief from the injection. Silver recommended arthroscopic examination of the right knee. Petitioner testified Silver is recommending knee surgery, and he is planning on getting that surgery. Petitioner said "...I need that surgery." In answer to a question whether he wants to get that surgery, Petitioner said "Yes sir." Contrary to Petitioner's sworn testimony, by April 1, 2016, Dr. Silver notes Petitioner "...has declined arthroscopic surgery...." Biurquis at 23, 24; Petitioner's Exhibit 5 at 17, 21, 24, 30.

Petitioner testified as of April 1, 2016, Dr. Silver gave him restrictions "not to lift more than 25 pounds or 50 pounds...also not to be standing. It had to be a sitting down job." Contrary to Petitioner's sworn testimony, Silver said Petitioner's permanent problems would be with regard to squatting, kneeling, and crawling. He issued a work status for Petitioner with a return to work with restrictions of no crawling, no kneeling, and no squatting. There was no indicated restriction on lifting, and no indication of sedentary work. Biurquis at 27; Petitioner's Exhibit 5 at 30, 31.

Petitioner's continuous fabrications weigh heavily on determining his credibility.

The notes of Bridgeport Pain control of August 18, 2015, the last recorded day of treatment, indicate Petitioner "...continues to be totally incapacitated and unable to work with an undetermined return to work date." They further noted "...the patient is totally incapacitated and unable to perform not only work but some activities of daily living." Yet, Petitioner testified at

hearing, he returned to work at a restaurant by September as a cook for six or seven months. He then went to work at a warehouse for about a year doing the same work he was doing for Respondent. He then went to work in the summer of 2017, for DuraCare cutting fabric for upholstered chairs. That is a standing job, working full time. Petitioner's Exhibit 1 at 37-38; Biurquis at 28-34.

Petitioner testified he still feels pain in his knee and puts heating pads on his knee. He also, on the advice of others, tried rubbing his knee with marijuana and alcohol twice. He said it didn't work for him. Petitioner testified he saw his personal doctor, Dr. Noam, a month before hearing for pain. No records were submitted as evidence. Biurquis at 35-36, 65.

Conclusions of Law

The decision in this case begins and ends with disputed issues **C**, did an accident occur that arose out of and in the course of Petitioner's employment by Respondent; and **F**, is Petitioner's current condition of ill-being causally related to the injury.

A claimant bears the burden of proving by a preponderance of the evidence, that his injury arose out of and in the course of the employment. Both elements must be present in order to justify compensation. First Cash Financial Services v. Industrial Commission (Rios), 367 Ill. App. 3d 102, 105 (2006). In the course of employment, refers to the time, place, and circumstances of the injury. If the injury occurs within the time period of employment, at a place the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980).

Arising out of the employment pertains to the origin or cause of the claimant's injury. To determine whether an injury arose out of employment, the risk to which an employee is exposed must be categorized into one of three kinds: those distinctly associated with employment; those personal to the employee; and neutral risks that have no particular employment or personal characteristics. First Cash, supra at 105.

I find, as a conclusion of law, Petitioner has failed to prove a work place injury. I do so for several reasons.

Petitioner misrepresented the duties he was doing at Golden Country, testifying he was a picker at hearing and telling medical providers and Dr. Karlsson he was a checker. Given Petitioner's testimony of the different responsibilities of a picker and a checker, a checker likely does not use the equipment Petitioner claims to have used. This is important because without a claim he was doing a job requiring him to step off a piece of equipment, there is no prefatory action to the knee pain placing him at risk. Even so, just walking and having knee pain or the equivalent of stepping down a stair is not enough to rise to being out of employment. Petitioner

is not a credible witness at all. There was no corroborative evidence or witness substantiating the accident.

I also note Petitioner's continuous and broad based misrepresentations referred to above and his evasive demeanor and testimony during cross examination, reinforced Petitioner's lack of credibility, and thoroughly compromised his testimony.

I rely on the examination of Dr. Karlsson, who found Petitioner had degenerative changes at the patellofemoral joint at an early age, not acute or traumatic changes, but degenerative changes that take years to develop. Karlsson believed Petitioner experienced symptoms of his degenerative disease while at work without any true injury at work. The fact that Petitioner admitted having regular knee pain at work supports the findings of Dr. Karlsson, as does his observation petitioner's treatment was that of degenerative changes.

I give weight to Karlsson over Petitioner's other identified medical providers for several reasons.

Petitioner failed to seek medical attention for three weeks after he claims to have injured himself at work, even from his own doctor. There were long gaps in his medical treatment. There were obscure remarks in the records of Bridgeport Pain Control Petitioner could not explain. The disability certificates from Bridgeport Pain Control are conflicting and vague and often issued with treatment notes. Diagnostic testing was unremarkable. Dr. Silver's notes stand in direct conflict with those of Bridgeport Pain Control. Silver's relationship with Dr. Mark Cohen is a mystery. The notes of Bridgeport Pain Control indicate Petitioner as totally incapacitated, yet he continued to work. It is also of note that although Petitioner had his own physician, he was referred for treatment by his attorney.

I find as a conclusion of law, considering Petitioner's complete lack of credibility, and the opinions of Dr. Karlsson, there is no reasonable certainty any injury to Petitioner stemmed from a risk associated with his employment.

I further find as a conclusion of law, Petitioner's current condition of ill-being is not causally connected to any work place injury, but degenerative in nature.

As to disputed issues **J**, involving payment of medical charges, **K**, temporary benefits, **L**, the nature and extent of the injury, and **O**, prospective medical treatment, because Petitioner failed to prove an accident arose out of his employment, he is not entitled to medical benefits, or temporary total disability, nor is he entitled to prospective medical treatment he has already declined. No benefits of any kind are awarded.

Arbitrator

9/12/2018

Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRANDON MAGALSKI,

Petitioner,

21IWCC0102

vs. NO: 16 WC 22000

OLIVE GARDEN,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, temporary total disability, medical expenses and nature and extent, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator for the Statement of Facts with the modifications noted below.

In finding that Petitioner failed to prove a compensable accident, we find the most persuasive evidence to be the two most contemporaneous documents that reflect he sustained an injury at home instead of at work: 1) Dr. Markus's June 2, 2016 record indicating that Petitioner injured his knee getting up from a chair at home the day before; and 2) Mr. Smulkstys's June 6, 2016 Employee Statement that Petitioner called off work on "Wednesday" (even though it was actually Thursday) and told him that Petitioner "was getting up from computer desk at home and felt a sharp pain in his knee."

To ignore these documents would be to find that Dr. Markus is incompetent and/or unethical and that Mr. Smulkstys fabricated the contents of his Employee Statement. We find neither to be the case.

Dr. Markus's June 2, 2016 record

The questions by Petitioner's attorney attempted to establish that Dr. Markus was very busy the day he saw Petitioner and did not take notes and, therefore, that Petitioner was credible when he denied telling Dr. Markus that he was injured at home getting up from a chair. In other

words, Petitioner argues that Dr. Markus is incompetent and unable to record an accurate history. Although Dr. Markus's record does contain a couple of typographical errors that refer to Petitioner's *right* knee instead of the left, it is clear that this visit was for Petitioner's left knee. We do not believe these errors are sufficient to call into question the validity of the recorded history because it is supported by Mr. Smulkstys's June 6th Employee Statement, which reflects that Petitioner gave Mr. Smulkstys a remarkably similar history of having injured his knee getting up from a computer desk at home.

Mr. Simas Smulkstys's June 6, 2016 Employee Statement

Mr. Simas Smulkstys, one of Petitioner's supervisors, testified that Petitioner called him on June 2nd and said he would like to take a day off because he was getting up from the computer desk and felt a sharp pain in his knee. *T.155.* Mr. Smulkstys told Petitioner to take a day off and keep him posted. *Id.* Mr. Smulkstys testified that he did not follow Respondent's work-injury procedures on June 1st or June 2nd "because no injury was reported to me" and "I had no knowledge of an injury." *T.157.*

Mr. Smulkstys testified that he prepared his Employee Statement Form on June 6, 2016 to document his conversations with Petitioner. *T.158-59.* That form states:

> Jamie (General manager) asked me if I knew anything about Brandon injuring his knee last week at work. Jamie overheard Brandon complaining to other servers. I told Jamie that all I knew was, that Brandon called off on Wednesday due to pain in his knee. Brandon told me he was getting up from computer desk at home and felt a sharp pain in his knee. I told him to take a day off and keep me updated about his condition. Brandon never mentioned that again to me. *Rx7.*

The Arbitrator found Mr. Smulkstys's testimony and report "to be less than credible and contradictory" because his report indicated that Petitioner called off on "Wednesday," but "Wednesday" was June 1st, the alleged date of accident when Petitioner was at work. "Thus, he could not have called off as Smulkstys's report suggests." *Dec. at 9 (unnumbered).*

We disagree and find that, although Mr. Smulkstys incorrectly identified "Wednesday" as the day Petitioner called off, this error does not reflect poorly on his credibility. We note that, on the issue of Petitioner's "testimony as to the timelines of events and circumstances" the Arbitrator found Petitioner credible and that he was not "attempting to be deceptive" regarding whether he worked on certain dates but, "rather the date(s) that were being discussed at trial were at times confusing, even prompting the Arbitrator to interject and ask about date(s) and work hours." *Dec. at 9 (unnumbered).* We believe it is unfair to give Petitioner the benefit of the doubt when the time logs contradicted his testimony but then find Mr. Smulkstys not credible because he mistakenly wrote "Wednesday" instead of "Thursday."

We also disagree with the Arbitrator's finding that "[t]he language used [in Mr. Smulkstys's Employee Statement] appears to be in the past tense, referencing what occurred back on June 6, 2016 and the Arbitrator does not believe it was created it [sic] on June 6, 2016." *Dec. at 10 (unnumbered).* We find there was no language "referencing what occurred back on" June 6th. Although it includes "past tense" language about what happened in the week prior to June 6th, it contains nothing referring to the date of the report in the past tense. The Arbitrator also wrote that if it had been prepared on June 6, 2016, Mr. Smulkstys failed to explain why he did not submit this to workers' compensation sooner. *Id.* Mr. Smulkstys testified that he was

asked about Petitioner's alleged June 1st accident by his General Manager, Jaime Leech, on June 6th and he wrote his statement. *T.186.* He testified that Ms. Leech told him she heard rumors that employees were talking about Petitioner having been injured at work and asked him if he knew anything about it. *T.189.*

The evidence reflects that Ms. Leech is deceased and was unavailable to testify at trial. However, we do not know when Ms. Leech died nor any of the circumstances surrounding what Ms. Leech may or may not have done with Mr. Smulkstys's Employee Statement after he provided it to her. Therefore, we do not believe the Arbitrator's inference is accurate that this in any way impugns his credibility that the Employee Statement was written on June 6, 2016.

Having found that Mr. Smulkstys wrote the Employee Statement on June 6, 2016, the question is how could this statement contain such a similar history to Dr. Markus's June 1st record unless they both accurately reflect that Petitioner injured himself at home? For arguments sake, even if Dr. Markus had recorded an inaccurate history, in order for Mr. Smulkstys to have written a history that corroborated that medical record, he would have had to have access to Dr. Markus's June 2nd record *before* he wrote his Employee Statement on June 6th. There is no evidence this happened, and Petitioner never claimed that he provided this medical record to Respondent prior to June 6, 2016. Furthermore, there would have been no reason for Petitioner to have brought that record to Respondent because Dr. Markus had not taken Petitioner off work.

As further support for our finding that Mr. Smulkstys wrote his Employee Statement on June 6, 2016, we note that Respondent's §12 physician, Dr. Bare, initially opined on September 21, 2016, that Petitioner's knee condition was work-related. However, almost a year later on September 1, 2017, he changed his opinion after being provided with Dr. Markus's June 2, 2016 record, which he did not have at the time of his previous opinion.

We are aware that Respondent initially accepted Petitioner's claim and paid temporary total disability and medical benefits until Petitioner returned to work full duty on October 24, 2016. *T.120.* The evidence seems to indicate that the claims adjuster was handling this claim in the beginning because Dr. Bare's September 21, 2016 report was addressed to Gallagher Bassett. The second report, on September 1, 2017, was addressed to Respondent's attorney. Respondent's Exhibit 2, which is a copy of Dr. Markus's (Pronger Smith) records, was subpoenaed on February 14, 2017, and the certification that was returned is dated March 13, 2017. It seems more likely than not that neither Respondent nor Respondent's attorney had obtained Dr. Markus's record until March 2017, after Petitioner had already completed his treatment and returned to work full duty.

Therefore, if Mr. Smulkstys fabricated his Employee Statement after March 2017 in order to corroborate Dr. Markus's June 2nd medical record, this would implicate quite a few people in a conspiracy to manufacture evidence including Mr. Smulkstys, the claims adjuster and Respondent's attorney. We find this implication completely without merit and wholly unsubstantiated.

Petitioner also testified Dr. Markus told him, at the initial June 2, 2016 visit, that Petitioner would never get surgery if he claimed a workers' compensation accident. *T.57.* According to Petitioner, Dr. Markus is unethical because he purposely did not document an accurate history of a work accident and, instead, wrote down a false history of an accident at home just so Petitioner could have his medical treatment covered through his personal insurance instead of worker's compensation. We find this highly unlikely and disagree with the

Arbitrator's finding that Petitioner "provided a very candid and credible explanation that he never told Dr. Markus he injured himself while getting up from a chair." *Dec. at 9 (unnumbered).*

In addition to the credible documentary evidence discussed above that contradicts Petitioner's claim that he was injured at work on June 1st, 2016, we make the following findings regarding credibility.

Did Petitioner actually clear his own tables?

Petitioner testified that on June 1, 2016, the date of accident, "I was cleaning off my tables. Two of my tables had gotten up, so I had about six piles worth of dishes on my tray." *T.17.* Later, Petitioner testified, "So back then, I never cleaned my tables. I always paid my host Luke to clean my tables." *T.29.* The Commission questions why Petitioner would have cleaned off his tables on June 1, 2016, thus leading to his alleged accident while carrying the tray full of dishes, even though he "never cleaned" his own tables during that time period. We take note of this inconsistency and also that Petitioner's alleged accident was unwitnessed.

After the alleged accident, did Petitioner or his girlfriend, Dawn Kostenski, arrive at Petitioner's house first?

Petitioner testified that when he got home from work after his alleged accident on June 1, 2016, his girlfriend, Dawn Kostenski, was already at his house:

> "I got in the house. … My girlfriend at the time was there." *T.35.*
> "Based on the swelling of my knee, Dawn went and got me ice for my knee…" *T.39.*
> "I sat there probably a half hour, 45 minutes without my knee -- the swelling hadn't really gone down or anything like that." *T.39.*

However, Petitioner's girlfriend, Dawn Kostenski testified, "I went over to [Petitioner's] house when he got off work when I was done with school. He was in his room. I went upstairs. He was like doubled over like this in pain. I had asked him what happened. He told me he got hurt at work." *T.226.*

The Commission notes the contradiction between Petitioner's testimony that Ms. Kostenski was at his house when he arrived and her testimony that Petitioner was already upstairs in his room when she arrived. This, by itself, does not negate the possibility that Petitioner was injured at work, but it does make us question the veracity of their stories. If Ms. Kostenski, according to her own testimony, was not already at Petitioner's home when he arrived, she would not know if Petitioner was having left knee pain and swelling prior to his arrival from work or whether his knee was injured while he was getting up from a chair or computer desk at home prior to her arrival.

How many phone conversations did Petitioner have with Mr. Smulkstys on June 2, 2016?

Petitioner testified that he had two phone conversations with Mr. Smulkstys on June 2, 2016. The first conversation was in the morning after he made an appointment with the doctor:

> I then call [Respondent] and I spoke to [Simas Smulkstys]. I said, Simas, hey, I'm going to my doctor. My knee is not better. I can no longer walk on it like without having a

major limp. There's not much weight I can put on it. I'm going to my doctor. *T.45.*

Petitioner testified that Mr. Smulkstys "said, okay, well, let me know what your doctor says because we expect you at work." *T.46.* Petitioner testified, "I said, I will give you a call when I'm done with my doctor because I really didn't even know if I would be able to." *T.46-47.*

Petitioner testified that he called Mr. Smulkstys a second time on June 2nd after he visited Dr. Markus:

> I called him, and I informed him of what my doctor had talked to me about. ... I recall saying I would not be coming to work because there was no way I could walk on my knee, and I remember his response that day. *T.64-65.*

Petitioner testified:

Q: Then please tell us what his response was.
A: Well, it's the weekend; so you better find a way to be at work.
Q: Did you respond to that?
A: Yes.
Q: You can say it in here.
A: Yes. I told him to go fuck himself.
Q: And what was his response back to you?
A: There was none. I hung up.
Q: You hung up the phone?
A: Yeah.
Q: Did you go to work that day?
A: No, I did not. *T.65.*

In contrast, Mr. Smulkstys testified that Petitioner called him the morning of June 2nd before the restaurant opened and that was the only time Petitioner called him that day. *T.196-97.* He testified:

Q: Did [Petitioner] ever call you asking you or telling you that he was not going to show up for his shift today?
A: No. The conversation was that he injured his leg and he would like to take a day off.
Q: Did you ever tell [Petitioner] on the phone that he needed to report for his shift that day?
A: Absolutely not.
Q: Did [Petitioner] ever tell you on the telephone call to go fuck yourself?
A: Excuse me?
Q: I'm sorry, I'm just repeating the testimony of the Petitioner.
A: No.
Q: If [Petitioner] would have said that to you on the phone, would there have been any repercussions?
A: It's a professional work environment. Use of profanity or being insubordinate leads to one thing -- immediate termination. So if there were profanity -- would have used the words to me, it would have led to only one thing immediately. It doesn't matter what the situation is.

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Q: What would that have been?
A: Creating hostile work environment leads to immediate termination. *T.198-99.*

The Commission does not believe Petitioner's testimony that he had a second conversation with Mr. Smulkstys on June 2, 2016. We find Mr. Smulkstys credible that Petitioner would have been terminated if he had used profanity with his supervisor. In any event, whether there was one conversation or two, we find Mr. Smulkstys's testimony that Petitioner never reported a work injury to him to be persuasive. *T.154-59.*

After a thorough review of the evidence, we find that Petitioner failed to prove he sustained a compensable accident at work on June 1, 2016. Petitioner's testimony is contradicted by both Dr. Markus's June 2, 2016 medical record and the June 6, 2016 Employee Statement of Mr. Smulkstys. We find both of these documents to be credible and accurately reflect a history that Petitioner injured his knee at home on June 1, 2016. We find the testimony of Mr. Smulkstys to be more persuasive than that of Petitioner and Ms. Kostenski. We note that Ms. Kostenski did not witness Petitioner's alleged accident and whatever knowledge she has about it came from Petitioner. We are also not persuaded by the fact that the medical records, after Petitioner reported the alleged injury to Ms. Leech on June 5, 2016, consistently reflect a history of a work injury. It is not surprising that Petitioner would be consistent once he decided to allege that his left knee injury occurred at work instead of at home. The fact of the matter is that Petitioner's initial medical record reflects that he sustained an injury at home and Mr. Smulkstys's Employee Statement credibly corroborates that medical record. Finally, we note that Respondent's payment of temporary total disability and medical benefits is not an admission of liability.

The Conclusions of Law in the Decision of the Arbitrator are hereby stricken. Based on our finding regarding accident, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed October 2, 2018, is reversed and all awards are hereby vacated.

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

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

DATED: MAR 5 - 2021

Maria Elena Portela
M. E. Portela

Thomas J. Tyrrell

L Elizabeth Coppoletti
L. Elizabeth Coppoletti

SE/
O: 1/26/21
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAGALSKI, BRANDON
Employee/Petitioner

Case# **16WC022000**

21IWCC0102

OLIVE GARDEN
Employer/Respondent

On 10/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1521 THE FITZ LAW GROUP
NICHOLAS FITZ
212 W WASHINGTON ST SUITE 2004
CHICAGO, IL 60606

0560 WIEDNER & McAULIFFE LTD
SEAN PETERS
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

21IWCC0102

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRANDON MAGALSKI
Employee/Petitioner

v.

OLIVE GARDEN
Employer/Respondent

Case # **16** WC **22000**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **8/16/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/1/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$506.75**; the average weekly wage was **$26,350.95**.

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

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

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

Respondent shall be given a credit of **$7,932.36 (6/2/16 – 11/16/16)** for TTD, **$0** for TPD, **$0** for maintenance, and **$20,566.49 in medical benefits**, for a total credit of **$28,498.85**.

By stipulation, Respondent is entitled to a credit of **$TBD** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$337.83/week** for **17-5/7th weeks**, commencing **6/22/16** through **10/23/16**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **6/22/16** through **10/23/16**, and shall pay the remainder of the award, if any, in weekly payments. Respondent shall be given a credit of **$7,932.36** for temporary total disability benefits that have been paid and this credit shall apply toward any permanency awarded to the extent there was an overpayment of TTD.

Respondent shall pay reasonable and necessary medical services of **$7,017.68**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of **$20,566.49** for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$304.05/week** for 1 weeks, because the injuries sustained caused the **15%** loss of the **left leg (knee)**, as provided in Section **8(e)** of the Act.

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

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

Signature of Arbitrator

10/2/18
Date

OCT 2 - 2018

FINDINGS OF FACT

Background

Brandon Magalski ("Petitioner") alleged injuries to the left knee arising out of it in the course of his employment with all of garden Respondent occurring on June 1, 2016. Ax1. On August 16, 2018, the parties proceeded to arbitration on the disputed issues of accident, notice, causal connection, liability for unpaid medical bills, temporary total disability, nature and extent of the injury. Ax1. Each party provided opening statements. The following is a recitation of the facts adduced at trial.

Testimony and Other Evidence

Petitioner testified he has worked for Respondent as a server and bar hop, and has worked in the prep area for the last four years. His job duties include serving guests, taking orders, and bringing food to the tables. Petitioner is also required to clear the tables he serves, aside from the glasses. When Petitioner works as a bartender, his job duties consist of staying behind the bar, taking orders, and making drinks. When Petitioner works in the prep area, he makes salads and breadsticks.

Petitioner testified he was working as a server on June 1, 2016, but that he never cleaned his tables as his job duties required him to. Instead, he always paid his host, Luke, in cash to clean his tables for him. Despite delegating this assignment to a co-employee for payment, Petitioner claims he was cleaning off his tables and was carrying his banquet tray into the kitchen. Petitioner testified that as he was turning the corner to walk through the "IN" door, a co-worker was walking out the opposite way, the door swung open and he stopped and felt a pop in his left knee. Petitioner testified that he put his dishes away in the kitchen and finished his shift.

Petitioner said he reported his injury to his manager, Simas Smulkstys, at the end of the night when signing out on June 1, 2016. Specifically, Petitioner told Simas that their employees do not want to listen to the rules as they want to walk out the "IN" door. Petitioner told Simas that he did not know what he did to his knee, but it was throbbing in pain and he was going to go home and put some ice on it. Petitioner testified Simas told him to go to his doctor in the morning if it was really bad. Subsequently, Petitioner drove home in a stick shift vehicle with a clutch to meet his girlfriend, Dawn Kostenski, and ice his knee. On June 1, 2016, Petitioner clocked in at 11:50 AM, clocked out at 2:12 PM, clocked in once again at 4:08 PM and clocked out at 9:43 PM. Rx8.

On June 2, 2016, Petitioner saw Dr. Robert Markus of DuPage Medical Group. Px1, Rx2. The history noted Petitioner complained of left knee pain when sitting at home turned and felt a pop in the knee. Pain was rated 5/10. Additional history noted that Petitioner felt a pop in his left knee yesterday when he was getting up from a chair. Notes indicated that the *right* knee was examined in revealed no appreciable effusion, there was medial joint line tenderness, patellar apprehension was negative, knee was stable to stress testing and Lockman's was negative. Assessment was *right* knee pain, could not rule out immediately meniscus tear. Petitioner was advised on activity modification and home exercise. The document was signed by the doctor at approximately 3:18 PM. The gross outstanding charge was $296.99. Petitioner testified he did not tell his doctor he was getting up from a chair. Petitioner's girlfriend Dawn Kostenski testified that she greeted Petitioner the night after his accident and that she never saw that he was injured from getting up from a chair. Kostenski testified that Petitioner told her he injured his knee at work. Petitioner testified that he told Simas before his initial appointment that he had ongoing knee pain and that he was going to his doctor and that he called him back after to call in to work.

Petitioner testified that on Friday June 2, 2016 he called Simas Smulkstys and told him he could not go into work. Petitioner stated that Simas responded that it is the weekend so Petitioner should find a way.

Petitioner testified he told Simas to go fuck himself. On Friday June 3, 2016, Petitioner said he called off again and spoke to Larry. Petitioner testified he then went into work on Sunday morning because he was informed his general manager would be there. Jamie instructed Petitioner to go to the manager's office and fill out a work comp form. He was then placed the phone and spoke with Gallagher Bassett. He said they asked him questions, opened a claim and gave instructions. He said he did not finish his shift and was sent home that day. For Friday June 3, 2016, Petitioner clocked in at 11:16 AM and clocked out at 2:05 PM. Rx8.

Petitioner testified he went into work on Sunday June 5, 2016 because he heard Jaime Leech, general manager, would be there and he wanted to report is injury. He said he spoke with Jamie and he was placed on the phone with Gallagher Bassett and that a claim was initiated. For Sunday June 5, 2016 at 11:11 AM and clocked out that same date at 3:58 PM. Rx8. Petitioner said thereafter he waited for the insurance to set him up with a medical appointment and that he kept calling to attempt to schedule one.

On June 6, 2016, an employee statement form was completed in writing indicating that on June 6, 2016, Simas Smulkstys was asked by Jamie the general manager if he knew anything about Petitioner's injury to his knee last week at work. Jamie had overheard Brandon complaining to other servers. Simas Smulkstys told Jamie that all he knew was that Brandon called off on Wednesday due to pain in his knee. Petitioner told Simas Smulkstys he was getting up from a computer desk at home and felt a sharp pain in his knee. Simas Smulkstys told Petitioner to take a day off and to keep him posted about his condition. Petitioner never mentioned that again to Simas Smulkstys. Rx7.

Clocking documentation indicated that Petitioner worked on June 6, 2016 from 5:10 PM through 8:01 PM. Rx8. Petitioner testified that he attempted to contact workers' compensation in order to secure a medical appointment.

On June 22, 2016, Petitioner presented to Physicians Immediate Care. Px2. Chief complaint was constant joint pain in the left knee since Wednesday, June 1, 2016. Pain was rated 8/10. Petitioner related that he twisted while at work and felt a sharp pain. The plan was for follow up and an MRI of the left knee. Physical therapy was prescribed and Petitioner was released to light duty. Diagnosis was left knee sprain. That same date, PIC requested authorization for physical therapy and an MRI. On June 23, 2016, PIC logged that physical therapy and the MRI were approved.

On June 24, 2016, MRI of the left knee performed at Preferred Open MRI showed a bucket handle tear of the medial meniscus with displaced fragment and associated effusion. Px2.

On June 27, 2016, Petitioner was first evaluated for physical therapy at ATI physical therapy. Px2, Px3. Assessment noted that Petitioner presented with signs and symptoms consistent with a diagnosis of left knee pain and left knee medial meniscus tear. Under nature of the injury, it was noted that Petitioner was walking at work, suddenly stopped as coworker was also walking opposite direction in the "in" door. He felt a sudden sharp pain as if it popped out. He finished his shift and worked two more days and went to his doctor where he was taken off work. The date of injury noted was June 1, 2016.

On June 29, 2016, Petitioner followed up with PIC. Px2. Petitioner rated his pain 7/10. Interval history noted that pain had not improved and Petitioner was doing physical therapy with little relief. Medication provided little relief. There was pain with medial movement. Diagnosis was changed to bucket handle tear of the medial meniscus of the left knee. The plan was for follow up, light duty and ice. The physician assistant hand wrote a prescription indicating that Petitioner needed treatment with an orthopedic doctor for the torn medial meniscus. Referral activity logs noted that the clinic attempted to contact Worker's Compensation but that on July 8, 2016, Petitioner stated that he no longer needed in orthopedic visit as his lawyer was no handling medical issues. Total gross balance was $632.91.

On July 8, 2016, Petitioner was discharged from ATI physical therapy. Px3. Assessment noted Petitioner had attended for physical therapy sessions with signs and symptoms consistent with diagnosis of left knee pain and left knee medial meniscus tear. He continued to present with impairments involving range of motion, soft tissue mobility, strength, flexibility, gait, balance, joint mobility and lifting mechanics. Those deficits limited Petitioner's ability to perform acsending stairs, caring, descending stairs, driving stick shift, squatting, sustained standing, transferring in and out of the chair and walking. Petitioner's previous job as a server was categorized at a medium physical demand level. Petitioner was discharged at the direction of his doctor pending surgery. Total gross charges were $2,017.77. Total balance was zero dollars.

On July 8, 2016, Petitioner first presented to Dr. Blair Rhode at Orland Park Orthopedics. Px4. Petitioner's hand-written intake forms indicated that on June 1, 2016, Petitioner experienced an onset of symptoms to the left knee. He described pain, swelling and locking. He last worked on June 4, 2016. Outside interests included golfing. The history noted that Petitioner was working for Respondent and was walking to the kitchen when his knee pivoted. He felt a sharp pain along the medial aspect of his knee and he initially thought it was a sprain. In the evening, Petitioner continued to experience a catching sensation along the medial aspect of his knee and he subsequently reported his injury. Assessment was knee pain and medial mensicus tear. The doctor concluded Petitioner sustained a work-related left knee bucket handle medial meniscus tear secondary to pivoting on his knee while at work on June 1, 2016. On exam, he demonstrated medial joint line pain with positive medial McMurray's. MRI demonstrated bucket handle medial meniscus tear with a double PCL sign. The doctor recommended proceeding with surgical intervention and stopping physical therapy as he could aggravate chondral loss. Petitioner was removed from work.

On July 19, 2016, Petitioner underwent and Dr. Blair Rhode performed a left knee partial medial meniscectomy. Px4. Post-operative diagnosis was left knee bucket handle medial meniscus tear. The surgery was performed at South Chicago Surgical Solutions. At that time, Petitioner was dispensed one cold therapy unit, crutches, hinged knee brace, aspirin, stool softener, Norco, Mobic, Flexeril, Prilosec, sequential compression device and Exaprel.

On July 27, 2016, Petitioner followed up with Dr. Rhode's office. Px4. Petitioner was to begin formal physical therapy for range of motion and strengthening. He was to remain off duty and follow up. On July 28, 2016, Petitioner began physical therapy with Orland Park Orthopedics. Px4.

On August 24, 2016, Petitioner followed up with physician assistant for Dr. Blair Rhode. Px4. Range of motion was -5° extension to 130° of flexion. On exam, Petitioner had medial joint line tenderness, negative McMurray's both medially and laterally. The plan was to continue physical therapy for range of motion and strengthening. He was to remain off work.

Petitioner continued with physical therapy throughout August 2016 and on August 31, 2016, physical therapists noted that Petitioner continued to be limited by pain, decreased strength, increased if you Jean, decreased balance. Petitioner remained dysfunctional in the ability to perform tasks necessary for normal work function, participate in hobbies he enjoys, participate at previous level of support, ambulate without deviations, acsend and descend stairs without difficulty and perform kneeling activities, which affect his normal activities of daily living. However, Petitioner was on track regarding normal and expected progression. Petitioner was making significant gains towards goals. The plan was to continue physical therapy.

On September 5, 2016, Petitioner played golf at Silver Lake country club. Rx4. Golf was played with a cart for nine holes. On September 7, 2016, Petitioner returned for physical therapy. Px4. Notations for subjective, objective, assessment, and orders were identical as prior physical therapy notes.

On September 21, 2016, Petitioner followed up with physician assistant for Dr. Rhode. Px4. On exam, range of motion was 0 to 130°. There was a full active and passive flexion and extension. On exam there was medial joint line tenderness, negative McMurray's both medially and laterally. Assessment, orders in plans were unchanged. Petitioner remained off work.

On September 21, 2016, Petitioner was evaluated at the request of Respondent by Dr. Aaron Bare of Northwestern Medicine. Px5. The doctor noted that Petitioner reported injury to his knee that occurred on June 1, 2016 while walking through a hinged door. Specifically, as Petitioner was walking through the door into the kitchen, a coworker was coming out the door. He was struck by the other worker as that particular worker was exiting the door and he was entering the kitchen. Petitioner felt that he probably pivoted or twisted as he did that he had immediate pain on the inside of his knee. The injury was reported 6 days later. Petitioner disclosed he had pain in his knee but was able to continue working on the date of the injury. The doctor diagnosed status post left knee arthroscopy with partial medial menisectomy. The doctor opined that Petitioner sustained an injury to his knee while at work, walking through a door when he was struck by a coworker. The doctor concluded that this could have and probably did cause the bucket handle tear to the meniscus. Petitioner denied previous problems, treatments or injuries to his knee and therefore, a pre-existing condition, assuming his history is accurate, was not part of this particular problem. Rather, the doctor noted that, the acute injury could have and probably did cause the condition that led to the surgical intervention. The doctor noted Petitioner was able to return to work light duty, that physical therapy was warranted and that Petitioner would reach maximum medical improvement 16 weeks post op.

On September 24, 2016, records demonstrate that Petitioner played golf at Chick Evans golf course. Rx5.

On September 26, 2016, Petitioner followed up with his PCP's office. Rx2. The reason for follow up was noted to be refill. Problem list, in relevant part, noted left knee injury initially noted on June 2, 2016 and still present. Under surgical history, left knee surgery was noted. Musculoskeletal exam noted full range of motion and stable gate. On September 28, 2016, Petitioner attended physical therapy in the morning, where subjective, objective, assessment and orders were unchanged. It was noted Petitioner was making significant gains toward goals. Px4. On September 28, 2016, records show that approximately 11:32 AM, Petitioner reserved golf at Silver Lake Country Club, starting at 1:33 PM. Rx4. The record does not indicate whether a cart with used and many holes were played.

On October 5, 2016, Petitioner returned for physical therapy. Px4. Subjective, objective, assessment and orders were identical and unchanged. On October 7, 2016, records indicate Petitioner played golf beginning at 2 PM at Silver Lake Country Club. Rx4. Petitioner used a golf cart and nine holes were played.

On October 19, 2016, Petitioner followed up with physician assistant for Dr. Rhode. Px4. On exam, range of motion was 0 to 130°. There was a full active and passive flexion and extension. There was medial joint line tenderness, and negative McMurray's both medially and laterally. It was noted Petitioner was doing well despite some compensatory back issues which he was currently working on. He was to return to work as of October 24, 2016 he was to follow up in four weeks for probable maximum medical improvement.

Petitioner testified that around this time, he was working full duty as Respondent did not have light duty. He could not recall the exact date but said that he went right back to serving.

On December 12, 2016, Petitioner followed up with the PA for Dr. Rhode. Px4. Exam and assessment were unchanged. Follow up was scheduled. On January 9, 2017, Petitioner followed up with the PA for Dr. Rhode. Px4. Examination, assessment and orders were unchanged. Petitioner was placed at maximum medical improvement, was to continue with full duty and was to follow up PRN.

On April 13, 2017, Petitioner play golf at Silver Lake Country Club. Rx4. No indication is noted weather Petitioner used a cart. Petitioner play nine holes. On May 13, 2017, Petitioner played 9 holes of golf at Silver Lake Country Club with the use of a golf cart. Rx4.

On September 1, 2017, Dr. Bare issued a supplemental report. Px5. The doctor reviewed Petitioner's initial treatment note with his primary care doctor's office and also reviewed the follow up note from September 26, 2016. Dr. Bare noted that the September 26 note did not note any pain or any mention of any type of work injury in that note. Based upon the additional documentation reviewed, the doctor concluded that Petitioner's injury occurred at home it was not caused by or directly related to any particular work injury.

Petitioner testified that he never got up from a computer desk and injured himself nor did he tell any co-worker that. Petitioner knew of no co-worker reports stating this and testified he never told anyone that he struck the door or that the door struck him.

On March 14, 2018, the parties took the evidence deposition of Dr. Aaron Bare. Rx1, Px7. The doctor testified consistent with his previous medical opinions given in his reports. The doctor testified that the change in his causation opinion was based primarily on the additional medical records that he reviewed suggesting that the knee injury occurred in a different fashion or a different matter. On cross-examination, the doctor testified that he did believe that the mechanism of getting up from a chair was a valid mechanism to cause a medial meniscus tear, bucket handle style. Likewise, the doctor agreed that the mechanism as noted in the June 22, 2016 date of service was also competent mechanism. Regardless of causation, the doctor agreed that treatment was appropriate, that restrictions were appropriate, that Petitioner had no degenerative changes to the left knee and that the bucket handle tear was traumatic.

Photos were submitted by Petitioner showing photos of the "in" door. Px8.1-8.3. Photo 8.1 shows a door with hinges on the left side, a small square like window in the top middle of the door, the word "in" on top of the window and the door open or propped open inward inside of the kitchen. Photo 8.2 demonstrates a male server or waiter carrying a tray with his right hand and arm and entering through the "in" door. At trial, Petitioner testified that the individual in photo 8.2 is of the same size, weight, height and build.

Petitioner testified that he continues to work full duty performing the same job duties as he did for Respondent before June 1, 2016.

Testimony of Simas Smulkstys

Simas Smulkstys has been employed by Respondent as a manager for approximately three years. As a culinary manager, his job duties consist of visiting guests, writing schedules, managing employees, accepting orders, placing orders, and anything else that arises in the restaurant. He has known Petitioner for approximately three years, as they work at the same Olive Garden location.

Simas testified that he and Petitioner worked on June 1, 2016. Simas testified he was working as a service manager during that time period and was responsible for the "front of the house team. Simas testified that no one reported a work incident to him that day. Simas testified that he and Petitioner were scheduled to work the following day on June 2, 2016. However, Petitioner did not show up for work. Simas testified to a telephone conference he had with Petitioner in the morning. Simas testified that Petitioner told him that he was getting up from a computer desk at home and felt a sharp pain in his knee. Simas told Petitioner to take the day off and to keep him updated about his condition. Simas testified Petitioner never told him that he sustained a work accident while walking to the kitchen with a tray full of plates and dishes.

Simas testified that he only had one telephone conference with Petitioner on June 2, 2016. He said this conversation occurred the morning of June 2, 2016 before the restaurant opened and that Petitioner simply took the day off because of pain in his knee. No work accident was mentioned. Simas testified that he did not have a second telephone conference with Petitioner wherein he told Petitioner he had to report for his shift on June 2, 2016, or that Petitioner told him to go fuck himself. Simas stated that had Petitioner made this comment to him on the telephone, there would have been repercussions, such as immediate termination.

Simas testified that Respondent has implemented policies for managers when they receive notice of a work injury. Accordingly, if an employee gets injured at work, a manager is to call a nurse triage who then assesses the situation and how severe the injury is to determine whether medical treatment is warranted. Simas testified that he did not follow this policy on June 1, 2016 or June 2, 2016 because Petitioner never informed him of a work injury. Instead, Simas testified he generated an Employee Statement Form on June 6, 2016 when he was asked by the General Manager, Jamie Leech, if he was aware of a work injury involving Petitioner.

Simas further testified that each employee is given a three-digit number that they enter into a computer system to clock in and clock out for work. As a manager, Simas testified that he has access to an employee's time logs. Simas testified that according to Petitioner's time logs, Petitioner worked on June 1, 2016, June 3, 2016, June 5, 2016, and June 6, 2016. Rx8. However, Petitioner did not have any hours clocked in on June 2, 2016, because this was the day Simas told Petitioner to take the day off.

Simas testified that Petitioner remains employed by Respondent and works more or less the same amount of time he did before June 1, 2016. Simas testified that Petitioner has not required any sort of accommodations for his left leg and does not utilize any sort of ambulatory devices when he works. Further, Simas has never seen Petitioner wear a knee brace when he works and has made no complaints of left leg pain since returning to work.

Testimony of Dawn Kostenski

Dawn Kostenski testified she has been employed by Respondent as a server for approximately four years. In addition to being Petitioner's co-worker, she is Petitioner's girlfriend and currently lives with him. She said she was familiar with the time clock and said that everyone gets a three-digit code and that clock time can be adjusted by managers, including Simas. She said she had personal knowledge of Simas adjusting the clock for her when she herself was a food runner. She testified it was generally known that Petitioner got hurt on the job. Kostenski testified that she learned of Petitioner's after he came home from his shift in pain. She said he explained what occurred and she noticed his knee was swollen.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries to his left knee arising out of and in the course of his employment with Respondent occurring on Wednesday June 1, 2016.

The Arbitrator concludes that Petitioner's accident arose out of his employment as he was performing employment related duties of opening the kitchen "in" door with his serving tray in order to access the kitchen to continue his serving duties. Further, Petitioner's accident occurred in the course of his employment as he was on the clock working his assigned serving shifts and was on the employer's premises at the time of the work

accident. Having addressed the arising out of and in the course of analysis the Arbitrator note that the issue of accident thus comes down to credibility. The Arbitrator finds Petitioner's testimony as to the timelines of events and circumstances regarding his accident to be credible. Petitioner was asked whether he recalled working on certain dates and having had an opportunity to observe the Petitioner, the Arbitrator does not find Petitioner was attempting to be deceptive as to this line of questioning but rather the date(s) that were being discussed at trial were at times confusing, even prompting the Arbitrator to interject and ask about date(s) and work hours.

Petitioner testified that following the accident, he presented the next day to his primary doctor's office, which was on Thursday June 2, 2016. Regarding the notation made by Dr. Markus, the Arbitrator assigns little weight to that as Petitioner provided a very candid and credible explanation that he never told Dr. Markus he injured himself while getting up from a chair. Moreover, no other medical record corroborates the history noted by Dr. Markus. Further, Petitioner was cross examined on whether he told any other doctors that he injured himself getting up from a chair, whether he ran into a co-worker and whether he made contact with the door to all of which he answered that he had not told Dr. Bare any of those things. In the Arbitrator's view, this line of questioning corroborated Petitioner's version of history of events – namely, that he injured himself at work when he pivoted to avoid contact with a door and a co-worker. Petitioner's version of events is also supported by his medical records, which give a similar history of twisting or pivoting. Petitioner's girlfriend, Dawn Kostenski, credibly testified that Petitioner informed her the night after his work accident that he injured his knee at work. She also corroborated Petitioner's refuting that he ever injured himself while getting up from a desk, stating that she either never saw that or heard that from him.

Finally, the Arbitrator has considered the rebuttal testimony of Simas Smulkstys, who testified that no work injury to the knee was mentioned to him on 6/1 or 6/2 and that on 6/2 Petitioner related to him via phone that he injured his knee when getting up from a computer desk. Smulkstys also testified that on Monday, June 6, 2016, he completed a report indicated that Petitioner had related to him he injured himself getting up from a computer desk. See, Rx7.

The Arbitrator has weighed and considered Smulkstys' testimony and report and finds his testimony to be less than credible and contradictory. For example, Smulkstys wrote that Petitioner called off on Wednesday but the only Wednesday that Smulkstys could have meant in the timeline of events would have been Wednesday June 1, 2016, the date of the accident and it is undisputed Petitioner in fact worked that day. Rx8. Thus, he could not have called off as Smulkstys' report suggests.

In addition, Smulkstys wrote that Jamie asked him whether he knew anything about Petitioner's knee injury at work the week prior and that Jaime told him (Smulkstys) that she overheard Brandon complaining to other servers. The only reasonable and logical conclusion to be drawn from this statement is that Jamie must have asked Smulkstys on Monday June 6, 2016 whether he overheard anything about a knee injury at "work" because she referenced the "week prior." This, in turn, means that Petitioner would have complained about and asserted a knee injury occurring at work on the days he worked or clocked in – Wednesday June 1, 2016, Friday June 3, 2016 and/or Sunday June 5, 2016. See, Rx8. Thus, Jamie would have overheard these complaints on that Wednesday, Friday or Sunday. However, Petitioner's unrebutted and credible testimony was that although he intended to call off Sunday, he heard Jaime would be there and so he went in to file a report. This means that Jamie would have overheard Petitioner's complaints on Sunday June 5, 2016. This supports Petitioner's testimony that he went in on Sunday to file a report with Jamie and that he was interviewed via phone by Gallagher Bassett. Of note, Petitioner was issued a "medical awareness card" by workers' compensation insurance and the date of that document shows that it was "created on: June 5, 2016." Again, this also corroborates Petitioner's version of events. This card is contained in the PIC records in Px2. In the Arbitrator's view, these facts and conclusions contradicts Smulkstys' assertion that Petitioner reported a knee injury involving a desk.

Finally, the Arbitrator questions the authenticity of the document Smulkstys prepared as it was allegedly created on June 6, 2016. The language used appears to be in the past tense, referencing what occurred back on June 6, 2016 and the Arbitrator does not believe it was created it on June 6, 2016. If it was, Smulkstys failed to explain why he did not submit this to workers' compensation sooner on or around on June 6, 2016. In summary and for the foregoing reasons, the Arbitrator finds that Petitioner sustained accidental injuries to his left knee arising out of and in the course of his employment with Respondent on June 1, 2016.

ISSUE (E) Was timely notice of the accident given to Respondent?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he gave proper notice of his work accident. At trial, Respondent asserted that while they do not dispute that notice of an accident was given with in the 45 days required under the Act, Respondent disputed that notice was properly given. Petitioner testified that he notified Smulkstys on the date of the incident while finishing his shift of hurting his knee while attempting to avoid a door and his co-worker, who had improperly come out thru the "in" door. Petitioner testified he also gave notice the next day, on Thursday 6/2/16, when he called Smulkstys over the phone to tell him that he was going to the doctor and again that same date after the doctor's appointment that he would not be coming. Petitioner credibly testified that he came into work on Sunday June 5, 2016 to report his injury to Jamie and that he gave a statement to Gallagher Bassett. A "medical awareness card" was created by the insurance carrier on June 5, 2016, which indicated a work injury of June 1, 2016 to the knee.

The Arbitrator has considered Smulkstys' testimony and assigns it little to no weight based on credibility and finds that Smulkstys' assertion that no notice of a work accident was given to him to be unsupported by the totality of the evidence. Based on the foregoing, the Arbitrator concludes proper notice was given.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that his current condition of ill-being as it relates to his left knee is casually related to his work accident. The evidence showed, and it was generally undisputed that Petitioner had no prior injuries, symptoms complaints or treatment to his left knee before June 1, 2016. The competing medical evidence also generally agrees that the nature of Petitioner's tear was acute in nature given his history, onset of symptoms and imaging. Dr. Bare testified that both the mechanisms of a twisting or pivoting of the leg and/or knee as well as getting up from a chair were both competent mechanisms capable of causing Petitioner's type of knee tear. However, having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that the accurate mechanism of injury was the twisting or pivoting injury occurring at work. In this regard, the Arbitrator assigns less weight to the opinion of Dr. Bare and greater weight to Petitioner's treating doctor, Dr. Rhode, who related his injury to the work accident. Based on the foregoing and the record as a whole, the Arbitrator concludes that Petitioner's current condition of ill-being as it relates to his left knee is casually related to his work accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that the medical services that were provided to him were both reasonable and

necessary and that Respondent has not yet paid all appropriate charges for same. At trial, Respondent's dispute for medical services and bills was based primarily on liability rather than reasonableness and/or necessity. Ax1. In fact, Dr. Bare agreed that Petitioner's treatment was appropriate for his injury. Moreover, Respondent did not present any utilization review challenging either the reasonableness or necessity of treatment. Petitioner submitted one outstanding bill from Orland Park Orthopedics in the amount of $7,017.68. Ax1, Px6. The Arbitrator finds that the bill and charges correspond to treatment related to this work accident and for which corresponding medical records appear in evidence. Px4. Having found in favor of Petitioner, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services of **$7,017.68**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of **$20,566.49** for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he is entitled to temporary total disability as a result of this work-related accident. Petitioner alleged lost time from work as a result of the injury beginning on June 2, 2016 and through his release to return to work by Dr. Rhode as of October 23, 2016. Ax1, Px4. However, when Petitioner saw Dr. Markus for his left knee the next day after his work accident, no work restriction issued. Px1. Petitioner called in to excuse himself from work for Thursday June 2nd but it was not pursuant to any doctor's order. Furthermore, Petitioner in fact continued to work on Friday June 3rd, Sunday June 5th and Monday June 6th. Rx8. This decision to work was not pursuant to any light duty restriction. Petitioner's first appointment following his initial visit with Dr. Markus was on June 22, 2016 and at that time PIC issued light duty work restrictions. Px2. According to the credible testimony of Petitioner, these restrictions were not accommodated, for whatever reason. Therefore, having found in favor of Petitioner of the foregoing issues, the Arbitrator awards Petitioner temporary total disability from June 22, 2016 through October 23, 2016. The parties stipulated that Respondent paid and was entitled to a credit in the amount of $7,932.36 for amounts paid. Ax1. This amount covered June 2, 2016 through November 16, 2016, resulting in an overpayment beyond the time period awarded. Respondent submitted proof of such payments via Rx3. Respondent shall be entitled to such credit as applied against the TTD award and any permanency award to issue.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he suffered permanent partial disability as a result of his work related left knee injury. Petitioner's accident resulted in a bucket handle partial medial meniscal tear, which was surgically repaired and for which he underwent usual post-operative treatment with a full duty release. Petitioner was released from care and permitted to return to work full duty on October 23, 2016. He last treated for this injury on January 9, 2017, therefore the Arbitrator finds Petitioner reached maximum medical improvement on January 9, 2017 and that his claim is ripe for adjudication of permanency, if any. Consistent with the Act, the Arbitrator considers and weighs the following factors:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that ***no*** permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives ***no*** weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a ***server*** before and at the time of the injury and following his accident, he returned

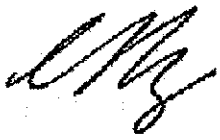
to work for Respondent performing the same work. There is nothing in the record that indicates Petitioner was unable to return to his prior job therefore, the Arbitrator assigns ***little*** weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was ***27*** years old at the time of the injury. His young age suggests a longer work life expectancy which may expose him to such similar and repeated work duties and risks that led to his injury. Balanced against this, the Arbitrator notes his age also suggests Petitioner may not feel the effects of his injury to a greater degree compared to an older worker. The Arbitrator assigns ***some*** weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence Petitioner's future earnings capacity was affected by this accident. The Arbitrator therefore assigns ***no*** weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's final treatment notes indicate that January 9, 2017, there was full active and passive flexion and extension. There was medial joint line tenderness, and negative McMurray's both medially and laterally. It was noted Petitioner was doing well. Px4. These were identical findings as early as October 19, 2016. Px4. His last physical therapy note, dated October 12, 2016 noted that Petitioner continued to be limited by pain, decreased strength, increased effusion, decreased balance. He remained dysfunctional in the ability to perform tasks necessary for normal work function and participate in hobbies he enjoyed, participate at previous level of sport, ambulate without deviations, ascend and descend stairs without difficulty and perform kneeling activities. He was still on track and making progress, however. The Arbitrator finds that Petitioner's treatment notes most accurately and likely reflect Petitioner's level of function and perceived disability and/or difficulties. The Arbitrator does not find Petitioner's last physical therapy note entirely corroborative of evidence of disability, as it is clear Petitioner was able to continue to engage in his golfing activities and continue working full duty as a server. Further, Petitioner did not appear to endorse such difficulties when he was with his treating doctor's office and/or at trial. The Arbitrator has considered the record and therefore gives the ***greatest*** weight to this factor.

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



Signature of Arbitrator

10/2/18
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY SMYTH,

Petitioner,

21IWCC0103

vs. NO: 14 WC 41121

CITY OF JOLIET,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's decision as to causation, prospective medical treatment, temporary total disability benefits, and all credits except the make whole credit of $14,120.30. The Commission vacates the make whole credit of $14,120.30 for the period from January 27, 2015 through June 27, 2015.

The Commission finds the cases of *Tee-Pak, Inc. v. Industrial Comm'n of Illinois*, 141 Ill.3d 520 (1986) and *Elgin Bd. Of Educ. Sch. Dist. U-46 v. Illinois Workers' Comp. Comm'n and Linda Weiler*, 409 Ill.App.3d 943 (2011) to be controlling on this issue.

In *Tee-Pak, Inc.*, the Commission allowed the employer a Section 8(j) credit under a program which ensured a full salary to employees who are off work due to an accident or illness. The claimant argued that the Commission had erred in allowing the employer a credit for money paid to him under "a benefit program which ensure[d] a full salary to employees who are off work due to an accident or illness." *Tee-Pak, Inc. v. Industrial Comm'n of Illinois*, 141 Ill.3d 520, 522 (1986). The Appellate Court reversed, noting that under section 8(j) of the Act, "the employer received no credit for benefits which would have been paid irrespective of the occurrence of a

workers' compensation accident." *Tee-Pak*, 141 Ill.3d at 529. In the instant case, Respondent failed to show that the salary payments that Petitioner received between January 27, 2015 and June 27, 2015 were limited to employment related disabilities, and therefore the Respondent should not have been awarded the credit of $14,120.30, representing the additional 1/3 of Petitioner's salary above the temporary total disability payments for that time period.

Section 8(j)2 of the Act states:

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee *other than the compensation payments provided by this Act*, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment. *Emphasis added.*

It is the burden of the employer to establish its entitlement to credit under section 8(j) of the Act. *Hill Freight Lines, Inc. v. Industrial Comm'n*, 36 Ill.2d 419, 424 (1967). The employer receives no credit for benefits which would have been paid irrespective of the occurrence of a workers' compensation accident. *Tee-Pak, Inc. v. Industrial Comm'n of Illinois*, 141 Ill.3d 520, 529 (1986).

The Appellate Court also addressed this issue in *Elgin Bd. Of Educ. Sch. Dist. U-46 v. Illinois Workers' Comp. Comm'n and Linda Weiler*, 409 Ill.App.3d 943 (2011). *Elgin* is distinguishable from *Tee-Pak, Inc.* In *Elgin*, the Court found that in *Tee-Pak,* the employer intended its employees to collect both TTD benefits and salary payments for the same period of time. In *Elgin,* there was no evidence that Respondent had in place a similar policy. Thus, the limitation of Section 8(j) imposed in *Tee-Pak* does not apply and that Respondent is entitled to a credit for salary paid to claimant, but only to the extent of its TTD liability. *Elgin*, 409 Ill.App.3d 943, 954 (2011).

Though the "make whole" benefit for which the Arbitrator awarded credit to Respondent of $14,120.30 for the period of January 27, 2015 through June 27, 2015, was solely paid for work accidents, under the above-cited case law, the Respondent already received a credit for the TTD paid of $58,188.50 – the extent of the compensation that would have been payable during the period covered by such payment. Additionally, Respondent did not prove their case that they were entitled to such credit. Armando DeAvila testified that the first "make whole benefit" was paid on February 13, 2015. (T. 169) He then testified that the "make whole" payments were made between February 27, 2015 and January 15, 2016. He was unable to testify why Petitioner was paid the amount she was paid in February of 2016 and said his predecessor would know. (T. 170-171) He then testified that the "make whole" benefit would have been February 13, 2015 through August 14, 2015, but did not know if Petitioner agreed to have make-whole payments deducted from her sick bank or what the agreement was between Petitioner and HR. (T. 174-178) As Respondent's own witness could not provide an explanation for the duration of, or even verify the time period for, the "make whole" benefit, Respondent did not prove it was entitled to this credit.

Based on the above, the Commission vacates the award of credit for $14,210.30 and modifies the *Findings* section of the Order to read: "Respondent shall be given a credit of

21IWCC0103

$58,188.50 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $58,278.50. Respondent is entitled to a credit of $90.00 under Section 8(j) of the Act."

Additionally, the decision, in multiple places, incorrectly refers to Petitioner's date of accident as "September 24, 2014" even though the Petitioner's accident occurred on September 29, 2014. These errors, on pages 2, 3, 10 and 13, are hereby corrected to reflect the accurate accident date.

Finally, on page 13 of the Arbitrator's decision in the 6th sentence of paragraph 3, the Commission strikes the word "maintenance", as well as strikes the final sentence of that paragraph.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,166.66 per week for a period of 207 4/7 weeks, from January 23, 2015 through August 11, 2016, and February 17, 2017 through July 23, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $15,666.59 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

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

DATED: MAR 5 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 012621
49

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

SMYTH, KIMBERLY
Employee/Petitioner

Case# **14WC041121**
17WC014554

CITY OF JOLIET
Employer/Respondent

21IWCC0103

On 12/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1377 PARENTE & NOREM PC
MATTHEW COLEMAN
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

4866 KNELL O'CONNOR & DANIELEWICZ
BRIAN DRISCOLL
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

21IWCC0103

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KIMBERLY SMYTH
Employee/Petitioner

v.

CITY OF JOLIET
Employer/Respondent

Case # **14** WC **41121**

Consolidated cases: **17WC14554**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Ottawa, Illinois,** on **06/24/2019** and in the city of **Chicago** on **07/23/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **09/24/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**91,000.00**; the average weekly wage was $**1,750.00**.

On the date of accident, Petitioner was **46** years of age ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $**58,188.50** for TTD, $**0** for TPD, $**0** for maintenance, and $**14,210.30** for other benefits, for a total credit of $**72,398.80**.

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

ORDER

Respondent shall authorize all treatment recommended by Petitioner's treating physicians including but not limited to the arthroscopic surgery to the right shoulder as recommended by Dr. Burra and all postoperative therapy, medication, modalities, and vocational services recommended as provided by section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $**15,666.59**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,166.66/week for 207 and 4/7 weeks, commencing 01/23/15 through 08/11/16 and 02/17/17 through 07//23/19, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

12/3/19
Date

ICArbDec19(b)

DEC 6 - 2019

FINDINGS OF FACT

Petitioner has filed two Applications for Benefits. (PX11-12) The first case – 14WC41121 – stems from an automobile wreck on September 24, 2014 (PX11) in which Petitioner claims she sustained injuries to her cervical spine, left knee, and right shoulder. The second case – 17WC14554 – arises out of an alleged slipping incident at an inspection site on January 31, 2017 (PX12) in which Petitioner claims an injury to her right knee and temporary exacerbation of her cervical condition.

Petitioner, Kimberly Smyth is employed as a residential property inspector by Respondent, City of Joliet ("City"). She has worked for the City since June 11, 1990 and has worked as a residential property inspector since 2010-2011. The residential property inspector's task is to inspect both interior and exterior properties for compliance with the city ordinances and the International Property Maintenance Code as adopted with the City of Joliet. Residential property inspectors inspect properties to ensure safety and maintain compliance with the building code. (Also see PX13) The majority of assignments derive from complaints from other residents. Inspectors could be dispatched to dilapidated structures and vacant properties. They encounter vagrants squatting on properties, animals, and threats of violence from residents that receive citations. Inspectors must be able to walk moderate distances over rough terrain, climb ladders, work in confined spaces, inspect crawl spaces and attics. They inspect surfaces that may be slippery and work outdoors under adverse conditions. Inspectors must also be able to occasionally lift and/or move up to 25 pounds. (PX13)

Petitioner testified that she reported to work on September 29, 2014. Prior to that day the condition of her neck, cervical spine, left knee, and right shoulder were fine. According to Petitioner, she had never undergone any treatment for her neck or left knee. She however stated that she had a prior right shoulder injury when she slipped and fell around 2009. Petitioner provided that she ultimately underwent right shoulder surgery. She returned to full duty work three months thereafter and has continued to work since with no right shoulder issues.

Petitioner testified that on September 29, 2014, she was driving with a coworker on Plainfield Road when she was rear ended. The Lockport Fire Protection arrived on the scene and transported Petitioner to Provena Saint Joseph's Medical Center. Hospital records show she was treated for complaints of left knee and neck pains. She was discharged that same day with a diagnosis of cervical strain and left knee contusion. (PX1)

Post discharge from Provena Saint Joseph's Medical Center, Petitioner sought medical treatment with her primary care physician, Dr. Kerry Marchesci. Petitioner presented on October 1, 2014 with a history of "2 days ago was in car accident. Was restrained driver, rear-ended at 30mph…Immediately felt left knee pain and neck pain…Still having right posterior neck pain radiating to right shoulder…Taking 600mg Ibuprofen which helps with neck and shoulder pain." Dr. Marchesci assessed neck pain and recommended stretching exercises. (PX6)

Petitioner next came into the care of Dr. Burra of Hinsdale Orhtopedic. According to the doctor's records he was seen in consultation at the request of Dr. Marchesci. Petitioner presented on October 8, 2014 with chief complaints of "pain, injury, weakness of right shoulder" and "pain injury of the left knee." (PX 2, pp. 5-6) Dr. Burra documented Petitioner's conveyence that she was driving to a job site when another vehicle struck her from behind. Petitioner reported that her right hand was on the steering wheel just before impact and her left knee forcefully hit and got lodged under the window roller mechanism on the driver's side door. Petitioner reported that she continued to have right shoulder pain and weakness; left lateral knee pain; and neck soreness

which radiated into her right shoulder. The doctor noted that Petitioner never had a neck or left knee injury. Also noted was a prior right shoulder surgery for which Petitioner had a full recovery. After performing an examination and obtaining x-rays, Dr. Burra's impression was 1.) right shoulder possible subscapularis tear, ACJ contusion, bicep tendinitis vs. possible rupture (popeye deformity and ecchymosis); 2.) left knee lateral femoral condyle bone contusion, patellofemoral pain and exacerbation of patellofemoral chondromalacia; and 3.) neck pain/strain, whiplash injury. Dr. Burra documented that Petitioner's right shoulder, left knee and neck were "clearly and causally related to the car accident sustained on September 29, 2014." The doctor ordered a MRI arthrogram of the right shoulder. With respect to the left knee, the doctor wanted to initially try a course of conservative treatment. He referred her to a spine specialist with respect to her cervical/neck condition. Petitioner was released to driving as tolerated and breaks as needed. (PX 2, pp. 7-13)

On October 14, 2014, Petitioner underwent a right shoulder arthrogram. The diagnostic revealed 1.) intact supraspinatus tendon; 2.) delamination but retraction of the subscapularis tendon; 3.) small tear of the posterosuperior labrum; and 4.) intact superior biceps labral complex. (PX 2, pp. 15-18)

On October 20, 2014, Dr. Burra noted Petitioner continued to report right shoulder and neck pain. The doctor performed an ultrasound-guided injection into the right shoulder. (PX 2, pp. 19-22) On October 29, 2014, Petitioner reported continuing right shoulder complaints. With respect to her left knee, Dr. Burra noted Petitioner reported more anterior knee pain. Also noted was that clicking and popping increased her knee pain. Physical therapy was recommended. (PX 2, pp. 25-28)

After undergoing a full course of physical therapy, Petitioner returned to Dr. Burra on December 3, 2014. Petitioner reported that the injections worked well for approximately one week, before her pain returned to pre-injection levels. She also reported increased left knee symptoms. Dr. Burra ordered a left knee MRI to rule out a medial meniscus tear. Potential surgery was discussed for the right shoulder, however, the doctor wanted to wait until Petitioner saw the spine specialist before surgically addressing the shoulder. (PX 2, pp. 30-35)

Petitioner underwent the left knee MRI on December 5, 2014. (PX2, pp. 40-41) When she returned to Dr. Burra on December 17, 2014, the doctor noted the MRI study revealed an oblique horizontal clevage tear of the posterior body of the medical meniscus. Arthroscopy of the left knee was recommended. (PX 2, pp. 44-45)

On January 8, 2015, Petitioner presented to Dr. Rinella at the Illinois Spine Scoliosis Center with complaints of neck pain and tenderness extending into her right trapezial region as well as the radial 3 digits on her left hand. An examination revealed full range of motion of her neck and her Spurling's sign was negative bilaterally. The doctor noted Petitioner was hesitant to move her right shoulder secondary to pain. Dr. Rinella's impression was 1.) right shoulder and left knee pathology after work related motor vehicle collision; and 2.) probable cervical radiculopathy. An MRI was ordered to rule out any areas of neural impingement. (Px 3, P.10-11) The MRI when completed on January 19, 2015 demonstrated small to moderate central disc herniation and mild left and moderate right foraminal stenosis at C4-C5. At C5-C6 there was moderate sized central and left paramedian disc herniation as well as mild left foraminal stenosis. (PX 3, p. 29)

Petitioner followed up with Dr. Rinella on January 21, 2015 when he recommended an EMG. At her follow-up visit on January 28, 2015, Dr. Rinella noted the EMG performed on January 26th revealed Petitioner had left C6 radiculopathy with a moderate left median mononeuropthy. Physical therapy was ordered and Petitioner was referred to Dr. Udit Patel of the Pain and Spine Institute for pain management. (PX 3)

Petitioner initially saw Dr. Patel on February 25, 2015. At that visit, Dr. Patel recommended a transforaminal epidural steroid injection at C6. (PX 4, pp. 5-6) Meanwhile, Petitioner had continued treating with Dr. Burra. On February 18, 2015, Dr. Burra noted that because of Petitioner's significant radicular

symptoms from the neck, Dr. Rinella recommended treating her neck symptoms prior to shoulder surgery. Dr. Burra's plan was to move forward with the left knee arthroscopy and then address the shoulder procedure. (PX 2, p. 63) On March 2, 2015, Dr. Patel performed a transforaminal epidural steroid injection at C6. (PX 4, pp. 7-8)

On March 13, 2015, Petitioner returned to Dr. Rinella. The doctor noted the injection provided temporary relief before her symptoms returned. Dr. Rinella discussed a second course of injections. The doctor noted that if Petitioner did not improve, surgical intervention was a consideration. (PX 3, p.18)

On April 29, 2015, Dr. Burra performed 1.) left knee arthroscopy with partial medial meniscectomy; and 2.) abrasion chondroplasty of the medial femoral condyle and the medial facet of the patella. The postoperative diagnosis was medial meniscus tear and chondral lesion of the medial facet of the patella and also the medial femoral condyle. (PX 2, p.89)

Postoperatively, Petitioner underwent an uneventful course of treatment to the left knee. On June 4, 2015, Petitioner sought a second opinion with Dr. Alexander Ghanayem for her neck pain and radicular symptoms. After obtaining a history, performing an examination and reviewing the MRI images from January 19, 2015, Dr. Ghanayem assessed cervical spondylosis, C4-5 and C5-6. The doctor noted Petitioner had tried and failed conservative care. As a result, he recommended a two-level anterior cervical discectomy and fusion from C4 through C6. (PX 5, pp.123-124)

On August 10, 2015, Petitioner returned to Dr. Burra. The doctor noted Petitioner's left knee was doing very well. She no longer had mechanical symptoms and had very minimal anterior knee pain. Dr. Burra felt that from a knee perspective, Petitioner was ready for full duty. He also indicated that from her shoulder perspective, further treatment was needed. (PX 2, pp. 95-97)

On August 12, 2015, Dr. Ghanayem performed 1.) anterior cervical discectomy and fusion at C4-C5 and C5-C6: and 2.) anterior plate stabilization from C4-C6. (PX 5, p.159) Petitioner continued with Dr. Ghanayem postoperatively. On November 12, 2015, the doctor noted that Petitioner was progressing but wanted Petitioner to see her shoulder specialist as he felt Petitioner had plateaued without getting the shoulder stabilized. Dr. Ghanayem indicated that once the shoulder is stabilized, "we can return to cervical reconditioning." Petitioner was kept off work. (PX 5, pp. 89-90)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Lawrence Lieber on December 16, 2015. In his report dated same, Dr. Lieber provided that he obtained a history of accident, performed a physical examination and reviewed the medical records of Drs. Burra and Ghanayem. The doctor also provided that he reviewed the October 19, 2014 MRI arthrogram of the right shoulder which he stated confirmed no evidence of a rotator cuff tear or significant intra-articular pathology. Dr. Leiber assessed rotator cuff syndrome and degenerative joint disease of the right shoulder. Dr. Lieber opined that there was no direct relationship between Petitioner's right shoulder area and the September 29, 2014 injury. The doctor explained that the mechanism of injury was that of a whiplash type strain to the upper extremity and neck area. He opined that Petitioner's complaints were related to her pre-existing degenerative abnormalities and not that of the September 29, 2014 injury. Dr. Lieber stated, "[a]t most,...the Petitioner had a strain to the right shoulder area. There is no objective evidence of any further abnormality within the right shoulder that can be associated with the alleged September 29, 2014, event." The doctor added that the treatment overall appeared to have been appropriate for a period of 2 months. He opined that any treatment after January 15, 2015 was excessive and not associated with the alleged September 29, 2014 event. He felt Petitioner had reached maximum medical improvement and was capable of working full duty with respect to her right shoulder. (RX 12)

On February 18, 2016, Petitioner returned to Dr. Ghanayem. The doctor noted that she had been having problems with her shoulder. Dr. Ghanayem noted he reviewed Dr. Burra's notes wherein the doctor expressed his opinion that Petitioner's shoulder problem was distinctly different from her 2009 shoulder problem. Dr. Ghanayem indicated that it was difficult to determine how much of her residual symptoms were shoulder mediated versus cervical mediated. The doctor expressed his desire that Petitioner get her shoulder surgery done at that time. (PX 5, p. 82)

Petitioner returned to Dr. Burra on February 15, 2016. Dr. Burra noted that he reviewed Dr. Lieber's Section 12 examination report and disagreed with the doctor's conclusion. Dr. Burra wrote, " It is noteworthy to note that his exam clearly demonstrates a tender AC joint and biceps tendon, a positive Obrien's test and weakness strength testing both for internal/external rotation...Having identified all of these positive findings of weakness, pain, as well as positive labral tests, Dr. Lieber has opined that the entirety [of] ill being as far as her right shoulder is concerned is related to a pre-existing condition and [has] qualified these as pre-existing degenerative abnormalities." Dr. Burra indicated that he reviewed Petitioner's medical records and imaging and did not find any evidence of involvement of the subscapularis and/or the labrum. The doctor noted that Petitioner had a complete recovery following her previous surgery performed in 2009. He pointed out that Petitioner worked without symptoms for several years following her surgical recovery noting there was no record of any treatment in the intervening period. Dr. Burra stated, "Based on the fact that she was asymptomatic, had no involvement of the labrum or the subscapularis, [and] all the AC joint at the time of the previous surgery, I do believe that her present condition of ill being is quite clearly causally related to [the] present injury and is not a pre-existing injury." The doctor also noted that he reviewed documents detailing Petitioner's essential job duties and felt she was not capable of performing the duties with her condition of the right shoulder. Dr. Burra felt that Petitioner had failed conservative treatment, recommended surgical intervention and imposed work restrictions. (PX 2, pp. 99-103)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Kern Singh on June 9, 2016. In his report, Dr. Singh recorded that he obtained an accident history, performed an examination and reviewed medical documentation. Dr. Singh diagnosed 1.) cervical muscular strain; 2.) degenerative disk disease at C4-5, C5-C6; and 3.) status post anterior cervical discectomy and fusion (ACDF), C4-5, C5-C6. The doctor opined that Petitioner sustained an aggravation of the underlying degenerative condition at C4-5 level necessitating spinal intervention. The doctor felt Petitioner was not a maximum medical improvement as she had persistent pain that radiated in the C6 distribution. He recommended a CT scan of the cervical spine. Also recommended were light duty work restrictions. (RX 10)

Petitioner testified that after her Section 12 examination with Dr. Singh, she received a letter from Respondent offering accommodated light duty work effective August 11, 2016.

Petitioner testified that she in fact returned to work on August 11, 2016 and reported to Jeff Sterr. According to Petitioner she performed desk work from August 11, 2016 through December 27, 2016. She stated that on December 27, 2016, Mr. Sterr changed her assignment and dispatched her to the field.

On January 4, 2017, Ms. Smyth presented to Dr. Burra for a follow up regarding the right shoulder. He noted Petitioner reported that since returning to working in the field doing inspections she had been in and out of her car for 8 hours per day and had been walking through fields. He noted that since changing from her sedentary position she had an increase in right shoulder pain, right sided neck and trapezius pain and muscle spasms, and increase in forearm tingling and numbness. Also noted was that she had difficulty with performing ADL's such as washing her hair, and caring for herself. (PX2 at 107) Dr. Burra continued his surgical recommendation and prescribed work restrictions of sedentary desk work only; no field inspections due to

exacerbation of shoulder symptoms; no reaching, lifting, or repetitive overhead use of upper extremity. (PX2 at 111)

Petitioner testified that on January 31, 2017, she was sent to the Deer Path Crossing subdivision where she was assigned to attach notice of violation tags to the property. Petitioner provided that the subdivision was empty with no houses and seemed to be a dumping ground for contractors and for household garbage. Petitioner stated that prior to January 31, 2017, she had never had any medical treatment regarding her right knee. Nor had she ever missed time from work for right knee pain.

Petitioner testified that on January 31, 2017, she was tagging a pin number with an orange sticker. Petitioner described that she was on uneven ground with scattered garbage, when she turned, her right foot slipped in the mud. Petitioner provided that she caught herself and felt a crack and pop in her neck. Petitioner testified that she returned to the office and advised Mr. Sterr that she had slipped but not fallen. Petitioner conveyed that she was a little sore and asked to go home to change her clothes.

Petitioner testified that she attempted to see Dr. Ghanayem the day after the fall, but he was not in. As a result, she saw the physician's assistant who x-rayed her neck and gave her anti-inflammatory medicine and advised her to follow-up on February 9, 2017. Records submitted show she presented with continuing myofascial neck pain. Dr. Ghanayem took her off work. (PX 5, pp. 65-67)

Petitioner returned to Dr. Burra on February 15, 2017 for a follow-up visit regarding her right shoulder. At that visit, Petitioner reported to the doctor that on "...January 31, 2017, she was at a dump, which was fairly wet and she had a twisting injury." Petitioner informed the doctor that she did not fall, but suffered pain going from the base of her neck into the interscapular area. There was no direct contact injury of the shoulder. The doctor noted that "while all this was going on, her shoulder continues to be symptomatic. Dr. Burra again noted that Petitioner had failed conservative care and that surgical intervention was reasonable. The doctor again expressed his opinion that her shoulder condition of ill-being was causally related to her work injury. The doctor noted that he still awaited clarification from the workers' compensation carrier with regard to authorization for shoulder intervention. The doctor also noted that Petitioner wanted to put the surgery through her own insurance, and that he would need a denial letter from the workers' compensation carrier. (PX 2, pp. 112-115)

On February 22, 2017, Petitioner saw Dr. Burra with a chief complaint of right knee pain. Petitioner again conveyed the January 31, 2017 incident. Specifically, the doctor noted, "...she was in a muddy field tagging a tree. She states that as she was tagging the tree she had her right foot standing in the mud with her left foot standing on a bag of garbage in an attempt to elevate herself to tag the tree. She mentions that her right foot slipped to the right causing a twisting injury to her right knee. As she twisted her right knee she stepped back with her left foot to prevent herself from falling backwards. She denies falling..." After performing an examination and reviewing x-rays taken, Dr. Burra diagnosed right knee medial meniscus tear, patellofemoral pain. To further evaluate the knee, the doctor ordered a MRI. (PX 2, pp. 117- 120)

Petitioner underwent the prescribed MRI on February 28, 2017. (PX 2, p. 122) When Petitioner returned to Dr. Burra on March 10, 2017, the doctor expressed his opinion that the MRI clearly indicated a tear of the posterior horn of the medial meniscus. Other findings included 1.) chondromalacia along the medial tibial plateau; 2.) patellofemoral narrowing with osteophytic formation and high-grade chondromalacia; and 3.) a small joint effusion. Dr. Burra diagnosed medial meniscus tear, chondromalacia patellofemoral compartment and medial compartment. There was also an incidental finding of fibular enchodroma. Dr. Burra stated that the "...mechanism of the injury and the nature of the injury described ...most certainly can result in not only in an exacerbation of her underlying chondromalacia, but can result in the meniscal pathology..." The doctor noted

that the incidental finding of enchodroma was not work related. (PX 2, pp. 124 -127) At her follow-up visit on May 31, 2017, Dr. Burra recommended right knee surgical intervention. (PX 2, pp. 130-131)

Petitioner testified and the records show she continued to treat with Dr. Burra and Dr. Ghanayem since the second injury of January 31, 2017 and she continues to be on restrictions. (See PX 2 and PX 5)

At Respondent's request, Petitioner underwent another second Section 12 examination with Dr. Lieber on May 25, 2017. In his report dated same, the doctor noted that he performed a right shoulder examination and reviewed Dr. Singh's June 2016 IME report as well as the treating records of Dr. Burra through February 2017. Dr. Lieber assessed 1.) degenerative joint disease, right shoulder; and 2.) rotator cuff syndrome. The doctor provided that his opinion had not changed stating, "[t]here is no objective evidence of any abnormality within the Petitioner's right shoulder that can be related to that alleged event." He noted that Dr. Burra continued to recommend surgical intervention to the right shoulder. He noted that no further medical treatment was reasonable or necessary in association with the alleged September 2014 event. He reviewed the October 2014 MRI arthrogram indicating it confirms there is no evidence of any acute pathology within the right shoulder area that could be related to the vehicular accident. He indicated that all of the findings on the October 2014 MRI were pre-existing and had no relationship to the alleged incident. (RX 13)

At Respondent's request, Petitioner saw Dr. John Cherf for a Section 12 examination regarding her right knee. According to Dr. Cherf he obtained a history of the January 2017 twisting incident, performed an examination and reviewed Petitioner treating records. Dr. Cherf diagnosed Petitioner with a work-related right knee sprain/strain on January 31, 2017. Also noted was that she had a primary idiopathic osteoarthritis of the right nee and an enchodroma of the proximal fibula on the right. Dr, Cherf provided that Petitioner exhibited abnormal illness behavior to include symptom magnification and overreaction during examination. He stated that her subjective complaints were partially explained by the records and could be attributed to moderate-to-advance osteoarthritis of the right knee. Dr. Cherf opined that "[b]ased on Ms. Smyth's history of not having any symptoms in her right knee prior to the work-related right knee injury, there appears to be a temporal and causal relationship between her right knee symptoms and the injury in question." The doctor added "The mechanism of injury as described and recreated by Ms. Smyth is a low-energy injury and may have caused a temporary exacerbation of the osteoarthritis of her right knee." He stated her MRI was equivocal in terms of meniscal pathology and that patients with the degree of osteoarthritis found in Petitioner's right knee often have degenerative meniscal tears. (RX 14)

Dr. Cherf offered that it was unlikely the injury caused a permanent aggravation or acceleration beyond the natural history of degenerative arthritis of the right knee. The doctor however offered that based on Petitioner's history of the subjective complaints of pain beginning after the work accident on January 31, 2017, there appears to be a temporal and possible causal relationship between her symptoms and the injury in question. Dr. Cherf stated that he was reluctant to recommend arthroscopy. The doctor reasoned that patients such as Petitioner who are extremely obese with moderate-to-severe osteoarthritis of the right knee were known to have unpredictable and often poor results. Dr. Cherf recommended conservative care consisting of cortisone injections, anti-inflammatory medications and physical therapy. (RX 14)

At Respondent's request, Petitioner underwent a second Section 12 examination with Dr. Kern Singh. In his report dated September 28, 2017, Dr. Singh indicated that in addition to performing an examination, he reviewed updated medical records. Dr. Singh provided that none of his opinions had changed. He stated Petitioner's fusion was solid and Petitioner was at maximum medical improvement. With respect to the January 31, 2017 incident, the doctor opined that Petitioner sustained a separate soft tissue strain, cervical in nature, which had resolved. Dr. Singh also stated, "[y]ou cannot aggravate a solid fusion, and there are no symptoms that would be objectifiable. (RX 11)

At Respondent's request, Dr. Cherf authored an addendum Section 12 report on October 18, 2017. Dr. Cherf opined that Petitioner did not have a permanent aggravation of any pathology to the right knee as a result of the January 31, 2017 incident. The doctor also provided that it did not appear she sustained an acute meniscal tear as a result of the incident. (RX 15)

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's right shoulder condition is causally related to the motor vehicle crash of September 24, 2014, the Arbitrator finds the following:

Petitioner's credibly testified that prior to the crash, her right shoulder was in "fine" condition. Petitioner previously underwent right shoulder surgery in 2009. She was off work approximately three months after that procedure. Between 2009 and September 29, 2014 she did not seek medical treatment nor miss any work due to right shoulder pain. The records of Dr. Kerry Marcheschi support that Petitioner made no complaints of right shoulder pain prior to the crash. (PX 6)

Following the crash, Petitioner was taken by ambulance to Provena St. Joseph Medical Center. (PX1) She reported neck and left knee pain. (PX1 at 30) On October 1, 2014, Petitioner presented to her primary care physician, Dr. Marcheschi. (PX6 at 6) Dr. Marchesci noted:

> "2 days ago was in car accident. Was restrained driver, rear ended at 30 mph. Other car left the seen [sic] of the accident. Immediately felt left knee pain and neck pain. Seen at ER at St. Joe's. Had x-ray of left knee and neck which were both normal. Still having posterior neck pain radiating to the right shoulder. Also having mild headache since accident. She did hit her head on the headrest. Taking 600mg Ibuprofen which helps with neck and shoulder pain." (PX6 at 6)

Petitioner was referred to Dr. Giridhar Burra. (PX2 at 5) Petitioner first presented to Dr. Burra on October 8, 2014. (PX2 at 5) He took the below relevant history:

> On 9/29/14, she was driving and had another city employee in the back seat. They were driving to a job site going about 30mph and another vehicle hit them from behind while they were moving and fled the scene of the accident. She remembers that her right hand was on the steering wheeling when the impact occurred. (PX2 at 5)

Dr. Burra ordered a work up in the form of an MRI arthrogram. (PX9 at 10) He reviewed the findings and noted Petitioner had "delamination of her subscapularis" and the "biceps tendon had significant signal. . .consistent with tendinosis or injury," as well as a labral tear. (PX9 at 11) Dr. Burra diagnosed Petitioner with "AC joint contusion with biceps tendonitis and a second impingement in the subscapularis tendinosis." (PX9 at 11)

The evidence deposition of Dr. Burra was submitted into evidence. (PX9-10) The deposition was originally set pursuant to Respondent's dedimus application. (PX9 at 4, 50) Dr. Burra testified that it was his opinion to a reasonable degree of medical and surgical certainty that Petitioner's injuries to the right shoulder were causally connected to the motor vehicle crash of September 29, 2014. (PX9 at 16-17) Specifically, Dr. Burra testified that because Petitioner's arm was on the steering wheel an "axial load" or force was transmitted along the length of her arm which resulted in displacement and traction on the biceps tendon and a traumatic contact within the bone and the rotator cuff. (PX9 at 16-17) He further testified that the same force was responsible for impaction against the AC joint which thereby caused swelling and impingement. (PX9 at 16-17)

On cross examination Dr. Burra was asked and answered:

Q: And you hold the opinion that the motor vehicle accident caused the right shoulder conditions to go from asymptomatic to symptomatic, correct?
A: Yes, I do.
Q: Can you tell me the basis for your opinion?
A: I think it's reflected there, but I will try to phrase it again. The lady was working. I – in the course of my chart review – and I can find it for you, if you want. I had also reviewed her job description. She had to crawl, kneel. There is a significant manual component to her work. She was – she had no symptoms prior to the injury, She had a mechanism of injury consistent that can reproduce the symptoms she has. And she became symptomatic after the motor vehicle accident. (PX10 at 80-81)

The Arbitrator does not find the opinions of Respondent's Section 12 examiner, Dr. Lawrence Lieber to be persuasive. (RX12) Dr. Leiber assessed rotator cuff syndrome and degenerative joint disease of the right shoulder. Dr. Lieber opined that there was no direct relationship between Petitioner's right shoulder area and the September 29, 2014 injury. The doctor explained that the mechanism of injury was that of a whiplash type strain to the upper extremity and neck area. He opined that Petitioner's complaints were related to her pre-existing degenerative abnormalities and not that of the September 29, 2014 injury. Dr. Lieber stated, "[a]t most,...the Petitioner had a strain to the right shoulder area. There is no objective evidence of any further abnormality within the right shoulder that can be associated with the alleged September 29, 2014, event." Yet, Dr. Lieber noted positive clinical findings with regard to AC tenderness, biceps tendon, greater tuberosity, impingement, apprehension, speed, O'Brien, and reverse O'Brien. It also appears that he ignores the fact that Petitioner's right shoulder was pain free for five years prior to the car crash. He opined that any treatment after January 15, 2015 was excessive and felt Petitioner had reached maximum medical improvement and was capable of working full duty with respect to her right shoulder.

The Arbitrator finds the temporal relationship and testimony of Dr. Burra regarding mechanism of injury to be compelling. The Arbitrator therefore finds that Petitioner has proven by a preponderance of the evidence that her right shoulder injury is causally related to the to the motor vehicle crash of September 24, 2014. The Arbitrator further notes that Respondent accepted liability for Petitioner's cervical spondylosis and authorized the C4-C6 surgical ACDF with Dr. Ghanayem. Respondent also took responsibility for the left medial meniscus tear and chondral lesions on the patella and medial femoral condyle and authorized the arthroscopic surgical repair by Dr. Burra.

In support of the Arbitrator's decision relating to Issue (J), whether the services provided were reasonable and necessary and payment of outstanding medical bills, the Arbitrator finds the following:

Having found that Petitioner's cervical spine injury, left knee injury, and right shoulder injury are causally related to the motor vehicle crash of September 24, 2014, the Arbitrator finds that Respondent shall pay the outstanding medical bills set forth in PX8 pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for paid medical bills in the amount of $105,853.35.

In support of the Arbitrator's decision relating to Issue (K), whether Petitioner is entitled to prospective medical treatment in the form of a right shoulder arthroscopic surgery, the Arbitrator finds the following:

As stated above, the Arbitrator finds Petitioner's right shoulder injury is causally related to the motor vehicle crash. Dr. Burra testified that the results of the injections clearly identified that she had immediate

temporary relief from local anesthetic. (PX9 at 13) He has identified the pain generators and will create more space for the rotator cuff tendons by resecting the AC joint and distal clavicle. (PX9 at 13) He will remove the biceps tendon excursion which is causing pain with movement and transfer it to the humorous thereby stopping the pain. (PX9 at 13)

As noted above, the Arbitrator does not find the opinions of Respondent's Section 12 examiner, Dr. Lawrence Lieber to be persuasive. Dr. Lieber noted positive clinical findings with regard to AC tenderness, biceps tendon, greater tuberosity, impingement, apprehension, speed, O'Brien, and reverse O'Brien. (RX12) He acknowledged Petitioner suffered an injury in the crash and admits that all treatment as of the date of the report including cortisone injections were reasonable and necessary to treat the condition. However, Dr. Lieber only found Petitioner sustained "at most a strain." This is not consistent with the medical evidence. Accordingly, the Arbitrator orders Respondent to authorize the recommended right shoulder arthroscopy.

The Arbitrator notes that much has been made about whether Respondent tendered a notification denying the claim (right shoulder surgery) so that Petitioner could proceed with the surgery and pay for it by means of her group insurance. This quarrel is irrelevant with respect to Respondent liability under the Workers' Compensation Act. Nevertheless, having found a causal nexus, said dispute is rendered moot.

In support of the Arbitrator's decision relating to Issue (L), whether Petitioner is entitled to TTD benefits, the Arbitrator finds the following:

As stated above the Arbitrator finds Petitioner's right shoulder injury is causally related to the motor vehicle crash. Respondent does not dispute liability for the injuries Petitioner sustained to her left knee and cervical spine.

On June 9, 2016, Petitioner presented to Dr. Kern Singh for a Section 12 examination. (RX 10) Dr. Singh found that Petitioner had not reached MMI. He recommended restrictions of "light duty, less than ten pounds lifting, less than ten pounds of push-pull, and minimal bending, kneeling, stooping, and squatting. (RX 10)

On August 4, 2016, Respondent offered a "light/sedentary duty" position to accommodate her restrictions set forth by Dr. Singh. (PX 22) Petitioner began the accommodated position on August 11, 2016. (PX 22) Between August 11, 2016 and December 27, 2016, Petitioner was assigned desk work. She continued working until she began losing time off work due to the sequalae in claim 17 WC 14554.

Based on the above, the Arbitrator finds Petitioner was temporarily totally disabled from January 27, 2015 to August 11, 2016, or a period of 80-2/7 weeks.

On January 4, 2017, Ms. Smyth presented to Dr. Burra for a follow up regarding the right shoulder. He noted:

> [Petitioner] reports that since returning to working in the field doing inspections she has been in and out of her car for 8 hours per day and has been walking through fields. Since changing from her sedentary position she has had an increase in right shoulder pain, right sided neck and trapezius pain and muscle spasms, and increase in forearm tingling and numbness. She has difficulty with performing ADL's such as washing her hair, and caring for herself. (PX2 at 107)

Dr. Burra prescribed work restrictions of "sedentary desk work only," "no field inspections due to exacerbation of shoulder symptoms," and "no reaching, lifting, or repetitive overhead use of upper extremity." (PX2 at 111) However, despite this note and its own Section 12 examiner's restrictions, Respondent continued to assign field

work. She had been dispatched to the Deer Path Crossing subdivision on a number of occasions between December 27, 2016 and January 31, 2017. The Deer Path Crossing was a vacant subdivision in which there were numerous reports of "fly dumping." Petitioner testified that she was required to locate every pin number within the Deer Path Crossing subdivision, match garbage to it, pin a notice of violation to the property, and take a picture of it. She was to place notice tags on the street, curb, tree, or anything standing on the pin. (Also see PX 15)

Petitioner submitted into evidence PX15 which are the photographs of garbage located at the Deer Path Crossing subdivision with notice of violation tags. The Arbitrator notes that Petitioner would be required to perform frequent bending and stooping to perform the assigned task. (PX 15) Petitioner testified that while performing this task she noticed strain on her body with reaching and bending down. She also noticed physical difficulty in getting in out of her car and walking the terrain.

After the January 31, 2017 incident, Petitioner followed-up with Dr. Ghanayem on February 9, 2017. Dr. Ghanayem took her off work. (PX 5, pp. 65-67)

On February 22, 2017, Petitioner saw Dr. Burra with a chief complaint of right knee pain. After performing an examination and reviewing x-rays taken, Dr. Burra diagnosed right knee medial meniscus tear, patellofemoral pain. An MRI was ordered and when Petitioner returned to Dr. Burra on March 10, 2017, the doctor expressed his opinion that the MRI clearly indicated a tear of the posterior horn of the medial meniscus. Other findings included 1.) chondromalacia along the medial tibial plateau; 2.) patellofemoral narrowing with osteophytic formation and high-grade chondromalacia; and 3.) a small joint effusion. Dr. Burra diagnosed medial meniscus tear, chondromalacia patellofemoral compartment and medial compartment. There was also an incidental finding of fibular enchodroma. Dr. Burra stated that the "...mechanism of the injury and the nature of the injury described ...most certainly can result in not only in an exacerbation of her underlying chondromalacia, but can result in the meniscal pathology..." Thereafter, the doctor recommended right knee surgical intervention. (PX 2, pp. 130-131)

Petitioner testified and the records show she continued to treat with Dr. Burra and Dr. Ghanayem since the second injury of January 31, 2017 and she continues to be on restrictions. (See PX 2 and PX 5)

Petitioner sustained a second injury to her right knee while tagging a tree at the Deer Path Crossing subdivision. It appears Respondent was not accommodating Petitioner's job restrictions from its own examiner when Petitioner was assigned field work as of December 27, 2016. The Arbitrator bases this decision on the job description of a residential property inspector as testified to by both Petitioner and Sterr and corroborated by the job description. The Arbitrator does not find the testimony of Sterr credible. Sterr testified that Petitioner was not assigned tasks outside her restrictions. However, the photographs of the Deer Path Crossing appear to show that Petitioner was required to frequently bend and stoop to perform the tasks depicted. It also appears that Respondent was not accommodating the work restrictions as set forth by Dr. Burra on January 4, 2017.

Petitioner's restrictions as they relate to both the cervical condition and right shoulder have not changed. (PX 5, RX11) Petitioner was re-examined by Dr. Singh on September 28, 2017. (RX11) He opined that his findings were the same. (RX11) As of November 5, 2018, Dr. Burra authored restrictions "no kneeling, squatting, or climbing ladders," "no deep flexion or bending," "no lifting greater than 10 lbs.," "no pushing pulling greater than 10 lbs.," "no overhead reaching of the right upper extremity." (PX2 at 165) On October 15, 2018, Dr. Ghanayem, Petitioner's spine surgeon, issued similar work restrictions as Dr. Singh – "10 pounds lifting/pushing/pulling. No repetitive bending/stooping/kneeling/squatting. Needs to be able to move around throughout the course of the work day. No crawling." (PX 5)

On November 5, 2018, Petitioner sent both work status notes to Respondent and requested an accommodation. (PX 19) The same day, Respondent's counsel responded:

> "Your client sent (2) two off work notes to my client's attention today. One is from Dr. Ghanayem. It is dated 10/15. It appears it pertains to the petitioner's right knee. Dr. Ghanayem is a spine surgeon, and only has treated the petitioner for her cervical condition. As for her spine, your client has been at MMI for some time. Therefore, we are denying any light duty request pertaining to Dr. Ghanayem. As for Dr. Burra, we have denied the rt. Knee/shoulder accident from day one. Therefore, we are not going to provide any light duty per Dr. Burra's 11/5/18 note. (PX21)

Records from Dr. Ghanayem show that Petitioner presented on July 5, 2018. At that time the doctor recorded that Petitioner was doing reasonably well. She had some residual muscular discomfort in her cervical spine, which the doctor felt was a combination of things including residuals from the neck and from the shoulder. Dr. Ghanayem indicated that once her shoulder and knee were addressed, he would recommend an FCE. Meanwhile she was to remain on an off-work status. (PX 5, pp.30-31) On September 17, 2018, the doctor recorded "From my standpoint, things are unchanged." At Petitioner's return visit on October 15, 2018, Dr. Ghanayem stated that "[Petitioner] seems to have problems with shoulder and knee, and she is working on that, appropriate light duty restrictions…" The restrictions included no lifting, pushing or pulling over 10 lbs; no repetitive bending, stooping, kneeling, or squatting; no crawling; and the ability to move around during the course of the day. (PX 5, pp. 17-22, PX 19)

The Arbitrator disagrees with Respondent's interpretation of Dr. Ghanayem's work status note. The doctor has been consistent that although Petitioner was doing reasonably well, she continued with residual symptoms in her cervical spine, which the doctor opined was a "combination of things including residuals from the neck and from the shoulder." Dr. Ghanayem indicated that once her shoulder and knee were addressed, he would recommend an FCE. Meanwhile, he removed her off-work status and imposed the above reference restrictions. Nowhere in the records is there a reference that Petitioner could return to work full duty as it relates to her cervical condition. Accordingly, Petitioner is entitled to TTD/maintenance benefits as it relates to the cervical spine from February 17, 2017 to July 23, 2019. The Arbitrator finds that Ms. Smyth's right shoulder injury is causally related to the motor vehicle crash of September 24, 2014. The Arbitrator finds that Petitioner has yet to reach MMI and is entitled to prospective medical in the form of arthroscopic surgery. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD from February 17, 2017 through July 23, 2019.

Based on the above the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $1,166.66/week for 207 and 4/7 weeks, commencing 01/23/15 through 08/11/16 and from 02/17/17 through 07//23/19 for a total amount of $242,165.28, as provided in Section 8(b) of the Act.

In support of the Arbitrator's decision relating to Issue (N), whether Respondent is due any credit, the Arbitrator finds the following:

Respondent claims that it paid $58,188.50 in temporary total disability benefits. Respondent also claims it paid $105,863.35 in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act. It further sought 8(j) credits for "whole pay benefits" and "short term disability benefits" the amount of which to be determined by proofs.

Section 8(j)2 provides:

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.

The right to credits, which operates as an exception to liability created under the Act, is narrowly construed. *World Color Press v. Industrial Comm'n,* 125 Ill. App. 3d 469, 471 (1984). Moreover, it is the burden of the employer to establish its entitlement to a credit under section 8(j) of the Act. *Hill Freight Lines, Inc. v. Industrial Comm'n,* 36 Ill. 2d 419, 424 (1967). The employer receives no credit for benefits which would have been paid irrespective of the occurrence of a workers' compensation accident. *Tee-Pak, Inc.* 141 Ill. App. 3d 520, 529 (1986) An employer is not entitled to credit for payment from a pension fund where the benefits were not limited to occupationally related disabilities. *Village of Streamwood Police Department v. Industrial Comm'n,* 57 Ill. 2d 345, 351 (1977).

Medical Benefits

Respondent submitted RX4 – an explanation of medical benefits paid by Respondent's workers' compensation administrator totaling $105,863.35. Mr. Deavila testified that the workers compensation administrator paid $105,863.35 in medical benefits as a result of the September 29, 2014 car crash. Respondent submitted no evidence by means of testimony nor documents that these bills were paid by its group medical plan. The Arbitrator finds Respondent met its liabilities under Section 8(a) of the Act up to $105, 863.35 but is not entitled to an additional credit under Section 8(j).

TTD Benefits Between January 27, 2015 through January 14, 2016

Respondent submitted RX3 – an explanation of temporary total disability benefits paid by the workers compensation administrator between January 28, 2015 through January 14, 2016. (RX3) The document shows the workers compensation administrator made biweekly payments of $2,327.54 during this time period and issued 25 payments totaling $58,188.50. (RX3) Accordingly, the Arbitrator find Respondent met is liabilities under Section 8(b) of the Act.

"Make Whole" Payments Between January 27, 2015 through June 27, 2015

Petitioner is a member of AFSCME Local 440. Respondent submitted into evidence the pertinent section of its collective bargaining agreement ("CBA") with the union which pertains to Petitioner. (RX19) Section 2 of the CBA defines "Sick Leave" and states it "may be used for illness, injury or off the job disability." (RX19)

Section 4 of the CBA states:

> An Employee (or his authorized representative) who becomes ill, injured, or disabled shall report to his supervisor as soon as possible. In case of an on-the-job injury, illness or disability, the City will pay the difference between any payments received by the Employee from a public employee pension fund and/or provisions under Workers Compensation or Occupational Diseases Acts and

the Employee's regular salary or wages for a maximum of six (6) months. Time lost as pertains to this Section shall not be deducted from the employee's accrued Sick Leave, except as follows:

(a) In cases where such disability exceeds six (6) month, and the Employee desires to continue receiving such pay differential, it shall be deducted from accrued but unused Sick Leave, at the rate of one (1) hour for each three (3) working hours the employee is absent due to such status.

(b) Employees who exhaust Sick Leave, but remain disabled and wish to continue receiving pay differential, shall be able to do so by deducting such pay from accrued but unused Vacation Leave and/or Compensatory Leave at a rate of one (1) day for each three (3) working days the Employee is absent due to such status. (RX19)

Deavila testified that Sick Leave, Vacation Leave, and Compensatory Leave ("Comp Time") are accrued benefits and that City employees may use such time whether they are off for a work injury or not. The City submitted RX22 – copies of eighty-one (81) earning statements and pay vouchers for the pay periods between September 19, 2014 and December 7, 2017. (RX22) It also submitted RX6 to illustrate the adjustments made on a pay voucher to signify payment of TTD benefits versus the "make whole" benefits for the pay periods between February 13, 2015 and March 27, 2015. (RX6) Deavila testified that each voucher represented payments made to Petitioner in the amount of $3,735.57 on a biweekly basis. Out of that amount, two-thirds or $2,327.54 represented TTD benefits and the remaining one-third or $1,412.03 represented the make whole benefit. Out of the "make whole" benefit the City would make deductions for taxes, insurance, or any other elections.

The Arbitrator has reviewed RX22 and computed the "make whole" benefits paid between January 27, 2015 and June 27, 2015 – the maximum time period for which the City was required to pay such benefits. The Arbitrator calculated the amount paid to be $14,120.30. The Arbitrator further finds that this benefit is solely paid for work accidents and the City is entitled a credit for the amount paid.

Benefits Paid Between June 28, 2015 through January 7, 2016

The Arbitrator further reviewed RX22 and computed payments made between June 26, 2015 through January 7, 2016. The Arbitrator finds the City paid $20,371.35 by means of accrued collective bargaining benefits. The Arbitrator finds that Petitioner was entitled to such benefits for this time period irrespective of her work injury. According to the plain language of the CBA, in order for Petitioner to continue to receive make whole benefits she would have to express a desire for them to be deducted from her accrued Sick and Vacation Leave. (RX19) Deavila testified "sick time would need to be taken off after six months. . .if the employee decides to use it to make herself whole, then they would go ahead and do that." However, the City offered no evidence that Petitioner actually opted in and agreed to have her Sick and Vacation Leave converted to a "make whole" benefit. On cross examination Mr. Avila admitted he did not know whether his predecessor ever sought such an agreement from Petitioner. He further admitted that there was no documentation or correspondence in Petitioner's personnel file which authorized the City to convert her Sick and Vacation Leave to a "make whole" benefit. Petitioner credibly testified that she was never contacted by the City nor authorized it to convert her Sick and Vacation Leave to "make whole benefits.

The Arbitrator finds that the City is attempting to seek credit for accrued Sick and Vacation Leave benefits by renaming them as "make whole" benefits. The CBA is clear that any "make whole" benefit paid after six months will be deducted from Sick and Vacation Leave. (RX 19) Deavila admitted that such benefits were accrued and could be used by City employees irrespective of a work injury. The Arbitrator relies upon the

CBA and testimony Deavila as to the general procedure rather than any itemization on the payment vouchers. The Arbitrator finds the information on the payment vouchers to be unreliable. The Arbitrator points to the time period between January 8, 2016 and August 11, 2016. (RX 22) Both Petitioner and her supervisor Sterr testified that she did not return to light duty until August 11, 2016. (RX 22) However, Deavila testified that the pay vouchers for this period of time represent payment for actual time worked by Ms. Smyth. He had no actual knowledge but spoke with Laurie Maloy from payroll. He stated that a "glitch" in the system occurred and that is why no hours worked were recorded on the vouchers. This is inapposite as all vouchers for the period of September 19, 2014 through January 27, 2015 record the hours Petitioner actually worked. (RX 22) As do all vouchers for the period of time between August 11, 2016 through February 16, 2017. (RX 22) He could not reconcile how Petitioner received such payments when she was not offered a light duty position until August 11, 2016.

Based on the above, Arbitrator finds Respondent used Petitioner's accrued benefits to compensate her for this time period. These benefits are to be paid irrespective of whether a work injury occurred. Accordingly, Respondent did not meet its burden in proving it is due any credit under Section 8(j) of the Act.

Benefits Paid Between January 8, 2016 through August 11, 2016

The Arbitrator further reviewed RX 22 and computed payments made between January 8, 2016 through August 11, 2016. The Arbitrator finds the City paid $59,669.76 by means of accrued collective bargaining benefits. The Arbitrator finds that Ms. Smyth was entitled to such benefits for this time period irrespective of her work injury. As noted above, Ms. Smyth was not offered a light duty position until August 11, 2016. This is corroborated by the testimony of Petitioner, Sterr, and the offer letter. Even the payment vouchers for that period show no hours actually worked. (RX 22) Yet, Deavila claims all payments between January 8, 2016 through August 11, 2016 were actual regular gross pay. Petitioner testified that she was advised by Andrea from human resources that the City had used Vacation and Sick Leave, and Comp Time benefits to compensate her for this time period.

The Arbitrator does not find the testimony of Deavila persuasive. The Arbitrator notes Deavila did not begin working with the City until April of 2018. Regarding pay date February 26, 2016 he was asked, and he answered:

Q: How much was paid by the City of Joliet?
A: How much was paid? According to this, she was paid $3,729.36.
Q: Why?
A: Why was she paid this amount?
Q: She wasn't working and its not TTD. Why did you pay that amount…or why did your predecessor pay that amount?

A: You would need to ask her.

Deavila did not have any knowledge as to whether his predecessor sought authorization to convert Petitioner' accrued benefits to "make whole" benefits. He did not know if the City's response to Petitioner's subpoena for her personnel file was complete. He had no personal knowledge as to whether Petitioner worked between January 8, 2016 and August 11, 2016 but for conversations with other payroll employees. As to this time period he was asked and he answered:

Q: So if the record shows that [Petitioner] wasn't offered a job from the City until August 11, 2016, how would you reconcile these payments made?

A: How would I reconcile them?
Q: Sure.
A: I would have to have payroll reconcile them.

Accordingly, the Arbitrator finds Respondent used Petitioner's accrued benefits to compensate her for this time period. These benefits are to be paid irrespective of whether a work injury occurred. Accordingly, Respondent failed to meet its burden in proving entitlement to a credit under Section 8(j) of the Act.

Benefits Paid Between February 17, 2017 through December 7, 2017

The Arbitrator further reviewed RX 22 and computed payments made between February 17, 2017 and December 7, 2017. The Arbitrator finds the City paid $54,403.28 by means of accrued collective bargaining benefits. The City denied benefits as to the second incident on January 31, 2017. The check stubs indicate all payments were made by means of Sick Leave, Vacation Time, Comp Time. (RX 22) The Arbitrator finds that Petitioner was entitled to such benefits for this time period irrespective of her work injury. Accordingly, Respondent failed to meet its burden in proving entitlement to a credit under Section 8(j) of the Act.

Benefits Paid Between September 1, 2017 through September 26, 2018

Ms. Beth Janicki Clark testified as a joint witness. Ms. Janicki Clark is general counsel for the Illinois Municipal Retirement Fund ("Fund"). The Fund is governed by Article 7 of the Illinois Pension Code. The Fund administers payment of disability benefits to its members. In general a member is entitled to the Fund's disability benefits irrespective as to whether they suffered a work injury. In the event that a member's workers compensation claim for benefits is denied, the Fund allows its members the option to enter into a "payment agreement." The terms of the agreement allow members to draw monthly payments from their contributions less twenty percent (20%). (PX 25)

Petitioner entered into a payment agreement with the Fund on August 15, 2017. (PX 25) The maximum amount she was able to draw was $55,743.456. (PX 25) This represented Petitioner's own contributions ($69,679.32) less twenty percent ($13,935.864). (PX 25) The Fund made such payments by way of 13.746 monthly installments of $4,055.12. (PX 24-25) The Fund made its final payment in that amount on September 26, 2018. (PX 24)

Ms. Janicki Clark testified that all funds paid to Petitioner came solely from her own contributions to the Fund. The City did not contribute to any funds under the payment agreement. The terms of the agreement state that if the claim is found compensable and Petitioner receives TTD benefits for the time period of September 1, 2017 through September 26, 2018, she will be responsible for repayment of $55,743.45. If workers compensation benefits are denied, payments made by the Fund will be converted to short-term disability benefits. In the event benefits are awarded and the City is given a credit for the payments made under the agreement, Petitioner will still be responsible for repaying the Fund in the amount of $55,743.45.

The Arbitrator finds that the City is attempting to seek credit for benefits by the Fund which come directly from Petitioner's contributions. Ms. Janicki Clark's testimony is unrebutted. Accordingly, the City did not meet its burden in proving it is due any credit under Section 8(j) of the Act.

Benefits Paid from November 1, 2018 through July 2, 2019

The Fund paid Petitioner disability benefits of $10.00 per month from November 1, 2018 through July 2, 2019. This amount totaled $90.00. (PX 24) These benefits are paid by statute so that members continue to earn a service credit. The source of these benefits is a pooled fund that all employers – including the City contribute.

The Arbitrator finds that because the City contributed to this benefit, as part of the pooled Fund, it is entitled to a credit under Section 8(j) of the Act in the amount of $90.00 for this time period.

Based on all the above, the Arbitrator finds the City is entitled to the below credits:

Medical pursuant Section 8(a):	$105,863.35
TTD pursuant to 8(b):	$58,188.50
"Make whole/STD pursuant 8(j):	$14,210.30

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY SMYTH,

Petitioner,

21IWCC0104

vs.

NO: 17 WC 14554

CITY OF JOLIET,

Respondent.

DECISION AND OPINION ON REVIEW

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

We correct a scrivener's error in the body of the decision. Petitioner's initial date of accident was September 29, 2014, and replaces the above-noted entries wherein it was identified as September 24, 2014 in the first paragraph under *Findings of Fact*, on page 3 of the Arbitrator's decision.

All else is affirmed and adopted.

21IWCC0104

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 6, 2019 is hereby affirmed and adopted with the corrections noted in the body of this decision, above.

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

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

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

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

DATED: MAR 5 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 012621
49

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

SMYTH, KIMBERLY
Employee/Petitioner

Case# **17WC014554**
14WC041121

CITY OF JOLIET
Employer/Respondent

21IWCC0104

On 12/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1377 PARENTE & NOREM PC
MATTHEW COLEMAN
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

4866 KNELL O'CONNER & DANIELEWICZ
BRIAN DRISCOLL
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

21IWCC0104

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KIMBERLY SMYTH
Employee/Petitioner

v.

CITY OF JOLIET
Employer/Respondent

Case # **17** WC **14554**

Consolidated cases: **14WC41121**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Ottawa, Illinois**, on **06/24/2019** and in the city of **Chicago, Illinois** on **07/23/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **01/31/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**91,000.00**; the average weekly wage was $**1,750.00**.

On the date of accident, Petitioner was **49** years of age ***married*** with **1** dependent children.

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

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

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

ORDER

Respondent shall authorize all treatment recommended by Petitioner's treating physicians including but not limited to the arthroscopic surgery to the right knee as recommended by Dr. Burra and all postoperative therapy, medication, modalities, and vocational services recommended as provided by section 8(a) of the Act.

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

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

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

Signature of Arbitrator

12/3/19
Date

ICArbDec19(b)

DEC 6 - 2019

FINDINGS OF FACT

Petitioner has filed two Applications for Benefits. (PX11-12) The first case – 14WC41121 – stems from an automobile wreck on September 24, 2014 (PX11) in which Petitioner claims she sustained injuries to her cervical spine, left knee, and right shoulder. The second case – 17WC14554 – arises out of an alleged slipping incident at an inspection site on January 31, 2017 (PX12) in which Petitioner claims an injury to her right knee and temporary exacerbation of her cervical condition.

Petitioner, Kimberly Smyth is employed as a residential property inspector by Respondent, City of Joliet ("City"). She has worked for the City since June 11, 1990 and has worked as a residential property inspector since 2010-2011. The residential property inspector's task is to inspect both interior and exterior properties for compliance with the city ordinances and the International Property Maintenance Code as adopted with the City of Joliet. Residential property inspectors inspect properties to ensure safety and maintain compliance with the building code. (Also see PX13) The majority of assignments derive from complaints from other residents. Inspectors could be dispatched to dilapidated structures and vacant properties. They encounter vagrants squatting on properties, animals, and threats of violence from residents that receive citations. Inspectors must be able to walk moderate distances over rough terrain, climb ladders, work in confined spaces, inspect crawl spaces and attics. They inspect surfaces that may be slippery and work outdoors under adverse conditions. Inspectors must also be able to occasionally lift and/or move up to 25 pounds. (PX13)

Petitioner testified that she reported to work on September 29, 2014. Prior to that day the condition of her neck, cervical spine, left knee, and right shoulder were fine. According to Petitioner, she had never undergone any treatment for her neck or left knee. She however stated that she had a prior right shoulder injury when she slipped and fell around 2009. Petitioner provided that she ultimately underwent right shoulder surgery. She returned to full duty work three months thereafter and has continued to work since with no right shoulder issues.

Petitioner testified that on September 29, 2014, she was driving with a coworker on Plainfield Road when she was rear ended. The Lockport Fire Protection arrived on the scene and transported Petitioner to Provena Saint Joseph's Medical Center. Hospital records show she was treated for complaints of left knee and neck pains. She was discharged that same day with a diagnosis of cervical strain and left knee contusion. (PX1)

Post discharge from Provena Saint Joseph's Medical Center, Petitioner sought medical treatment with her primary care physician, Dr. Kerry Marchesci. Petitioner presented on October 1, 2014 with a history of "2 days ago was in car accident. Was restrained driver, rear-ended at 30mph…Immediately felt left knee pain and neck pain…Still having right posterior neck pain radiating to right shoulder…Taking 600mg Ibuprofen which helps with neck and shoulder pain." Dr. Marchesci assessed neck pain and recommended stretching exercises. (PX6)

Petitioner next came into the care of Dr. Burra of Hinsdale Orhtopedic. According to the doctor's records he was seen in consultation at the request of Dr. Marchesci. Petitioner presented on October 8, 2014 with chief complaints of "pain, injury, weakness of right shoulder" and "pain injury of the left knee." (PX 2, pp. 5-6) Dr. Burra documented Petitioner's conveyence that she was driving to a job site when another vehicle struck her from behind. Petitioner reported that her right hand was on the steering wheel just before impact and her left knee forcefully hit and got lodged under the window roller mechanism on the driver's side door. Petitioner reported that she continued to have right shoulder pain and weakness; left lateral knee pain; and neck soreness which radiated into her right shoulder. The doctor noted that Petitioner never had a neck or left knee injury.

Also noted was a prior right shoulder surgery for which Petitioner had a full recovery. After performing an examination and obtaining x-rays, Dr. Burra's impression was 1.) right shoulder possible subscapularis tear, ACJ contusion, bicep tendinitis vs. possible rupture (popeye deformity and ecchymosis); 2.) left knee lateral femoral condyle bone contusion, patellofemoral pain and exacerbation of patellofemoral chondromalacia; and 3.) neck pain/strain, whiplash injury. Dr. Burra documented that Petitioner's right shoulder, left knee and neck were "clearly and causally related to the car accident sustained on September 29, 2014." The doctor ordered a MRI arthrogram of the right shoulder. With respect to the left knee, the doctor wanted to initially try a course of conservative treatment. He referred her to a spine specialist with respect to her cervical/neck condition. Petitioner was released to driving as tolerated and breaks as needed. (PX 2, pp. 7-13)

On October 14, 2014, Petitioner underwent a right shoulder arthrogram. The diagnostic revealed 1.) intact supraspinatus tendon; 2.) delamination but retraction of the subscapularis tendon; 3.) small tear of the posterosuperior labrum; and 4.) intact superior biceps labral complex. (PX 2, pp. 15-18)

On October 20, 2014, Dr. Burra noted Petitioner continued to report right shoulder and neck pain. The doctor performed an ultrasound-guided injection into the right shoulder. (PX 2, pp. 19-22) On October 29, 2014, Petitioner reported continuing right shoulder complaints. With respect to her left knee, Dr. Burra noted Petitioner reported more anterior knee pain. Also noted was that clicking and popping increased her knee pain. Physical therapy was recommended. (PX 2, pp. 25-28)

After undergoing a full course of physical therapy, Petitioner returned to Dr. Burra on December 3, 2014. Petitioner reported that the injections worked well for approximately one week, before her pain returned to pre-injection levels. She also reported increased left knee symptoms. Dr. Burra ordered a left knee MRI to rule out a medial meniscus tear. Potential surgery was discussed for the right shoulder, however, the doctor wanted to wait until Petitioner saw the spine specialist before surgically addressing the shoulder. (PX 2, pp. 30-35)

Petitioner underwent the left knee MRI on December 5, 2014. (PX2, pp. 40-41) When she returned to Dr. Burra on December 17, 2014, the doctor noted the MRI study revealed an oblique horizontal clevage tear of the posterior body of the medical meniscus. Arthroscopy of the left knee was recommended. (PX 2, pp. 44-45)

On January 8, 2015, Petitioner presented to Dr. Rinella at the Illinois Spine Scoliosis Center with complaints of neck pain and tenderness extending into her right trapezial region as well as the radial 3 digits on her left hand. An examination revealed full range of motion of her neck and her Spurling's sign was negative bilaterally. The doctor noted Petitioner was hesitant to move her right shoulder secondary to pain. Dr. Rinella's impression was 1.) right shoulder and left knee pathology after work related motor vehicle collision; and 2.) probable cervical radiculopathy. An MRI was ordered to rule out any areas of neural impingement. (Px 3, P.10-11) The MRI when completed on January 19, 2015 demonstrated small to moderate central disc herniation and mild left and moderate right foraminal stenosis at C4-C5. At C5-C6 there was moderate sized central and left paramedian disc herniation as well as mild left foraminal stenosis. (PX 3, p. 29)

Petitioner followed up with Dr. Rinella on January 21, 2015 when he recommended an EMG. At her follow-up visit on January 28, 2015, Dr. Rinella noted the EMG performed on January 26th revealed Petitioner had left C6 radiculopathy with a moderate left median mononeuropthy. Physical therapy was ordered and Petitioner was referred to Dr. Udit Patel of the Pain and Spine Institute for pain management. (PX 3)

Petitioner initially saw Dr. Patel on February 25, 2015. At that visit, Dr. Patel recommended a transforaminal epidural steroid injection at C6. (PX 4, pp. 5-6) Meanwhile, Petitioner had continued treating with Dr. Burra. On February 18, 2015, Dr. Burra noted that because of Petitioner's significant radicular symptoms from the neck, Dr. Rinella recommended treating her neck symptoms prior to shoulder surgery. Dr. Burra's plan was to move forward with the left knee arthroscopy and then address the shoulder procedure. (PX

2, p. 63) On March 2, 2015, Dr. Patel performed a transforaminal epidural steroid injection at C6. (PX 4, pp. 7-8)

On March 13, 2015, Petitioner returned to Dr. Rinella. The doctor noted the injection provided temporary relief before her symptoms returned. Dr. Rinella discussed a second course of injections. The doctor noted that if Petitioner did not improve, surgical intervention was a consideration. (PX 3, p.18)

On April 29, 2015, Dr. Burra performed 1.) left knee arthroscopy with partial medial meniscectomy; and 2.) abrasion chondroplasty of the medial femoral condyle and the medial facet of the patella. The postoperative diagnosis was medial meniscus tear and chondral lesion of the medial facet of the patella and also the medial femoral condyle. (PX 2, p.89)

Postoperatively, Petitioner underwent an uneventful course of treatment to the left knee. On June 4, 2015, Petitioner sought a second opinion with Dr. Alexander Ghanayem for her neck pain and radicular symptoms. After obtaining a history, performing an examination and reviewing the MRI images from January 19, 2015, Dr. Ghanayem assessed cervical spondylosis, C4-5 and C5-6. The doctor noted Petitioner had tried and failed conservative care. As a result, he recommended a two-level anterior cervical discectomy and fusion from C4 through C6. (PX 5, pp.123-124)

On August 10, 2015, Petitioner returned to Dr. Burra. The doctor noted Petitioner's left knee was doing very well. She no longer had mechanical symptoms and had very minimal anterior knee pain. Dr. Burra felt that from a knee perspective, Petitioner was ready for full duty. He also indicated that from her shoulder perspective, further treatment was needed. (PX 2, pp. 95-97)

On August 12, 2015, Dr. Ghanayem performed 1.) anterior cervical discectomy and fusion at C4-C5 and C5-C6: and 2.) anterior plate stabilization from C4-C6. (PX 5, p.159) Petitioner continued with Dr. Ghanayem postoperatively. On November 12, 2015, the doctor noted that Petitioner was progressing but wanted Petitioner to see her shoulder specialist as he felt Petitioner had plateaued without getting the shoulder stabilized. Dr. Ghanayem indicated that once the shoulder is stabilized, "we can return to cervical reconditioning." Petitioner was kept off work. (PX 5, pp. 89-90)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Lawrence Lieber on December 16, 2015. In his report dated same, Dr. Lieber provided that he obtained a history of accident, performed a physical examination and reviewed the medical records of Drs. Burra and Ghanayem. The doctor also provided that he reviewed the October 19, 2014 MRI arthrogram of the right shoulder which he stated confirmed no evidence of a rotator cuff tear or significant intra-articular pathology. Dr. Leiber assessed rotator cuff syndrome and degenerative joint disease of the right shoulder. Dr. Lieber opined that there was no direct relationship between Petitioner's right shoulder area and the September 29, 2014 injury. The doctor explained that the mechanism of injury was that of a whiplash type strain to the upper extremity and neck area. He opined that Petitioner's complaints were related to her pre-existing degenerative abnormalities and not that of the September 29, 2014 injury. Dr. Lieber stated, "[a]t most,...the Petitioner had a strain to the right shoulder area. There is no objective evidence of any further abnormality within the right shoulder that can be associated with the alleged September 29, 2014, event." The doctor added that the treatment overall appeared to have been appropriate for a period of 2 months. He opined that any treatment after January 15, 2015 was excessive and not associated with the alleged September 29, 2014 event. He felt Petitioner had reached maximum medical improvement and was capable of working full duty with respect to her right shoulder. (RX 12)

On February 18, 2016, Petitioner returned to Dr. Ghanayem. The doctor noted that she had been having problems with her shoulder. Dr. Ghanayem noted he reviewed Dr. Burra's notes wherein the doctor expressed his opinion that Petitioner's shoulder problem was distinctly different from her 2009 shoulder problem. Dr.

Ghanayem indicated that it was difficult to determine how much of her residual symptoms were shoulder mediated versus cervical mediated. The doctor expressed his desire that Petitioner get her shoulder surgery done at that time. (PX 5, p. 82)

Petitioner returned to Dr. Burra on February 15, 2016. Dr. Burra noted that he reviewed Dr. Lieber's Section 12 examination report and disagreed with the doctor's conclusion. Dr. Burra wrote, " It is noteworthy to note that his exam clearly demonstrates a tender AC joint and biceps tendon, a positive Obrien's test and weakness strength testing both for internal/external rotation...Having identified all of these positive findings of weakness, pain, as well as positive labral tests, Dr. Lieber has opined that the entirety [of] ill being as far as her right shoulder is concerned is related to a pre-existing condition and [has] qualified these as pre-existing degenerative abnormalities." Dr. Burra indicated that he reviewed Petitioner's medical records and imaging and did not find any evidence of involvement of the subscapularis and/or the labrum. The doctor noted that Petitioner had a complete recovery following her previous surgery performed in 2009. He pointed out that Petitioner worked without symptoms for several years following her surgical recovery noting there was no record of any treatment in the intervening period. Dr. Burra stated, "Based on the fact that she was asymptomatic, had no involvement of the labrum or the subscapularis, [and] all the AC joint at the time of the previous surgery, I do believe that her present condition of ill being is quite clearly causally related to [the] present injury and is not a pre-existing injury." The doctor also noted that he reviewed documents detailing Petitioner's essential job duties and felt she was not capable of performing the duties with her condition of the right shoulder. Dr. Burra felt that Petitioner had failed conservative treatment, recommended surgical intervention and imposed work restrictions. (PX 2, pp. 99-103)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Kern Singh on June 9, 2016. In his report, Dr. Singh recorded that he obtained an accident history, performed an examination and reviewed medical documentation. Dr. Singh diagnosed 1.) cervical muscular strain; 2.) degenerative disk disease at C4-5, C5-C6; and 3.) status post anterior cervical discectomy and fusion (ACDF), C4-5, C5-C6. The doctor opined that Petitioner sustained an aggravation of the underlying degenerative condition at C4-5 level necessitating spinal intervention. The doctor felt Petitioner was not a maximum medical improvement as she had persistent pain that radiated in the C6 distribution. He recommended a CT scan of the cervical spine. Also recommended were light duty work restrictions. (RX 10)

Petitioner testified that after her Section 12 examination with Dr. Singh, she received a letter from Respondent offering accommodated light duty work effective August 11, 2016.

Petitioner testified that she in fact returned to work on August 11, 2016 and reported to Jeff Sterr. According to Petitioner she performed desk work from August 11, 2016 through December 27, 2016. She stated that on December 27, 2016, Mr. Sterr changed her assignment and dispatched her to the field.

On January 4, 2017, Ms. Smyth presented to Dr. Burra for a follow up regarding the right shoulder. He noted Petitioner reported that since returning to working in the field doing inspections she had been in and out of her car for 8 hours per day and had been walking through fields. He noted that since changing from her sedentary position she had an increase in right shoulder pain, right sided neck and trapezius pain and muscle spasms, and increase in forearm tingling and numbness. Also noted was that she had difficulty with performing ADL's such as washing her hair, and caring for herself. (PX2 at 107) Dr. Burra continued his surgical recommendation and prescribed work restrictions of sedentary desk work only; no field inspections due to exacerbation of shoulder symptoms; no reaching, lifting, or repetitive overhead use of upper extremity. (PX2 at 111)

Petitioner testified that on January 31, 2017, she was sent to the Deer Path Crossing subdivision where she was assigned to attach notice of violation tags to the property. Petitioner provided that the subdivision was

empty with no houses and seemed to be a dumping ground for contractors and for household garbage. Petitioner stated that prior to January 31, 2017, she had never had any medical treatment regarding her right knee. Nor had she ever missed time from work for right knee pain.

Petitioner testified that on January 31, 2017, she was tagging a pin number with an orange sticker. Petitioner described that she was on uneven ground with scattered garbage, when she turned, her right foot slipped in the mud. Petitioner provided that she caught herself and felt a crack and pop in her neck. Petitioner testified that she returned to the office and advised Mr. Sterr that she had slipped but not fallen. Petitioner conveyed that she was a little sore and asked to go home to change her clothes.

Petitioner testified that she attempted to see Dr. Ghanayem the day after the fall, but he was not in. As a result, she saw the physician's assistant who x-rayed her neck and gave her anti-inflammatory medicine and advised her to follow-up on February 9, 2017. Records submitted show she presented with continuing myofascial neck pain. Dr. Ghanayem took her off work. (PX 5, pp. 65-67)

Petitioner returned to Dr. Burra on February 15, 2017 for a follow-up visit regarding her right shoulder. At that visit, Petitioner reported to the doctor that on "...January 31, 2017, she was at a dump, which was fairly wet and she had a twisting injury." Petitioner informed the doctor that she did not fall, but suffered pain going from the base of her neck into the interscapular area. There was no direct contact injury of the shoulder. The doctor noted that "while all this was going on, her shoulder continues to be symptomatic. Dr. Burra again noted that Petitioner had failed conservative care and that surgical intervention was reasonable. The doctor again expressed his opinion that her shoulder condition of ill-being was causally related to her work injury. The doctor noted that he still awaited clarification from the workers' compensation carrier with regard to authorization for shoulder intervention. The doctor also noted that Petitioner wanted to put the surgery through her own insurance, and that he would need a denial letter from the workers' compensation carrier. (PX 2, pp. 112-115)

On February 22, 2017, Petitioner saw Dr. Burra with a chief complaint of right knee pain. Petitioner again conveyed the January 31, 2017 incident. Specifically, the doctor noted, "...she was in a muddy field tagging a tree. She states that as she was tagging the tree she had her right foot standing in the mud with her left foot standing on a bag of garbage in an attempt to elevate herself to tag the tree. She mentions that her right foot slipped to the right causing a twisting injury to her right knee. As she twisted her right knee she stepped back with her left foot to prevent herself from falling backwards. She denies falling..." After performing an examination and reviewing x-rays taken, Dr. Burra diagnosed right knee medial meniscus tear, patellofemoral pain. To further evaluate the knee, the doctor ordered a MRI. (PX 2, pp. 117- 120)

Petitioner underwent the prescribed MRI on February 28, 2017. (PX 2, p. 122) When Petitioner returned to Dr. Burra on March 10, 2017, the doctor expressed his opinion that the MRI clearly indicated a tear of the posterior horn of the medial meniscus. Other findings included 1.) chondromalacia along the medial tibial plateau; 2.) patellofemoral narrowing with osteophytic formation and high-grade chondromalacia; and 3.) a small joint effusion. Dr. Burra diagnosed medial meniscus tear, chondromalacia patellofemoral compartment and medial compartment. There was also an incidental finding of fibular enchodroma. Dr. Burra stated that the "...mechanism of the injury and the nature of the injury described ...most certainly can result in not only in an exacerbation of her underlying chondromalacia, but can result in the meniscal pathology..." The doctor noted that the incidental finding of enchodroma was not work related. (PX 2, pp. 124 -127) At her follow-up visit on May 31, 2017, Dr. Burra recommended right knee surgical intervention. (PX 2, pp. 130-131)

Petitioner testified and the records show she continued to treat with Dr. Burra and Dr. Ghanayem since the second injury of January 31, 2017 and she continues to be on restrictions. (See PX 2 and PX 5)

At Respondent's request, Petitioner underwent another second Section 12 examination with Dr. Lieber on May 25, 2017. In his report dated same, the doctor noted that he performed a right shoulder examination and reviewed Dr. Singh's June 2016 IME report as well as the treating records of Dr. Burra through February 2017. Dr. Lieber assessed 1.) degenerative joint disease, right shoulder; and 2.) rotator cuff syndrome. The doctor provided that his opinion had not changed stating, "[t]here is no objective evidence of any abnormality within the Petitioner's right shoulder that can be related to that alleged event." He noted that Dr. Burra continued to recommend surgical intervention to the right shoulder. He noted that no further medical treatment was reasonable or necessary in association with the alleged September 2014 event. He reviewed the October 2014 MRI arthrogram indicating it confirms there is no evidence of any acute pathology within the right shoulder area that could be related to the vehicular accident. He indicated that all of the findings on the October 2014 MRI were pre-existing and had no relationship to the alleged incident. (RX 13)

At Respondent's request, Petitioner saw Dr. John Cherf for a Section 12 examination regarding her right knee. According to Dr. Cherf he obtained a history of the January 2017 twisting incident, performed an examination and reviewed Petitioner treating records. Dr. Cherf diagnosed Petitioner with a work-related right knee sprain/strain on January 31, 2017. Also noted was that she had a primary idiopathic osteoarthritis of the right nee and an enchodroma of the proximal fibula on the right. Dr, Cherf provided that Petitioner exhibited abnormal illness behavior to include symptom magnification and overreaction during examination. He stated that her subjective complaints were partially explained by the records and could be attributed to moderate-to-advance osteoarthritis of the right knee. Dr. Cherf opined that "[b]ased on Ms. Smyth's history of not having any symptoms in her right knee prior to the work-related right knee injury, there appears to be a temporal and causal relationship between her right knee symptoms and the injury in question." The doctor added "The mechanism of injury as described and recreated by Ms. Smyth is a low-energy injury and may have caused a temporary exacerbation of the osteoarthritis of her right knee." He stated her MRI was equivocal in terms of meniscal pathology and that patients with the degree of osteoarthritis found in Petitioner's right knee often have degenerative meniscal tears. (RX 14)

Dr. Cherf offered that it was unlikely the injury caused a permanent aggravation or acceleration beyond the natural history of degenerative arthritis of the right knee. The doctor however offered that based on Petitioner's history of the subjective complaints of pain beginning after the work accident on January 31, 2017, there appears to be a temporal and possible causal relationship between her symptoms and the injury in question. Dr. Cherf stated that he was reluctant to recommend arthroscopy. The doctor reasoned that patients such as Petitioner who are extremely obese with moderate-to-severe osteoarthritis of the right knee were known to have unpredictable and often poor results. Dr. Cherf recommended conservative care consisting of cortisone injections, anti-inflammatory medications and physical therapy. (RX 14)

At Respondent's request, Petitioner underwent a second Section 12 examination with Dr. Kern Singh. In his report dated September 28, 2017, Dr. Singh indicated that in addition to performing an examination, he reviewed updated medical records. Dr. Singh provided that none of his opinions had changed. He stated Petitioner's fusion was solid and Petitioner was at maximum medical improvement. With respect to the January 31, 2017 incident, the doctor opined that Petitioner sustained a separate soft tissue strain, cervical in nature, which had resolved. Dr. Singh also stated, "[y]ou cannot aggravate a solid fusion, and there are no symptoms that would be objectifiable. (RX 11)

At Respondent's request, Dr. Cherf authored an addendum Section 12 report on October 18, 2017. Dr. Cherf opined that Petitioner did not have a permanent aggravation of any pathology to the right knee as a result of the January 31, 2017 incident. The doctor also provided that it did not appear she sustained an acute meniscal tear as a result of the incident. (RX 15)

In support of the Arbitrator's decision relating to Issue (C), whether Petitioner sustained an accident that arose out of and in the course of her job as a property inspector, the Arbitrator finds the following:

The Arbitrator finds Petitioner has proven that she sustained an injury that arose out of and in the course of her employment as a residential property inspector on January 31, 2017. An employee's injury is compensable under the Act only if it "aris [es] out of" and "in the course of" her employment. 820 ILCS 305/2 (West 2006). Both elements must be present for the claimant's injuries to be compensable. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill.2d 478, 483, 137 Ill. Dec. 658, 546 N.E.2d 603 (1989). "In the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). An injury "arises out of" one's employment if there is a causal connection between the employment and the accidental injury, i.e., the injury has its origin in some risk connected with, or incidental to, the employment or the injury is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. *Caterpillar Tractor Co.*, 129 Ill.2d at 58, 133 Ill. Dec. 454, 541 N.E.2d 665; *Becker v. Industrial Comm'n,* 308 Ill.App.3d 278, 281, 241 Ill. Dec. 663, 719 N.E.2d 792 (1999).

A traveling employee is one who is required to travel away from their employer's premises to perform their job. *Wright v. Industrial Commission,*62 Ill 2d 65. The test for determining whether an injury to a "traveling employee" arose out of and in the course of employment, however, is governed by different rules than are applicable to other employees. *Venture–Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2012 IL App (4th). It turns on the reasonableness of the conduct in which the employee was engaged and whether it might normally be anticipated or foreseen by the employer. *U.S. Industries, Production Mach. Division v. Industrial Commission*, 40 Ill. 2d 469 (1968).

There is no dispute as to whether Petitioner was dispatched to the Deer Path Crossing subdivision on the date of the accident. There is no dispute that residential property inspectors are dispatched by Sterr to inspect properties throughout its territory. The job description for the position states that qualified candidates must have the ability to "walk moderate distances over rough terrain," and "inspect surfaces that may be slippery." (PX13) Sterr testified that it is not unusual for inspectors to encounter mud or slippery surfaces.

The Arbitrator finds that Petitioner sustained an injury while attaching a notice of violation tag to a property pin at the Deer Path Crossing subdivision. The Arbitrator relies on the credible testimony of Petitioner. The Arbitrator notes that Petitioner's testimony is corroborated by her email to her supervisor Alfred Melesio of February 15, 2017 (PX16), her duty injury report of February 17, 2017 (PX17), the supervisor's investigation report (PX18), and the records of Dr. Burra from February 15, 2017 and February 22, 2017 (PX2).

The Arbitrator further notes that the City's own self-serving letters of Sterr corroborate that Petitioner slipped in the mud. (RX2-3) The letter of February 24, 2017 states:

> Ms. Smyth was assigned to follow-up on a complaint of illegal dumping at a partially developed tract of land known as Deer Crossing Subdivision. The property is located northwest of Caton Farm Road and Ridge Road in Kendall County.
>
> Ms. Smyth related that upon arrival and exiting her vehicle, she slipped on some mud. She stated she did not fall, nor did she indicate she was injured, she left the impression that she was mostly thrown off-balance. She did wish to be allowed to travel to her home to clean the mud off of her pants, which I allowed. (RX2-3)

Sterr testified that he has no reason to doubt that Petitioner slipped in mud on January 31, 2017. Petitioner has met her burden under the traveling employee doctrine. Accordingly, based on the above, the Arbitrator finds

Petitioner sustained an injury that arose out of and in the course of her employment as a residential property inspector.

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's right knee condition is causally related to the slipping incident of January 31, 2017, the Arbitrator finds the following:

Prior to January 31, 2017, Petitioner never had any medical treatment regarding her right knee. She never missed time from work for right knee pain and the medical records of Dr. Burra note no prior right knee pain throughout his treatment. (PX 2)

Following the incident, Petitioner reported the injury to Sterr. She told him she slipped but did not fall. She told him she injured her pride and needed to change her clothes. She told Sterr that she felt a jolt in her neck.

The evening of January 31, 2017 Petitioner was mainly concerned with whether she reinjured her neck and would require a second cervical surgery. She did notice pain in her leg as well. Petitioner followed up with her spine surgeon, Dr. Ghanayem on February 9, 2017. (PX 5) She presented to Dr. Burra on February 15, 2017 and again on February 22, 2017. (PX 2) Dr. Burra noted positive McMurray's on the medial right knee. His impression was right knee medial meniscus tear and patellofemoral pain. Dr. Burra recommended an MRI. (PX2, pp. 18-20)

Petitioner underwent the MRI on February 28, 2017. The radiologist impression was suspicious for "focal tear of the posterior horn of the medial meniscus. Petitioner returned to Dr. Burra on March 10, 2017. Dr. Burra was able to reproduce positive McMurray's on the right medial knee. Petitioner's clinical examination was negative on the left knee. (PX 2, pp. 122-125) On that date Dr. Burra noted:

> I have revisited and reviewed with her the mechanism of injury and the nature the injury to describe to the right knee. Most certainly this can result in not only in an exacerbation of her underlying chondromalcia, but can result in the meniscal pathology which is visualized. (PX 2, p. 127)

Dr. Burra further testified:

> Twisting injuries of the knee can cause a meniscal tear, and I do believe that that injury that she reported is causally related to her meniscal tear. . .she was walking, she was doing her work, she had no symptoms, and I had been seeing her in the past, she had no right knee symptoms, and then, you have an acute injury and the clinical exam and MRI indicate meniscal pathology. (PX 9, pp. 23-24)

Respondent's Section 12 examiner, Dr. Cherf diagnosed Petitioner with a work-related right knee sprain/strain on January 31, 2017. Also noted was that she had a primary idiopathic osteoarthritis of the right knee. He stated that her subjective complaints were partially explained by the records and could be attributed to moderate-to-advance osteoarthritis of the right knee. Dr. Cherf opined that "[b]ased on Ms. Smyth's history of not having any symptoms in her right knee prior to the work-related right knee injury, there appears to be a temporal and causal relationship between her right knee symptoms and the injury in question." The doctor added "The mechanism of injury as described and recreated by Ms. Smyth is a low-energy injury and may have caused a temporary exacerbation of the osteoarthritis of her right knee." He stated her MRI was equivocal in terms of meniscal pathology and that patients with the degree of osteoarthritis found in Petitioner's right knee often have degenerative meniscal tears. Dr. Cherf offered that it was unlikely the injury caused a permanent aggravation or acceleration beyond the natural history of degenerative arthritis of the right knee. The doctor however offered

that based on Petitioner's history of the subjective complaints of pain beginning after the work accident on January 31, 2017, there appears to be a temporal and possible causal relationship between her symptoms and the injury in question. In a subsequent addendum report, the doctor hedges his opinion indicating Petitioner did not have a permanent aggravation of any pathology to the right knee as a result of the January 31, 2017 incident. The doctor also provided that it did not appear she sustained an acute meniscal tear as a result of the incident. Due to the hedging nature of Dr. Cherf's thoughts, the Arbitrator is not persuaded by his opinions.

Relying on the sequence of events and the opinion of Dr. Burra, the Arbitrator finds that a causal relationship exists between Petitioner's right knee condition of ill-being and the accident sustained on January 31, 2017.

In support of the Arbitrator's decision relating to Issue (K), whether Petitioner is entitled to prospective medical treatment in the form of a right knee arthroscopic surgery, the Arbitrator finds the following:

Having found in favor of Petitioner on the dispute issues of accident and causal relationship, the Arbitrator finds that Respondent shall authorize the right knee surgical procedure as prescribed by Dr. Burra. The Arbitrator notes that Respondent's Section 12 examiner, Dr. Cherf, though "reluctant" did not opine that the recommended surgery was not necessary.

In support of the Arbitrator's decision relating to Issue (L), whether Petitioner is entitled to TTD benefits, the Arbitrator finds the following:

The Arbitrator adopts his findings as to TTD in 14WC41121. The Arbitrator further notes that Dr. Burra has had the Petitioner on of "no kneeling, squatting, or climbing ladders," "no deep flexion or bending," "no lifting greater than 10 lbs.," "no pushing pulling greater than 10 lbs.," "no overhead reaching of the right upper extremity." (PX2 at 165) The City has not offered any accommodation as it has been denying the claim "from day one." (PX21)

In support of the Arbitrator's decision relating to Issue (N), whether Respondent is due any credit, the Arbitrator finds the following:

The Arbitrator adopts his findings as to credit in 14WC41121.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Garay,

Petitioner,

vs.

21IWCC0105

NO: 15 WC 10352

Loews Chicago O'Hare,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission corrects the Arbitrator's decision at p.2 to show that Petitioner is entitled to temporary total disability benefits from 8/23/14 through 9/3/14 and from 2/3/15 through 9/21/15, for a period of 34-5/7 weeks (not 34-3/7).

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/17/20 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $452.22 per week for a period of 34-5/7 weeks, from 8/23/14 through 9/3/14 and from 2/3/15 through 9/21/15, that being the period of temporary total incapacity for work under §8(b) of the Act.

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

21IWCC0105

reasonable and necessary medical expenses in the amount of $54,136.37 pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $407.00 per week for a period of 102.125 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused permanent partial loss of use of 47.5% of the left leg.

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

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

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

DATED: MAR 5 - 2021
o: 1/12/21
TJT: pmo
51

Thomas J. Tyrrell

Kathryn A. Doerries

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARAY, CARLOS
Employee/Petitioner

Case# **15WC010352**

21IWCC0105

LOEWS CHICAGO O'HARE
Employer/Respondent

On 6/17/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2675 COVEN LAW GROUP
MATTHEW SMART
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

1596 MEACHUM BOYLE TRAFMAN ET AL
AISHA SHOTANDE
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

C. Garay v. Loews Chicago O'Hare, 15 WC 010352

21IWCC0105

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CARLOS GARAY
Employee/Petitioner
v.
LOEWS CHICAGO O'HARE
Employer/Respondent

Case # **15** WC **010352**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **02/11/2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0105

FINDINGS

On **08/22/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$35,273.16**; the average weekly wage was **$678.33**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$3,940.72** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of **$3,940.72**.

Respondent is entitled to a credit of **$17,447.00** under Section 8(j) of the Ac, per the Parties' stipulation.

ORDER

Respondent shall pay the bills of Illinois Sports Medicine and Orthopaedics Centers, Illinois Bone and Joint Institute, and Swedish Covenant Hospital pursuant to the fee schedule and as is set forth below.

Respondent shall pay Petitioner Temporary Total Disability benefits of $452.22/week for 34 -3/7 weeks, commencing August 23, 2014 through September 3, 2014 and February 3, 2015 through September 21, 2015, in accordance with §8(b) of the Act.

Respondent shall pay Petitioner Permanent Partial Disability Benefits of $407.00/week for 102.125 weeks because the injuries sustained caused Petitioner to suffer the 47.5% loss of use of the left leg, in accordance with §8(e)12 of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 8/22/2014 through 2/11/2020 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

June 16, 2020
Date

JUN 17 2020

FINDINGS OF FACT

Petitioner testified via a Spanish/English interpreter.

On August 22, 2014, Petitioner, Carlos Garay, was employed as a houseman for Respondent, Loews Chicago-O'Hare. Petitioner testified he has worked in that capacity for Respondent for roughly the past 10 years. As a houseman, Petitioner is required to set up and break down the furniture and fixtures for large banquets and events at the hotel. He and the other team members are required to set up the large banquet tables and chairs, as well to decorate the tables with the proper linens and flatware, among other things. Petitioner testified that the job was in the heavy physical demand category, explaining that the weights of the tables and chairs, along with the frequency of the heavy lifting was physically demanding.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 22, 2014. Petitioner and his co-workers were setting up a banquet. As Petitioner was lifting a table from knee level to overhead, the weight of the table caused him to twist his left knee in a way that caused him to experience pain. He reported the incident and was sent by Respondent for medical treatment at US Health Works.

Petitioner denied left leg medical treatment. Before the injury, his left leg was muy bien.

At U.S. Healthworks, Petitioner was examined by Dr. Mehul Garala, who ordered x-rays (that were negative for fracture) and diagnosed a left knee sprain. The doctor ordered Petitioner to return to seated-only work. Respondent had no such work available, and Petitioner was placed on TTD. Petitioner returned to US Health Works on August 26, 2014, and he was seen by Dr. Priti Khanna. Dr. Khanna diagnosed sprain and contusion of the left knee, prescribed Medrol Dose Pak and a polar frost gel, and ordered Petitioner to continue with seated-only work restrictions. Petitioner returned to US Health Works for re-examination by Dr. Khanna on September 3, 2014. In his testimony, Petitioner stated that he was still in pain and discomfort at this time. The record of US Health Works has a hand-written note stating "0/10 pain" but also notes that Petitioner had

erythema and ecchymosis in the left knee. Petitioner was discharged with instructions to continue use of the polar frost gel. (PX 1)

Petitioner testified that following his September 3, 2014 discharge, he returned to work for Respondent. When questioned on how he was able to perform his job duties, Petitioner testified that his co-workers assisted him by having him do the lighter tasks in the set-up of the banquets, such as placing the linens on the table and setting the flatware and glasses on the table. He testified they avoided having him lift and set up the tables and chairs.

Petitioner testified that despite his co-workers allowing him to perform lighter tasks, his pain in the left knee persisted. He next presented to Illinois Sports Medicine and Orthopaedic Centers in Glenview, Illinois on October 20, 2014. He was seen by Dr. Chadwick Prodromos. In his examination, Dr. Prodromos noted tenderness over the medial joint line, decreased range of motion, and reduced strength. Dr. Prodromos diagnosed a left knee strain and prescribed a platelet rich plasma (PRP) injection. On January 5, 2015, Petitioner underwent PRP injection in the left knee. Of note, Dr. Prodromos diagnosed knee arthrosis on that date. Petitioner returned for follow-up examination on January 12, 2015. Dr. Prodromos noted Petitioner experienced 50% improvement after the PRP injection. Dr. Prodromos further noted continued issues with range of motion, stiffness, and pain with movement in the left knee. (PX 2)

On February 2, 2015, Petitioner followed up with Dr. Prodromos. Petitioner reported that his pain continued to bother him when he was working. X-rays were ordered, and Dr. Prodromos noted that the x-rays showed "bone on bone in the medial compartments." Dr. Prodromos opined that if Petitioner was allowed to do sedentary work-only, he could continue with conservative care. But given the nature of Petitioner's work, Dr. Prodromos referred him to Dr. Joseph D'Silva for consideration for total left knee replacement. (PX 2)

Petitioner presented to Illinois Bone and Joint Institute on February 4, 2015. Dr. D'Silva ordered x-rays of the left knee and noted "advanced degenerative changes with complete loss of medial joint space in the medial compartment" of the knee. Dr. D'Silva recommended Petitioner undergo left total knee replacement.

Respondent requested Petitioner undergo an independent medical examination (IME) by Dr. Lawrence Lieber on March 5, 2015. Dr. Lieber testified via evidence deposition on August 21, 2019 and noted that Petitioner had no medical problems with the left knee prior to August 22, 2014. Dr. Lieber found Petitioner's subjective complaints to correlate with the objective findings, diagnosing significant advanced degenerative osteoarthritis of the left knee. Dr. Lieber stated that Petitioner's current medical condition was "neither caused, aggravated, or associated with the August 2014 event." He agreed with the U.S. Healthcare diagnosis of a knee sprain. Dr. Lieber is a board certified orthopedic surgeon who performs 400 to 500 knee surgeries a year. (RX 1)

Petitioner returned to Dr. D'Silva, and eventually, left total knee replacement was undertaken at Swedish Covenant Hospital on May 15, 2015. Of note, the procedure was not authorized by or paid for by Respondent. Following his surgery, Petitioner was ordered off work by Dr. D'Silva. Petitioner underwent physical therapy and regular post-operative visits with Dr. D'Silva until September 21, 2015. On September 21, 2015, Petitioner was returned to full-duty work by Dr. D'Silva. (PX4, PX 3)

Petitioner returned to work and continued to follow up with Dr. D'Silva. He presented to Dr. D'Silva on November 2, 2015 with complaints of worsening pain. The doctor ordered and performed an injection in the left knee. Following that, Petitioner continued with regular follow-ups with Dr. D'Silva. The last visit was on April 17, 2017. The left knee exam was benign, post TKA surgery two years prior. Petitioner was given the standard follow up schedule for every 2 years. (PX 3)

Dr. D'Silva testified via evidence deposition on November 20, 2019. He is a board certified orthopedic surgeon who performs 300 lower extremity joint replacement procedures a year. Dr. D'Silva endorsed causation, testifying that the injury aggravated Petitioner's preexisting asymptomatic left knee OA, leading to the TKA procedure. Petitioner was at MMI as of April 13, 2016. Dr. D'Silva did not agree with Dr. Lieber's opinions, noting that Petitioner had persistent left knee pain when he presented to Dr. D'Silva on February 18, 2015. Therefore, Petitioner's knee injury could not have resolved by March of 2015 as was stated by Dr. Lieber. (PX 5)

On October 30, 2018, Petitioner was sent by his attorney for an IME with Dr. Matthew Jimenez. Dr. Jimenez is a board certified orthopedic surgeon, specializing in joint replacement and reconstruction. He is well respected in his field, having given 378 invited lectures at the time of his deposition. Dr. Jimenez testified via evidence deposition on October 29, 2019. He opined that the mechanism of injury noted by Petitioner was an aggravating factor of Petitioner's osteoarthritis. Dr. Jimenez opined that the need for total knee replacement was causally connected to the accident of August 22, 2014. It likely worsened or aggravated Petitioner's OA condition to speed the disease process. (PX 6)

At trial, Petitioner testified that he still works with Respondent as a houseman. He further testified that his co-workers continue to assist him when necessary, allowing him to perform lighter duty tasks when his knee bothers him. He noted he still has difficulty and occasional pain in the knee, but that he treats it with over-the-counter medications.

Petitioner claimed the following bills, per the RFH: Illinois Sports Medicine and Orthopaedic Centers-$212.15 (PX 2); Illinois Bone and Joint Institute-$17,447.00 (PX 3); and Swedish Covenant Hospital-$36,457.22 (PX 4). (ArbX 1)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989).

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work injury of August 22, 2014.

This finding is based upon the credible testimony of Petitioner that he had no prior left leg problems or treatment and that his left knee pain and disability did not resolve after the accident. The finding is also supported by the records of Drs. Prodromos and Dr. D'Silva. Finally, the Arbitrator relies upon the persuasive opinions testified to by Drs. D'Silva and Jimenez. There causation opinions make the most sense and best comport with the evidence adduced. Petitioner was asymptomatic before the accident and his left knee condition never went back to baseline after the accident (per Petitioner's testimony and the records of Drs. Prodromos and D'Silva).

Dr. Lieber's opinion is not persuasive. He states that whatever injury Petitioner suffered had resolved by March of 2015, when he examined Petitioner. But, Petitioner was still symptomatic at that time and in February of 2015 when Dr. D'Silva examined him. Dr. Lieber could endorse an aggravation of advanced OA via a significant trauma, such as a fracture or acute bone injury that could be verified via MRI. The Arbitrator notes that Dr. Lieber did not review the initial x-rays and he does not explain how Petitioner returned to baseline, given that Petitioner's advanced arthritis condition never again became asymptomatic after the injury.

Petitioner was able to show that his work related injury aggravated his preexisting OA condition such that his condition of ill-being which led to the left knee TKA procedure can be said to be causally connected to the injury and not simply the result of a normal degenerative process of the preexisting condition. The injury was a causative factor in the resulting condition of ill-being. See: Sisbro v. Industrial Comm'n, 207 Ill. 2d 193 (2003)

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for treatment of his work related left knee injury. Petitioner failed conservative care, underwent surgical intervention, and was released to full duty work in the months following his surgery. He does continue with regular follow-up appointments with the surgeon, which the Arbitrator finds to be reasonable and necessary treatment for his condition.

The Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. Petitioner submitted bills from Illinois Sports Medicine and Orthopaedic Centers showing a balance of $232.15. The Arbitrator finds Respondent is responsible for payment of said balance pursuant to the fee schedule. Petitioner submitted bills from Illinois Bone and Joint Institute showing a balance of $17,447.00. The Arbitrator finds Respondent is responsible for payment of said balance pursuant to the fee schedule. Petitioner submitted bills from Swedish Covenant Hospital showing a balance of $36,457.22. The Arbitrator finds Respondent is responsible for payment of said balance pursuant to the fee schedule.

The total amount of medical expenses awarded is $54,136.37. This award is pursuant to §§8(a) and 8.2 of the Act.

The Arbitrator notes that the Parties stipulated to a $17,447.00 §8(j) credit which Respondent is allowed, along with the hold harmless obligations set forth in §8(j).

K. What temporary benefits are in dispute? TTD

The Arbitrator finds that Petitioner was temporarily and totally disabled for the periods of 08/23/2014-09/03/2014 and 02/03/2015-09/21/2015 representing a period of 34- 3/7 weeks. Petitioner asserted that he was due TTD for the periods of 08/22/2014-09/03/2014 and 02/03/2015-09/21/2015. Of course, Petitioner is not entitled to TTD for 8/22/2014, the date of injury. He was working, so he was not temporarily and totally

disabled. Respondent disputed TTD for the period of 02/03/2015-09/21/2015, relying on the IME of Dr. Lieber. In accordance with the Arbitrator's prior findings regarding causation, Petitioner reasonably necessitated being off work for the period of 02/03/2015-09/21/2015. The Arbitrator hereby orders that Respondent pay Petitioner TTD for the claimed 32 6/7 weeks, in addition to the TTD already paid for the period of 08/23/2014-09/03/2014.

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

In determining permanent partial disability, the Arbitrator must take into consideration the five factors set forth in Section 8.1b of the Act: ": (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records."

(i) The reported level of impairment pursuant to subsection (a)

No AMA rating was obtained in this matter. An impairment rating is not required in order for the Arbitrator to award permanent partial disability benefits. Corn Belt Energy v. Illinois Workers' Compensation Commission, 2016 IL App (3d) 150311 WC (3d Dist. 2016). Given that no rating was obtained, the Arbitrator gives this factor no weight in determining PPD.

(ii) The occupation of the injured employee

The Arbitrator notes that on August 22, 2014, Petitioner was employed as a houseman for Loews Chicago-O'Hare. He testified that his job was in the heavy physical demand, citing the need to lift and set up banquet tables and chairs, among other activities. Following his post-operative course, Petitioner was returned to full-duty work. He did testify that his co-workers assist him by allowing him to perform the lighter duty tasks (handling linens, flatware, and other lighter lifting), but the Arbitrator notes that he has otherwise been returned to his pre-injury employment. The Arbitrator gives moderate weight to this factor in determining PPD.

(iii) The age of the employee at the time of the injury

The Arbitrator notes that Petitioner was 62 years old at the time of his injury. The Arbitrator finds that his age makes it more difficult for him to bounce-back or recover from injuries resulting in major surgery. That said, it also means he has less time in the work force with the injury. The Arbitrator gives moderate weight to this factor in determining PPD.

(iv) The employee's future earning capacity

The Arbitrator notes that Petitioner returned to his pre-injury employment. There was little to no evidence submitted by either Party that seemed to indicate whether Petitioner was earning the same, more, or less than he was at the time of the injury. The Arbitrator does note that an older worker with a history of total knee arthroplasty is likely to experience more difficulty seeking employment in the general work force. The Arbitrator gives less, but appropriate weight to this factor in determining PPD

(v) Evidence of disability corroborated by the treating medical records

The Arbitrator notes that Petitioner required a total knee arthroplasty. The medical records of his surgeon, Dr. Joseph D'Silva, show that Petitioner continued with instances of pain and discomfort several months after his surgery, and even that he continues to deal with pain and discomfort to this day. The final medical record introduced into evidence, dated 04/17/2017 (PX 3), is a post-operative follow-up appointment with Dr. D'Silva. In the record, the doctor noted Petitioner was still bothered by "rare discomfort in the infrapatellar area." Petitioner further noted increased pain with activity. Further, in his testimony at trial, Dr. D'Silva explained that even with the surgery, patients undergoing a total knee arthroplasty are going to continue to have pain and discomfort in the knee. He stated: "The general rule of thumb I tell my patients preoperatively is that if their pain is somewhere between 7, 8, 9, to 10 out of 10, my expectation is to get them to somewhere between zero and 2, 90-plus percent of the time." (PX 5 at p. 15)

At trial, Petitioner testified to his ongoing complaints of pain with activity, which is corroborated by the records and testimony of Dr. D'Silva. Given the unrebutted testimony of Petitioner and his treating surgeon, the

Arbitrator finds there is strong evidence in favor of finding disability, and that this weighs heavily in favor of increased permanency. The Arbitrator gives significant weight to this factor in determining PPD.

After giving appropriate rate to each of the 5 factors, and considering the entirety of the evidence adduced, the Arbitrator finds that as a result of his August 22, 2014 injury, Petitioner sustained the 47.5% loss of use of his left leg, in accordance with §8(e)12 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Griselda Morel,

Petitioner,

21IWCC0106

vs.

NO: 18 WC 33333

Claire's Stores,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission solely seeks to correct two clerical errors on the Arbitration Decision Form. On the Arbitration Decision Form, the Arbitrator mistakenly wrote that Respondent shall pay temporary total disability benefits for 24 and 4/7 weeks, commencing October 27, 2018, through April 17, **2018**. The Arbitrator also mistakenly wrote that Respondent shall pay reasonable and necessary medical services through April 17, **2018**. These are clearly scrivener's errors. The Commission thus modifies the above-referenced sentences to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of $400/week for 24 and 4/7 weeks, commencing **October 27, 2018**, through **April 17, 2019**, as provided in Section 8(b) of the Act.
>
> Respondent shall pay reasonable and necessary medical services through **April 17, 2019**, for treatment to the shoulder as provided in Sections 8(a) and 8.2 of the Act.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 14, 2019, is modified as stated herein.

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

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

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

DATED: MAR 5 - 2021

o: 1/12/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

MOREL, GRISELDA
Employee/Petitioner

Case# **18WC033333**

CLAIRE'S STORES
Employer/Respondent

21IWCC0106

On 11/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2553 MC HARGUE & JONES
PETAR MILENKOVICH
123 W MADISON ST SUITE 1800
CHICAGO, IL 60602

4876 ARNETT LAW GROUP LLC
BETHANY N WHITE
223 W JACKSON BLVD SUITE 750
CHICAGO, IL 60606

STATE OF ILLINOIS)SS.

COUNTY OF COOK)

21IWCC0106

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Griselda Morel
Employee/Petitioner

v.

Claire's Stores
Employer/Respondent

Case # **18** WC **33333**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Chicago**, on **October 17, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

FINDINGS

On the date of accident, **October 26, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,200.00**; the average weekly wage was **$600.00**.

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

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

Respondent shall be given a credit of **$10,908.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$24,109.62** for other benefits, for a total credit of **$35,017.62**.

Respondent is entitled to a credit for any benefits it has paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $400/week for 24 and 4/7 weeks, commencing October 27, 2018, through April 17, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services through April 17, 2018, for treatment to the shoulder as provided in Sections 8(a) and 8.2 of the Act. Per the stipulation of the parties, Respondent will pay any outstanding medical bills for the shoulder only directly to the medical providers who rendered service.

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

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

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

Signature of Arbitrator Gerald Granada

11/14/19
Date

NOV 14 2019

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FINDINGS OF FACT

This case involves Petitioner Griselda Morel, who alleges injuries sustained while working for Respondent Claire's Stores on October 26, 2018. Respondent disputes Petitioner's claims, with the issues being: 1) causation; 2) medical expenses; 3) TTD; and 4) prospective medical care.

The Petitioner has been an employee of the Respondent for 26 years. She is employed in the warehouse, performing warehouse duties. On October 26, 2018, while straightening up an area of the warehouse, she was picking up pallets. While bent down, a pallet that was standing on its side fell onto her right arm. The initial injury reports show that the Petitioner felt pain in the arm while lifting pallets. (Respondent's Group Exhibit 6).

Petitioner was seen at Presence St. Mary of Nazareth Hospital on the date of injury. She indicated she was at work when a wooden pallet fell onto her right elbow, and she had pain radiating into her hand and shoulder as well as numbness into the hand. While waiting for x-rays, she indicated she could not wait any longer and asked to be discharged. She was diagnosed with a contusion of the shoulder and instructed to follow up with her primary care physician. She left ambulating in no acute distress with all belongings. (Petitioner's Exhibit 1).

Petitioner presented to Dr. Perez, D.C., on October 29, 2018, for chief complaints of right upper extremity pain following a work injury on October 26, 2018. On that date, she moved a heavy pallet to the side and then bent over to move another pallet when, suddenly, the pallet that she had just finished moving fell onto her, striking the right side of body and causing her to fall to the ground. She yelled out when this occurred and pushed the pallet off her. She was able to get up on her own. She reported the incident to her supervisor and was sent to the emergency room of St. Mary Hospital where she was examined, prescribed medication, and released. She continued to experience persistent pain and had not been able to return to work. She described her pain as starting in the shoulder and traveling to the hand. She made no complaints of neck pain. She wanted to obtain another medical opinion, presenting to their office for evaluation. She denied any pre-existing treatment or complaints to the right upper extremity. She had not returned to work since the accident. X-rays of the right shoulder were normal, and she was diagnosed with a right shoulder contusion, right elbow contusion, and right hand pain. Physical therapy was recommended, and she was taken off work. She was also referred for consultation with an orthopedic specialist. (Petitioner's Exhibit 3).

On November 1, 2018, Petitioner presented to Dr. Koutsky at LaClinica for evaluation of neck pain that radiated into the right arm as well as right shoulder and right elbow pain. Her symptoms began after a work-related injury on October 26, 2018, after a pallet fell on her. After physical examination, she was diagnosed with cervical radiculopathy, right shoulder impingement and right lateral epicondylitis. MRIs of the cervical spine and shoulder were prescribed as well as continued physical therapy. She was also given a cortisone injection for lateral epicondylitis. She was taken off work for the time being and told to follow up in a month. (Petitioner's Exhibit 3).

On November 12, 2018, Petitioner underwent a MRI of the cervical spine, which showed a osteophyte complex at C5-C6 causing mild to moderate neural foraminal and central canal stenosis. The same

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finding was noted at C6-C7. There was disc bulging with exacerbating facet arthropathy at C3-C4 that contributed to mild right and moderate left foraminal stenosis as well as multilevel spondylotic changes with facet arthropathy and uncovertebral joint disease. On the same date, Petitioner underwent a MRI of the right shoulder, which showed a small, thin low-grade partial-thickness interstitial tear of the posterior supraspinatus/anterior infraspinatus tendon at or near the footprint as well as infraspinatus tendinosis with tiny cystic change at the myotendinous junction reflecting delaminating, interstitial component of distal tendon pathology. (Petitioner's Exhibit 3).

Petitioner returned to Dr. Koutsky on December 13, 2018, for evaluation of her cervical radiculopathy, right shoulder and right elbow pain. She had been given an injection in the lateral epicondylar area that helped significantly. Petitioner had been off work and was continuing physical therapy for range of motion, strengthening and stabilization. She underwent MRIs of the cervical spine and right shoulder on November 12, 2018. The MRI of the cervical spine showed disc spur complexes at C5-C6 and C6-C7 that contributed to central and foraminal stenosis with no evidence of a herniated disc. MRI of the right shoulder showed a partial thickness rotator cuff tear with biceps tendon intact. She was diagnosed with right C5-C6 and C6-C7 radiculopathy, shoulder impingement and partial thickness rotator cuff tear as well as resolved lateral epicondylitis. A right shoulder injection was recommended, which was performed that day. A pain clinic evaluation for cervical injections was recommended, and she was still authorized off work. She was also given pain medications and told to follow up with physical therapy. (Petitioner's Exhibit 3).

On January 4, 2019, Petitioner saw Dr. Scott Glaser of Advanced Physical Medicine for a pain management evaluation. She presented with right neck pain following a work-related accident. She had not had any physical therapy for the condition but had taken oral medication. She was diagnosed with facet syndrome of the cervical spine and cervical radiculopathy. She received an injection at C6-C7 on January 14, 2019. (Petitioner's Exhibit 3, 7). When she was re-examined by Dr. Glaser's office on January 28, 2019, she noted no improvement from the injection. (Petitioner's Exhibit 4).

On January 31, 2019, Petitioner followed up with Dr. Koutsky for her right shoulder pain, cervical radiculopathy, and elbow pain. Since she had last been seen, she underwent physical therapy and received one cervical epidural injection that gave her some relief. She also had relief from the shoulder injection for a short time. She was diagnosed with right C5-C6 and C6-C7 radiculopathy. The doctor recommended continuing physical therapy for range of motion and following up with a pain clinic for a second injection. If her symptoms persisted despite exhausting conservative management, she would be a reasonable candidate for decompression and fusion. She was off work, and the Petitioner indicated she was not interested in surgery at the present time. (Petitioner's Exhibit 3.)

On February 11, 2019, Petitioner underwent a right C5-C6 and C5-C7 intraarticular facet joint injection. (Petitioner's Exhibit 3.) Alex Lerch, a nurse practitioner, re-examined the Petitioner on March 11, 2019, at which time Ms. Morel complained of increased neck pain following her February facet joint injection after experiencing approximately 30% relief for only one week. A right medical branch block was recommended. (Petitioner's Exhibit 4.)

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On March 14, 2019, Petitioner returned to Dr. Koutsky for her right shoulder pain and cervical radiculopathy. She received her second cervical injection, which helped significantly for only five days. She had been continuing physical therapy with limited long-term improvement and was reluctant to undergo surgery. The decompression and fusion as well as a shoulder arthroscopy were discussed. She was scheduled for a third injection in the near future, which would likely give her similar results as the first two injections. The doctor believed she was reaching the end of her conservative treatment and a functional capacity evaluation was addressed in order to determine her functional capabilities. (Petitioner's Exhibit 3).

On March 25, 2019, Petitioner underwent a right C5, C6, and C7 medial branch nerve block. (Petitioner's Exhibit 7). Dr. Glaser's Nurse Practitioner re-examined the Petitioner on April 15, 2019. Her pain had decreased following the procedure, but she noted only a 20% improvement in her symptoms. Radiofrequency ablation was recommended. (Petitioner's Exhibit 3).

At the request of her employer, the Petitioner underwent the first of two Section 12 examinations on April 8, 2019, with Dr. Avi Bernstein. At the time of her evaluation, she indicated surgery was recommended, which she believed would focus on her right shoulder. When asked about the source of her pain, she pointed to the anterior aspect of the right shoulder and the right elbow. Upon physical examination, she only had pain at the extreme end of the Spurling's maneuver. She also denied any radicular symptoms. Dr. Bernstein also reviewed the Petitioner's imaging studies, which he interpreted as showing degenerative changes at C5-6 and C6-7. Dr. Bernstein opined that as to Mr. Morel's cervical spine, she may have sustained contusions as a result of the work accident. He did not believe that she sustained any structural injury to the cervical spine. She required no further treatment, and there was no medical reason why she could not work full duty. There was no indication for cervical spine surgery. (Respondent's Exhibit 1).

On April 17, 2019, the Petitioner underwent a second Section 12 Examination with Dr. Charles Bush-Joseph for her right shoulder. Upon physical examination, she complained of pain radiating to the base of the cervical spine to the posterior superior aspect of the shoulder into the lateral aspect of the arm and hand. He also reviewed the MRI scan of the Petitioner's shoulder. His impression was that the images were normal. He did not see any evidence of shoulder pathology warranting treatment nor any injury to the shoulder. No further treatment was necessary for the shoulder, and she reached MMI for it on April 17, 2019. She could work without restrictions related to the right shoulder. (Respondent's Exhibit 4).

At Petitioner's attorney request, Dr. Koutsky drafted a narrative report on May 9, 2019. He reiterated his opinions related to the cervical spine and places great emphasis on Dr. Bush Joseph's findings on physical examination, inferring that Bush Joseph was in agreement with his opinions, which misconstrues the opinions in Dr. Bush-Joseph's report. Based upon his treatment, he disagreed with the opinions of Dr. Bernstein. (Petitioner's Exhibit 3). Dr. Bernstein issued an addendum upon reviewing Dr. Koutsky's May 9, 2019 narrative, reiterating the basis for his opinions, which included age appropriate degeneration on MRIs and negative Spurling's test. (Respondent's Exhibit 2).

On May 16, 2019, Dr. Koutsky re-examined Petitioner. Her symptoms had been about the same, and the doctor noted that she had failed conservative treatment. She had been reconsidering surgery. Dr.

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Koutsky indicated that Dr. Bush-Joseph concurred with his opinions that Petitioner's symptoms were coming from her neck and reiterated his recommendation for surgery. He did not mention his prior recommendation for a potential shoulder arthroscopy. (Petitioner's Exhibit 3.)

On June 7, 2019, Petitioner underwent a functional capacity evaluation, which was deemed to be valid. She was released to light duty work functions. Petitioner returned to Dr. Koutsky for her cervical radiculopathy on June 27, 2019. The doctor had been awaiting authorization for decompression and fusion. While authorization was pending, she would continue physical therapy at home and was released per FCE restrictions. (Petitioner's Exhibit 3). Dr. Koutsky reexamined the Petitioner for her cervical radiculopathy on September 19, 2019, noting that she was still awaiting authorization for surgery. She was taking medications as needed for her discomfort, and she could work with restrictions outlined in her FCE. No treatment was recommended for her shoulder pain. (Petitioner's Exhibit 2.)

Petitioner has also undergone multiple sessions of physical therapy. Per the records, the Petitioner did not complain to Dr. Perez, D.C., of neck pain until after she received a cervical injection. At that point, physical therapy began treating her for neck pain in addition to right shoulder and elbow pain. (Petitioner's Exhibit 3).

During the hearing, the Petitioner described pain in her neck and right arm that had been relatively the same since her injury. She wishes to undergo the surgery recommended by Dr. Koutsky.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony, the investigative evidence and the various medical opinions. On the outset, the Arbitrator notes that the Petitioner's account of what happened on the accident date is questionable in that there is no mention of any neck injury in the initial medical records to substantiate Petitioner's testimony regarding her neck condition. The initial accident report signed and dated by Petitioner on October 31, 2018 shows a history of Petitioner injuring her right arm when she picked up a pallet. (RX 6) The history given to the emergency room later that day indicates Petitioner injured her arm when a wooden pallet fell onto her arm with complaints of pain radiating to her hand and shoulder; and the records from this initial medical provider note that there were no contusions on the arm and do not indicate Petitioner had any complaints of neck pain. (PX 1) Her history to Dr. Perez, D.C. provided more detail in that she moved a heavy pallet to the side and then bent over to move another pallet when, suddenly, the pallet that she had just finished moving fell onto her, striking the right side of body and causing her to fall to the ground, but there is no mention of any injury to the neck or any complaints of neck pain. Petitioner's first complaints of neck pain in the medical evidence was when she began seeing Dr. Koutsky at LaClinica in November 1, 2018, wherein she gives a history of being struck on the right side of her body, "including the neck". (PX 2)

In reviewing the facts regarding the mechanism of Petitioner's injury, it appears that Petitioner struck her right arm and elbow when a pallet that she had placed on its side fell down as she was picking up another

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pallet. This explanation would comport with the opinions of the Section 12 experts who noted only mild degenerative changes in the objective testing that do no merit surgical intervention. This would also explain why the Petitioner had little to no response to the conservative treatment and the various injections administered for her neck. It may also explain why Petitioner indicated her right elbow and shoulder when Dr. Bernstein asked her what was the source of her pain. For these reasons, the Arbitrator finds persuasive the opinions of Dr. Bernstein and Dr. Bush-Joseph, who opine that Petitioner has reached maximum medical improvement for her injuries and is not in need of surgery. Accordingly, the Arbitrator concludes that Petitioner has failed to prove her current condition of ill-being is causally connected to her October 26, 2018 work accident.

2. Regarding the issue of medical expenses, the Arbitrator finds that not all the medical services rendered have been reasonable and necessary. Specifically, the Arbitrator finds that treatment rendered to the cervical spine was not reasonable or necessary based upon the opinions of Dr. Bernstein, and that the treatment for the shoulder after April 17, 2019, is unreasonable and unnecessary based upon the opinions of Dr. Bush-Joseph, who deemed the Petitioner at maximum medical improvement as of that date. Respondent shall pay for any medical treatment limited to Petitioner's right arm through April 19, 2019, subject to the Fee Schedule. Respondent shall receive a credit for any medical expenses it has already paid.

3. Based on the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner was temporarily totally disabled from October 27, 2018, through April 17, 2019, the date she was placed at maximum medical improvement by Dr. Bush-Joseph. Accordingly, Respondent shall pay Petitioner TTD for this time period and shall receive a credit for any TTD it has already paid.

4. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the Petitioner's request for prospective medical care is not reasonable and necessary. This finding is supported by the opinions of Dr. Bernstein and Dr. Bush-Joseph. Accordingly, the Petitioner's request for prospective medical care, including the surgical intervention proposed by Dr. Koutsky, is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terence Byrne,

Petitioner,

21IWCC0107

vs.

NO: 13 WC 36780

Southwest Airlines,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Arbitrator Decision and corrects a few scrivener's errors. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct clerical errors in the Arbitrator Decision. On page two (2) of the Decision, the Arbitrator mistakenly wrote: "Petitioner related that on September 19, 2013, he was bending over to pick up an object at work that was **stuck in a pond** pulling on the object to begin to feel pain down the right side, starting from the **low but I talk** to the back of his thigh." These are clearly clerical errors. The Commission thus modifies the above-referenced sentence to read as follows:

> Petitioner related that on September 19, 2013, he was bending over to pick up an object at work that was **stuck upon** pulling on the object began to feel pain down the right side, starting from the **low buttocks** to the back of his thigh.

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

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 20, 2018, is modified as stated herein.

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

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

DATED: MAR 5 - 2021

d: 1/12/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BYRNE, TERENCE
Employee/Petitioner

Case# **13WC036780**

SOUTHWEST AIRLINES
Employer/Respondent

21IWCC0107

On 9/20/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2731 SALVATO & O'TOOLE
DAVID FROYLAN
53 W JACKSON BLVD SUITE 1750
CHICAGO, IL 60604

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

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TERENCE BYRNE
Employee/Petitioner

v.

SOUTHWEST AIRLINES
Employer/Respondent

Case # 13 WC 36780

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **7/10/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0107

FINDINGS

On **9/13/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$26,499.20**; the average weekly wage was **$509.60**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. By oral stipulation, Respondent is entitled to a credit under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$339.73/week** for **29 weeks**, commencing **9/23/13** through **4/14/14**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **9/23/13** through **4/14/14**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services in the gross total amount of **$479,470.98**, as provided in and subject to Sections 8(a) and 8.2 of the Act. By oral stipulation, Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$305.76/week** for **125 weeks**, because the injuries sustained caused the **25%** loss of the **person as a whole**, as provided in Section **8(d)2** of the Act.

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

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

Signature of Arbitrator

9-20-18
Date

SEP 20 2018

FINDINGS OF FACT

Terrence Byrne ("Petitioner") alleged injuries to his low back/lumbar spine arising out of and in the course of his employment with Southwest Airlines ("Respondent") occurring on September 13, 2013. Ax1. On July 10, 2018, the parties proceeded to arbitration on the disputed issues of accident, causal connection, liability for unpaid medical bills, temporary total disability and nature and extent of the injury. The following is a recitation of the facts adduced at trial.

On September 13, 2013, Petitioner was an employee of Southwest Airlines, Department of Cargo. On said date, Petitioner was working the 3rd shift which began at 11:00 p.m. and ended at 7:00 a.m. Petitioner's responsibilities included handling commercial freight. On average, the freight weighed between 25lbs. and 50lbs. Petitioner would receive the freight from customers, weigh it, inspect it for explosives or drugs, and return the freight to customers. Throughout this process, Petitioner repeatedly lifted the freight from a ground position onto a conveyor or crate. During his shift, Petitioner lifted a box weighing approximately 45lbs. and placed it on a pallet. The pallet weighed a little less than the box. The pallet sat on a conveyor. Petitioner attempted to pull the pallet with the box off the conveyor, but it became stuck. As Petitioner attempted to pull it off, he felt pain in his back that radiated down his right side into his right leg. Petitioner finished his shift without reporting his injury.

On September 16, 2013, Petitioner presented to his primary doctor at Lawn Medical Center. Px1, Rx4. He reported that he had been working in the cargo area for approximately 3 to 3 1/2 months. He stated that he has had pain for the past few months, which had increased. He had a known history of spinal stenosis. He was bending forward to pick up after dog and had shooting pain from the rear end to posterior legs. Further, he complained of pain in the right upper back and it was present for a few days. He described it as a whole separate pain. Assessment was sciatica and low back pain. The plan was to follow up.

On September 23, 2013, Petitioner reported his injury to Jennifer Lantz, Supervisor at Southwest Airlines. Px2:26. That same day, Petitioner presented to Clearing Clinic with a chief complaint that he was screening a cargo belt where he picked up a package and felt pain in the lower back. He related he pulled upper legs and that he had pain in the lower back. Diagnosis was lumbar strain. He was released to light duty of no lifting greater than 5 pounds and no bending, twisting, squatting or kneeling. Physical therapy was prescribed. During the 10 days that Petitioner waited to report the incident, Petitioner said he thought it would go away, that he believed he had sciatica due to age and that his back continued to worsen during this time.

On September 23, 2013, Petitioner also completed an occupational information form with MacNeal Occupational Health Services, indicating that he hurt himself while screening cargo on a belt. Px2:25. Specifically that he picked up to move the package and pulled in upper legs. *Id.* He reported pain in the sacrum shooting to the upper legs. He identified his lower buttocks and upper legs as injured. He rated his pain 8.5 out of 10. *Id.* at 32. He complained of acute gluteal pain with radiation down both legs. *Id.* It started after he tried to maneuver a crate to x-ray it on September 13. He went to see his own doctor who prescribed ibuprofen and took him off work. He denied previous injury. Diagnosis was lumbar strain. Medical causation was work. Work capacity was light duty. Petitioner was prescribed medications, physical therapy and follow up. *Id.*

On September 23, 2013, Petitioner returned to Lawn Medical Center. Px1, Rx4. He continued to complain of back pain and noted that medications were not helping. Assessment was low back pain. The plan was to begin Norco and continue Ibuprofen and Flexeril.

On September 26, 2013, Petitioner presented for initial evaluation at Clearing Clinic Physical Therapy. Px2:20. Petitioner exhibited limited tolerance for physical therapy due to severity of back and bilateral leg pain. Petitioner completed a questionnaire and related he injured himself at work when he pulled something when he

was taking a package off a belt. *Id.* at 17. He reported pain in the lower back and both legs. He endorsed a pins and needles sensation below the buttock and above the knee. He denied numbness and rated his pain 6/10 at rest.

On September 30, 2013, Petitioner followed up with Lawn Medical Center. Px1, Rx4. The doctor assessed low back pain and spinal stenosis of the lumbar region. The plan was to continue Norco and Nabumetone. An MRI was ordered. Petitioner was referred to Dr. Daniel Troy for orthopedic surgery.

On October 1, 2013, Petitioner followed up with Clearing Clinic. Px2:15. Chief complaint and diagnosis was unchanged. Petitioner was released to sitting work only. An MRI was ordered ASAP. On October 8, 2013, Petitioner followed up with Clearing Clinic. Px2:12. Chief complaint and diagnosis was unchanged. Petitioner was released to sitting work only. Petitioner was prescribed additional medications. An MRI was ordered ASAP.

On October 16, 2013, Petitioner was evaluated for physical therapy at Advocate Christ. Px3, Rx2. Diagnosis was low back pain, sciatica, spinal stenosis of the lumbar spine without neurogenic claudication. Petitioner related that on September 19, 2013, he was bending over to pick up an object at work that was stuck in a pond pulling on the object to begin to feel pain down the right side, starting from the low but I talk to the back of his thigh. Petitioners prior level of function was active. Functional deficits including bending, twisting, lifting, caring, coughing, sneezing, moving, walking for 2 to 3 minutes, stairs, squatting, disturbed sleep, leaning back and daily activities. Petitioner reported his pain was a constant 4-5/10 starting in the low gluteals ending at the posterior thigh, bilaterally. Therapists concluded that Petitioner presented with signs and symptoms consistent with low back pain and sciatica. Petitioner was discharged from therapy as he never returned following the initial evaluation.

On October 16, 2013, Petitioner underwent MRI of the lumbar spine at the referral of his primary doctor at Lawn Medical Center. Px1, Rx4. Impression was multilevel degenerative disc disease and soft tissue signal mass lesion extending from L1 to just below the L2-L3 disc level. It was noted it could represent a large extruded disk fragment however neoplastic lesion could not be excluded.

On October 18, 2013, Petitioner first presented to Dr. Daniel Troy of Advanced Orthopedic Spine Care. Px4. History noted bilateral pain in both lower extremities extending from the bottom of the buttocks to the back of the calf area. Petitioner related that he injured himself at work when pulling cargo and that he pulled too hard and felt like he pulled a muscle. He used a cane and had a slow gait. Impression was stenosis of the spinal lumbar with no neurological claudication. The plan was to return for follow-up and to decide on whether he wanted surgery or not. Petitioner was prescribed Tramadol.

On October 18, 2013, Clearing Clinic referred Petitioner to Dr. Zelby based upon an abnormal MRI. Px2:1. Petitioner rated his pain as severe and 10/10. *Id.* at 8. He had trouble sleeping, numbness in the right lower extremity and had difficulty sitting. *Id.* On exam, gait was antalgic, he used a 4-prong cane to ambulate and pain radiated to the thighs. Range of motion was limited due to pain. *Id.* He was released to sitting work only. *Id.* The physician statement diagnosed Petitioner with bulging disc, DJD of the lumbar spine and probable extruded disc fragment L1 to L3. *Id.* at 6. He was released to sitting work only. *Id.* at 7. He was released from care.

On October 30, 2013, Petitioner returned to Dr. Troy. Px4. He noted Petitioner had severe spinal stenosis at L2-3 and massive herniation as well as pre-existing spinal stenosis at L3-4. The doctor noted that the herniation occupied approximately 80 to 90% of the canal inducing very severe spinal stenosis. The doctor noted Petitioner may possibly benefit from a facetectomy and then coming in from the side to decompress the herniation. The recommendation was for a very wide decompression trying to avoid this. Petitioner was also to

have a decompression at L3-4 because of the pre-existing severe spinal stenosis. Impression was spinal stenosis of the lumbar spine with no neurological claudication. The plan was to proceed with surgery.

On November 6, 2013, Petitioner treated with Advocate Christ where he underwent pre-operative x-rays. Px3, Rx2. On November 7, 2013, Petitioner presented to Lawn Medical Center for preoperative clearance for the planned lumbar fusion. Px1, Rx4.

On November 10, 2013, Petitioner was admitted for surgery at Franciscan St. James Olympia Fields a.k.a. Franciscan alliance from the PACU Center for Minimally Invasive Surgery. Px5, Px6. There, Petitioner underwent and Dr. Troy performed an L-2 to L-4 posterior spinal fusion with screw instrumentation, L2 to L3 discectomy, L2 bilateral laminotomies with bilateral facetectomies, L3 laminectomy with bilateral facetectomies and L2 through L4 interbody fusion and cage placement. Px4:19-23. Post-operatively, Petitioner was diagnosed with L2-3 massive herniated disc inducing 90% canal compromise and L3-4 advanced degenerative facet arthropathy with moderate spinal stenosis and severe lateral recess stenosis. *Id.*
He was discharged on November 12, 2013. Px6.

On November 16, 2013, Petitioner presented to Advocate Christ Medical Center on an emergency basis. Px3, Rx2. Petitioner reported complaints of severe back spasms, weakness in the lower extremities and severe pain upon movement. Petitioner disclosed he had two falls over the past few days due to his legs giving out on him. Petitioner also related that he had spine pain with cramping in his right lower extremity and right buttock. Petitioner was recommended for subacute rehab placement and follow up. Petitioner was discharged on November 17, 2013 to a skilled nursing facility. Petitioner was advised to follow up with Dr. Troy.

On November 16, 2013, Petitioner was able to see Dr. Troy after being admitted on an emergency basis. Px3, Rx2. He reported he had been having progressively worse and right-sided weakness and was having spasms in his back. Spasms were alleviated with Valium and Norco. Petitioner stated that his right lower gave out on him due to weakness while attempting to ambulate which caused him to fall twice. Assessment was right lower extremity radiculopathy, status post posterior spinal lumbar fusion. Dr. Troy noted Petitioner had residual weakness to the right lower extremity, but that motor function was firing. The plan was to transfer Petitioner to Manor Care.

On November 17, 2013, Petitioner presented for physical therapy through Advocate Christ Medical Center. Px3, Rx2. Therapists noted Petitioner had history of low back pain with recent posterior lumbar fusion along with past medical history significant for sciatica, low back pain, spinal stenosis. On November 22, 2013, Petitioner returned to Dr. Troy for follow-up. Px4. Discussion was had about continuing in a rehab center where he could receive physical therapy and increase ambulation. Follow up was scheduled.

On December 3, 2013, Petitioner presented to Dr. Edward Rybka of Lawn Medical Center. Px1, Rx4. The doctor noted that Petitioner was status post fusion and was recently released from Manor Care on November 26, 2013. Petitioner was improving in walking with the assistance of a walker. He had no complaints of pain and took himself off pain medication on the second date. Since being discharged home, he had been doing physical therapy at home. He reported occasional nerve like pain since beginning therapy. He denied weakness and numbness. The plan was to continue with home physical therapy and to follow up with Dr. Troy. He was to continue ibuprofen as needed. Assessment with spinal stenosis of the lumbar spine.

On December 12, 2013, Petitioner saw Dr. Troy for review of home health certification from November 27, 2013 to January 25, 2014. Px4. Petitioner was unchanged on exam. Follow up was ordered. On December 17, 2013, Petitioner began a new round of physical therapy with AthletiCo. Px7. On December 27, 2013, Petitioner followed up with Dr. Troy. Px4. Petitioner reported he had absolutely no pain and takes a little bit of ibuprofen intermittently but otherwise was off all of his pain medications. On exam, the doctor confirmed

that Petitioner was neurologically intact to the upper and lower extremities. There was no radiculopathy and no back pain. The plan was for follow up.

On March 4, 2014, Petitioner followed up with Dr. Troy. Px4. The doctor noted that all of Petitioner's prior dysfunction had completely resolved. Petitioner had minimal deficit to the right lower extremity and was overall 95% improved. He had only been lifting about 15 pounds. The doctor noted that after having this surgery, Petitioner will have significant difficulty getting back to 75-pound lifting. The plan is to continue therapy, some type of vocational rehab at work and follow up.

On April 14, 2014, Petitioner was discharged from AthletiCo Physical Therapy, having completed 50 visits. Px7:155-159. He demonstrated improvement in pain and had continued reports of achiness and soreness mostly with occasional pain in the morning. He demonstrated improved lumbar flexion range of motion with noted hamstring tightness due to knee flexion. He demonstrated improved single leg balance but required upper extremity assist to maintain. He also demonstrated improved gait pattern. He was not recommended for an FCE or work conditioning as he was returning to work with new job requirements. He was discharged from physical therapy with independent home exercise program to maintain current level of function.

On April 15, 2014, Petitioner returned to Dr. Troy. Px4. He had mild symptoms to the low back area but overall it was neurologically intact to bilateral lower extremities, almost symmetric. Petitioner had minimal symptomology except for the low back symptoms otherwise he was greatly improved and was happy with the results. Plain radiographs demonstrated acceptable interbody cage placement and pedicle screw instrumentation from L2 to L4 with fusion mass. Follow up with scheduled for six months. He was to return to work restricted duty.

On April 28, 2014, Petitioner testified he returned to Respondent working staffing as a center operations associate. He said the job required no lifting and he could sit and stand as needed.

On July 5, 2014, Petitioner returned to his primary doctor at Lawn Medical Center complaining of back pain located in the left mid to lower back, rated 9/10. Px1, Rx4. He was told it could be a kidney stone. It did not radiate into the left leg. He denied weakness or numbness. Assessment was low back pain. He was to continue ibuprofen tablets. The doctor suspected muscle strain and spasm.

On February 20, 2015, Petitioner returned for follow-up with Dr. Troy. Px4. Symptoms to the left lower extremity were completely resolved. He had slight numbness in the anterior aspect of his L3 level. He admitted to intermittent pain in the low back area. X-rays demonstrated successful placement of the pedicle screw instrumentation consistent with two level fusion. There was residual scoliosis, mild. There appeared to be facet arthropathy developing at L4-5 and L5-S1 levels. The plan was to return as needed.

Respondent subpoenaed records from Allstate insurance company, which were admitted into evidence as RX three. Records disclose that on November 28, 2012, Petitioner was involved in a four way stop intersection accident where by Petitioner was struck by another driver while entering the intersection on his turn. Included were recorded statements, a police report, photographs, correspondence and claim information.

Petitioner had a prior history of low back issues as documented in his record with Lawn Medical Center. Specifically, on June 5, 2012, Petitioner presented to Lawn Medical Center, where doctors assessed Petitioner with low back pain, thoracic spine pain and spinal stenosis of the lumbar region, known. Px1, Rx4. Petitioner reported he had been having back pain, same as in the past. He was started on Nabumetone and was instructed to do low back exercises. In addition, on January 7, 2013, Petitioner presented to Lawn Medical Center. Px1, Rx4. He was assessed with low back pain and Nabumetone was refilled. Finally, on April 22, 2013, Petitioner presented to his primary medical doctor at Lawn Medical Center. Px1, Rx4. He reported left lower extremity pain extending from the superior aspect of the posterior knee to the buttock. He also had associated back pain

which had been more consistent. Petitioner admitted to being seen by orthopedics approximately two years ago and received physical therapy. The doctor noted Petitioner was positive for chronic back pain and assessed Petitioner with low back pain. At trial, Petitioner was asked if he had back pains prior to the date of accident and he testified he could not recall but that he had aches and pains from age.

On August 23, 2016, the parties took the evidence deposition of Dr. Daniel Troy. Px8. The doctor stated that at the initial evaluation of Petitioner, based upon physical exam, objective findings indicated that Petitioner's strength was weaker on the right side, that sensation was normal but objectively he was demonstrating neurological deficits. The doctor confirmed that MRI imaging showed a massive herniation at approximately the L1-2 and L2-3 levels. Based upon exam and imaging, the doctor recommended surgery due to the massive nature of the herniation and neurological deficits and symptomology. The doctor explained that once there are neurological deficits displayed, the matter is pushed into surgical intervention. In Petitioner's case, he had already undergone physical therapy. The doctor confirmed that Petitioner eventually underwent surgery and usual post-operative care. The doctor opined that the occurrence of September 13, 2013 could be the cause of his condition based upon the history, the subsequent onset of neurological deficits and the massive size of the herniation identified on MRI, which demonstrated what appeared to be more acute rather than chronic findings. Regarding degenerative changes, the doctor identified those as being facet joint arthritis and slight scoliosis. The doctor conceded that while the massive herniation was impossible to date, the probability that one would have symptoms from it, it would be relatively acute rather than chronic in nature. Under cross-examination, the doctor acknowledged that he did not review medical records from Petitioner's primary doctor.

On March 27, 2018, the parties took the evidence deposition of Dr. Srdjan Mirkovic. Rx1. The doctor previously conducted a medical record review and issued his written opinion on April 21, 2015. The doctor pointed out Petitioner's September 16, 2013 office visit failed to mention any specific work accident and show a worsening of Petitioner symptoms. The doctor stated that the gradual worsening and symptoms could more likely than not be related to the chronic pre-existing history of low back symptoms and history of spinal some stenosis. Further, the doctor noted that the medical records of October 1st and October 8th indicates severe pain since September 23, 2013. The records did however also state that the pain began after Petitioner try to maneuver a crate of x-rays on September 13, 2013. Thus, the doctor concluded the October dates of service suggest in aggravation on or about September 23, 2013. The doctor summarized additional medical records and concluded Petitioner's diagnosis was degenerative lumbar spinal stenosis, lumbar spondylosis and more likely than not, acute disc herniation from L1 through L3 causing severe spinal stenosis with exacerbation of Petitioner symptoms on or around September 23, 2013. The doctor further concluded that his review of the records failed to suggest in immediate direct correlation between the events of September 13, 2013 and the underlying chronic degenerative conditions. The doctor further concluded that it was not clear that the events 10 days prior on September 13 aggravated, accelerated or exacerbated Petitioner's pre-existing low back condition. The doctor was unable to determine return to work restrictions. The doctor concluded that based on his causation opinion, subsequent need for treatment would not be related to any September 13, 2013 incident.

Katherine McCue ("McCue") testified on behalf of Respondent. She has worked for Respondent for 26 years, most recently as a station specialist where she handles leave, hours, bids, "OJIs", returns to work and personal leaves. She is also involved with claims reporting. She testified that claims are to be reported immediately and this is taught at basic and recurrent training. There is a safety department that also teaches and trains on this. McCue testified that while she did not know Petitioner before the trial day, he would have had training on these processes and re-training if he was switched to cargo.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only witness to testify at trial. The Arbitrator had an opportunity to observe his demeanor and the Arbitrator finds Petitioner was credible, truthful, candid and forthright in his recollection of the incident at work, his history of medical treatment, his auto accident and as to his subjective belief as to his current condition.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner testified that he injured his back when he attempted to pull a pallet with a box on it off the conveyor belt. He said it became stuck. When he attempted to pull it off, he felt a pain in his low back that radiated to his right side and right leg. Here, there is no question Petitioner was in the course of his employment at the time his alleged accident occurred. Specifically, Petitioner credibly testified he was working the third shift in the Cargo department where he was assigned. The Arbitrator also finds that Petitioner's accident arose out of his employment as he was performing an employment related task when he pulled on the pallet and the box in an attempt to move it off the conveyor belt. In other words, he was performing tasks he would reasonably be expected to perform and the risk to which was exposed was employment related in nature. Petitioner's mechanism is corroborated by various medical records.

Having addressed the arising out of and in the course of analysis, the Arbitrator notes that the accident dispute in this case centers on credibility. Namely, that Petitioner had a prior history of low back issues, sustained an unwitnessed accident, that he waited 10 days to report his accident, that there are potentially differing mechanisms or history of injury and that an aggravation occurred on or about September 23, 2013. Having considered the record, the Arbitrator resolves the issue of credibility in terms of accident in Petitioner's favor.

Petitioner's recollection as to how the accident occurred is corroborated in multiple records, including the accident report he completed with his supervisor, his primary doctor's medical record, Dr. Troy's records and in his physical therapy records. Dr. Mirkovic suggested that an aggravation occurred on or about September 23rd, relying two October Clearing Clinic records. After reviewing all evidence, the October 1st and 8th records are the only records to make such an alleged reference to an aggravation and even so, no aggravation is mentioned as suggested by Dr. Mirkovic. Rather, an alleged onset of pain is noted. Moreover, the entirety of Clearing Clinic records still continued to reference September 13th as the date of injury:

Petitioner's first visit to Clearing Clinic was on September 23rd and his own hand-written intake forms identify September 13th as the work accident;

The September 23rd date of service, which is the same date the alleged aggravation is to have occurred, fails to mention such aggravation and instead mentions September 13th as the work accident details and lists "medical causation" as "work";

The September 26th date of service again only references September 13th as the work accident date both in the typed notes and in the hand-written questionnaire for physical therapy;

The October 1st date of service still references September 13th as the date of injury and never indicates that September 23rd was an accident or aggravation date but rather the date on which pain was onset. It still lists "medical causation" as "work";

The October 8th date of service continues to reference September 13th as the date of injury and never indicates that September 23rd was an accident or aggravation date but rather the date on which pain was onset. It still lists "medical causation" as "work";

The final October 18th date of service fails to mention September 23rd at all and again continues to identify September 13th as the date of injury.

At trial, Petitioner was not asked about any September 23rd onset or aggravation and therefore the Arbitrator is unable to corroborate Dr. Mirkovic's suggestion. Petitioner testified that during the 10 days he waited to report, his symptoms increased and that he generally worsened. Based on the preponderance of the evidence, the Arbitrator concludes that Dr. Mirkovic's opinion that most likely an aggravation occurred is not supported by testimony or any other record.

Respondent also points out that Petitioner's primary doctor noted Petitioner felt increased symptoms after picking up after his dog and again when he related that he had been working in the cargo area for several months. In other words, no mention of lifting or pulling a package is made. Having reviewed the record as a whole, the Arbitrator finds that the notation referencing a dog also stands alone in relation to the preponderance of the evidence, as is the mention that Petitioner had been working in the cargo area for a few months. Dr. Mirkovic did not rely on or factor the alleged incident of picking up after dog when rendering his opinion. Rather, his opinion largely rests on the September 23rd alleged aggravation, which the Arbitrator has already addressed, *supra*. There are other notations with slight variations regarding lifting or pulling a package or box and the Arbitrator finds this insignificant as all of those histories corroborate Petitioner's recollection that he injured his low back after trying to lift a package at work. Here, the preponderance of the evidence shows that his accident is traceable to a definite time, place and cause.

As to his prior medical history, the record shows Petitioner had treated as far back as 2012 for the low back and was diagnosed with low back pain and lumbar stenosis before the work accident. Before the accident, Petitioner reported left lower extremity pain extending from the superior aspect of the posterior knee to the buttock. Petitioner also admitted to his primary doctor that he had been working in the cargo area for several months and had noticed an increase in back pain or symptoms. However, following the work accident, Petitioner credibly reported to his primary doctor that the pain had increased and that he had a whole separate pain. Subsequent medical records indicate Petitioner was now experiencing right lower extremity and then *bilateral* leg symptoms whereas before his symptoms were left sided. In addition, Petitioner's prescriptions were increased and changed following the accident. Thus, in the Arbitrator's view, the work accident did in fact occur which changed the nature of Petitioner's symptoms. The Arbitrator also rejects Respondent's suggestion that Petitioner denied having prior symptoms during his testimony at trial; Petitioner stated that he could not recall but that he had aches and pains from age and that part of the reason he waited to report was because he thought it was another one of his aches and pains from being older and out of shape.

As to any delay in reporting, while Petitioner waited 10 days to report his work accident to his supervisor, Petitioner credibly and timely sought medical treatment on the third day following his work accident. In considering McCue's testimony that accidents are to be reported immediately, credibly and candidly explained that he thought what he felt was another one of his aches and pains from being older and out of shape. The Arbitrator does not find Petitioner's decision to wait to report his work accident fatal to his claim.

Based on the foregoing, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that his accident arose out of and in the course of his employment on September 13, 2013 with Respondent.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the issue of accident, the Arbitrator concludes his current condition of ill-being as it relates to his lumbar spine is causally related to his work accident.

Respondent's Section 12 doctor, Dr. Mirkovic, concluded that Petitioner's diagnosis was degenerative lumbar spinal stenosis, lumbar spondylosis and *more likely than not, acute* disc herniation from L1 through L3 causing severe spinal stenosis with exacerbation of Petitioner's symptoms on or around September 23, 2013. (Emphasis added). The doctor's opinion acknowledges the likelihood that Petitioner's herniation was acute in nature but stops short of relating it to the September 13th date of accident, relying instead on the alleged September 23rd exacerbation. However, having rejected the September 23rd alleged aggravation, the Arbitrator must assign little weight to the causation opinion of Dr. Mirkovic as it necessarily is dependent upon an incident occurring on September 23rd.

Rather, the preponderance of the evidence shows that Petitioner had pre-existing degenerative conditions (spinal stenosis and lumbar spondylosis), aggravated by the work accident and most likely an acute massive herniation from L1 through L3 caused by the work accident and that further aggravated or exacerbated Petitioner's stenosis, as credibly noted by Dr. Troy. Both Drs. Troy and Mirkovic generally agree upon the likelihood that Petitioner's herniation was acute rather than chronic in nature given the severity of symptoms. Dr. Troy opined that the September 13, 2013 occurrence could be the cause of his condition considering all findings. The Arbitrator adopts this conclusion and finds that it is consistent with a change in Petitioner's condition following the accident under a chain of events theory.

In addressing Petitioner's non-occupational accidents, the Arbitrator notes that Dr. Troy's medical record referred to a prior auto accident as making Petitioner weaker on the right side. At his deposition, Dr. Troy testified that the date of the auto accident would need to be considered when determining whether it was the cause of his herniation. Px8:20-22. Only two prior auto accidents are found in the record; one which Petitioner candidly disclosed in his medical records occurring in the 1970s for which his *right* femur, foot and ankle were injured; and the other occurring on November 28, 2012 for which no treatment for the lumbar spine, low back, massive herniation and/or anything right sided is found. (Emphasis added) See, Rx3, Px1:42, 47. Other potential non-occupational incidents, including an alleged dog incident and an alleged September 23rd aggravation were already found to be entitled to little weight. In addition, the Arbitrator again considers Petitioner's prior low back treatment for which his doctor noted primarily right sided complaints and a history of chronic stenosis and finds that Petitioner's work accident was clearly a causative factor in a change in his condition, which led to bilateral symptoms, increased back pain and aggravations of pre-existing conditions along with disc herniations. Therefore, based on the foregoing, the Arbitrator finds Petitioner's current condition of ill-being is causally related to his work accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner has proven that the medical services provided were reasonable and necessary in addressing his lumbar condition and that Respondent has not yet paid all appropriate charges for same. At trial, Petitioner alleged outstanding medical bills totaling $479,470.98. Ax1. Having reviewed the record, the Arbitrator concludes that the outstanding medical charges for Advanced Orthopedic, Center for Minimally Invasive Surgery, Athletico, Franciscan St. James and Advocate Christ all correspond to dates of service found in the medical records and to causally related treatment. Therefore, Respondent shall pay reasonable and necessary medical services in the

gross total amount of **$479,470.98**, as provided in and subject to Sections 8(a) and 8.2 of the Act. By oral stipulation, Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner has proven that he is entitled to temporary total disability benefits as a result of his injury. Under the Act, weekly temporary total disability ("TTD") payments shall be paid "beginning on the 4th day of such temporary total incapacity and continuing as long as the total temporary incapacity lasts." 820 ILCS 305/8(b). Petitioner alleges 29 weeks of TTD, September 23, 2013 thru April 14, 2014. Ax1.

On September 23, 2013, Clearing Clinic placed Petitioner on work restrictions. Tr. at 27, Px2. Respondent was not able to accommodate said restrictions. Tr. at 43. Petitioner remained on restrictions or off work until April 15, 2013, when Respondent was able to accommodate his restrictions. Tr. at 41, Px1, Px4. Respondent shall pay Petitioner temporary total disability benefits of **$339.73/week** for **29 weeks**, commencing **9/23/13** through **4/14/14**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **9/23/13** through **4/14/14**, and shall pay the remainder of the award, if any, in weekly payments.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner's low back injury resulted in a 2-level fusion from L2 to L4 with an eventual release where no permanent restrictions were indicated. Petitioner last treated for this injury on February 20, 2015 and at that time he was advised to return as needed. There is no indication Petitioner has returned since then therefore his claim for permanency, if any, is ripe for adjudication. Consistent with the Act, the Arbitrator considers and weighs the following factors:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was an employee of Southwest Airlines working in the cargo department and following his accident, he returned to work for Respondent performing staffing as a center operations associate. Petitioner said this job required no lifting and that he could sit and stand as needed. There is nothing in the record that indicates Petitioner was unable to return to his prior job but rather that he simply obtained a different job with Respondent. Therefore, the Arbitrator assigns little weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 55 years old at the time of the injury. His advanced age suggests a shorter work life expectancy and also suggests he may feel the effects of his injury to a greater degree than a younger worker. The Arbitrator assigns some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence Petitioner's future earnings capacity was affected by this accident. The Arbitrator therefore assigns no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that much of Dr. Troy's final treatment notes indicate that Petitioner had mild symptoms to the low back area but overall it was neurologically intact to bilateral lower extremities, almost symmetric. Petitioner had minimal symptomology except for the low back symptoms otherwise he was greatly improved and was happy with the results. Petitioner testified that his lower extremity symptoms and the numbness in the low back had pretty much resolved and the Arbitrator finds this testimony corroborated by the records. T. at 45. The Arbitrator therefore gives the greatest weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **25%** loss of use of **man as a whole** pursuant to **§8(d)(2)** of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Bankston,

Petitioner,

21IWCC0108

vs.

NO: 16 WC 26515

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 1/22/20 is affirmed and adopted with changes as stated herein.

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

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

21IWCC0108

interest under §19(n) of the Act, if any.

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

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

DATED: MAR 5 - 2021
o:1/12/21
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

BANKSTON, DONNA
Employee/Petitioner

Case# **16WC026515**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

21IWCC0108

On 1/22/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
ARGY KOUTSIKOS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

21IWCC0108

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Donna Bankston
Employee/Petitioner
v.
Chicago Transit Authority
Employer/Respondent

Case # **16** WC **026515**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **October 10, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0108

FINDINGS

On the date of accident, **8/12/2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being regarding her left knee *is not* causally related to the accident, as is explained below.

In the year preceding the injury, Petitioner earned **$57,427.02**; the average weekly wage was **$1,148.54**.

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

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

Respondent shall be given a credit of **$13,848.32** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$13,848.32**. The Parties stipulated that Petitioner was temporarily and totally disabled from work as a result of the accident from 8/13/2016 to 12/18/2016.

Respondent is entitled to a credit under Section 8(j) of the Act, per the Parties' agreement, as explained below.

ORDER

Petitioner failed to prove that her current condition of ill-being regarding her left knee (for which Dr. Primus recommends surgery) is causally related to the injury of 8/12/2016. Accordingly, Petitioner's claim for prospective medical care regarding her left knee is denied.

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

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

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

Signature of Arbitrator

January 21, 2020
Date

ICArbDec19(b)

JAN 22 2020

INTRODUCTION

This matter was tried on the limited issues of causation regarding the stipulated accident of 8/12/2016 and Petitioner's condition of ill-being regarding her left knee, including her request for prospective medical care. Issues regarding any other injuries sustained by Petitioner as a result of the said accident will be addressed in further proceedings.

At the beginning of the trial, it was agreed that Respondent would direct pay to Petitioner $152.87, representing an underpayment in TTD. Further, Respondent would pay the Concentra bill for the date of service of 8/16/2016, pursuant to the Fee Schedule, in an amount not to exceed $184.72. Finally, it was agreed that Respondent would protect and hold Petitioner harmless from any subrogation claims by Respondent's Group Carrier, Cigna, for related, reasonable and necessary expenses.

FINDINGS OF FACT

Petitioner is employed by Respondent as a Bus Operator. She has been so employed since April of 1999.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 12, 2016. She was involved in a MVA when the bus she was operating was rear ended by a car. She described the impact as heavy. The car had its front end smashed and the airbags were deployed. Petitioner testified that at the time of the impact, her body moved forward. Petitioner did not recall the exact play-by play of the accident. After the impact, Petitioner was able to stand and exit the bus. Petitioner called CTA Control Center to report the accident. Medical help was summoned to help some injured passengers. Petitioner testified that she felt pain in her left knee, shoulder and back at that time. She did not say anything to anyone about the pain.

Later that day, Petitioner completed a CTA accident report form, "CONTACT WITH VEHICLE/PEDESTRIAN/FIXED OBJECT", documenting that her bus was rear ended, when and where the accident occurred and who claimed to have sustained injuries. Petitioner did not document any injuries to her person at that time. (RX 6) The next accident report she prepared, "Interview Record", was on 8-15-16 wherein she claimed to have possibly injured her left knee on the fare box when she was involved in an accident on 8-12-16. (RX 7)

Petitioner testified she is not aware of how she injured her left knee on 8-12-16; she did not recall if any portion of her body struck any portion of the bus interior at the time of impact or immediately thereafter. Petitioner testified that at the time she sought medical attention she probably would have given a history of specifics as to what happened to her body in the accident. Petitioner could not say if she had injured her left knee other than in the 8-12-16 work accident - she would accept what was contained in her medical records.

Respondent submitted into evidence the bus video footage depicting the accident of 8/12/16. (RX 3) There are several views of the event that show the following: From camera #9 ("Fare box"), Petitioner is seen talking to another CTA employee standing by the front door and starts to brake at 13:53:10 but has not come to a complete stop before the bus is rear ended at 13:53:12. At the time of contact, Petitioner is seen with her right foot extended out by the control pedals and her left leg in a flexed position, as her body moves back in her seat and

then goes forward; she continues to brake and at 13:53:20 pulls the bus over to a stop; from 13:53:26-13:53:36 Petitioner proceeds to undo her seat belt, get up off her seat by leaning to her right and getting her right foot down and then standing up entirely onto her right foot while bringing her left side and foot over to stand up, all done at a normal steady pace; she steps down from the seat platform without twisting or banging her left knee on the dash/steering column/fare box, and exits the front door: From camera #1 ("Front door") you see Petitioner's right knee extended and the left knee is flexed when the impact occurred and her body goes back and forward with the right leg further extending out and down while the left knee appears to stay in relatively the same position and her upper torso has a backward / forward movement; she then pulls over the bus and moves her body to the right edge of her seat, as she unfastens her seat belt and gets up first entirely on the right leg while scooting her left side and leg to stand and exits the bus; no contact of the left knee with the interior of the bus is observed; Petitioner has no difficulty walking, or getting up and down the steps of the bus is noted. The video ends at 14:05:39. (RX 3)

Petitioner did not seek immediate medical attention for her injuries. She testified that when she got home, she was hurting a little bit more, so she went to the ER two days after the accident. Petitioner first sought medical attention at Christ Hospital on 8-14-16. (PX 8) She presented for: *"Visit Reason: Motor vehicle crash-minor; WORK RELATED MVA."* She gave a history of ... *"After the accident the patient jumped from her seat to evaluate the situation and she believes this is when she sustained her injuries from the quick jerking motion she made. The patient says she was feeling ok until Saturday morning when she started having pain in her back, hip, knee and foot on her left side, essentially radiating down her entire L side.* The Arbitrator takes judicial notice that August 12, 2016 was a Friday. Another history noted "*...patient was driving a bus when the bus was rear ended by a car 2 days ago. Pt was jerked, no head injury or loc, c/o left lower back pain w/ radiation down left leg, left medial knee pain and left ankle/top of foot pain."* It was noted that she had difficulty with left knee flexion and there was left knee swelling, but there was no erythema or surrounding edema on examination. X-rays of the left knee, 3 views, were taken at that time with the report noting that there were comparison films from 6-11-15. The x-ray findings were no acute osseous abnormality and the lateral view demonstrated small patellofemoral joint effusion. Petitioner was diagnosed with left ankle, foot and knee sprain, low back strain and left knee effusion. She was discharged with a left knee immobilizer and crutches. (PX 8)

Petitioner was seen at Concentra Medical Center, at Respondent's request, on one occasion, on 8-16-16, wherein she complained of shoulder, back and left knee pain. (PX 7) She complained of left knee sharp pain and stiffness and on examination the appearance of the knee was normal over the lateral and medial joint line. She denied previous left knee injuries. She was diagnosed with a left knee sprain. (PX 7)

On 8-15-16, Petitioner saw her PCP, Dr. Cedrick Coleman (PX 9 and RX 4) and her orthopedic specialist, Dr. Jay Brooker. (PX 6 and RX 5)[1] When Petitioner presented to Dr. Coleman on 8-15-16 she had complaints of being involved in a MVA on 8-12-16 resulting in lower back pain and bruising in knee; on examination she was noted to have bilateral knee pain, tenderness to palpation, pain to passive movement and a full leg splint on the left knee.[2] The diagnosis included left knee injury as well as osteoarthritis (OA). Dr. Coleman prescribed Flexeril for the low back ache to be added to the medications Petitioner was already on prescribed on 7-21-16, when she was seen for complaints of ... *"1.Pain in knees. 2. Follow up visit. 3. Unable to go to work today."* (RX 4, pg 33) On that visit, pre-dating the accident on 8-12-16 by 3 weeks, the examination once again noted

[1] It is noted that the medical records for both providers offered into evidence by Respondent contain service dates prior to 8-12-16 and there are relevant references to the lower extremities.

[2] In Dr. Coleman's chart there is a recorded MVA pre-dating the 8-12-16 accident: the 7-7-16 chart note from Dr. Robert Balk makes note that petitioner gave a history of being hit by a car while she was driving the bus earlier that day. (RX 4, pgs 92-93)

bilateral knee pain, tenderness to palpation, pain to passive movements; her diagnosis included OA and a right knee injury. (PX 9) Dr. Coleman's records contain a diagnosis of OA intermittently included as of 3-12-14 depending on the nature of the office visit. Petitioner had been seen in follow up by a rheumatologist, Dr. Shri Agrawal, on 10-29-15, wherein it was noted that she was diagnosed with *"Arthralgia of both knees"*. (RX 4, pgs 97-98)

When Petitioner presented to Dr. Brooker on 8-15-16 the progress note states... *"HPI: Donna Bankston is here in follow up for her left knee. This time, unfortunately, she was hit from behind in her bus by a motor vehicle so hard that the bus actually moved 5 feet. When she jumped up initially she didn't necessarily have difficulty with ambulation, but shortly thereafter she noticed bruising, swelling, difficulty with ambulation."* (PX 6)[3] She was diagnosed as sustaining either an MCL sprain or meniscal injury, so she was referred for an MRI of her left knee. The MRI on 8-17-16 noted small amount of fluid within the suprapatellar bursa and likely a type 2 strain of the MCL (medial collateral ligament). In follow up with Dr. Brooker on 9-14-16, he opined that the MRI confirmed a MCL sprain... " *which is the work-related portion of this."* A knee immobilizer was dispensed for the left knee and Petitioner was to wear it for a couple of weeks before starting physical therapy. A right knee brace was ordered to help the flair up/exacerbation of her existing right patellar instability caused by the left knee ligament injury. (PX 6, script dated 9-14-16)[4]

By 9-20-16, Petitioner started therapy for her lower back at ATI. The left leg was also included in therapy, for the diagnosed MCL sprain, after 10-7-16, per the ATI script form. (PX 6) On 10-7-16, Petitioner presented to ATI with a history of... *"States she was late as she was trying to fix a leaking water bed. Pt reports falling down the stairs when attempting to let water out during move. "It was 7 steps and I had no handrail to hold onto." "I'm not ok but I got to do what I got to do".* (PX 4) After that day the p.t. notes document various bilateral knee complaints until the visits in December, 2016, where it is noted that her knees feel okay or they are not referenced at all. Petitioner was discharged by ATI on 12-16-16. (PX 4)

Dr. Brooker's records (RX 5) also contain an initial evaluation at ATI on 6-21-16 (7.5 weeks prior to the 8-12-16 work injury), for what was diagnosed as patellofemoral syndrome, bilaterally. The assessment documented multiple symptoms and deficits related to Petitioner's knees, as well as noting the following: her primary complaint of bilateral knee pain, right greater than left behind the knee cap; the nature of the injury noted as right knee pain with both knees then starting to hurt for about a year. (RX 5)

On 12-6-16, Dr. Brooker cleared Petitioner to return to full duty work as of 12-19-16. The ATI discharge that Dr. Brooker relied upon for the full duty release describes the left knee injury as left knee sprain and left MCL sprain. (PX 6) Petitioner returned to Dr. Brooker on 1-23-17 for complaints of flare-up, swelling and difficulty walking due to the right knee. She was given an injection in the right knee. (PX 6) Petitioner next returned to Dr. Coleman on 3-15-17, where she ... *"complains of knee pain, she says today the right knee is really hurting."* She was given a referral to an orthopedic surgeon for a second opinion. (PX 9)

Thereafter. Petitioner sought an evaluation at Chicago Center for Sports Medicine and came under the care of Drs. Dore DeBartolo and Gregory Primus. (PX 3) Petitioner first presented to Chicago Center for Sports

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[3] The 7-11-16 chart note from Dr. Brooker, for a follow up appointment for both knees, also describes a July, 2016 accident by adding that she had a an episode at work where her bus was hit and her knees hit the dashboard and this caused a flare up a little bit more of her condition. (RX5, pg 6)

[4] Petitioner saw Dr. Brooker on 6-10-16, wherein improving patellar tracking in the right knee was the concern and therapy was prescribed.

Medicine on 3-21-17 and filled out a Medical History Information form. (PX 3) Therein she identified the problem or injury as regarding her right knee (from an injury sustained at work when she struck her knee on a farebox). Petitioner was seen and treated by Dr. DeBartolo for the right knee on 3-21-17, 4-25-17 and 6-27-17; she also was evaluated by Dr. Primus for the right knee on 8-14-17. She was referred to and initially evaluated at Athletico on 4-11-17 for a diagnosis of right knee stiffness. At therapy, Petitioner described bilateral knee pain, right greater than left, secondary to OA. (PX 3)

The first examination regarding Petitioner's left knee by Dr. DeBartolo was on 7-11-17, when the progress note states: *"50 year old female presents with c/o left knee pain Mechanism of Injury. No injury... c/o There is swelling that is. c/o There is locking and catching that is. c/o There is popping. c/o There is stiffness and loss of motion. c/o Prior knee injections with 9/2016 12/2016 cortisone."*[5] At that visit, x-rays were taken of the left knee and OA was diagnosed; a synvisc injection was given and Petitioner was referred to p.t. for the diagnosed bilateral knee OA. On 9-5-17, Dr. DeBartolo noted Petitioner received no relief from the gel injection and an MRI was prescribed. On 9-25-17, weight bearing x-rays were taken showing degenerative changes moderate medial joint space narrowing and osteophytes at the medial and lateral femur; diagnosis of OA[6] of the left knee was made, with a left knee chondral lesion also diagnosed from the MRI. Petitioner was referred to Dr. Primus for surgical consultation. (PX 3)

On 9-25-17, Dr. Primus performed an initial consultation on Petitioner's left knee.[7] Dr. Primus recorded a history of Petitioner being in pain for over a year; there was an injury due to a MVA while working when she sustained a direct collision and injured her left side, especially her left knee and shoulder. On exam, all ligaments appeared stable, negative patella grind - negative McMurray's; weight bearing x-rays showed age – appropriate signs of mild degenerative changes; upon review of the 9-22-17 MRI scan a diagnosis was rendered of most likely a knee strain/contusion with chondrosis related to her work injury MVA. At that time surgery was recommended in the form of: *"VA Chx, with possible Mfx and or osteochondral transplant."* To date, Petitioner has not had any surgery to the left knee, as medical authorization for same has not been provided by Respondent.

Dr. Primus testified via evidence deposition in this matter on 10-2-18. (PX 2) Dr.Primus is a board certified orthopedic surgeon, as of 2010, trained in sports and knee and shoulder reconstruction . Dr. Primus testified that on his initial left knee examination of Petitioner on 9-25-17 there was trace effusion noted. Petitioner was tender along the medial joint line and ROM was 0 to 120 degrees. Normal flexion has a range anywhere from 135 to 155 degrees, and can be limited due to chondromalacia of the patellofemoral joint. (PX 2, pg 54-56)[8] Dr. Primus testified that the x-rays taken at his office demonstrated what he described as age-appropriate signs of mild degenerative changes. Dr. Primus testified that Petitioner's symptoms and diagnosis were consistent with a trauma-type injury and causally related to the work injury on 8-12-16. The basis for that opinion was … *"based on the history that she reported. It's based on her history that predated the injury in her recent function*

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[5] The Arbitrator having reviewed the entire record for service dates of 9/2016 and 12/2016 does not find any reference to left knee cortisone injections.

[6] Dr. Primus testified osteoarthritis is most commonly defined by x-rays as it is bone changes; the bone changes have to occur because there's been cartilage loss–once the cartilage loss occurs with time the bone reacts to that. (PX2, pg 43-44)

[7] It is noted that Dr. Primus had treated Petitioner for right knee complaints before and after this date as well as for left shoulder complaints, but those are not in issue for these proceedings.

[8] The only definitive ROM flexion findings were recorded before the 8-12-16 accident and are contained in the ATI p.t. progress reports which identify limited flexion in June and July of 2016. (RX5, pg 18-20)

and activity level predating the injury in question, also based on our examination and objective findings." (PX 2 pgs 15-17)

On cross-examination, Dr. Primus was unable to specify what type of trauma to Petitioner's left knee actually occurred on 8-12-16. He could not state that the mechanism of injury was due to some direct left knee contact with the bus interior. He was relying on Petitioner's history... *"that she related a time that was associated with trauma that there was some injury to her left knee allows me to link that injury to the injury mechanism."* (PX 2, pgs 26-31)

Dr. Primus testified that he could not opine that Petitioner sustained an aggravation to any pre-existing chondromalacia in the left knee as a result of the 8-12-16 accident. He testified that a fall could aggravate such a condition or any increased pressure on the cartilage, to include sitting too long, any direct surface contact injury, strain or anything that causes inflammation to the knee; the kneecap itself hitting the end of the femur, called the trochlea, could be a type of impact that can cause an aggravation of chondromalacia. (PX 2, pgs 31-34) Dr. Primus testified that Petitioner's E.R. history of jumping up from her seat to evaluate the accident and the quick jerking motion of that act could be within the scope of reason as an acceptable mechanism of injury, resulting in her complaints regarding the left medial knee and the subsequent 8-17-16 MRI findings; he explained that would require ... *"someone jumping up in a way to where they're placing their body weight on their knee causing their knee to go inward in a way to where it stretches out their ligaments."* (PX 2, pgs 39-40) The Arbitrator, having viewed the video footage which showed that Petitioner got up and exited her seat after the accident without any difficulty, trauma or limitation, finds that actions consistent with Dr. Primus' description of the movements needed to have caused any left knee injury in the process of getting up and out of the bus driver's seat did not occur.

Dr. Primus testified that the 8-17-16 MRI findings of a small amount of fluid in the suprapatellar bursa (located above the knee cap) would be separate from Petitioner's chondromalacia condition that he was referencing, which was actually in her kneecap. (PX 2 at 37)[9] He opined that a lot of that MRI's findings were related to the suprapatellar swelling and he was unable to determine the cause of it. (PX2, pgs 41-43) If the MRI findings were indicative of a MCL strain, which Dr. Primus did not confirm or accept as a diagnosis from that MRI, that type of condition would not evolve into the chondromalacia of the patella which necessitates the proposed surgery. (PX 2 at 39-42, 57-59) Subsequently, Dr. Primus opined that Petitioner suffered a direct impact/contusion to the patellofemoral joint that initiated a process that over time worsened her left knee cartilage. Said contusion could have occurred from many different angles, it could have been a direct contusion, it could have been from the side. However, he also testified... *"In terms of the outer forces that contributed to that in the act of a motor vehicle accident, I can't describe that."* (PX 2 pgs 69-70)

Dr. Primus testified that he diagnosed left knee cartilage lesion[10] or cartilage wear and accordingly has recommended an arthroscopic evaluation of that cartilage damage. Depending on the size and extent of the damage, he would either perform some form of cartilage transplant as well as a synovectomy. (PX 2 pg 18)

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[9] The finding on the 8-17-16 MRI of a possible MCL injury would require a valgus stress where the knee is hit from the outside causing the knee to go inward.(PX 2, pg 37-40) The video footage depicting the accident demonstrates that motion does not occur. (RX 3)

[10] The diagnosis is also synonymous with left knee chondromalacia, which Dr. Primus defined as altered cartilage that can be degenerative in nature, wear and tear, or can be an inflammatory process that causes damage to the cartilage. (PX 2, pg 29-30)

Dr. Primus testified that he was not aware of any prior injury, left knee symptoms, or any prior work up or treatment regarding Petitioner's left knee before the 8-12-16 accident. (PX2, pg 60-61) The mere fact that she had a prior left knee x-ray would not change his opinions as to the diagnosed injury occurring on 8-12-16 and the necessity for surgery therefrom; what would be relevant is if she had pain predating the 8-12-16 injury and if she was working with some dysfunction in that knee. (PX 2 pg 23-26) Dr. Primus did testify that if there were prior symptoms and/or prior treatment to Petitioner's left knee that predated 8-12-16 it would possibly cause him to revise his testimony as to his causal connection opinions testified to. (PX 2 at 61)

Dr. John Cherf testified via evidence deposition on April 1, 2019 and August 28, 2019, at the request of Respondent. (RX 1 and RX 2) Dr. Cherf is a board certified orthopedic surgeon whose area of practice largely concentrates on knee related conditions. He saw Petitioner for a §12 examination, which took place on 12-27-17. X-rays were taken on 12-27-17 and were said to be indicative of early OA of both knees, with early spurring in all three knee compartments and a little sclerosis. Dr. Cherf opined that those 2017 x-ray findings were 100 percent independent of any sequela from the 8-12-16 accident. (RX 1-RX 2, pgs 13-14,31-36,109-110) Addendum reports were prepared after additional medical records were forwarded for review. (RX1; RX2) Dr. Cherf opined that at best Petitioner sustained a minor / very low energy left knee contusion as a result of the 8/12/2016 accident. This was based on Petitioner's history. (RX 1-RX 2, pgs 35, 37-45, 53-61, 65-67,80-84) As of the exam of 12/27/2017, no further work up was necessary, nor was there any or sequela of an injury to the left knee related to the 8-12-16 accident. Petitioner was at MMI for the left knee injuries sustained. (RX1, RX2 pg 49)

Petitioner testified that she would pursue the recommended surgery if it was awarded. Her knee is hurting badly and surgery appears to be her only option. She continues to work. She could not recall if she saw a doctor regarding her left knee prior to August 12, 2016. There may have been some minor treatment, which would be shown in the medical records.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUE WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING REGARDING HER LEFT KNEE CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

Petitioner failed to prove that her current condition of ill-being regarding her left knee (for which surgery is recommended) is causally related to the injury.

This finding is based on the accident video, Petitioner's testimony, the medical records and the persuasive testimony of Dr. Cherf.

First, the accident video does not show that Petitioner suffered any direct left knee trauma in the accident. Her left knee appears flexed at the time of the accident and it does not appear to move. Her knee does not come in contact with the interior of the bus either at the time of the accident or subsequent thereto. Petitioner could not explain how her knee was injured. Her knee does not hit the farebox as is reported in RX 7. If she hit her knee on something causing injury and pain, she would remember. No trauma = no causal.

The video also does not show any dramatic movements by Petitioner subsequent to the accident which arguably could have caused injury to her left knee that would lead to a chondral lesion as described by Dr. Primus. She gets up and moves about in a normal and effortless fashion, not jumping and making a quick jerking motion as she described in the ER at Christ Hospital. No jumping and no jerking motion = no causal.

Petitioner's testimony does not support her claim. On Cross-Examination, she said she did not know how she injured her knee. There is no consistent history in the medical records and accident reports regarding the mechanism of injury.

Dr. Primus endorsed causation on the basis of Petitioner's history of an injury on 8/12/2016 (the exact mechanism being unknown) and her lack of symptoms before the accident. The video belies any trauma having occurred and the medical records clearly show that Petitioner's left knee was significantly symptomatic before the injury. Therefore, Dr. Primus' opinions are not persuasive on the issue of causation.

Dr. Cherf's opinions on causal connection are persuasive an comport with the evidence adduced. At most, Petitioner suffered a minor contusion as a result of the accident (albeit with no trauma shown on the video). Petitioner was at MMI by the time she was seen by Dr. Cherf in December of 2017 and was not in need of any further causally related medical care for her left knee.

The Arbitrator is persuaded by Dr. Brooker's release of petitioner to RTW at full duty as of December 19, 2016, based upon her discharge by ATI. Petitioner's left knee sprain and left knee MCL sprain had resolved by that time.

Petitioner has failed to prove a causal connection exists between the accidental injury of 8/12/2016 and any left knee condition that should be addressed by the surgery offered by Dr. Primus. Based upon the Record herein, the Arbitrator finds that Petitioner suffered a left knee sprain and left knee MCL sprain as a result of the accident and the said injuries have resolved as of 12/19/2016, per Dr. Brooker's records.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, AND ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS:

Based upon the Arbitrator's finding regarding causation, above, no medical expenses are awarded and Petitioner is not entitled to any prospective medical care regarding her left knee. Petitioner's claims for same are denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Restrepo,

Petitioner,

21IWCC0109

vs. NO: 15 WC 32936

Elite Staffing, Inc. and Summer House,
a subsidiary of Lettuce Entertain You Enterprises, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical expenses and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission notes several clerical errors in the Conclusions of Law section of the addendum to the Arbitrator's decision. On p.8, third full paragraph, the Arbitrator mistakenly referred to the "*1004* Supreme Court decision"; this should actually be "*2004*". In addition, on p.9, third full paragraph, the Arbitrator indicated that "... the Commission cannot deny compensation based on a *dong* that both a Petitioner and a co-worker were aggressors..." The Commission corrects this to read "... the Commission cannot deny compensation based on a *finding* ..."

Furthermore, the Commission corrects the case caption to show Respondent in this case as "Elite Staffing, Inc. and Summer House, a subsidiary of Lettuce Entertain You Enterprises, Inc." The Commission notes that these were the named Respondents in Petitioner's "Second Amended" Application for Adjustment of Claim filed 12/7/15 and admitted into evidence as Arb.Ex.2. The Commission also notes that at the commencement of trial, the Arbitrator specifically referenced the above two entities as the Respondents in this case pursuant to the Second Amended Application. (T.4).

21IWCC0109

Finally, the Commission strikes the photographs attached to Petitioner's Statement of Exceptions given that they were not admitted at the time of the hearing at arbitration and are clearly an attempt to submit additional evidence on review in contravention of §19(e) of the Act.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 8/23/18 is affirmed and adopted with changes as stated herein.

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

DATED: MAR 5 - 2021
o: 1/12/21
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RESTREPO, DANIEL
Employee/Petitioner

Case# **15WC032936**

ELITE STAFFING INC
Employer/Respondent

21IWCC0109

On 8/23/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1497 MORICI FIGLIOLI & ASSOCIATES
CARL A VIRGILIO
150 N MICHIGAN AVE SUITE 1100
CHICAGO, IL 60601

6020 GOLDBERG SEGALLA LLP
MEGHAN P MURRAY
311 S WACKER DR SUITE 2450
CHICAGO, IL 60606

21IWCC0109

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Restrepo,
Employee/Petitioner

v.

Elite Staffing, Inc.,
Employer/Respondent

Case # **15** WC **32936**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **June 20, 2018 and proofs were closed on July 31.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0109

FINDINGS:

On the date of accident, **9/29/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**13,313.40**; the average weekly wage was $**380.38**.

On the date of accident, Petitioner was **21** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER:

Petitioner failed to prove that an accident occurred arising out of and in the course of his employment with Respondent on September 29, 2015. Therefore, Petitioner's claim for compensation is denied.

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

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

Robert M. Harris

Signature of Arbitrator

August 23, 2018
Date

ICArbDec19(b)

AUG 23 2018

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

21IWCC0109

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

Daniel Restrepo,	)	
	)	
Petitioner,	)	
	)	NO. 15 WC 32936
vs.	)	Chicago – Robert Harris
	)	
Elite Staffing, Inc.	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Daniel Restrepo, ("Petitioner") testified he was employed with Elite Staffing, Inc., ("Respondent") as a line cook at the Summer House Santa Monica restaurant on September 29, 2015. (T. 16)

PETITIONER'S TESTIMONY

Petitioner testified regarding an incident that occurred with another co-worker, Heriberto Cruz Juarez, on September 29, 2015. Petitioner testified that as a line cook, he worked at his own station to prepare food, ingredients, and complete customer requests. (T. 16) Food ticket orders would arrive at his station and he would fulfill those orders. (T. 17-18) Petitioner testified that at the time of restaurant closing, he would clean his station and the walls, floors, and cooler of the restaurant. (T .19) At closing time, employees could choose to take a break or start cleaning right away and leave early. (T. 19) Petitioner testified that on September 29, 2015, he started the cleaning process around 10:00 p.m. (T. 20) Petitioner testified he grabbed "tons of buckets of water to make sure everything gets rinsed properly." (T. 20) Petitioner testified Heriberto also started cleaning, which was normal behavior. (T. 20-21) Petitioner testified he started dropping water to rinse his station when he "accidentally" spilled water on Heriberto's shoes. (T. 21)

Petitioner testified Heriberto looked at him and said, "I am going to return it to you." (T. 21) Petitioner testified Heriberto picked up a deep fryer basket and tried to hit Petitioner with the basket. (T. 21) Petitioner testified Heriberto did not hit him hard with the fryer basket, and Petitioner thought Heriberto "was joking." (T. 21) Petitioner testified Heriberto did not touch him physically while inside the restaurant. (T. 45)

Petitioner testified there was an improvised room or storage unit outside in the alley which holds towels, degreasers, and soap. (T. 55) Petitioner testified he was walking to the storage unit in the alley when Heriberto followed him outside. (T. 48) Once outside, Petitioner testified he heard the person behind him say "Hey, what's up" in Spanish. (T. 21) Petitioner testified he turned around and was hit in the face. (T. 21) Petitioner fell to the ground, tried to stand up, but could not stand because he was being kicked. (T. 21) Petitioner testified that about two minutes later Heriberto was gone. (T. 21) Petitioner testified he could not stand up right away and noticed his ankle grew in size. (T. 22) Petitioner testified he called the police and notified his managers on duty, Adam Biolchin and Chef Jacob. (T. 22)

Petitioner testified he usually carried a knife with him while working at Summer House. (T. 44) Petitioner testified he left the knife at home that day and did not have the knife with him on September 29, 2015. (T. 45)

Petitioner testified repeatedly he never had any issues, arguments, or bad relationships with co-workers or supervisors his entire employment at Summer House. (T. 24-25; 42-43) Petitioner testified he never broke any rules for employee conduct at work and that he was never reprimanded by management. (T. 42-44) When asked about a specific co-worker, "Arturo", Petitioner admitted he had incidents with Arturo, and testified that he would always report these issues to Chef Jacob. (T. 25) Petitioner testified that he received "several raises" during his nine-month employment at Summer House and that a supervisor named Chef Ben "always" complimented his work (T. 25) On cross examination, Petitioner could not explain why an increase in wages was not documented on Respondent's Exhibit 1: Petitioner's wage statement. (T. 50)

Petitioner testified he was ultimately terminated by Elite Staffing and Summer House. (T. 38) Petitioner testified that at the time of trial, he worked as a restaurant manager at a restaurant in Oak Park. (T. 38) Petitioner testified it is a job that requires him to be on his feet for typically 9 hour days. (T. 39) Petitioner testified that sometimes his right ankle starts swelling up again and

he has some pain. (T. 40) Petitioner testified his ankle feels "a little funny" at the end of a 9-hour shift. (T. 40) Petitioner testified at the time of trial, he ran an adoption agency called AB Adoption with this girlfriend. (T. 35; 51) Petitioner testified AB Adoption is not a business, is not registered or licensed with the city, and does not make a profit. (T. 51-52) Petitioner testified the adoption agency was located in his residence, an apartment on the second floor. (T. 37) Petitioner testified AB Adoption has a Facebook page. (T. 53) Petitioner testified people contact him to find stray animals that are injured. (T. 53)

HERIBERTO CRUZ JUAREZ'S TESTIMONY

Heriberto Cruz Juarez appeared for trial and testified that he was an employee at Summer House Santa Monica for six months. (T. 62) Heriberto testified he was friendly with other workers and that he would help them with cleaning and tasks at different stations. (T. 62-63) Heriberto testified he worked with Petitioner his entire employment at Summer House. (T. 63) Heriberto testified that Petitioner was sometimes angry with the other workers. (T. 63) Heriberto testified Petitioner would boss around other workers, would try to give other workers orders, and would tell them to move faster. (T. 65) Heriberto specifically mentioned a co-worker Octavio to whom Petitioner would give orders. (T. 65)

Heriberto testified that on September 29, 2015, he was "reloading and getting ready to go clean." (T. 66) Heriberto testified Petitioner walked up to him and emptied a bucket of water on Heriberto's shoes. (T. 67) Heriberto asked Petitioner what was going on and Petitioner did not say anything. (T.67) Petitioner laughed and emptied a second bucket of water on Heriberto. (T. 67) Petitioner waked away and threw a third bucket of water on Heriberto. (T. 67-68) Heriberto testified he told Petitioner to stop throwing water on him. (T. 71; 67) Heriberto testified that Petitioner intentionally threw water on him and he felt Petitioner was trying to start a fight with him. (T. 68) Heriberto asked Petitioner if he had a problem, Petitioner said that he did, and agreed to go outside. (T. 68-69) Petitioner and Heriberto testified Petitioner turned around and walked outside first. (T. 69) Heriberto testified he did not want to go outside, but he felt that Petitioner wanted to fight him and Petitioner was not going to stop throwing water on him until Heriberto reacted to him. (T. 71) Heriberto testified it was his impression Petitioner went outside to fight and Heriberto felt forced to go outside to fight. (T. 73) Heriberto testified he did not force Petitioner to go outside and the only reason he went outside was in reaction to Petitioner's exit to

the alley. (T. 76; 83) Heriberto denied striking Petitioner with a deep fryer basket. (T. 69) Heriberto testified there was no physical contact inside the restaurant and the first point of physical contact was made once both workers were outside. (T. 69-70) Heriberto testified once they were outside in the alley, he pushed Petitioner, then Petitioner threw several punches at him. (T. 70) Heriberto hit Petitioner, who fell to the ground, stood up again, and started throwing more punches. (T. 82) Heriberto hit Petitioner again and the fighting stopped. (T. 82) On cross examination, Heriberto confirmed that the floor was not wet at the time of the incident. (T. 76) Heriberto testified that this incident was not a joke between him and Petitioner. (T. 76-77) Heriberto testified he knew this was not a joke because Petitioner threw water on him three times despite his requests for Petitioner to stop. (T. 77)

Heriberto testified that his friend and co-worker Octavio saw the incident in the alley, saw Petitioner try to use the knife, but Petitioner dropped the knife during the altercation. (T. 72-74).

ADAM BIOLCHIN's TESTIMONY

Adam Biolchin testified that he has worked as a front of house manager for Let Us Entertain You for approximately 5 years. (T. 85-86) Adam testified he has not worked for Elite Staffing in any capacity. (T. 86) Adam was the front of house manager at Summer House Santa Monica on September 29, 2015. (T. 86) Adam testified it was his responsibility to manage labor, oversee the staff, and handle guest complaints and employee issues. (T. 86) Adam testified that he was at the restaurant on the date of accident and was called out of his office once the incident happened. (T. 93-94) Adam testified he found Petitioner in the back alley outside of the restaurant. (T. 94) Adam brought Petitioner into his office immediately after the incident where Heriberto and Petitioner provided the exact same story. (T. 98) **Adam testified that Petitioner told him immediately following the accident that he purposely splashed water on Heriberto. (T. 95) Adam testified Petitioner never mentioned that Heriberto hit him with the fryer basket. (T. 98) Adam testified that Petitioner told him he (Petitioner) went outside in the alley to fight Heriberto. (T. 95)**

Adam testified that he worked with Heriberto for the length of his employment. (T. 92) Adam testified Heriberto was a quiet employee who did not talk very much. (T. 92) Adam confirmed Heriberto did not have any issues with other employees and there were no reported arguments between Heriberto and other workers. (T. 92) Adam testified Heriberto did not have

any kind of personal issues conflicting with work and that Heriberto was never reprimanded at work. (T. 92-93) Heriberto was never moved from one position to another. (T. 93)

Adam testified that there was a storage room for cleaning supplies but this was located "directly inside the restaurant," and employees would not go outside to access the storage room. (T. 100; 103) Adam testified the employees would have no reason to go outside. (T. 103) **Adam testified that anything that happened in the alley would not be related to employee work duties.** (T. 94) Adam testified workers knew they should not be in the alley because they had a lot of issues with neighbors behind them, so management actively tried to keep staff from congregating in the alley. (T.94) Adam testified that the workers knew that the alley was not restaurant property. (T. 94)

Adam testified he worked with Petitioner throughout his entire employment at Summer House. (T. 87) Adam testified Petitioner had several conflicts with other employees on the line and was constantly moved from one position to another. (T. 87 -88) Adam testified that Lettuce Entertain You does not suspend employees as a form of disciplinary action and as such Petitioner was never suspended for these issues. (T. 102) Adam testified if an employee was having an issue with a particular place or position and there was an option to move the employee elsewhere, Lettuce Entertain You would make all necessary efforts to move the employee. (T. 102) Adam testified Petitioner was made aware of reasons he was moved from one position to another. (T. 90) Adam testified Petitioner was told about these conflicts from the chefs at the restaurant, including Chef Ben Goodnic and Chef Geoffrey Yahn. (T. 89) Adam testified Petitioner had other issues outside of work including a girlfriend calling and harassing the chefs while Petitioner was at work. (T. 89) Adam testified Petitioner would use the restaurant's phone for personal calls. (T. 89) Adam testified Petitioner was reprimanded for these incidents. (T. 89)

Adam testified that after the fight, Petitioner kept insisting he was going to call his uncle to have "his uncle deal with Heriberto." (T. 95) Adam testified Petitioner said he "wanted to get Heriberto arrested" to "make sure his medical bills were paid." (T. 96) Adam testified that he was certain Petitioner said this. (T. 96) Adam conducted an incident investigation, spoke with Heriberto and Petitioner, and inspected the area where the incident occurred. (T. 96-97) Adam testified there were no signs of an altercation inside the restaurant. (T. 97) Adam testified there

was no sign of blood inside the restaurant. (T. 97) Adam testified Petitioner was bleeding when he saw him outside after the incident.

Adam confirmed Petitioner carried a knife in his front pocket every day at work. (T. 91-92) **Adam testified Petitioner did not receive a raise while he worked at Summer House.** (T. 90) Adam testified that the chefs had control over who would get a raise in the back of the house, and the chefs would not have given Petitioner a raise because they had so many issues with him. (T. 91) Adam testified that after Petitioner was terminated, Petitioner called and asked to speak with chef Ben, who refused, and did not want to talk to Petitioner. (T. 91) Ben told Adam that Petitioner was not a good employee and he was happy that Petitioner was terminated. (T. 91)

MEDICAL TREATMENT

Petitioner testified that following the incident, his girlfriend drove him to Presence St. Joseph Hospital. (T. 26-27) Petitioner was evaluated at Presence St. Joseph Hospital on September 30, 2015 and diagnosed with an unspecified closed fracture of the right ankle and chest contusion. (PX 1) Petitioner was provided crutches, prescribed ibuprofen, and referred to an orthopedic physician, Dr. Gabriel Levi. (PX 2) Petitioner presented to Dr. Levi at Orthopaedic and Rehabilitation Centers, S.C. on October 2, 2015. (PX 2) Dr. Levi diagnosed Petitioner with a right ankle fracture posterior malleolus and right bruised ribs. (PX 2) A right ankle cast was applied. (T. 31) Dr. Levi placed Petitioner off work until the next evaluation and prescribed tramadol and gabapentin. (PX 2) Petitioner returned to Dr. Levi on November 6, 2015 and reported improvement in right ankle pain. (PX 2) On November 20, 2015, Petitioner returned to Dr. Levi; the short right ankle cast was removed and Petitioner was prescribed a right short CAM boot. (PX 2) Dr. Levi prescribed Terocin patches, Terocin cream, gabapentin, hydrocodone, six weeks of physical therapy, and off work restrictions for an additional six weeks. (PX 2) On January 8, 2016, Petitioner returned to Dr. Levi and reported improvement in pain with physical therapy. (PX 2) Petitioner underwent an x-ray of the right ankle that revealed a healed posterior malleolus fracture. (PX 2) Dr. Levi recommended Petitioner discharge use of the CAM boot and prescribed six of physical therapy, tramadol, Norco, meloxicam, and topical opioid medications. (PX 2) On February 5, 2016, Petitioner returned to Dr. Levi and reported improvement in right ankle pain to a 3/10. (PX 2) Dr. Levi prescribed a CPM machine, cold compression therapy, six weeks of physical therapy three times per week, tramadol, topical opioid cream, and placed Petitioner off

work an additional six weeks. (PX 2) On March 11, 2016, Petitioner reported he was doing well with intermittent right ankle pain. (PX 2) Dr. Levi released Petitioner to full duty work without restrictions and prescribed meloxicam, omeprazole, and tramadol. (PX 2) On May 3, 2016, Petitioner attended his last office visit with Dr. Levi. (PX. 2) Petitioner reported minimal pain at 1-2/10 and confirmed that he was currently working valet and was on his feet all the time. (PX 2) Dr. Levi released Petitioner to full duty work and prescribed meloxicam, omeprazole, and tramadol. (PX 2) Petitioner did not return for additional treatment. (PX 2)

UTILIZATION REVIEW

Respondent obtained Utilization Reviews to evaluate the medical necessity of health care services provided to Petitioner allegedly related to the September 29, 2015 incident. (RX 2) Dr. Moshe Lewis is a board certified Physical Medicine and Rehabilitation physician who analyzed Petitioner's complete treatment records and prepared several Utilization Review reports according to the Official Disability Guidelines. (RX 2) Dr. Lewis determined that the Tramadol, Gabapentin, and drug screening prescribed by Dr. Gabriel Levi on October 2, 2015 were not medically necessary and appropriate. (RX 2) Dr. Lewis determined the 20 Terocin patches, Terocin cream, stool softener, Gabapentin, and hydrocodone prescribed on November 20, 2015 were not medically necessary and appropriate. (RX 2) Dr. Lewis determined the CPM device, Vascutherm/game ready cold therapy system prescribed from December 1, 2015 through February 27, 2016 were not medically necessary and appropriate. (RX 2) Dr. Lewis modified the 12 weeks of physical therapy prescribed to 3 weeks of physical therapy per Official Disability Guidelines. (RX 2) Dr. Lewis determined the hydrocodone/acetaminophen, Omeprazole, Meloxicam, and an additional 12 weeks of physical therapy prescribed on January 8, 2016 were not medically necessary and appropriate. (RX 2) The opioid compound cream prescribed on January 13, 2016 was also not medically necessary or appropriate. (RX 2) Dr. Lewis determined the Tramadol and additional 12 weeks of physical therapy prescribed on February 5, 2016 and the amantadine topical prescribed on February 18, 2016 were not medically necessary and appropriate. (RX 2) Dr. Lewis determined the Tramadol, Meloxicam, Omeprazole prescribed on March 11, 2016 and the opioid compound cream prescribed on March 14, 2016 were not medically necessary or appropriate. (RX 2) Dr. Lewis determined the opioid compound cream, Meloxicam, Omeprazole, and Tramadol prescribed on May 3, 2016 were not medically necessary and appropriate. (RX 2)

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to disputed issue (C) Whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes the claimed accident did not arise out of and in the course of Petitioner's employment because Petitioner was the aggressor of the altercation; therefore, this altercation negates all causal connection between the work and the injury; Petitioner took himself out of the scope of employment by initiating an altercation on off work premises; and, the altercation was not proven to be based on any work-related reason.

An injury is compensable under the Illinois Workers' Compensation Act only if the Petitioner proves by a preponderance of the evidence that the incident occurred in the course of and arose out of employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193,203 (2003). An injury arises out of employment if it results from a risk that originates in, or is incidental to, the employment. *Sisbro,* 207 Ill.2d at 203.

The law regarding fights/assaults at work is clearly set forth in the 1004 Supreme Court decision in *Franklin v. Industrial Comm'n,* 211 Ill.2d 272 (2004). In *Franklin,* the Court held that "When a fight at work arises out of a purely personal dispute, resulting injuries do not arise out of the employment. On the other hand, fights arising out of disputes concerning the employer's work are risks incidental to employment, and resulting injuries are compensable. However, injuries to the aggressor in such a fight are not compensable. We refer to the rule that an aggressor's injuries are not compensable as the 'aggressor defense.'" (citations omitted). Here, the Arbitrator finds and concludes both that the fight at work was not proven to arise out of disputes concerning the employer's work and Petitioner was the aggressor in this dispute. Therefore, compensation is denied based on both conclusions.

The law in *Franklin* further indicates, "...the aggression negates all causal connection between the work and the injury, so that the work is neither 'the proximate nor a contributing cause of the injury.' Instead, the cause of the injury is the aggressor's 'own rashness.'" *Franklin,* 211 Ill.2d at 280. Aggressive acts by the claimant may break the causal connection. It is not within

the intent of the Act that an employee be protected against the consequences of a fight in which he was the aggressor.

The "aggressor defense" applies only when the claimant's conduct negates the causal connection between the employment and the fight. The question of who made the first physical contact, while important to determining whether that has occurred, is not decisive. *Franklin,* 211 Ill.2d at 282. Rather, a claimant's conduct must be judged in light of the totality of the circumstances. The circumstances obviously include the conduct of the other participant or participants in the fight. Thus, whether a claimant's conduct rises to the level that triggers the "aggressor defense" depends in large part on the degree to which the other participant in the dispute has provoked [him[."

Whether a claimant is an aggressor is a question of fact. Only one participant in a fight may be deemed an "aggressor." The Supreme Court in *Franklin* also noted that, "A typical fight involving two employees has only one aggressor." Further, "When one employee escalates the dispute, he changes the circumstances and typically makes it reasonable for the other employee to respond in kind." The Court acknowledged that "a claimant's conduct must be judged in light of the circumstances, and the circumstances include the conduct of others."

While it may very well be a difficult task, the *Franklin* Court held that the Arbitrator/Commission must decide whether claimant was the (sole) aggressor. Further, because of this legal principle, the Commission cannot deny compensation based on a dong that both a Petitioner and a co-worker were aggressors.

Further, the Supreme Court has found that an employee is the aggressor to an altercation simply through antagonistic words or actions that **might** cause a physical altercation. *Ford Motor Co. v. Industrial Comm'n,* 78 Ill.2d 260, 263 (1980) *citing Container Corp. of America v. Industrial Comm'n*, 401 Ill. 129 (1948). A worker who did not make the first physical contact has been deemed the aggressor of an altercation simply by criticizing a co-worker's "unskilled" work. *Id.* Again, a claimant's conduct must be judged in light of the totality of the circumstances. *Franklin,* 211 Ill.2d at 282. These circumstances include the conduct of the other participant in the fight and the degree to which the other participant provoked the injured worker. *Id.*

In this matter, after hearing testimony from both participants and from the unbiased manager of both workers (Petitioner and the co-worker) the Arbitrator finds and concludes Petitioner did not offer credible testimony and the Arbitrator rather relies on and adopts the credible and persuasive testimony offered by Heriberto Cruz Juarez and Adam Biolchin. The Arbitrator notes several inconsistent statements made by Petitioner, which were discredited by the evidence presented at trial. First, Petitioner claimed he never had any issues with other workers, but Adam and Heriberto testified Petitioner had many issues with co-workers and was constantly moved to different positions due to these issues. Second, Petitioner claimed he received raises due to his job performance, but his wage statement shows he did not receive a raise and Adam testified Petitioner did not receive one. Third, Petitioner claimed his supervisor, Chef Ben, always complimented his work, but Adam testified Chef Ben stated Petitioner was not a good employee, refused to talk to Petitioner after he was terminated, and was relieved Petitioner was terminated. Fourth, Petitioner testified he went outside into the alley to access a storage unit with cleaning supplies, but Adam confirmed employees were not allowed into the alley for any reason and there was no storage unit in the alley. Lastly, in conjunction with and consider the above and the record as a whole, the Arbitrator finds and concludes that Petitioner's version of the events was overall not believable.

Therefore, in conclusion, the Arbitrator finds and concludes the evidence presented at trial confirms Petitioner was the aggressor of the September 29, 2015 incident; therefore, his conduct removed him for the scope of the Act. The Arbitrator finds instructive the case of *Locker v. MR Bult's, Inc.,* 15 ILWC 23793 (2017), where Petitioner was found to be the aggressor for yelling profanities at another coworker; and the case of *Container Corp. of America v. Industrial Comm'n*, 401 Ill. 129 (1948), where Petitioner was found to be the aggressor for verbal threats to a coworker. The case at issue is especially analogous and instructive because Petitioner did not initiate "physical" contact with Heriberto (that is, did not strike a blow, but nonetheless committed an "assault" when he dumped water several times on him) but Petitioner acted in a manner to provoke and instigate a physical altercation with Heriberto with the intentional (multiple) splashing of water and voluntarily entering the alley first to start the fight.

The Arbitrator relies on and adopts Adam's credible testimony that **Petitioner admitted he intentionally threw water on Heriberto immediately after the incident.** This significant

testimony was presented without objection by counsel and no redirect examination of Petitioner. This credible testimony shows that Petitioner and Heriberto were cleaning the kitchen when Petitioner - for unknown reasons - walked over to Heriberto and intentionally splashed water on him on three separate instances. Heriberto testified this was not in a "joking" manner and he felt forced to address the issue with Petitioner. The Arbitrator finds that Petitioner's actions were antagonistic and a direct provocation that common sense and human nature dictates would cause a reaction and an escalation into an altercation. The Arbitrator finds that **Petitioner led the way out to the alley to fight Heriberto**. No words were exchanged regarding what would occur in the alley – nor were any words necessary under the clear context here - and **Petitioner exited the restaurant first**. Heriberto testified that he felt compelled to follow Petitioner and continue the confrontation that Petitioner started. Although Heriberto made the first actual "physical" contact with Petitioner when outside, the Arbitrator finds and concludes that Petitioner's immediate prior actions amounted to aggression and direct provocation which foreseeably antagonized and provoked Heriberto and directly led to the physical altercation, with Petitioner ending up on the worst receiving end.

The Arbitrator further finds Petitioner's history and issues with other workers compelling and support a finding and conclusion that Petitioner was not credible and was the aggressor in this instant altercation. Adam and Heriberto credibly testified that Petitioner was a "problem" employee who regularly had issues and conflicts with other workers. Adam testified Petitioner was moved to several different positions because of his conflicts with other workers. Heriberto testified Petitioner acted superior to other workers and often tried to tell them what to do. The Arbitrator finds and concludes Petitioner is not credible where he stated he "never" had issues with anyone - in direct conflict with the testimony of Adam and Heriberto.

When examining the totality of the circumstances, it is also important to view the behavior of the other participant. *See Franklin,* 211 Ill.2d at 282. The Arbitrator finds and concludes Heriberto did not provoke or antagonize Petitioner in any way prior to the altercation, such that he did not instigate or incite any altercation. Heriberto responded reasonably and foreseeably when he asked Petitioner to stop, but Petitioner repeated his knowingly unwanted, aggressive and provoking behavior two more times dumping water. The Arbitrator relies on Heriberto's testimony and agrees Petitioner's demeanor and actions indicate he was instigating and looking for a fight.

The Arbitrator relies on Adam's credible and unbiased testimony to interpret the intent of each participant. Adam testified Heriberto was a quiet and good employee who never had any issues with any other workers his entire time at Summer House, but Petitioner regularly had conflicts with coworkers.

In addition to finding and concluding Petitioner was the aggressor in the fight, the Arbitrator further finds and concludes that the accident-injuries did not arise out of and in the course of Petitioner's employment; this is because Petitioner's voluntary, willing and knowing act of leaving the worksite to go into the alley - **a place where no employee was allowed to be** - to fight a coworker removed him from the course and scope of employment. Even if the Arbitrator were to find that Petitioner was not the aggressor to the altercation, the incident would still not be compensable because it occurred off the employer's premises (and for reasons not related to any work issues).

It is a longstanding principle of workers' compensation that an injury does not arise out of and in the course of employment where an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties. *Lakeside Architectural Metals v. Industrial Comm'n,* 204 Ill.2d 895 (1994). The Commission has found that the act of exiting the workplace to fight exposes the employee to a risk outside the scope of employment. *Gwartney v. Karma Night Club,* 09 IWCC 0548 (2009). In *Gwartney,* Petitioner worked as a bouncer who chased a patron outside of the nightclub into the parking lot and fought the patron. *Id.* The Commission affirmed the Arbitrator's findings that the bouncer's injuries did not arise out of and in the course of employment because the bouncer's job duties did not include exiting the employer's premises to fight. *Id.*

Both Petitioner and Heribeto consistently testified that the physical altercation happened outside of the business in the alley. The Arbitrator relies on Adam's testimony that employees would have no reason to exit the restaurant and go in the alley. The evidence presented at trial shows that employees were actually prohibited from going into the alley and Respondent instructed employee not to do so. The Arbitrator further relies on Adam's statement that there was no storage unit outside of the restaurant in the alley and finds and concludes that Petitioner exited the restaurant solely to further escalate the altercation with Heriberto. Petitioner detailed his work duties as a line cook, which required him to prepare food and clean the kitchen. Petitioner's work

duties clearly did not require him - nor permit him - to leave the employer's premises and go into the alley. The Arbitrator relies on Adam's testimony that the alley is not restaurant property and that workers were advised of same. The Arbitrator finds and concludes Petitioner voluntarily, knowingly and willingly chose to leave the employer's premises and thereby expose himself to a risk outside of his employment which removed Petitioner from a consideration of compensability.

Therefore, based on the finding and conclusion that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent on September 29, 2015, his claim for compensation is denied.

In support of the Arbitrator's decision relating disputed issue (F) Whether Petitioner's condition of ill-being was causally related to the accident, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the facts and conclusion with respect to issue "C" (accident) above and incorporates same herein. Given the Arbitrator's findings and conclusion that no compensable accident occurred, all other issues are moot.

In support of the Arbitrator's decision relating to disputed issue (J) Whether the medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the facts and conclusion with respect to issues "C" (accident) above and incorporates same herein. Given the Arbitrator's findings and conclusion that no compensable accident occurred, this other issue is moot.

In support of the Arbitrator's decision relating to disputed issue (K), Whether Petitioner is entitled to prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the facts and conclusion with respect to issues "C" (accident) above and incorporates same herein. Given the Arbitrator's findings and conclusion that no compensable accident occurred, this issue is moot.

In support of the Arbitrator's decision relating to disputed issue (L), Whether Petitioner is entitled to TTD benefits, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the facts and conclusion with respect to issues "C" (accident) above and incorporates same herein. Given the Arbitrator's findings and conclusion that no compensable accident occurred, this issue is moot.

Robert M. Harris

Robert M. Harris, Arbitrator
Dated August 23, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BILLY HEIFNER,

Petitioner,

vs. NO: 19 WC 15185

STATE OF ILLINOIS,
LAWRENCE CORRECTIONAL CENTER,

Respondent.

21IWCC0110

DECISION AND OPINION ON REVIEW

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

Permanent Disability

The Commission, like the Arbitrator, finds Petitioner sustained 20% loss of use of the right leg. We write separately to address the analysis of factor (iv).

The Commission finds the Arbitrator's analysis of factor (iv) is flawed. Although acknowledging the absence of direct evidence demonstrating Petitioner's accident resulted in reduced future earning capacity, the Arbitrator nonetheless opined "such repercussions may manifest in the future." This is impermissible speculation, not reliable evidence of Petitioner's current disability, and the Commission strikes that language. *Deichmiller v. Industrial Commission*, 147 Ill. App. 3d 66, 74, 497 N.E.2d 452 (1986) (It is axiomatic that liability under the Act cannot be premised on imagination, speculation or conjecture but must be based solely on the facts contained in the record). The Commission finds the absence of reliable evidence

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showing the injury had an adverse impact on Petitioner's future earning capacity weighs in favor of reduced permanent disability.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 16, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $857.35 per week for a period of 36 1/7 weeks, representing January 23, 2019 through October 2, 2019, that being the period of temporary total incapacity for work under §8(b). Respondent shall have credit of $30,743.54 for TTD payments already made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $771.61 per week for a period of 43 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused 20% loss of use of the right leg.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

Stephen J. Mathis
Stephen Mathis

Marc Parker
Marc Parker

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its award of temporary total disability benefits for the period of April 30, 2019 through August 5, 2019. I would vacate this period of benefits due to Petitioner's failure to attend the rescheduled evaluation pursuant to Section 12 of the Act.

As the Court stated in *Warriner v. Illinois Workers' Compensation Commission*, 2012 IL App (5th) 110213WC-U, ¶ 50, "the Commission's decision to vacate the TTD award from the date the IME was cancelled until it was rescheduled was authorized under section 12 of the Act. That section provides that if an employee refused to submit to or unnecessarily obstructs an IME, his or her 'right to compensation payments shall be temporarily suspended until such

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examination shall have taken place, and no compensation shall be payable under this Act for such period.' *820 ILCS 305/12* (West 2008)." In the present matter, Petitioner failed to attend the initially scheduled evaluation of March 25, 2019. T. 39. The evaluation was rescheduled for April 30, 2019. Again, Petitioner failed to attend. *Id.* Petitioner did attend a third scheduled evaluation on August 6, 2019. T. 40. Pursuant to Section 12 of the Act, I would vacate the temporary total benefits as stated above.

I respectfully dissent.

DATED: MAR 8 - 2021

L. Elizabeth Coppoletti

LEC/mck

O: 1/6/21

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HEIFNER, BILLY
Employee/Petitioner

Case# **19WC015185**

ST OF IL/LAWRENCE CORRECTIONAL CENTER
Employer/Respondent

21IWCC0110

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

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAR 16 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Billy Heifner
Employee/Petitioner

v.

State of Illinois / Lawrence Correctional Center
Employer/Respondent

Case # **19** WC **15185**

Consolidated cases: _____

21IWCC0110

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda Cantrell**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **February 11, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 15, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,873.14**; the average weekly wage was $**1,286.02**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**30,743.54** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**30,743.54**.

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

ORDER

Respondent shall pay temporary total disability benefits of $**857.35**/week for **36-1/7th** weeks, as provided in Section 8(b) of the Act, for the period January 23, 2019 through October 2, 2019, including the disputed period from March 25, 2019, through August 6, 2019. Respondent shall receive credit of $30,743.54 for temporary total disability benefits already paid.

Respondent shall pay Petitioner the sum of $**771.61**/week for a further period of **43** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **20% loss of use of the right leg**.

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

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

Signature of Arbitrator

3/2/20
Date

MAR 16 2020

21IWCC0110

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BILLY HEIFNER,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19 WC 15185
	)	
STATE OF ILLINOIS/LAWRENCE CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 11, 2020 on all issues. The issues in dispute are the nature and extent of Petitioner's injuries and whether or not Petitioner is entitled to temporary total disability benefits paid from March 25, 2019 through August 6, 2019, for which Respondent is claiming a credit against permanent partial disability. All other issues have been stipulated.

MEDICAL HISTORY

Immediately following the accident, Petitioner was seen by Renee Kohlman, FNP, at Horizon Healthcare as an urgent care visit. The history of the injury was documented, as well as Petitioner's symptoms of pain that was aggravated by climbing stairs, movement, walking, and standing. Physical examination revealed an unstable gait with a limp on the right side, right knee tenderness, moderate pain with motion, mild swelling, and painful weight bearing, although he was able to have full range of motion. X-rays were ordered, the impression of which was no acute osseous abnormality. He was given prescriptions for Naproxen and Flexeril, instructed to ice the area every 20 minutes, elevate, and keep it wrapped.

Petitioner returned to Horizon Healthcare three days later on January 18, 2019, and PA-C Kristen Harris indicated that he was still having trouble jumping and climbing stairs, but was able to walk. She ordered physical therapy and kept Petitioner off work until he could be reevaluated. Petitioner continued to follow up with the physicians at Horizon Healthcare and presented with complaints of pain rated 6 out of 10 with prolonged standing, crepitus, decreased mobility, difficultly sleeping, limping, locking, and popping despite participating in therapy, taking

medication, and wearing his adjustable compression brace. PA-C Harris ordered an MRI and kept Petitioner off work.

The MRI was performed at Southern Illinois Imaging on February 22, 2019, and showed severe bone bruising of the medial femoral condyle, and moderate to severe bone bruising of the tibial plateau, no fracture, fragmentation of the posterior horn of the medial meniscus and an oblique tear of the posterior horn and body of the medial meniscus.

On May 6, 2019, Petitioner was seen by Dr. George Paletta, a board-certified orthopedic specialist. Dr. Paletta took the history of Petitioner's work injury, noted his symptoms, and conducted a physical examination which revealed that Petitioner could only flex to about 110 degrees without significant medial joint line pain. There was also marked and severe tenderness to palpation along the medial joint line. Dr. Paletta reviewed the MRI from Southern Illinois Imaging and concluded that there was evidence of a meniscal root avulsion injury and severe bone bruising. It did not, however, provide sufficient information for him to evaluate his bone bruise. He thus recommended that Petitioner undergo a repeat MRI scan to evaluate the bone bruise to determine whether Petitioner would require an unloader brace. He also believed that Petitioner would require a meniscal repair to alleviate his symptoms.

The new MRI completed May 14, 2019, showed resolution of Petitioner's bone bruising, but showed a root or root equivalent avulsion of the posterior horn of the medial meniscus with associated Grade III and IV medial compartment chondrosis with areas of full-thickness chondral loss. Dr. Paletta again recommended surgery.

Respondent had Petitioner examined by Dr. Michael Nogalski on August 6, 2019. Dr. Nogalski reviewed the history of Petitioner's injury and the records detailing Petitioner's care and treatment. His physical examination was positive for pain around the medial joint line, patellofemoral tenderness and crepitus, and pain in the posterior knee with resisted flexion and extension. Dr. Nogalski agreed that Petitioner's MRIs showed evidence of chondromalacia and a displaced meniscal tear. He also agreed that Petitioner's medial meniscal pathology "reasonably requires further treatment," and agreed Petitioner's medical treatment thus far had been reasonable and necessary. He concluded that the surgical treatment recommended for Petitioner was appropriate and that Petitioner's condition was possibly related to the accident on January 15, 2019.

On September 17, 2019, Petitioner underwent a right knee arthroscopy with partial medial meniscectomy, chondroplasty of the medial femoral condyle, and chondroplasty and debridement at the patellofemoral articulation. Petitioner's right knee was doing well during the post-operative follow-up, and Dr. Paletta referred him for physical therapy. Follow-up visits show that although Petitioner continued to do well, he noted stiffness in his knee with activities such as walking along with occasional pain that made him feel as though he sprained his knee. Dr. Paletta advised Petitioner that this was normal given the arthritic changes in Petitioner's right knee patellofemoral

articulation and medial compartment. He advised Petitioner to use ice and over-the-counter medication as needed to ameliorate his symptoms and released him to return to work full duty.

Petitioner was placed at maximum medical improvement on January 6, 2020, at which time Dr. Paletta noted that Petitioner was doing well with respect to his right knee, though he continued to have residual symptoms. Dr. Paletta recommended the use of glucosamine and chondroidtin sulfate for Petitioner's knee symptoms.

TESTIMONY

Petitioner was a 30-year-old Correctional Officer at Respondent's Lawrence Correctional Center and had been employed there since March 2004. The parties stipulated that on January 15, 2019, Petitioner sustained accidental injuries when he heard a call for a Code 6 over his radio, and while he was responding to that call, it turned into a Code 1, at which time he turned around to run to the location of the Code 1 and twisted his right knee. Prior to his work injury on January 15, 2019, Petitioner credibly testified he had never injured his right leg, knee, or foot and had no prior MRIs or x-rays to his right knee.

Petitioner testified at Arbitration that despite the improvement from his surgery and post-operative therapy, he continues to have symptoms commensurate with his level of activity. He testified he experiences pain and stiffness after prolonged activity, and he reported swelling and pain when working mandated 16-hour shifts. He takes ibuprofen twice a day for his symptoms. He was not able to complete his firearm requalification while kneeling, but Respondent allowed him to qualify in a standing position. His hobby of playing basketball has been adversely affected. He testified he can no longer squat.

Respondent disputed liability for temporary total disability benefits because Petitioner failed to attend two IME appointments. Petitioner testified that he confused the dates and appeared on the wrong day for the first appointment. Petitioner missed the second scheduled appointment because he alleges he did not received notice of same. Petitioner testified he has not moved from the address Respondent addressed all notices to. Respondent acknowledges that Petitioner did attend the IME with Dr. Nogalski in August 2019, but continues to dispute liability for benefits between the first missed IME appointment on March 25, 2019, and the appointment Petitioner attended on August 6, 2019.

CONCLUSIONS

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

Respondent disputes liability for temporary total disability benefits because Petitioner did not appear at two IME appointments. Respondent offered a letter dated February 12, 2019, that was addressed to Petitioner at 1012 County Road 1675 East in Fairfield, Illinois. This letter notified Petitioner of his upcoming IME appointment with Dr. Nogalski on March 25, 2019. Respondent also offered a letter dated March 28, 2019 that was addressed to Petitioner at 1012 County Road

1675 East in Fairfield, Illinois. This letter notified Petitioner his benefits were being terminated as of March 31, 2019 due this failure to attend his IME on March 25, 2019.

Respondent offered a letter dated April 3, 2019 that was addressed to Petitioner at 1012 County Road 1675 East in Fairfield, Illinois. This letter notified Petitioner of his second upcoming IME appointment with Dr. Nogalski on April 30, 2019. Respondent offered a letter dated June 7, 2019, that was addressed to Petitioner at 1012 County Road 1675 East in Fairfield, Illinois. This letter notified Petitioner his benefits were being terminated effective immediately due this failure to attend his second IME on April 30, 2019. Respondent offered a letter dated July 5, 2019 that was addressed to Petitioner at 1012 County Road 1675 East in Fairfield, Illinois. This letter notified Petitioner of his third upcoming IME appointment with Dr. Nogalski on August 6, 2019.

Under §12 of the Act, "If the employee refuses so to submit himself to an examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period." 820 ILCS 305/12. The Arbitrator does not find this section to be applicable in the instant matter, as this section plain states that compensation shall be suspended in instances of *refusal* or *obstruction*. Petitioner testified credibly that he missed the first IME appointment because he confused the date and that he actually appeared on the incorrect date. Petitioner testified he missed the second IME appointment because he did not receive notice of same. There was no evidence offered to show Petitioner's failure to appear at either IME appointment was the result of refusal or obstruction. Petitioner's failure to appear at both IME appointments was simply innocent, inadvertent mistakes as a result of confusion and failure to receive notice. Consequently, the Arbitrator awards Petitioner temporary total disability benefits for the disputed period from March 25, 2019 through August 6, 2019. Respondent shall have credit for $30,743.54 in TTD benefits paid.

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

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

(i) **Level of Impairment**: Neither party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a Correctional Officer for

Respondent, where he has worked since March 2004. The Arbitrator gives greater weight to this factor.

(i) **Age**: Petitioner was 30 years old at the time of his injury. He is very young and must live and work with his disability for a considerable period of time. The Arbitrator places greater weight on this factor pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time).

(ii) **Earning Capacity**: While there is no direct evidence of reduced earning capacity contained in the record; based on the severity of Petitioner's injuries, the requisite treatment, and his testimony concerning his symptoms with prolonged standing or working long shifts, the Arbitrator finds it reasonable to conclude that such repercussions may manifest in the future. The Arbitrator gives lesser weight to this factor.

(iii) **Disability**: As a result of the accident, Petitioner suffered a medial meniscal tear and aggravated underlying chondromalacia and medial compartment degeneration. Petitioner testified at Arbitration that despite the improvement from his surgery and post-operative therapy, he continues to have symptoms commensurate with his level of activity. He testified he experiences pain and stiffness after prolonged activity, and he reported swelling and pain when working long shifts. He takes ibuprofen twice a day for his symptoms. He was not able to complete his firearm requalification while kneeling, but Respondent allowed him to qualify in a standing position. His hobby of playing basketball has been adversely affected. He is not able to kneel. The Arbitrator finds Petitioner's complaints supported by the treating records, as Dr. Paletta noted that Petitioner continued to have symptoms commensurate with his level of activity following his operation for which he recommended over-the-counter medication, home exercises, and glucosamine and chondroitin sulfate. Petitioner testified he continues to perform home exercises on a weekly basis. The Arbitrator places greater weight on this factor.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 20% loss of his right leg, under Section 8(e) of the Act.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/2/20

DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LISA ESKRIDGE,

Petitioner,

vs. NO: 11 WC 5859

CHICAGO BOARD OF EDUCATION, 21IWCC0111

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely Petition for Review of the Decision of the Arbitrator. Therein, the Arbitrator found Petitioner did not sustain an accidental injury arising out of her employment. Notice having been given to all parties, the Commission, after considering the issues of accident, causal connection, prospective medical, and temporary disability, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

Findings of Fact

The Commission adopts and incorporates herein the Arbitrator's Findings of Fact.

Conclusions of Law

I. Accident

The Commissions views the evidence differently than the Arbitrator and finds Petitioner proved she sustained an accident which arose out of and in the course of her employment. The

Arbitrator found Petitioner sustained a fall due to a syncopal episode and thusly denied the claim. The Commission finds further analysis must be undertaken.

Regarding falls, "a claimant must present evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. After all, the 'arising out of' requirement contemplates 'a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill [her] duties.' *Stapleton, 282 Ill. App. 3d at 15*. Awarding compensation for a purely unexplained fall would eviscerate this requirement." *Builders Square v. The Industrial Commission*, 339 Ill. App. 3d 1006, 1010, 791 N.E.2d 1308 (2003). Petitioner is required to "present evidence which supports a reasonable inference that the fall stemmed from a risk related to the employment…By, itself, the act of walking up a staircase does not expose an employee to a risk greater than that faced by the general public. [citations omitted]." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011).

Petitioner presented such evidence. The stairs upon which Petitioner fell were not "average" stairs. The stairs were 25 steps in height, and Petitioner fell on the second or third step. T. 23-24. The stairs were made of cement, worn, uneven, and lacked treading. T. 21-23. Moreover, Petitioner was required to traverse the stairs in order to sign in and out of her workday. T. 120.

Given these facts, the Commission finds the stairs increased her risk of injury from the fall. See *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 244, 505 N.E.2d 1062 (1987) ("An idiopathic fall is compensable if the employment significantly contributed to the injury by placing the employee in a position increasing the dangerous effects of the fall. *Ervin v. Industrial Comm.* (1956), 364 Ill. 56, 4 N.E.2d 22."). Accordingly, the Commission finds Petitioner sustained an accident on January 19, 2011 which arose out of and occurred during the course of her employment with Respondent.

II. Causal Connection

The Commission finds Petitioner proved a causal relationship between her right knee and lower back conditions. Right knee surgery was initially recommended on July 9, 2012, but Petitioner was unable to undergo the recommended treatment due to her uncontrolled hypertension. T. 79. On April 7, 2017, Dr. Bartola again recommended surgery for the right knee pending Petitioner's treatment for hypertension. PX4.

On August 8, 2017, Dr. Primus, who is Dr. Bartola's partner and Petitioner's current treating physician, provided his opinions via evidence deposition. Dr. Primus testified he last evaluated Petitioner on March 7, 2014 at which time she complained of worsening knee symptoms. PX8, p. 32. Dr. Primus' continued to recommended surgery pending medical clearance. PX8, p. 30. Dr. Primus ultimately testified "at this point I would consider repeating the MRI with contrast to get a better sense of her anatomy, in particular, if she is still very symptomatic and interested in surgery, and then would recommend some type of surgical procedure again." PX8, p. 34. As for Petitioner's low back condition, Dr. Primus testified he was unable to provide recommendations for Petitioner's treatment given he was unaware of her current condition. PX8, p. 55.

21IWCC0111

On August 16, 2018, Dr. Kornblatt provided his opinions via evidence deposition. Dr. Kornblatt testified he evaluated Petitioner on several occasions (March 21, 2012; November 5, 2014; and October 15, 2015) pursuant to Section 12 of the Act. RX27, p. 9. Dr. Kornblatt testified consistent with Dr. Primus that Petitioner's fall caused injury to her right knee. RX27, p. 16. Unlike Dr. Primus, Dr. Kornblatt testified Petitioner sustained a contusion to her knee which had resolved, and no further treatment was recommended. RX27, p. 16-17; 21. As for Petitioner's low back condition, Dr. Kornblatt noted Petitioner's ongoing complaints but provided no opinion regarding Petitioner's low back condition as he did not perform an evaluation regarding the same. RX27, p. 17.

The Commission affords greater weight to the opinions of Dr. Primus over those of Dr. Kornblatt. The Commission finds Petitioner proved her current conditions of ill-being as it relates to her right knee and lower back are causally related to her fall sustained on January 19, 2011. As no physician provided an opinion as to causal relationship between Petitioner's right index finger and her current condition of ill-being, the Commission finds Petitioner failed to prove causal relationship regarding the same.

III. Medical Expenses / Prospective Medical

Given the Commission's findings regarding causal relationship as it relates to Petitioner's right knee and lower back conditions, the Commission awards prospective medical care as recommended by Dr. Primus that being an MRI regarding the Petitioner's right knee and the attendant follow-up care based upon the findings therein and Dr. Primus' recommendations therefrom. As to the lower back, the Commission awards an evaluation in order to assess Petitioner's current condition and need for treatment, if any.

IV. Temporary Disability

The Commission finds Petitioner entitled to temporary total disability benefits from January 20, 2011 through September 9, 2018 and awards the same. "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement. [citation omitted]." *Mechanical Devices v. The Industrial Commission*, 344 Ill. App. 3d 752, 759. As outlined above, Petitioner is in need of further treatment and her condition has not stabilized at present.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and in the course of her employment on January 19, 2011.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,177.72 per week for a period of 398 3/7 weeks, representing January 20, 2011 through September 9, 2018, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

21IWCC0111

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 8, pursuant to §8(a) and subject to §8.2 of the Act. Respondent shall receive credit for payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide and pay for an MRI of the right knee and follow up treatment as recommended by Petitioner's treating physicians, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide and pay for an evaluation of Petitioner's lower back as recommended by her treating physicians, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury including $283,830.15 for TTD benefits and $28,556.00 for advances previously paid.

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 9 - 2021

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/cak

D: 1/26/21

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Stephen J. Mathis

Stephen Mathis

Marc Parker

Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSALINDA CISNEROS,

Petitioner,

21IWCC0112

vs. NO: 18 WC 30297

NORTHSHORE UNIVERSITY HEALTH SYSTEM,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission reverses the Arbitrator's decision as to causation, and modifies the awards for temporary total disability benefits, medical benefits and prospective medical benefits. The Commission affirms the Arbitrator's denial as to penalties and attorneys' fees.

Factual Background

Petitioner was employed as a medical assistant by Respondent. On August 10, 2018 Petitioner was stocking and attempted to pick up a 40-50 pound box containing 4 big bottles of

liquid cleaning solution when she felt a pop in her back. (T. 37) Within an hour or two, Petitioner started feeling tingling and numbness in her right leg, felt it dragging and was sent home by her supervisor. (T. 38)

The next day, Petitioner sought medical treatment at NorthShore and was seen by Dr. Rebecca Weiss-Coleman. She was given work restrictions consisting of no heavy lifting. (T. 39) On August 24, 2018, Petitioner was seen by orthopedist Dr. Eldin Karaikovic – also at NorthShore. Dr. Karaikovic recommended physical therapy and provided work restrictions. (T. 40)

Petitioner was seen for an independent medical exam by Dr. Lieber on September 17, 2018. Dr. Lieber diagnosed Petitioner with a low back strain and causally connected the injury to her work accident of August 10, 2018. Dr. Lieber recommended additional therapy, steroids and work restrictions. He opined that Petitioner was not at maximum medical improvement but should reach same in four weeks. (Rx1)

Petitioner's pain complaints continued and she returned to Dr. Karaikovic on September 28, 2018. At that time, Dr. Karaikovic ordered an MRI of the lumbar spine. (T. 41-42 and Px1) Petitioner's pain persisted and when she returned to Dr. Karaikovic on October 5, 2018, he recommended additional physical therapy and referred Petitioner to a pain specialist. (T. 44)

Petitioner sought a second opinion with Dr. Erickson on November 7, 2018. (T. 44) Dr. Erickson also recommended Petitioner see a pain specialist and referred her to Dr. Vargas. (T. 45) Petitioner initially saw Dr. Vargas on November 14, 2018. (Px5) Dr. Vargas performed epidural steroid injections on November 14, 2018, December 26, 2018 and January 11, 2019. (T. 45-46 and Px5) Petitioner reported some improvement in her symptoms following the injections.

On December 4, 2018, Dr. Lieber issued an IME addendum based on a records review. He reviewed physical therapy records of Athletico Physical Therapy and the records of Dr. Karaikovic. He noted he was provided the records of Rehabilitation Physical Therapy, but did not list them as having been reviewed. Additionally, there were no imaging studies identified in his report. Dr. Lieber opined that at that time, Petitioner was able to return to full-duty employment with no restrictions and that she had reached maximum medical improvement as it related to the August 10, 2018 incident. (Rx2)

Petitioner underwent a spinal SSEP exam on January 23, 2019, wherein the findings on exam suggested a moderate delay affecting the S1 nerve root on the right side. Additionally, mild delays were seen bilaterally at L5. (Px8)

Petitioner followed up with Dr. Erickson on January 23, 2019 and reported on her progress after the therapeutic epidural steroid injections. Dr. Erickson reviewed the SSEP results and opined that Petitioner's symptoms correlated with the findings. Dr. Erickson ordered discography with a CT scan to determine the source of Petitioner's pain.

On February 8, 2019, Petitioner was seen by Dr. Vargas. His exam noted a 2-3 mm posterior disc herniation at L4-L5, and at L5-S1 a 6-7 mm posterior disc herniation with an extruded nucleus pulposus with central stenosis and mild bilateral neuroforaminal narrowing. (Px6)

At the time of Petitioner's visit with Dr. Erikson on February 20, 2019 and based on the results of the discography combined with Petitioner's continued clinical presentation, Dr. Erickson recommended a transforaminal lumbar interbody fusion at L5-S1. (Px4) Petitioner's symptoms continued to worsen, and Dr. Erickson again recommended surgery on April 3, 2019. (Px4)

Analysis and Conclusions of Law

The Commission finds that the Arbitrator erred in determining that Petitioner's current condition of ill-being is not causally connected to the August 10, 2019 work incident. Prior to the August 10, 2018 work incident, Petitioner did not have any problems or receive treatment for her lower back. (T. 48) She was not found to be malingering, display "red flag" findings or have Waddell signs. (Px2, Px5) Additionally, even the findings of Dr. Lieber, Respondent's Section 12 Examiner, correlated with Petitioner's subjective complaints. (Rx1)

The Arbitrator based his finding of causation on the fact that he found Petitioner's complaints of pain to be inconsistent and increasing near the time of trial. However, in reviewing the evidence, the Commission finds that the Petitioner consistently had lower back complaints which ebbed and flowed based on treatment – i.e. steroid treatment, physical therapy, epidural steroid injections, opioid medication. The records demonstrate a consistent pattern of symptoms where no low back problems had been documented prior to the work injury.

The Commission finds Petitioner's treating physicians, Drs. Erikson and Vargas, more persuasive than Dr. Karaikovic or Respondent's Section 12 examiner, Dr. Lieber. Dr. Vargas recommended an EMG/NCV, back brace and cryotherapy, as well as therapeutic epidural steroid injections when he saw Petitioner on November 14, 2018. (Px5). Petitioner saw Dr. Erickson for an initial evaluation on November 17, 2018. He conducted a thorough exam and also reviewed the MRI. Dr. Erickson found there to be a small tear associated with the L4-L5 disc protrusion. However, at this point, Dr. Erickson recommended conservative treatment in the form of an epidural steroid injection and directed physical therapy (Px4) – an opinion that is actually identical to that of Dr. Karaikovic. (Px1)

Neither Dr. Karaikovic nor Dr. Lieber saw or personally treated Petitioner after the respective October 5, 2018 and September 17, 2018 visits. Dr. Lieber never reviewed any radiographic studies nor re-examined Petitioner. Dr. Lieber released Petitioner back to work full duty and declared Petitioner at maximum medical improvement on December 4, 2018 without a follow up exam, without an indication he reviewed a job description, and without any indication that he reviewed the records of Dr. Erickson, Dr. Vargas or even Rehabilitation Physical Therapy.

The Commission finds that the Arbitrator's conclusion that Dr. Karaikovic and Dr. Lieber's opinions were more persuasive than Drs. Erikson and Vargas, is contrary to the evidence in the record. The Arbitrator interpreted Dr. Karaikovic's instructions to follow up as equivalent to Petitioner's having reached maximum medical improvement. (Arb. Dec. p. 12, second paragraph) However, Dr. Karaikovic's full note reads that she is to continue pain medications, restart physical therapy, continue work restrictions, and that if she does not improve, she can be referred to a pain specialist for an epidural steroid injection. The reading of Dr. Karaikovic's note in its entirety stated that Petitioner was not a surgical candidate at that time, but that other conservative treatment might be warranted and, in fact, was being prescribed (in the form of PT). (Px1, 10/5/18 visit) Petitioner sought treatment with a pain management specialist – a possibility that was noted by Dr. Karaikovic

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– on November 14, 2018. (Px5) In Dr. Lieber's September 17, 2018 Independent Medical Exam report, he opines that Petitioner has not reached maximum medical improvement, but that she *should* reach maximum medical improvement after 3-4 weeks of physical therapy and treatment with a tapered steroid.

The Commission also finds that some weight must be given to the fact that Dr. Karaikovic works for Respondent and engaged in significant conversations with the nurse case manager assigned by Respondent (T. 43-44)

Based on the above, the Commission finds that Petitioner met her burden of proof that her current condition of ill being as to her lumbar spine is related to the August 10, 2018 work accident.

Based on the reversal regarding causation, the Commission increases the award of temporary total disability benefits and awards benefits from August 13, 2018 through October 2, 2019, representing 59 3/7 weeks.

The Commission finds there is no evidence in the record to support Respondent's termination of Petitioner's temporary total disability benefits on November 2, 2018. Petitioner underwent an independent medical examination on September 17, 2018, at which time Dr. Lieber opined her condition at that time was related to the August 10, 2018 incident and that she was not at maximum medical improvement. Dr. Lieber anticipated she would reach maximum medical improvement in 4 weeks. (Rx1) Petitioner had not completed physical therapy (She stopped with Athletico after October 15, 2018, but continued with Rehabilitation Physical Therapy through mid-February 2019 (Px2 and Px3)) Dr. Lieber did not opine that Petitioner had reached maximum medical improvement until his correspondence dated December 4, 2018. (Rx2) Furthermore, Petitioner's last work restriction placed her on light duty – despite her employer wanting her at full duty and not accommodating her restrictions. (Px1, 10/5/18 and 10/13/18 visits; T. 44)

Moreover, based on its finding of causation, the Commission modifies the award of medical expenses and awards the prospective medical treatment. There is no clear justification as to the termination date of November 20, 2018 regarding medical expenses.

In Dr. Lieber's September 17, 2018 independent medical examination report, he indicated that Petitioner was not at maximum medical improvement and that additional treatment was warranted. It was not until Dr. Lieber's December 4, 2018 addendum that he stated no further treatment was necessary. (Rx2) However, this addendum is not persuasive as it was not predicated on the totality of the treatment records up to and including that date. Additionally, based on the causation analysis above, Drs. Erickson and Vargas were more persuasive in their opinions regarding diagnosis and treatment of Petitioner.

Petitioner met her burden of proof that her current condition of ill-being is causally connected to the August 10, 2018 work accident and that she has not improved as of the date of the Arbitration hearing. However, before awarding surgery, the Commission finds that she should undergo updated imaging studies and physician evaluation to determine if surgery is, in fact, still the appropriate prospective treatment for her work-related condition.

The Commission affirms the Arbitrator's denial of penalties and fees. Although the opinions of Drs. Karaikovic and Dr. Lieber were not as persuasive as those of Drs. Erickson and Vargas, the

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Commission finds that the Respondent was reasonable in relying on the opinions of its Section 12 examiners in discontinuing benefit payments.

Lastly, the Commission strikes the 4th paragraph of page 12 and the second paragraph of page 13 of the Arbitrator's decision as both paragraphs refer to Petitioner's proposed decision which is not evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $494.37 per week for a period of 59 3/7 weeks, from August 13, 201 8 through October 2, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the unpaid medical expenses identified in Petitioner's Exhibits 3(a), 4(a), 5(a), 6(a), 6(b), 6(c), 6(d), 7, 8(a), and 9, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

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

DATED: MAR 10 2021

Maria Elena Portela
Maria E. Portela

Kathryn A. Doerries

MEP/dmm
O: 011221
49

Partial Concurrence and Dissent

I respectfully dissent in part from the opinion of the majority and would award penalties and attorney's fees pursuant to Sections 16, 19(k), 19(l) of the Act. Respondent's behavior in prematurely terminating Petitioner's medical and TTD benefits was unreasonable and vexatious given the totality of the evidence.

Petitioner worked for Respondent as a medical assistant. She injured her back while stocking boxes. Before this work incident, she did not have any back pain or other complaints. After extensive conservative failed to improve Petitioner's condition, her doctor recommended she undergo a lumbar fusion surgery. The majority correctly has reversed the Arbitrator's conclusions and has found Petitioner's current condition of ill-being is causally related to the August 10, 2018, work incident. I also agree with the majority's reversal of the Arbitrator's denial of medical expenses, TTD benefits, and prospective medical treatment. The credible evidence overwhelmingly supports these findings. However, I disagree with the majority's refusal to award penalties and fees pursuant to Sections 16, 19(k), and 19(l) of the Act.

Respondent unceremoniously terminated Petitioner's TTD benefits on November 2, 2018. Respondent then denied further medical treatment after November 20, 2018. While Respondent ostensibly relied on the opinions of Dr. Lieber, its Section 12 examiner, the evidence tells a much different story. It is indisputable that as of November 2, 2018, no doctor—including Dr. Lieber—had placed Petitioner at MMI or opined that Petitioner could work full duty. Notably, Respondent refused to accommodate Petitioner's work restrictions. Likewise, there is no credible evidence that Respondent can rely upon to justify its termination of Petitioner's medical benefits on November 20, 2018. In fact, Respondent did not obtain an opinion in support of its actions until Dr. Lieber wrote his December 4, 2018, addendum—a full month after Respondent terminated Petitioner's TTD benefits and two weeks after it terminated the medical benefits. Respondent's unceremonious termination of Petitioner's benefits is unreasonable and vexatious in light of the totality of the evidence. As such, I believe Respondent's actions rise to the level of unscrupulous behavior the legislature seeks to discourage by allowing the Commission to levy penalties and fees against employers who unreasonably or vexatiously refuse to provide benefits.

For the forgoing reasons, I would reverse the Arbitrator's denial of penalties and fees pursuant to Sections 16, 19(k), and 19(l). Respondent had absolutely no basis to terminate Petitioner's TTD and medical benefits on November 2, 2018, and November 20, 2018, respectively. Thus, Respondent's termination of benefits was unreasonable and vexatious.

Thomas J. Tyrrell

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

CISNEROS, ROSALINDA
Employee/Petitioner

Case# **18WC030297**

21IWCC0112

NORTHSHORE UNIVERSITY HEALTHSYSTEM
Employer/Respondent

On 11/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0815 ACEVES & PEREZ PC
EMILIANO PEREZ JR
1931 N MILWAUKEE AVE
CHICAGO, IL 60647

2965 KEEFE CAMPBELL BIERY & ASSOC
TIMOTHY J O'GORMAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21IWCC0112

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rosalinda Cisneros,
Employee/Petitioner

Case # **18** WC **30297**

v.

Consolidated cases:

NorthShore University HealthSystem,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of Chicago, on **October 2, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On August 10, 2018, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$38,560.60**; the average weekly wage was **$741.55**

On the date of these accidents, Petitioner was **32** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$5,861.79** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$5,891.79.**

ORDER

The Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being is causally related to the accepted accident of August 10, 2018.

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence entitlement to TTD for a period of 11-5/7 weeks only in the amount of $494.37 per week for the dates of August 13, 2018 through November 2, 2018.

The Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence entitlement to payment of any medical treatment incurred after November 20, 2018; the Arbitrator finds Petitioner has received all reasonable and necessary medical services in relation to her August 10, 2018 alleged work injury. The Arbitrator finds Respondent has paid all appropriate charges for all reasonable and necessary medical services and shall receive credit for all amounts paid.

The Arbitrator denies Petitioner's request for prospective medical as outlined in the decision attached. The Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence entitlement to payment of any future medical treatment.

The Arbitrator denies Petitioner's request for penalties under Section 19(k) and Section 19(l) and attorneys' fees under Section 16. Respondent's conduct was not unreasonable or vexatious.

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

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

November 4, 2019
Date

NOV - 4 2019

MEMORANDUM OF DECISION OF ARBITRATOR

Rosalinda Cisneros v. NorthShore University HealthSystem, 18 WC 30297

In support of the Arbitrator's Decision, the Arbitrator finds the following facts:

The parties stipulated to accident, notice, employee-employer relationship, average weekly wage, marital status, dependents, credit for amount paid by Respondent and jurisdiction and are bound by those stipulations. Arb. Ex #1.

Petitioner testified on August 10, 2018 she was employed by Respondent NorthShore University HealthSystem as a medical assistant. Tx 35. Petitioner described her job duties as assisting with procedures, putting patients in rooms, stocking, lifting up boxes to put away materials. Tx 35-36. Petitioner testified she was employed for two years as a medical assistant with NorthShore. Tx 36. Petitioner testified on August 10, 2018, she was stocking rooms and had gotten a new product in the office. Tx 37. Petitioner described she went to pick up a box and when she lifted it, she felt a pop and discomfort. Tx 37. Petitioner explained the box she was lifting contained four bottles of liquid that she characterized as weighing forty to fifty pounds. Tx 37. Petitioner identified the mid-right portion of her lower back as the location of the pop she felt. Tx 37-38. Petitioner explained she tingling and numbness in her right leg and felt her leg dragging. Tx 38. Petitioner testified she was instructed to go home. Tx 38.

Petitioner testified the next day she sought medical treatment at NorthShore with Dr. Rebecca Weiss-Coleman. Tx 39. Petitioner explained she was prescribed Prednisone and underwent an x-ray. Tx 39. Petitioner stated she was given restrictions not to lift anything heavy. Tx 39. Petitioner testified she was then seen by Dr. Eldin Karaikovic on August 24, 2018 who prescribed physical therapy. Tx 40. Petitioner testified she underwent physical therapy that she did not feel was helpful. Tx 41. Petitioner testified her condition during physical therapy continued to get worse. Tx 41. Petitioner explained she was having more numbness in her leg and was in severe pain and an MRI was ordered. Tx 41.

Petitioner testified she underwent a lumbar MRI at NorthShore on October 4, 2018. Tx 43. Petitioner explained there was a nurse case manager present for her visit with Dr. Karaikovic on October 5, 2018. Tx 43. Petitioner testified she was prescribed additional physical therapy and did not find the treatment helpful. Tx 44. Petitioner testified she then saw Dr. Erickson who referred her to a pain specialist, Dr. Vargas. Tx 45.

Petitioner explained Dr. Vargas administer an epidural steroid injection and a nerve block on November 14, 2018 which did not provide relief. Tx 45. Petitioner testified she underwent a second set of injections on December 26, 2018 which provided little relief for two to three weeks. Tx 45-46. Petitioner testified she underwent a third series of injections on January 11, 2019 which provided little relief for two to three weeks. Tx

46. Petitioner explained she underwent a diskogram on February 8, 2019 and underwent SSEP testing on that same date. Tx 46-67.

Petitioner testified she was reevaluated by Dr. Erickson on February 20, 2019 whereupon he prescribed a lumbar fusion. Tx 47. Petitioner testified she experiences lower back pain on a daily basis that travels down her leg. Tx 48. Petitioner explained she cannot carry anything heavy because she feels tingling down her arms and lower back pain. Tx 48. Petitioner explained she has not worked for NorthShore and never experienced symptoms prior to August 10, 2019. Petitioner testified she has told her doctors about tingling in her arms. Tx 50.

On 8/11/18, Petitioner presented to Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood with complaints of left sided low back pain radiating into right sided low back. Pain began yesterday at work after lifting a heavy box containing 4 gallons of liquid. Petitioner reported her pain recurs when bending over to remove sutures. Petitioner described a past medical history of migraine headaches with aura & occasional visual flashes. Petitioner's physical examination revealed left paraspinal tenderness. Petitioner was prescribed an x-ray of the lumbar spine and Predisone and was ordered to return to work with restrictions of no heavy lifting. PX1.

On 8/14/18, Petitioner spoke Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood stating she went back to work and her back pain flared up. Petitioner denied focal tenderness and described pain located in the left lower back radiating into the left thigh. Petitioner explained the pain was aggravated by walking. Petitioner was referred to a spine specialist and an MRI of her lumbar spine was ordered. PX1.

On 8/20/18, Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood completed Work Status Note and sent to Petitioner's employer. Petitioner was to remain off work with a follow up with a specialist scheduled for 8/24/18. PX1.

On 8/24/18, Petitioner presented to Dr. Andrew Jaeger and Dr. Eldin Karaikovic at NSUHS Skokie Hospital for consultation for left sided low back pain. Petitioner reported on 8/10/18, she was picking up a box and felt a pull in her lower back which got worse over the course of the day. Petitioner explained she tried sitting for 3 hours but pain increased, and she left work. She reported tingling in bilateral feet and lower legs with pain that is worse with movement and going up/down stairs. Petitioner's 8/13/18 X-ray of the lumbar spine taken at NSUHS Lincolnwood revealed no acute fractures or dislocations. Petitioner was diagnosed with low back muscle strain w/bilateral leg pain (noting a distinction between myofascial pain and discogenic pain). PX1.

On 8/24/18, Petitioner presented to NSUHS Skokie Hospital for X-ray of her lumbar spine ordered by Dr. Andrew Jaeger and interpreted by Dr. Michael Gorey. Dr. Gorey's impression noted no fractures/dislocations and no instability. PX1.

On 9/4/18, Petitioner presented to Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood for follow up visit with complaints of continuing low back pain and right ankle pain. Petitioner had remained off work since 8/10/18 because of severe pain. Petitioner reported pain with prolonged sitting, standing and walking. Petitioner denied radiating pain into her lower extremities and denied numbness and tingling at this time. Petitioner complained of twisting her right ankle on 8/26/18 while getting out of bed. Petitioner reported leg weakness at times which she believed caused her to roll her ankle. Petitioner's physical examination revealed bilateral lumbar spinal tenderness, right dorsal ankle tenderness and full range of motion in her right ankle. Petitioner was diagnosed with midline low back pain without sciatica and a RT ankle sprain. PX1.

On 9/17/18, Petitioner presented to Dr. Lawrence Lieber at DMG Orthopedics for IME for low back pain. Petitioner described putting stock away when she picked up a case that weighed appx 40 lbs and felt a pull in her LT sided lower back. Petitioner explained she reported the incident to her manager and sought treatment with Dr. Rebecca Weiss-Coleman who she explained was her primary care physician. Petitioner explained she was referred to Dr. Karaikovic. Petitioner denied attending physical therapy and prior low back injury/trauma. Petitioner reported difficulty with prolonged sitting/standing/walking, going up/down stairs, lifting, and bending over. Petitioner described a past medical history of prior low back pain from childbirth 12 years ago. Petitioner's physical examination revealed complaints of bilateral leg weakness/numbness but no pain on exam. Petitioner was diagnosed with a low back strain. PX1.

Dr. Lieber opined Petitioner's low back pain at that time was causally connected to Petitioner's alleged 8/10/18 work injury. Dr. Lieber noted no pre-existing condition would have been aggravated by her alleged incident. Dr. Lieber recommended 3-4 more weeks of physical therapy for low back pain and a 6 day prescription of tapered Prednisone. Dr. Lieber recommended a return to work on September 17, 2018 with restrictions including sitting/standing as tolerated by pain, minimal bending or stooping and no lifting above ten pounds. Dr. Lieber believed Petitioner should be able to return to work at full duty without any restrictions in three weeks from the date of his examination. Dr. Lieber indicated MMI would be reached in 4 weeks on or around 10/15/18. RX1.

On 9/18/18, Petitioner presented to Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood for follow up visit with complaints of continuing low back pain radiating to bilateral legs. Petitioner reported an increase in low back pain after physical therapy. Petitioner indicated she saw another orthopedist for a 2nd opinion at unknown outside clinic. Petitioner explained she had not returned to work because of severe low back pain. Dr.

Weiss-Coleman opined that she can't return to work for 2-3 weeks. Petitioner stated she had resolution of right ankle pain. Petitioner was diagnosed with low back pain with radiation. Petitioner was prescribed to continue physical therapy 2 times a week and to have an MRI after 3 physical therapy sessions. PX1.

On 9/18/18, Petitioner presented to Elizabeth Maria, PT, at Athletico Physical Therapy for Initial physical therapy evaluation. Petitioner's treatment diagnosis at that time was bilateral low back pain with sciatica, lumbar paraspinal muscle strain, back stiffness, muscle weakness and difficulty walking. Petitioner reported on 8/10/18, she was lifting an unlabeled box from the floor when she felt a "tug" in her low back. She is used to lifting appx 10 lbs but later found out the box was over 40 lbs. Petitioner reported she tried to stay at work but the pain was progressing and radiating down left leg. Petitioner explained her manager told her to report to the ER but she refused, went home and took muscle relaxers. The next day she reported that the pain was so bad she couldn't get out of bed but went to see her PCP. Petitioner's PCP took X-rays L-spine which were unremarkable. Petitioner then went to see Dr. Karaikovic on 8/24/18. Petitioner explained her bilateral low back pain/tightness progresses throughout the day w/numbness in left lower extremity with increased activities. Petitioner reported she was not compliant with her home exercise program. Petitioner denied numbness/tingling in he left lower extremity for past week. Petitioner explained her bilateral leg numbness/weakness increases with prolonged sitting. Petitioner reported she fell without injury on 8/26/18 when her legs allegedly "gave out". PX2.

On 9/21/18, Petitioner presented to Elizabeth Maria, PT, at Athletico Physical Therapy for PT. Reports right sided low back pain after initial eval, compliant with HEP and was able to go for a walk with her sister yesterday. PX2.

On 9/25/18, Petitioner presented to Elizabeth Maria, PT, at Athletico Physical Therapy for PT. Petitioner reported continued low back soreness. Petitioner stated she overdid it the other day preparing for a family party and was unable to get out of bed on Sunday but tried home exercises and feels a little better. PX2.

On 9/27/18, Petitioner presented to Elizabeth Maria, PT, at Athletico Physical Therapy for PT. Reports soreness after yesterday's session but rested all day and took her medication. Petitioner explained she had an appointment for an MRI of her lumbar spine coming up. PX2.

On 9/28/18, Petitioner presented to Dr. Eldin Karaikovic at Skokie Hospital for follow up visit. Petitioner complained of continuing low back and bilateral hips/leg pain. Petitioner reported an inability to drive and leg weakness. Petitioner's physical examination indicated she was laying on table during exam and crying because of severe back pain. Petitioner was diagnosed with acute low back pain with radiculopathy to bilateral legs. Petitioner was prescribed to continue her medications, undergo an MRI of her lumbar spine and follow up in 1 week. PX1.

On 10/4/18, Petitioner presented to NSUHS Skokie Hospital for an MRI of the lumbar spine ordered Dr. Eldin Karaikovic. Petitioner's MRI was interpreted to show a small central disc protrusion without stenosis at L4-5 and a mildly bulging disc with very small superimposed central protrusion and loss of disc height at L5-S1. PX1.

On 10/5/18, Petitioner presented to Dr. Eldin Karaikovic at NSUHS Skokie Hospital for follow up visit for low back pain. Petitioner was diagnosed with acute low back pain with radiculopathy to her bilateral legs with minimal disc herniations at L4-S1. Petitioner was prescribed physical therapy 2 times per week for 3-4 weeks with a return to work with no lifting above 30 pounds and no repetitive bending/lifting/stooping for 1 month. Dr. Karaikovic noted Petitioner is not a surgical candidate. PX1.

On 10/9/18, Petitioner presented to Kristin Dryden, PT, at Team Rehab Physical Therapy for PT. Petitioner's diagnosis was bilateral lumbago with sciatica. Petitioner denied left leg numbness today but complains of numbness in right inner thigh, hips, and low back. Petitioner noted her numbness comes and goes with increased activities. Petitioner complained of bilateral leg weakness and reported falling twice since 8/10/18 because of leg weakness/pain. PX3.

On 10/12/18, Petitioner presented to Kristin Dryden, PT, at Team Rehab Physical Therapy for PT. PX3.

On 10/13/18, Petitioner presented to Dr. Rebecca Weiss-Coleman at NSUHS Lincolnwood for follow up visit with complaints of continuing low back pain w/numbness and tingling in bilateral legs. Petitioner's orthopedist ordered restrictions of no lifting greater than 30 pounds yet she describes her work as requiring lifting greater than 30 pounds, standing greater than 45 minutes twice per day and constant walking. She reports she is unable to perform these duties because of severe back pain. Petitioner's imagine was reviewed and her MRI L-spine revealed L4-5 central disc protrusion w/out stenosis and L5-S1 bulging disc with very small superimposed central protrusion and moderate loss of disc height at L5-S1. Petitioner was diagnosed with chronic midline low back pain w/bilateral sciatica. PX3.

On 10/16/18, 10/19, 10/22, and 10/25 Petitioner presented to Kristin Dryden, PT, at Team Rehab Physical Therapy for PT. PX3.

On 11/2/18, Petitioner's WC claim was denied, and TTD/medical benefits were terminated based on the 9/17/18 IME Report by Dr. Lieber which indicated Petitioner would have been able to work full duty after her physical therapy was completed and she would have reached MMI at that time.

On 11/7/18, Petitioner presented to Dr. Erickson at the American Center for Spine & Neurosurgery. Dr. Erickson noted Petitioner's MRI showed small disc herniations at L4-L5 and another small central disc herniation at L5-S1. Dr. Erickson believed the L5-S1 disc contour was slightly irregular and the L4-L5 disc protrusion was associated with a small tear. Dr. Erickson did not believe Petitioner's films demonstrated any

instability. Petitioner's physical examination demonstrated negative findings with no dermatomal sensory deficit. Dr. Erickson explained Petitioner suffered from mechanical rather than radicular pain and that her treatment should be conservative at that point. PX4.

On 11/9/18 and 11/15, Petitioner presented to Kristin Dryden, PT, at Team Rehab Physical Therapy for PT. Petitioner reported no change in symptoms. PX3.

On 12/4/18, Dr. Lawrence Lieber provided an opinion contained in his addendum IME after reviewing medical records from Athletico Physical therapy, Dr. Eldin Karaikovic and Team Rehabilitation Physical Therapy. Dr. Lieber confirmed his prior opinion that Petitioner was callable of returning to full duty employment with no restrictions and had reached maximum medical improvement and required no further treatment. Rx2.

On 1/23/19, Petitioner presented to Dr. Erickson at the American Center for Spine & Neurosurgery. Petitioner reported 5/10 pain at that time with right sided predominant pain. Petitioner had completed a series of epidural steroid injections which only the second provided relief of 1-2 weeks. Dr. Erickson noted Petitioner's pain continued as before however there appeared to be radiation past the knee on the right side. Dr. Erickson recommended a CT scan with discography be undertaken. PX4.

On 1/23/19, Petitioner underwent an SSEP examination administered by Dr. Leonard Kranzler. Dr. Kranzler's history indicates a "cervical SSEP examination suggested a moderate delay affecting the S1 nerve root on the right side. Mild delays are seen bilaterally at L5." Dr. Kranzler's results appear to reference levels of the cervical spine as indicated in PX8:

(1)Cz'-Fpz
(1)C3'-C4'
(1)Cs5-Fpz
(2)Cz'-Fpz
(2)C3'-C4'
(2)Cs5-Fpz
(3)Cz'-Fpz
(3)C3'-C4'
(3)Cs5-Fpz
(4)Cz'-Fpz
(4)C3'-C4'
(4)Cs5-Fpz
BL(1)Cz'-Fpz
BL(1)C3'-C4'
BL(1)Cs5-Fpz

However, his "clinical results" indicate:

Lower SSEP Clinical Results

L3 Left 0.7/Right 0.7
L4 Left 0.7/Right 0.7
L5 Left 0.8/Right 0.8
S1 Left 0.8/Right 0.9

On 2/8/19, Petitioner presented for an MRI with Dr. George Kuritza. Dr. Kuritza interpreted the MRI findings to show a 2-3mm posterior disk herniation at L4-5 and a 6-7mm disk herniation with an extruded nucleus pulposus which indented the ventral surface of the thecal sac with central stenosis and mild bilateral neuroforaminal narrowing at L5-S1. PX4.

On 2/20/19, Petitioner presented to Dr. Erickson at the American Center for Spine & Neurosurgery. Petitioner described severe pain while sitting for more than 2 minutes. Dr. Erickson noted Petitioner has not progressed despite taking up to four to six Norco per week. Dr. Erickson noted Petitioner's discography suggested concordant pain production at L5-S1 only with the CT scan confirming the structural changes were suggested to be most severe at L5-S1. Dr. Erickson opined Petitioner was a candidate for transforaminal lumbar interbody fusion at L5-S1 with approach taken from the right side. PX4.

On 4/3/19 Petitioner presented to Dr. Erickson at the American Center for Spine & Neurosurgery. Dr. Erickson opined again Petitioner's pain was mechanical in nature and that he may reasonably consider surgical treatment. PX4.

CONCLUSIONS OF LAW

The Arbitrator finds and concludes as follows with respect to Issue (F), Is Petitioner's current condition of ill-being causally related to the injury?:

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission* 44 Ill.2d 207 at 214, (1969), *Edward Don v Industrial Commission* 344 Ill.App.3d 643 (2003).

After listening to Petitioner and after a careful review of the trial record and exhibits, the Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being is causally related to agreed accident of August 10, 2018.

The Arbitrator notes Petitioner's testimony and initial medical records indicate Petitioner suffered a low back injury on August 10, 2018. Although Petitioner's testimony is consistent as to the mechanism of injury, there is definitely no consistency regarding her symptom reporting, in both severity, type and location, which all appear to vary and change with each passing examination and become most serious at the time of trial. Petitioner reported, at varying times:

1. 8/10/18—Mid-right low back pain with right leg tingling and numbness
2. 8/11/18—Left side low back pain with right side radiation into right side of low back
3. 8/14/18—Left side low back pain radiating into left thigh
4. 8/24/18—Left sided low back pain with bilateral numbness and tingling in feet and lower legs
5. 9/4/18—Pain with prolonged sitting with no radiating pain or numbness
6. 9/17/18—No pain but bilateral leg weakness/numbness
7. 9/18/18—Severe low back pain with bilateral radiating pain
8. 9/21/18—Right sided low back pain
9. 9/28/18—Low back and bilateral hip/leg pain in tears on the exam table
10. 10/5/18—Low back pain with bilateral leg radiculopathy
11. 10/9/18—Low back pain with no left leg numbness but complaints of right leg numbness
12. 10/13/18—Low back pain with bilateral leg numbness
13. 11/7/18—No radicular pain and no numbness
14. 1/23/19—Right sided back and leg pain extending past the knee

Further, in addition to these non-specific and changing symptoms, Petitioner reported arm numbness, tingling and weakness upon examination at trial which symptoms are entirely unsupported by any medical record contained in either parties' exhibits. Petitioner testified, "I have lower back pain. At times it travels down my leg. When I lift up my leg or when I'm sitting on a hard surface, both of my legs start going numb. I can't carry anything heavy because right away **I feel my tingling down my arms**, lower back pain." Tx 48; 50. Regarding Petitioner's tingling in her arms, Petitioner testified, "I've told them (her doctors) and as time has gone, now it's increasing especially right now like when I go – if I'm taking a shower and I lift up my legs because I can't bend down, my leg starts going numb; so I feel like everything is just getting worse now." (Tx pp. 50-51). **It is inexplicable how a moderate low back injury can cause and yield symptoms in the arms. This is clearly not a related symptom or a credible complaint** (per 10/14/18 lumbar spine MRI: L4-L5 small disc protrusion **without** stenosis; L5-S1 mildly bulging disc with questionable very small superimposed central protrusion; moderate loss of disc height also at L5-S1).

Petitioner's MRI was initially interpreted by her treating orthopedist to indicate surgical intervention is not necessary. Petitioner's radiologist specifically noted "no significant spinal canal or neural foraminal stenosis" at L4-L5 and "questionable superimposed very small central protrusion with no central spinal canal stenosis" at L5-S1. PX1.

In contrast, Dr. Erickson's opinions are based on the findings of Dr. George Kuritza's MRI interpretation (PX4) which notes a 6-7mm disk herniation with an extruded nucleus pulposus which indented the ventral surface of the thecal sac with central stenosis at L5-S1 and a nerve conduction examination that is entirely unclear as to what level of the spine is being examined. (PX8). These completely inapposite conclusions cannot be reconciled without corroborating evidence.

The Arbitrator finds Dr. Karaikovic's 10/5/18 note to support the findings of Dr. Lieber's 2 IME reports in that Petitioner appeared to reach a permanent state at that time when she was released "PRN" by Dr. Karaikovic. PX1, RX1. Dr. Lieber's opinion on September 17, 2018 stated Petitioner should be at MMI and able to return to work after a series of physical therapy visits which would have placed her projected MMI date around the same time as Dr. Karaikovic's release. Petitioner's morphing complaints are not supported by her objective findings and she was referred, in her words, "by a friend" to see Dr. Erickson who thereupon took her off work completely, who then sent her to Dr. Vargas who performed that did not help (unreasonable and unnecessary).

Given the lack of objective support for Dr. Erickson's findings, the entirely inconsistent pain complaints reported by Petitioner and the consistent findings of both Dr. Karaikovic and Dr. Lieber, the Arbitrator finds Petiti oner's condition of ill-being is not causally connected to Petitioner's alleged incident.

Lastly, Petitioner asserts, "Dr. Lieber opined that Petitioner's injury was causally connected to the work accident" and, "Furthermore, Respondent's Section 12 examiner explicitly stated that Petitioner's condition of ill-being was causally related to the work injury." **This is erroneous**, as Dr. Lieber **only opined, "Current diagnosis is low back strain, in direct relationship to August 10, 2018**. Claimant has a good prognosis for recovery."

The Arbitrator finds and concludes with respect to Issue (K), what temporary benefits are in dispute?:

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill. 2d 132, (2010).

After listening to Petitioner and after a careful review of the trial record and exhibits, the Arbitrator finds and concludes Petitioner was temporary totally disabled from August 13, 2018 through November 2, 2018. The Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence entitlement to any additional TTD after November 2, 2018 based upon the opinions of Dr. Lieber and Dr. Karaikovic.

The Arbitrator finds and concludes with respect to Issue (J) whether the medical services that were provided to Petitioner were reasonable and necessary:

The workers' compensation claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses. *Westin Hotel v. Industrial Com'n of Illinois*, 372 Ill.App.3d 527, (2007). After careful review of the parties' medical exhibits and consistent with the findings above, Petitioner failed to prove by a preponderance of the credible evidence entitlement to payment of any medical bills for treatment incurred after **November 20, 2018** (date of counsel's correspondence to Dr. Leiber). Petitioner has proven medical treatment incurred up to November 20, 2018 was reasonable and necessary. In his September 17, 2018 Section 12 report (Rx 1) and his December 4, 2018 addendum (Rx 2) Respondent's examining medical expert Dr. Lieber opined that Petitioner's treatment to date (as of September 17, 2018) was reasonable and necessary and Petitioner would benefit from additional physical therapy in his December 4, 2018 addendum he noted he reviewed physical therapy records and "...requires no further treatment at this time or in the future ..." Respondent shall maintain credit for any amounts of medical bills paid. **The Arbitrator notes Petitioner testified, "After the MRI he said (Dr. Karaikovic) everything looked normal. Those were his words."** (Tx 54). Obviously there is no need for surgical intervention if "everything looked normal."

Lastly, Petitioner asserts Dr. Lieber did not offer any opinions regarding the reasonableness or necessity of the medical treatment to date. This is erroneous. In his December 4, 2018 addendum, Dr. Lieber clearly opined that **Petitioner "...requires no further treatment at this time or in the future in association with that alleged event."**

The Arbitrator finds with respect to Issue (M) should penalties or fees be imposed upon Respondent?:

The Arbitrator finds and concludes the imposition of any penalties or fees is not warranted in this claim. Respondent's conduct was not unreasonable, not vexatious and was based on a good-faith defense.

Petitioner alleges Respondent's failure to pay temporary total disability benefits after November 2, 2018 and failure to authorize treatment per Dr. Erickson's recommendations has caused undue delay and is vexatious and unreasonable.

"It is not enough for workers' compensation claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause in order to obtain additional compensation and attorney fees under workers' compensation statute, providing that, in case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, then Workers' Compensation Commission may award additional compensation, and under statute providing for an award of attorney fees when an award of additional compensation is appropriate; instead, penalties and attorney fees under these statutes are intended to address situations where there is not only delay, but the delay is

deliberate or the result of bad faith or improper purpose." *Jacobo v. Illinois Workers' Compensation Com'n*, 355 Ill.Dec. 358, 959 N.E.2d 772 (2011).

Petitioner's motion references the Section 12 Examination with Dr. Lieber as does Respondent's response to penalties and fees. Furthermore, Respondent's response to Petitioner's request for penalties and fees notes, **"Respondent's reliance on this opinion is made in good faith as Dr. Lieber's opinions are supported, in part, by Petitioner's treating physician's impression that Petitioner's imaging studies "cannot explain all over symptoms." The Arbitrator agrees.**

A failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 302, 412 N.E.2d 470 (1980). In the workers' compensation context, generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed; the relevant question is whether the employer's reliance was objectively reasonable under the circumstances. *Global Products v. Workers' Compensation Com'n*, 392 Ill.App.3d 408 (2009). Where Respondent's actions are consistent with the Act, Respondent's nonpayment, underpayment, or delayed payment cannot be deemed vexatious or without just cause, and Section 19(k) and 19(l) penalties are denied. Where Respondent has acted in accordance with the Act, it should not be held liable for Petitioner's attorney's fees in his effort to establish otherwise, and Section 16 fees are denied.

The Arbitrator finds with respect to Issue (O) should prospective medical be awarded?:

As is the case with any element of a workers' compensation claim, the claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses. *Max Shepard, Inc. v. Industrial Com'n*, 348 Ill.App.3d 893 (2004).

Consistent with the findings detailed above and again noting the bases for those findings, Petitioner's request for prospective medical as recommended by Dr. Erickson is denied, as Petitioner has failed to prove by a preponderance of the credible evidence entitlement to same.

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Dated: November 4, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEO CALABRESE,

Petitioner,

21IWCC0113

vs.

NO: 18 WC 26260

U.S. VENTURE, INC. d/b/a
US AUTO FORCE and
FEDERATED INSURANCE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical expenses and "any and all objections made at trial," and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision for the Statement of Facts with the modifications noted below.

The Commission finds that Petitioner failed to prove he sustained a compensable accident on August 16, 2018, based on his lack of credibility. In particular, we focus on the multiple inconsistencies and irregularities in the various histories he provided, his delay in reporting his alleged accident despite multiple opportunities to do so, and the conflicting evidence regarding whether Petitioner was limping following the alleged accident.

Inconsistent Histories

Petitioner testified that his job duties included backing a regular-size van up to a loading dock to load it with various items ranging from drums of oil to brake pads to semi tires. *T.12-13.* He testified that there was about a two-and-a-half-foot height difference between the loading dock (48 to 50 inches from the ground) and the floor of the van (about 26 inches from the ground). *T.13-14.* Petitioner testified:

> So I would throw in so many tires at a time. Then you would have to jump into the van and as I would jump into the van the height -- I am almost six foot tall. I would hit my head most of the time on the van jumping back in and out of it because there is a discrepancy between the dock plate and the van.
>
> I would load the tires accordingly where they would go, jump back out. Throw more tires into the van and repeat that repetition until it's fully loaded. *T.15-16.*

Regarding his alleged accident on August 16, 2018, Petitioner initially testified, "as I went down into the van I felt a pull in my calf muscle and a pain in my foot. In my heel of my foot I felt a pain and I felt my calf muscle." *T.18.* He thought it was a pulled muscle and continued to load the van but, when he got out of the van, he took a few minutes to stretch his leg a little bit. *Id.* He then finished loading the van at a "smaller pace," checked in with someone to let them know he was leaving, stopped at the first aid kit, took two Advil, and "went on my day to finish the deliveries for the morning run." *T.18-19.*

On cross-examination, he again described the alleged accident:

> I jumped into the van. Well, stepped in, jumped in with my right side. I am a 320-pound man. As I went into the van I grabbed the top of the van so I don't fall backwards. As I went in with my right foot my weight came down on my right heel of my foot and that's when I felt a pain in my calf and my heel. *T.43.*

Petitioner did not seek medical treatment for this unwitnessed accident until August 19, 2018, three days after the alleged occurrence. The history documented at Northwestern Medicine Convenient Care was gradual onset of right heel pain for three days with "no falls or injury." This is inconsistent with Petitioner's testimony of sudden pain that he thought was a pulled muscle. We also note that this record does not even indicate that the gradual onset began or worsened at work.

On August 20, 2018, Petitioner saw Dr. Robin Pastore, DPM and gave a history of "foot and lower leg issues based on his daily functional and occupational demands working as a truck driver, where he is hauling and in and out of the truck." Petitioner had a history of left plantar fasciitis and fasciectomy. Dr. Pastore wrote, Petitioner "relates that he has always had a little achiness and soreness to his feet and legs, which he always thought of as typical based on his job demands and weight, but three days ago with *no known specific trauma* he developed sudden pain to the right heel, pointing to the inferior posterior heel juncture." *Emphasis added.* Again, this history is inconsistent with a specific injury while working at Respondent and also does not even indicate that the "sudden pain" occurred while working. To the contrary, this note indicates, "he could barely get out of bed or put weight on it, with a sharp, burning type of sensation." Dr. Pastore repeated that there was no specific injury when he wrote, "We discussed with no known trauma I do not feel there is any gross fracture or tear, but essentially is what we would describe as 'throwing his foot out' to the involved structures." Although Dr. Pastore took Petitioner off work for one week "due to a severe foot & ankle injury/pain," no opinion was provided causally relating Petitioner's condition to his job duties.

It was not until August 23, 2018, that Petitioner gave a history of a work-related injury. Dr. Adam Bryniczka, DPM documented a history of right heel pain of one-week duration, and "Patient states at work he was unloading and loading materials and *ended up falling into the back of the van.* Patient states he felt a pull. Patient did not report the incident. Patient states is [sic] progressively gotten worse." *Emphasis added.* Therefore, although the August 19th and August 20th medical

records positively state that there had been no injury or specific trauma, on August 23rd, Petitioner claimed he "fell" into the back of the van at work and "felt a pull." The Commission finds this highly incredulous.

Petitioner did not even give that same history in his own handwritten statement on August 24, 2018 when he wrote, "As I was coming off the dock plate, which is about a 2 foot drop, I felt a pull in my right heel. I thought it was just a pulled muscle so I continued on with my day." He wrote nothing about "falling" in his statement; only that his podiatrist said it "was caused by coming off the dock plate into the van."

We disagree with the Arbitrator's finding that the various histories of "falling, jumping, or stepping down" could all "describe the awkward maneuver of Petitioner entering the van." *Dec. 7.* We find that these are all very different actions. Furthermore, we note that Petitioner is claiming that he sustained a specific injury on a specific date. He has not alleged a repetitive trauma claim nor has he proven one.

Delay in Reporting the Alleged Accident

Petitioner testified that he did not report the injury right away because: 1) he thought it was a pulled muscle; and 2) Chris Soukup, the operations manager, would not have taken it seriously because Respondent's safety record would have been broken and Mr. Soukup gets bonuses based on the safety record. *T.75-79.*

As for Petitioner believing it was just a pulled muscle, that might explain why he did not report it immediately on August 16th. However, as discussed above, Petitioner went to Northwestern Medicine Convenient Care on August 19th and there is no mention of any injury in that record. The Commission finds that if Petitioner had experienced what he initially thought was a pulled muscle, he would have most likely told the medical providers that he experienced a sudden onset of pain at work three days prior instead of a "gradual onset" with "no falls or injury." Again, we point out that Petitioner has neither alleged nor proven a repetitive trauma accident.

Regarding Mr. Soukup, he denied that he gets any type of bonuses for the safety record and testified that Petitioner's is not the first work injury that had been reported to him while he has been the operations manager. *T.99-100.* We do not find Petitioner's claim that his alleged work injury would not have been taken seriously to be credible.

There is also the question of when Petitioner actually reported a "work" injury as opposed to just an injury. Petitioner testified that he told "Rich" via text message on August 19, 2018 that he hurt himself on Thursday and won't be at work tomorrow. *T.63.* Petitioner testified that he then met Rich in Respondent's parking lot on August 20th in the afternoon to give him the off-work note and "explained to him how I loaded the van, how I went in and how I felt a pain in my heel and up my leg." *T.64.*

In contrast, Richard Wienc testified that Petitioner's text message said his foot was injured but he did not recall it saying anything about it being work related. *T.6/21/19 at 10.* If Petitioner had indicated it was work-related, Mr. Wienc would have told Petitioner he needed to fill out paperwork or see if he needed medical attention. *Id.* Similarly, Mr. Wienc did not recall Petitioner mentioning anything about his foot being related to work when he saw Petitioner in the parking lot on August 20th. *Id. at 11-12.* It was only later in the week, on Thursday, August 23rd or Friday,

August 24th, that Petitioner told him "it might be work related." *Id.* Mr. Wienc testified Petitioner told him he injured his right heel and calf "from loading his truck from the repetitive movement of going up and down the dock." *Id. at 19.* We note that this is alleged mechanism of injury is inconsistent with Petitioner's claim of a specific injury on August 16, 2018.

Petitioner's Testimony about Limping at Work

Petitioner's alleged accident was unwitnessed, and he continued to work for the rest of the day after it allegedly occurred at 8:20 a.m. on August 16, 2018. He testified that he continued loading his van because he thought "it was a pulled muscle" so he got some Advil from the first aid kit. *T.18.* Petitioner had to check in with his supervisor before he left to make his deliveries. *Id.* However, he did not tell anyone about injuring his right foot. *T.48.* Petitioner testified he had pain while driving and his foot was throbbing. *T.19-20.*

When Petitioner returned to Respondent to pick up the parts for his afternoon deliveries, he had to check in with Chris or Rick because Rich was on vacation. *T.51-53.* Petitioner testified that his foot was throbbing and "I am limping around" but he still did not report an injury to them. *T.53-54.*

Petitioner testified that he was feeling a little better, so he went to work on Friday but "as the day went on the pain got more intensified." *T.20.* He testified that on Friday, August 17th, he was limping around the warehouse and Chris Soukup saw him limping but never asked if he was okay. *T.77-78.*

In contrast, Chris Soukup, Respondent's operations manager, testified that he observed Petitioner on both August 16th and August 17th in the mornings and afternoons and never saw him physically limping, favoring his right foot, or anything else that would have caught his eye. *T.97-98.* Mr. Soukup testified that if he had seen somebody limping:

> I would have asked them first are you all right, is there something wrong? If they said I hurt myself I would have gone through the policy, fill out the paperwork as usual and submit it into the people up at the corporate office and, you know, just start the whole process there. *T.98.*

We find Mr. Soukup's testimony to be credible since he had the opportunity to observe Petitioner on August 16th and 17th and did not see him limping or favoring his right foot.

Petitioner testified that other drivers also saw him limping around the warehouse including "Miguel" who asked him if he was okay and why he was limping. *T.78-79.* However, Petitioner did not subpoena Miguel or any of these other drivers to testify.

Also contrary to Petitioner's testimony, Sara Malaga, in Respondent's Human Resources department, testified that on August 16, 2018 at approximately 3:45 p.m., she had a conversation with Petitioner along with Marianne Desmore and "Kim" about Petitioner adding his family to the group insurance coverage. *T.85.* Petitioner never reported that he had suffered any right foot or ankle injury earlier that day. *T.85-86.* She also observed him walking and did not see him favoring his right foot, ankle, leg or limping in any fashion. *T.87.*

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Petitioner's testimony that he was limping is also contradicted by the video evidence (Rx2). Although Petitioner is only briefly observed walking across the dock area, there is no indication of him having a limp or altered gait. The Commission finds that the video is most consistent with the testimony of Mr. Soukup and Ms. Malaga and that Petitioner's claim that he was limping at work on August 16th and 17th is not credible.

In conclusion, we find that the Arbitrator's explanation as to why he denied penalties and attorneys' fees should also have applied to the issue of accident. The Arbitrator wrote:

> Respondent has established a good and just cause for the delay and behaved reasonably in denying benefits in this matter based upon the *multiple inconsistencies and irregularities* in Petitioner's presentation of his claim. As more fully addressed above, the Arbitrator notes *Petitioner's delay in reporting the injury despite multiple opportunities, and the inconsistency in his testimony that he was limping on [8/16/18] and [8/17/18] opposed to the brief video and the testimony of his supervisors.* The Arbitrator notes *the multiple histories provided which denied any injury or trauma which is coupled with prior foot injuries and surgery.* Petitioner thereafter *describes the incident as either stepping, jumping or falling into the truck.* Respondent then presented a *very well qualified expert who testified that he questioned any accident occurring based on the multiple histories* and opined that the condition of ill-being was misdiagnosed, mistreated and not causally related to the accident. *Dec. 12 (Emphases added).*

The Arbitrator pointed out all of the very significant reasons why Petitioner should not have been found credible at all. We agree and, after a thorough review of all the evidence, find Petitioner has failed to prove he sustained an accident at work on August 16, 2018.

The Conclusions of Law in the Decision of the Arbitrator are hereby stricken. Based on our finding regarding accident, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 13, 2019, is reversed and all awards are hereby vacated.

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

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

DATED: MAR 10 2021

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

SE/
O: 1/26/21
49

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

CALABRESE, LEO
Employee/Petitioner

Case# **18WC026260**

21IWCC0113

U S VENTURE INC D/B/A US AUTO FORCE AND FEDERATED INSURANCE
Employer/Respondent

On 8/13/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0445 RODDY LAW LTD
ROBERT J DOHERTY
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

21IWCC0113

STATE OF ILLINOIS)
)SS.
COUNTY OF Du Page)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Leo Calabrese
Employee/Petitioner

v.

Case # **18** WC **26260**

Consolidated cases: **N/A**

U.S. Venture, Inc. d/b/a US Auto Force and Federated Insurance
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **June 20, 2019 and June 21, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0113

FINDINGS

On the date of accident, **August 16, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**38,964.12**; the average weekly wage was $**749.31**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**15,648.69** for other benefits, for a total credit of $**15, 648.69**.

Respondent is entitled to a credit of $**333.72** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $499.54/week for 43 4/7 weeks, commencing August 20, 2018 through June 20, 2019, as provided in Section 8(b) of the Act. Respondent shall be given credit for $15,648.69 for non-occupational indemnity disability benefits paid under Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical services of $95,654.71 as detailed in the Arbitrator's finding with respect to Medical herein, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $333.72 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Adelstein including completing the current course of physical therapy and a follow up visit with Dr. Adelstein.

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

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

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

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

Signature of Arbitrator

August 12, 2019
Date

ICArbDec19(b)

AUG 13 2019

Statement of Facts

Petitioner Leo Calabrese testified that he had been employed by Respondent US Auto Force on August 16, 2018 for about a year and a half. He was a truck driver/warehouse worker. His shift was 8 to 9 hours Monday through Friday and one Saturday per month. He was also employed as a driver for Uber Eats, working from 5 to 20 hours per week.

He described his job duties to include using an RF scanner to pick his orders which consisted of drums of oil, tires and brake pads. He would load his vehicle, a regular sized van, and make customer deliveries in a timely manner. The loading dock was 48 to 50 inches high. The back of the van was a little over 2 feet from the ground, so there is a height difference of about 2 ½ feet to the loading dock. To load his van, he would get the van to do a pre-trip inspection, then back the van up to the dock door, with the doors open fully. He would get his paperwork and load his van with the furthest deliver closest to the back. He would throw in the tires then jump into the van and jump out, and repeat this until the van was fully loaded. Petitioner identified PX 24 as a photo representing the height of the work van in comparison to the loading dock. Petitioner testified that he does 2 runs per day, morning and afternoon.

Petitioner testified he had prior plantar fasciitis in his left foot with surgery in 2011. The past surgical history lists foot surgery-bilateral on April 27, 2011 (PX 11). He had rheumatoid arthritis. He did not have pain before like he experienced this time.

Petitioner testified that on August 16, 2018, he checked in at around 7:55 AM. His parts had already been picked. He was loading the van, going right side first. At about 8:15 or 8:20 AM, as he went down into the van, his 320 pound weight came down on his right heel and he felt a pull in his calf muscle and a pain in the heel of his right foot. He thought he pulled a muscle. He continued to load the van, climbing in and out of the van. As he checked out for the run, he stopped at the first aid kit and took two Advil. He checks out with a supervisor, either Rich, Rick or Chris. He did not tell the supervisor he injured his foot. He went on to finish his deliveries for the morning run. He testified he felt a throbbing pain while driving. He testified he had to hold his heel off the floor to avoid pain. He returned and picked his parts for the afternoon deliveries. He used stand-up forklifts. While picking his load, his foot was throbbing, and he was limping around. He then checked out again with Rick or Chris because Rich was on vacation. He did not report that he had injured his foot. He completed his run and returned the van. RX 5 is Respondent's time records documenting Petitioner clocked out at 3:54 PM.

Chris Soukup testified that he is the Operations Manager for Respondent. His duties include checking drivers to clear them for their deliveries. He testified the policy is that injuries are to be reported immediately to either the direct supervisor, or if he is not there, to him or Marianne Desmore, the assistant manager. He was performing clearing drivers on August 16, 2018. He cleared Petitioner for his runs in the morning and the afternoon. Petitioner never reported suffering an injury to his right foot on either August 16, 2018 or August 17, 2018. He testified he had an opportunity to observe Petitioner on both dates in the morning and afternoon. He did not observe him limping or favoring his right foot. He testified that if he had observed someone limping, he would has asked if something is wrong. If they said they hurt themselves, he would follow policy and fill out the paperwork.

Mr. Soukup identified RX 2 as video taken on August 16, 2018 and August 17, 2018 of the Petitioner. He is in charge of the security video. He reviewed the video himself and copied it with his cell phone. He testified this is

the only video that showed Petitioner on those dates. The video shows less than 30 seconds of Petitioner walking at 7:57 AM on August 16, 2018. The Arbitrator noted his usual gait. The video also shows 26 seconds of Petitioner checking out at 1:31 PM on August 17, 2018. Much of the video is obscured with a bright sunny area. The Arbitrator observed Petitioner for only a brief moment walking across the dock area (RX 2).

Petitioner testified he turned in the receipts to the front office on August 16, 2018. He spoke with Mariane Desmore, a front-end supervisor. Kim and Sara were there. Sara is the HR director. He spoke to Sara about the open enrollment for health insurance. He did not tell her about his right foot being injured. Sara Milaga testified that she works for Respondent in the HR department. She testified that she spoke with Petitioner at about 3:45 PM on August 16, 2018 about open enrollment applications for group insurance coverage. During the conversation, he did not report injuring himself. She testified she had an opportunity to observe Petitioner walking. He was not limping in any fashion. She does not recall seeing him on August 17, 2018. Injured employees would report any injury to their direct supervisor, not to her.

When he got home on August 16, 2018, Petitioner took more Advil and iced his right calf and the heel of his right foot. He went to work the next day, and worked an entire shift. He did not have anything else happen on Friday, but as the day went on, his pain increased. RX 5 documents that he worked 7:58 AM to 4:25 PM on August 17, 2018. He testified he was off work that Saturday. He testified that he stayed home all weekend and iced his leg. RX 6 shows that he completed 6 runs for Uber Eats on August 20, 2018 between 5:55 PM and 7:40 PM. He testified that his wife did the runs. She drove and he was in the car. She had not done that in the past.

Petitioner went to Northwestern Urgent Care on Sunday August 19, 2018 (RX 9). Petitioner reported heel pain similar to past plantar fasciitis, but also pain in the medial foot and posterior heel. He noted pain for 3 days. He denied injury. Risk factors noted were obesity and rheumatoid arthritis. X-rays were ordered for pain for 3 days. No history of fall or injury. The x-ray impression was small plantar and tiny Achilles spur. There was no evidence of fracture. The diagnosis was Achilles tendonitis. Petitioner was given a walking boot. He was advised that he could not drive with the boot and agreed to take a few days off work, He was advised to follow up with a podiatrist (RX 9).

He testified he texted his supervisor Rich Wience on Sunday. PX 27 documents the test at 6:52 PM. Rich Wience testified that in August 2018, he was employed by Respondent as a supervisor/dispatcher. He is now a driver. He testified he was on vacation on August 16, 2018. He received a text from Petitioner on August 19, 2018, but did not review it until Monday morning. The text said Petitioner would not be into work. His foot was injured. The text did not say it was a work injury. If it had, he would have told Petitioner to pick up paperwork.

Petitioner saw Dr. Pastore at Central DuPage Foot and Ankle on August 20, 2018 (PX 9). He reported a history of foot and lower leg issues based on his daily functional and occupational demands working as a truck driver. He developed plantar fasciitis in the left leg and underwent surgery. He stated he always has a little achiness and soreness in his feet and legs based on his job demand and his weight. He stated that three days ago, with no known specific trauma, he developed sudden pain to the right heel. Dr. Pastore noted that with no known trauma, he did not feel there was any gross fracture or tear. Petitioner was placed in a walker and taken off work through August 27, 2018 (PX 9).

Petitioner testified he took the off work note to Respondent and gave it to Rich, who he met as he was walking to his car to go home for the day. Rich Wience testified he met Petitioner in the parking lot at the end of the

day and Petitioner gave him the doctor's note. He remembers Petitioner was in a boot and with his wife. He does not recall Petitioner mentioning a work injury.

Petitioner saw Dr. Bryniczka at Northwest Podiatry Center for a second opinion on August 23, 2018 (PX 10). Petitioner reported right heel pain of one-week duration. He stated at work he was unloading and loading material and ended up falling into the back of the truck and felt a pull. He did not report the incident. The examination notes Petitioner is 5' 11" tall and weighs 315 pounds. The physical examination noted some edema on the posterior ankle. There was pain on palpation at the insertion of the Achilles tendon on the posterior aspect of the right heel. There was pain on range of motion. X-rays taken noted a possible stress fracture of the exostosis. Dr. Bryniczka ordered an MRI and kept Petitioner off work (PX 10).

Rich Wience testified that Petitioner called him on August 23, 2018 and let him know he needed to have surgery. At that time, he told him it might be work related and he told him he needed to come into work and start filling out the paperwork. Mr. Wience identified RX 4 as the statement he prepared. The Incident report was prepared on August 24, 2018 by Petitioner (RX 3). Petitioner described the injury "as I was coming off the dock plate, which is about a 2-foot drop, I felt a pull in my right heel" (RX 3).

Petitioner continued treatment with Dr. Bryniczka. He underwent an MRI on September 19, 2018 which showed mild insertional Achilles tendinosis, a medial talar dome osteochondral lesion which is suspicious for unstable lesion, suggestion of anterior inferior tibiofibular and anterior talofibular ligament low-grade sprains, and sub centimeter sinus tarsus cyst (PX 10). On September 20, 2018, Dr. Bryniczka reviewed the MRI and diagnosed post-traumatic osteoarthritis, Achilles tendinitis and hypertrophy of the bone. He recommended surgery for excision of the exostosis with Achilles tendon detachment with debridement and reattachment (PX 10). Surgery was performed by Dr. Bryniczka on October 19, 2018. The operative report notes the finding of a fracture fragment of the exostosis (PX 13).

Petitioner attended follow up visits with Dr. Bryniczka. He was continued off work. On November 23, 2018, Petitioner continued treatment for the open wound, developed from irritation/rubbing. Dr. Bryniczka performed debridement procedures. Petitioner also began physical therapy. On December 5, 2018, cultures noted bacterial infection. Petitioner was referred for infectious disease consult (PX 10). Petitioner was seen by Metro Infectious Disease Consultants on December 6, 2018 and January 15, 2019 (PX 11). Petitioner continued with wound care with Dr. Bryniczka through February 28, 2019 with debridement and antibiotic cream (PX 10). Petitioner testified his medical coverage forced him to change physicians in February 2019 after he had been terminated because his FMLA had run out due to him being of work for 6 months. Dr. Bryniczka's records note that he offered to see him for a follow up even if the insurance did not cover the visit (PX 10).

Petitioner saw Dr. Adelstein at Northwest Suburban Foot & Ankle beginning March 14, 2019 (PX 12). Petitioner testified that Dr. Adelstein recommended Petitioner have his wound debrided every other visit as opposed to Dr. Bryniczka who did it on every visit. Dr. Adelstein provide an off work slip on April 2, 2019 stating Petitioner was unable to work due to a chronic non-healing wound on his right heel. Dr. Adelstein treated not only the right heel wound, but also the warts on the left heel (PX 12). On April 16, 2019, Dr. Adelstein prescribed physical therapy. He advised Petitioner to discontinue local wound care (PX 12). Petitioner testified he could not start physical therapy until the wound was closed. Petitioner was evaluated for therapy on April 22, 2019 by Colleen Castro. She noted an antalgic gait with deficits including difficulty walking, going up and down stairs, driving, wearing gym shoes and getting in and out of a truck. The plan was to initiate therapy 2 times per week for 12 sessions (PX 11). On April 29, 2019, Petitioner advised he had

begun physical therapy. Petitioner's right heel was debrided. Petitioner was advised to complete his course of physical therapy. He was scheduled for follow up with Dr. Adelstein in one month (PX 12). Petitioner testified he is still attending physical therapy. He believes he has 2 ½ more weeks. The May 1, 2019 therapy note states that authorization is not required for 24 visits (PX 8). Petitioner testified that he has made an appointment with Dr. Adelstein for a potential release to work. Petitioner testified he has not been released to return to work full duty by any doctor.

Petitioner was terminated on February 21, 2019 due to being off work for 6 months. He testified he received short- and long-term disability benefit paid for by Respondent. He currently notices he cannot coach is kids' basketball team because he cannot run up and down the court. He does not take long walks or bike rides.

Dr. George Holmes evaluated Petitioner on November 29, 2018 at Respondent's request. He testified by evidence deposition taken December 31, 2018 (RX 1). Dr. Holmes testified that he is board certified in orthopedic surgery, focusing on foot and ankle surgery. He testified he has been dealing with Achilles tendon injuries on an almost daily basis and it has been a research interest of his for 30 years. He reviewed records of Petitioner's medical treatment, the MRI films and two brief videos (RX 2), and performed a physical examination of Petitioner. The examination noted atrophy of the right calf and an incompletely healed scar on the back of the heel. He had some pain in the area of the Achilles. The remainder of the exam was essentially normal (RX 1).

Dr. Holmes opined that Petitioner did not have a fracture based upon neither the x-ray nor the MRI showing any evidence of a fracture. He found no evidence of Achilles tendinosis. He testified that this is manifested by very characteristic features on an MRI. Petitioner's MRI excluded tendinosis or tendinitis of the Achilles tendon or any other significant injury. Petitioner had a draining wound at the back of his heel. Dr. Holmes diagnosed a generic strain as a result of the incident. Dr. Holmes opined that the incident as described by Petitioner did not cause, exacerbate or accelerate the condition diagnosed by Dr. Bryniczka. The treatment was not reasonable or necessary. A strain would not have led to surgery done soon after the reported injury. Dr. Holmes also noted Petitioner was given a Medrol Dosepak. Steroids are contraindicated for Achilles tendinitis or tendinosis. Dr. Holmes opined that sans the surgery, Petitioner would be capable of working, but because of the wound caused by the unnecessary surgery, he would not be. He testified that surgery should not be performed within three to six months after exposure to steroids because it increased the likelihood of delayed wound healing (RX 1).

Dr. Holmes testified that the initial history noted no fall or injury. Dr. Holmes' history was that Petitioner jumped or stepped down from a dock plate and felt pain. Dr. Bryniczka took a history of falling into the back of the van. Dr. Holmes notes that these are three different histories. He testified that he did not personally observe the heel during the course of the surgery. He testified that the MRI is an extremely sensitive mechanism to give him a picture of the heel and Achilles tendon. It is almost impossible to have a fracture not seen on the MRI. He testified it is often better that the eye. Dr. Holmes testified that a bone spur does not cause damage to the Achilles tendon or Achilles tendon insertion. He has heard podiatry colleagues tell a patient that a spur shreds a tendon but there is no evidence that occurs, and he cited his research. A fracture of the exostosis would not cause tendon damage. It could cause pain. Dr. Holmes could not state to a reasonable degree of certainty that Dr. Bryniczka had breached the standard of care by performing surgery on Petitioner's heel as he cannot make any opinions in the State of Illinois on the standard of care qualifications of a podiatrist.

Conclusions of Law

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs in "the course of" employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner testified that he was injured on Thursday, August 16, 2018 when, at about 8:15 or 8:20 AM, as he went down into the van, his 320 weight came down on his right heel and he felt a pull in his calf muscle and a pain in the heel of his right foot. He described the loading process of his van. PX 24 depicts the drop from the loading dock to the bed of the van of over 2 feet. Petitioner described the body positioning needed for him to make this drop to the bed of the van to load the tires and other items. He testified that he performs this maneuver multiple times each time he loads his truck. The Arbitrator heard the testimony and finds the Petitioner's testimony credible.

The Arbitrator notes the various histories as pointed out by Dr. Holmes at his deposition. The Arbitrator notes that while the descriptions of the incident use various verbs to describe the action including falling, jumping, or stepping down, that all of these could be used to describe the awkward maneuver of Petitioner entering the van. The Arbitrator also notes that, since Petitioner performs this action multiple times and after feeling the pain continued in his duties, that stating he did not have an accident or trauma is not inconsistent with developing pain while performing an action he has done so many times before. The Arbitrator finds that Petitioner's failure to report the accident until Sunday, while violating policy, is not unreasonable given his belief that it was just a muscle strain and that he has had foot problems before. The fact that his supervisors did not notice any limp does not persuade the Arbitrator that Petitioner was not injured, given the limited time of viewing and the that the purpose of the interactions was not related to any injury or physical problem.

Having found that the description of the injury while entering the van is persuasive, the Arbitrator finds that this occurred during employment and at a place where Petitioner was reasonably performing employment duties, and while he fulfills those duties and therefore was in the course of his employment.

There are three categories of risks an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. The Arbitrator finds that the risk of entering a van from a loading dock with a drop of over 2 feet in order to load the van with products for delivery is a risk distinctly associated with the employment and therefore the injury from this risk would be arising out of the employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on August 16, 2018.

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

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). Based upon the Arbitrator's finding with respect to Accident, Petitioner suffered an injury to his right foot as a result of the accident on August 16, 2018. Respondent further disputes whether Petitioner's condition of ill-being beyond a strain of the ankle is causally connected to the accident based upon the opinions of Dr. Holmes.

The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner presented no clear medical causation opinion. At Northwestern Urgent Care on Sunday August 19, 2018, Petitioner reported heel pain similar to past plantar fasciitis, but also pain in the medial foot and posterior heel. He noted pain for 3 days. He denied injury. Risk factors noted were obesity and rheumatoid arthritis. Dr. Pastore recorded a history of foot and lower leg issues based on his daily functional and occupational demands working as a truck driver. He developed plantar fasciitis in the left leg and underwent surgery. He stated he always has a little achiness and soreness in his feet and legs based on his job demand and his weight. He stated that three days ago, with no known specific trauma, he developed sudden pain to the right heel. Dr. Pastore noted that with no known trauma, he did not feel there was any gross fracture or tear. Neither treater was given an accident history to address causation of the condition, but does address the onset on August 16, 2018.

Petitioner gave Dr. Bryniczka a history that he was unloading and loading material and ended up falling into the back of the truck and felt a pull. Dr. Bryniczka's examination notes Petitioner is 5' 11" tall and weighs 315 pounds. The physical examination noted some edema on the posterior ankle. There was pain on palpation at the insertion of the Achilles tendon on the posterior aspect of the right heel. There was pain on range of motion. X-rays taken noted a possible stress fracture of the exostosis. The September 19, 2018 MRI was read as showing mild insertional Achilles tendinosis, a medical talar dome osteochondral lesion which is suspicious for unstable lesion. Dr. Bryniczka diagnosed post-traumatic osteoarthritis, Achilles tendinitis and hypertrophy of the bone. He recommended surgery for excision of the exostosis with Achilles tendon detachment with debridement and reattachment, which was performed on October 19, 2018. The operative report notes the finding of a fracture fragment of the exostosis. Dr. Adelstein's treatment focused on the wound care and he provided no opinions on the underlying condition.

Petitioner testified that he had prior plantar fasciitis with surgery to the opposite left foot. His medical records state the condition was bilateral. Petitioner reported to Northwestern Urgent Care that he had heel pain similar to past plantar fasciitis, but also pain in the medial foot and posterior heel. Petitioner told Dr. Pastore he had a history of foot and lower leg issues based on his daily functional and occupational demands working as a truck driver. He developed plantar fasciitis in the left leg and underwent surgery. He stated he always has a little achiness and soreness in his feet and legs based on his job demand and his weight. The Arbitrator notes that the plantar fasciitis surgery was in 2011. No records of this treatment or any treatment for the feet prior to the date of accident were admitted. Petitioner worked full duty at his physically demanding job until the accident. He was disabled thereafter and has been under continuous medical treatment and ongoing disability.

Dr. Holmes opined that Petitioner did not have a fracture based upon neither the x-ray nor the MRI showing any evidence of a fracture. He found no evidence of Achilles tendinosis. He testified that this is manifested by very characteristic features on an MRI. Petitioner's MRI excluded tendinosis or tendinitis of the Achilles tendon or any other significant injury. Petitioner had a draining wound at the back of his heel. Dr. Holmes diagnosed a generic strain as a result of the incident. Dr. Holmes opined that the incident as described by Petitioner did not cause, exacerbate or accelerate the condition diagnosed by Dr. Bryniczka.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. International Vermiculite Co. v. Industrial Comm'n, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); ARA Services, Inc. v. Industrial Comm'n, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Having heard the testimony and reviewed the exhibits the Arbitrator finds the opinion of Dr. Holmes unpersuasive. As noted above in the Arbitrator's finding with respect to Accident, the Arbitrator does not find the variance in the histories dispositive. The Arbitrator also notes that, while clearly very well qualified, that Dr. Holmes did not examine Petitioner until after surgery had already taken place. The opinions rendered rely on the doctor's own review of the MRI. Yet the x-rays and MRI do not completely support Dr. Holmes' reading. Northwestern Urgent Care x-ray impression was small plantar and tiny Achilles spur. There was no evidence of fracture. But Dr. Bryniczka's x-rays noted a possible stress fracture of the exostosis. The September 19, 2018 MRI was read as showing mild insertional Achilles tendinosis, a medical talar dome osteochondral lesion which is suspicious for unstable lesion. These readings are not consistent with Dr. Holmes assertions. Further,

the Arbitrator finds the operative finding of a fracture of the exostosis significant and finds Dr. Holmes dismissal of this unpersuasive. Given the chain of events and the Petitioner's treating doctors addressing the right foot condition including a fracture of the exostosis in the context of the accident histories, the Arbitrator finds the condition of ill-being for which surgery was performed causally connected to the accident.

Dr. Holmes agrees that Petitioner's wound problems are related to the surgical procedure performed, Since the Arbitrator finds that condition of ill-being treated is causally related to the accident and that the surgery would therefore be related, the subsequent treatment for the wound care would also be a consequence of the accident. While Dr. Holmes criticized Dr. Bryniczka performing surgery so soon after Petitioner's steroid use, he did not opine that this breached the standard of care which would be needed to break causal connection.

Based upon the record as a whole and the Arbitrator's finds with respect to Accident, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being as diagnosed and treated by Dr. Pastore, Dr. Bryniczka and Dr. Adelstein is causally connected to the accident sustained on August 16, 2018.

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

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Arbitrator's findings with respect to Accident and Causal Connection, reasonable and necessary medical treatment for Petitioner's condition of ill-being to the right foot and heel would be compensable.

Petitioner submitted medical bills as PX 14 through PX 23 and a summary of the charges listed as Exhibit A which seek recovery of the following:

PX 14. Radiology Subspecialist of Northern Illinois:	$793.00
PX 15. Northwestern Medicine	$3,062.25
PX 16. Central DuPage Foot & Ankle Assoc.	$194.00
PX 17. Northwest Podiatry	$17,554.00
PX 18. Smart Choice MRI	$600.00
PX 19. Presence St. Joseph Hospital	$67,855.51
PX 20. American Anesthesiology Assoc. of Ill.	$3,514.00
PX 21. Apria Healthcare	$877.95
PX 22. Metro Infectious Disease Consultants	$605.00
PX 23. Northwest Suburban Foot & Ankle Clinic	$1,350.00

The Arbitrator has reviewed these exhibits and the medical records admitted as 8 through PX 13. The Arbitrator notes that PX 14 includes a charge of $751.00 for treatment before the date of accident. This charge is not causally related and is denied. The Arbitrator also notes that Petitioner testified that he had insurance through Respondent until February 2019 and that the bills submitted include some insurance payments and some adjustments. The parties stipulated that $333.72 was paid by Petitioner's group carrier. The Arbitrator is unable to determine if the adjustments would be accurate pursuant to the provisions of Section 8.2 of the Act.

Petitioner also testified that he transferred treatment to Dr. Adelstein because he accepted Medicaid and his bills, while not showing any payments or adjustments, do note this coverage. The bills also document some payments by Petitioner for deductibles and co-pays. A Commission decision ordering the employer to 'pay any unpaid, related medical expenses according to the fee schedule and provide documentation with regard to said fee schedule payment calculations to Petitioner' complies with the statutorily mandated procedures set forth in the Act. *Springfield Urban League v. Ill. Workers' Comp. Comm'n,* 990 N.E.2d 284, 371 Ill.Dec 384 (4th Dist. 2013); *Wisdom v. Associated,* 19 IWCC 361.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that Respondent shall pay reasonable and necessary medical services of $95,654.71 as detailed above, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $333.72 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Arbitrator's findings with respect to Accident, Causal Connection, Medical, the Petitioner was still completing his treatment with Dr. Adelstein and physical therapy at the time of the hearing in this matter and had not yet been placed at maximum medical improvement or released from care. He had not been returned to work at either restricted or full duty. Petitioner testified that he was completing physical therapy within the next 2 ½ weeks and had a follow up appointment with Dr. Adelstein for discharge and return to work. No medical records corroborating this were admitted, but the Arbitrator notes that the physical therapy records include financial authorization for up to 24 visits.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident, Causal Connection, Medical, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Adelstein including completing the current course of physical therapy and a follow up visit with Dr. Adelstein.

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

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Based upon the Arbitrator's findings with respect to Accident, Causal Connection, Medical and Prospective Medical, the Petitioner was still completing his treatment with Dr. Adelstein and physical therapy at the time of the hearing in this matter and had not yet been placed at maximum medical improvement or released from care.

He had not been returned to work at either restricted or full duty. Petitioner testified that he did not receive any temporary compensation but that he received short term and long term disability. Per the stipulation of the parties these benefits totaled $15,648.69 as of the date of trial.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident, Causal Connection, Medical and Prospective Medical, the Arbitrator finds that the Petitioner has proven by a preponderance of the evidence that he is entitled to temporary total compensation commencing August 20, 2018 through June 20, 2019, being the date of the 19(b) hearing, a period of 43 4/7 weeks. Respondent shall be given credit for $15,648.69 for non-occupational indemnity disability benefits paid under Section 8(j) of the Act.

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

Penalties imposed under section 19(l) are in the nature of a late fee. The award of section 19(l) penalties is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified.

The standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and (16) require more than an "unreasonable delay" in payment of benefits. For the award of penalties and attorney fees under sections 19(k) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, penalties and attorney fees under sections 19(k) and 16 are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and 16 is discretionary.

Having reviewed the evidence herein, the Arbitrator finds that Respondent has established a good and just cause for the delay and behaved reasonably in denying benefits in this matter based upon the multiple inconsistencies and irregularities in Petitioner's presentation of his claim. As more fully addressed above, the Arbitrator notes Petitioner's delay in reporting the injury despite multiple opportunities, and the inconsistency in his testimony that he was limping on August 16, 2018 and August 17, 2018 opposed to the brief video and the testimony of his supervisors. The Arbitrator notes the multiple histories provided which denied any injury or trauma which is coupled with prior foot injuries and surgery. Petitioner thereafter describes the incident as either stepping, jumping or falling into the truck. Respondent then presented a very well qualified expert who testified that he questioned any accident occurring based on the multiple histories and opined that the condition of ill-being was misdiagnosed, mistreated and not causally related to the accident. The Arbitrator finds that Respondent was diligent in assessing the compensability of this matter, and while the Arbitrator has found the matter is compensable, notes the good faith defense mounted as to accident and causation.

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to establish that Respondent's denial and delay of payment in this matter was unreasonable. Petitioner's request for penalties and attorney's fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelle Vazquez,

Petitioner,

21IWCC0114

vs.

NO: 18 WC 36940

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 3/9/20, is hereby affirmed and adopted.

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

21IWCC0114

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

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

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

DATED: MAR 10 2021
TJT: pmo
o 1/26/21
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

VAZQUEZ, MICHELLE
Employee/Petitioner

Case# **18WC036940**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

21IWCC0114

On 3/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0222 GWC INJURY LAWYERS LLC
KITRA K KILLEN
ONE E WACKER DR SUITE 3800
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
J BARRETT LONG
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

21IWCC0114

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

MICHELLE VAZQUEZ
Employee/Petitioner

v.

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

Case # **18** WC **36940**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **November 20, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 2, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**46,222.80**; the average weekly wage was $**888.90**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**32,000.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**32,000.40**.

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

ORDER

The Arbitrator finds that the Petitioner sustained accidental injury arising out of and in the course of her employment on November 2, 2018. The Arbitrator further finds that the Petitioner's right shoulder injury is causally related to the November 2, 2018 accident

Respondent shall authorize the right shoulder surgery recommended by Dr. Heller, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

March 5, 2020
Date

MAR 9 - 2020

STATEMENT OF FACTS

Petitioner testified she has been employed by Respondent for 4.5 years as of 11/2/18 as a bus operator. Her duties involve inspecting the bus pre-trip for safety and operation, and then transporting bus riders on a designated route. She is part of Union ATU 241.

On 11/2/18, Petitioner testified she had an accident while on the bus. She was halfway through a run. When she was exiting the driver's seat her left foot got caught in a trash bag, she fell forward and braced herself with her right arm on the passenger side of the bus. She did not fall all the way down. She put her right leg and right arm out catch herself and grabbed onto a railing. She testified she notified her supervisor right after she got off the bus. Immediately after the incident she had pain in her right arm/shoulder and right leg. She was advised by management's Ms. Knowles that she needed to finish her bus run and to then write a report to the manager. She testified that she sought treatment the next morning, on 11/3/18.

Respondent submitted a surveillance video from inside the bus at the time of the alleged accident (Rx1). The Arbitrator notes the video depicts the Petitioner pulling into the garage, and then, when she gets up out of the driver's seat, trips or loses her footing and catches herself on a railing on the passenger side of the bus with her right arm. She then takes a slow time getting off the bus and is seen swinging her right leg back and forth, both initially when it happened as well as afterwards as she is exiting the bus. As she walks away from the bus she appears to limp. The incident takes place between approximately the 27:47 and 29:26 time stamps in the video.

On 11/3/18, Petitioner went to Advocate Immediate Care. The report states that she "tripped at work yesterday and broke her fall by reaching and landing on her right arm, since then her right shoulder hurts and can't raise right arm above the shoulder and every time she steps forward with her right leg her [sic] the back of her thigh hurts." Petitioner was noted to be 5'3" and 308 pounds. X-rays were obtained of right shoulder, which were essentially normal, and Petitioner was given a sling. She was advised to follow up with her primary provider in 2 to 3 days and to otherwise return to work on 11/6/18. (Px1).

On 11/9/18, she sought treatment with Dr. Strugala at Midland Orthopedic Associates. Petitioner reported she began to fall forward when she was getting out of her seat on the bus in an elevated area, she reached with her right arm and grabbed onto a railing to stop her fall and extended her right leg for the same purpose. She then experienced severe right shoulder and thigh pain. She indicated ongoing shoulder pain and weakness with problems reaching overhead. She was able to walk but complained of anterior and posterior thigh pain. Right thigh x-rays were normal. Following exam, the doctor diagnosed a probable right thigh strain and possible right rotator cuff injury. He prescribed a right shoulder MRI and held Petitioner off work. (Px2).

The 12/1/18 right shoulder MRI was read by the radiologist as showing: 1) partial thickness, near complete full width articular surface tear within the infraspinatus just proximal to the insertion, 2) mild supraspinatus tendinosis, 3) mild atrophy of the teres minor muscle, 4) very atretic bicep tendon within the bicipital groove that could be related to old injury, and 5) mild AC joint arthropathy. (Px2; Px4).

On 12/4/18, Dr. Strugala reviewed the MRI results, indicating testing showed a significant partial rotator cuff tear. Petitioner's complaints remained the same. Ibuprofen wasn't helping. The doctor recommended Tramadol and referred Petitioner to specialist Dr. Heller for the right shoulder. For the right thigh, he recommended physical therapy. She was continued off work. (Px2).

Petitioner saw Dr. Heller on 12/11/18. The history indicated "she slipped and fell and utilized her right arm to break her fall." He indicated the shoulder MRI showed a high-grade partial thickness near full thickness tear of

the right rotator cuff. Following his exam, Dr. Heller stated that based on Petitioner's age, the MRI and markedly limited range of motion on exam, arthroscopic right shoulder surgery was recommended. He continued her off work status pending same. (Px2).

Petitioner had therapy at Athletico from through 1/28/19, a total of 20 visits. (Px5).

On 12/18/18, Petitioner indicated therapy was hurting her shoulder so Dr. Strugala advised her to limit therapy to the thigh only and to remain off work. On 1/22/19, Dr. Strugala noted shoulder surgery authorization was still pending. Petitioner reported therapy was "somewhat helpful" with ongoing anterior right and posterolateral thigh pain that did not go below the knee. Therapy was continued and a right thigh/femur MRI was prescribed. The 1/25/19 MRI of the right femur was normal. Minimal subchondral patellar chondromalacia and a small suprapatellar effusion were noted in the knee. On 2/5/19, Petitioner continued to complain of the right thigh and therapy was again continued while awaiting authorization of shoulder surgery. (Px2).

Petitioner was examined by Dr. Wolin on 3/14/19 at the Respondent's request pursuant to Section 12 of the Act. She reported that she tripped over a transfer bag getting out of the driver's seat of her bus, grabbed onto a rail while falling and injuring her right hip/thigh and shoulder. She reported improvement in the right thigh with therapy, but she had continued pain and limited abduction in the right shoulder. She denied any numbness and tingling in the right arm and denied any prior right shoulder problems. Provocative shoulder examination was limited by pain. Dr. Wolin noted right shoulder x-ray showed AC joint hypertrophy, which was not specifically tender on exam. He noted the plain, non-contrast MRI of the shoulder was relatively insensitive to labral injuries but did indicate a partial thickness (60%) partial supraspinatus tear. (Rx2).

Dr. Wolin reviewed the surveillance video of the alleged 11/2/18 accident, noting Petitioner was seen to trip on her right leg as she got out of her seat, fall forward and grasp a railing with her right outstretched arm. After this, he noted she: was "seen to look around her workstation and is noticed to be reaching across the driver's seat with the arm to approximately 120 degrees of flexion without having to stop. In order to exit the vehicle, she grabs onto a perpendicular railing adjacent to the door apparently in order to steady herself as she goes downstairs. She seemed to go down the stairs without any problem to the right shoulder as the arm comes to and above shoulder level." Dr. Wolin diagnosed a partial thickness right rotator cuff tear with a possible glenoid labrum tear. As to the right thigh, he diagnosed a strain but noted he was not provided with the MRI films, advising he would like to have same if further opinion was needed. Dr. Wolin did state: "Specifically I am concerned about her generalized guarding and what appears to be a lack of veracity regarding the work episode. If the surgery was to be done, I would be concerned that both of these factors would mitigate against a good result." Noting the Petitioner had not yet undergone shoulder treatment, he recommended a diagnostic lidocaine injection into the subacromial space. If there was relief, he would recommend therapy. If not, he would recommend a second injection into the joint. If that helped and allowed better motion, he would be concerned about a possible labral tear. If no relief with either injection he "would be concerned about the ability to get a good result in the subject." Relief with either injection would result in a recommendation for therapy to try to avoid surgery.

With regard to causation of the right shoulder, Dr. Wolin stated: "one would certainly expect that there would be an immediate limitation of elevation and pain with attempted forward or over shoulder movement if the rotator cuff tear occurred on the date of injury. A review of the video does not show such a reaction. Therefore, I am unable to state that there is a causal relationship between the rotator cuff tear and the work injury." He noted Petitioner had denied any preexisting condition that may have been aggravated by the alleged work injury. He opined that treatment to date had been reasonable and that Petitioner was unable to drive a bus and should have work restrictions, though neither would be work related. In conclusion, the doctor stated: "The

subjective complaints including the history are not supported by the objective medical evidence including the video." (Rx2).

Dr. Heller issued a narrative report on 7/26/19 in response to a request from Petitioner's counsel. He noted Petitioner described using her right arm to break her fall on 11/2/19 and suffering a traction injury. He noted he reviewed the shoulder MRI himself and agreed it showed a high-grade cuff tear. He noted the marked loss of shoulder motion on exam. The diagnosis is a partial thickness right rotator cuff tear. His prognosis was improvement with surgery and likely worsening without. He believed she was unable to work pending the recommended surgery. Based on Petitioner's stated history of her right shoulder injury with no prior complaints, Dr. Heller opined that her current right shoulder symptoms and cuff tear were due to the 11/2/19 accident, and therefore the surgical recommendation is related as well. Dr. Heller also commented that Dr. Wolin agreed as to the diagnosis and surgical recommendation, only disputing the causal relationship to the accident. (Px6).

Petitioner testified she has continued to see Dr. Strugala through the present time. The records in evidence indicate she treated through 5/28/19. After reporting a setback with deep tissue massage on 3/5/19, physical therapy for the right thigh was continued. On 4/2/19, Petitioner reported improvement and that she only had symptoms with prolonged standing and ambulation. On 4/30/19, Dr. Strugala reported Petitioner had definite improvement but residual localized thigh pain. An EMG was obtained, which on 5/28/19 Dr. Strugala indicated was suggestive of a right L5 radiculopathy. He recommended a lumbar MRI. (Px3).

Petitioner has not seen Dr. Heller since her initial visit with him. She denied any right shoulder injuries or treatment prior to 11/2/18, and denied any subsequent new injuries or accidents involving the right shoulder. She has remained off work since the accident date. She testified she currently has limited range of right shoulder motion and can't do any heavy lifting with the right arm due to shoulder pain. She testified she is able to lift about two pounds before she gets discomfort. She can raise her arm forward to shoulder level but has difficulty if she holds it out to the side (to below shoulder level, just above elbow level). She can move her arm in front of her body but cannot put her right arm behind her at all. She testified that she wants to undergo the recommended surgery.

On cross-examination, Petitioner testified she is still employed by Respondent. She is able to drive her car with her left arm, noting she is right hand dominant. After reviewing the video of the incident, the Petitioner acknowledged it accurately depicted what occurred on 11/2/18. On redirect, the Petitioner noted the video showed her tripping over the trash receptacle. It was on her left side at the time she tripped, though it is normally on the right when she is seated. She also noted she is depicted grabbing the metal bar.

Respondent's counsel stated for the record that TTD benefits were continuing at the time of the hearing, and the specific credit indicated was the total paid through the date of hearing.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, that the alleged accidental injury both arose out of and occurred in the course of his or her employment (*Horvath v. Industrial Commission*, 96 Ill.2d. 349 (1983)), and that there is some causal relationship between his employment and his injury (*Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52, 63 (1998)).

The Petitioner testified credibly as to tripping when she was exiting the bus driver's seat on 11/2/18 and reaching out with her right arm to a railing across the aisle to catch herself. She testified that she injured her right shoulder and thigh at that time, and this is significantly corroborated by the contemporaneous medical records. The bus video corroborates Petitioner's description of the accident. The Arbitrator notes the video also depicts the Petitioner moving her leg as if she may have "tweaked" it in some fashion after the incident.

The Arbitrator finds that an accident did occur on 11/2/18 which arose out of and in the course of Petitioner's employment with Respondent. With regard to the in the course of element, the Petitioner had been inside of the bus and partially done with her route when she arose out of her driver's seat and tripped over something on the floor. She was clearly in the course of her employment at that time. With regard to the arising out of element, the Arbitrator finds that the act of exiting the bus from a fairly confined area in the driver's seat and tripping over something on the floor at her feet involved an increased risk that was directly related to the employment, within the meaning of the Act. As such, the Arbitrator finds that the Petitioner sustained injuries arising out of and in the course of her employment with Respondent on 11/2/18.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The parties have indicated that the main issue in this matter is the causal relationship of the Petitioner's right shoulder condition, as well as the causal relationship of any proposed right shoulder surgery, to the accident of 11/2/18.

On the one hand, treating surgeon Dr. Heller has opined that, based on the Petitioner's lack of any prior right shoulder complaints, her post-accident complaints and the MRI findings, the Petitioner's right shoulder condition is causally related to the 11/2/18 accident. The doctor noted that prior to the incident, Petitioner indicated she was pain free. Petitioner's right shoulder MRI revealed a partial thickness rotator cuff tear, which Dr. Heller opined is related to the accident and is the basis for the surgical recommendation. On the other hand, Respondent's Section 12 examiner, surgeon Dr. Wolin, has opined that the Petitioner was seen in the incident video using her right arm as she exited the bus following the incident in a fashion that does not indicate a rotator cuff tear. He has opined that there is no causal connection between the 11/2/18 accident and the Petitioner's right shoulder condition.

Both doctors examined the Petitioner on one occasion. Both physical exams were similar, and both agree further right shoulder treatment is warranted. Dr. Heller bases his finding of causal connection on the Petitioner's history of no prior right arm/shoulder complaints, a traction injury to the right arm/shoulder and subsequent and ongoing symptoms. Dr. Wolin bases his opinion on his review of the incident video and a lack of sufficient mechanism of injury. Dr. Heller never viewed the video.

The Arbitrator reviewed the video, and while there was relatively mild trauma to the right shoulder, the Petitioner does in fact reach out across the bus aisle to grab the railing with her outstretched right arm to catch herself. She also is seen focusing on her right leg, as she is seen swinging it as if to test it both while on the bus and after she exited.

It appears that the defense argument in this case, to a large extent, is that the Petitioner's incident on 11/2/18 involved a relatively minor trauma and that she perhaps is exaggerating her complaints. The evidence, however, does not evidence any significant pre-incident shoulder problems, the video does depict the Petitioner reaching her right arm out to the railing on the other side of the bus to catch herself, and she has had consistent continuing complaints since the accident date.

The Arbitrator has considered the opinions of Dr. Wolin, and notes that he makes fair argument that the video does not depict a tremendously significant trauma, and the Petitioner is using the right arm as she exists the bus, including at a relatively abducted level. However, it also appears to the Arbitrator that the Petitioner is focused on her leg initially as she exited the bus. There is no indication that the Petitioner has a full cuff tear and is unable to abduct her arm, but rather that she has pain and difficulty doing so. Finally, there is no evidence that has been presented indicating Petitioner had right shoulder symptoms prior to 11/2/18, and therefore it is reasonable to conclude that even if the partial tear itself wasn't caused by the 11/2/18 incident, it likely aggravated it based on a chain of events analysis. The Arbitrator finds Dr. Heller's opinion to be more persuasive in this case and relies on that opinion.

For these reasons, the Arbitrator finds Petitioner's right shoulder condition to be causally related to the 11/2/18 work accident.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings above, the Petitioner's right shoulder condition is causally related to the 11/2/18 work accident. The Arbitrator notes that Petitioner testified she continues to experience pain and limited motion of her right shoulder and that she wishes to undergo the prescribed shoulder surgery. The arbitrator notes that the Petitioner's complaints have remained significantly consistent with regard to the right shoulder from the time of her initial medical visit to her most recent medical visit. Dr. Heller explained Petitioner's prognosis is good if she undergoes the recommended surgery and that without the surgery, he expects worsening of her symptom of pain and weakness and inability to utilize the right shoulder in a normal fashion. The Arbitrator notes that even Dr. Wolin acknowledges that surgery may be reasonable and necessary although he disputed a causal relationship to the accident and indicated that he would initially attempt injections to the shoulder.

The Arbitrator finds that the Petitioner is entitled to the right shoulder surgery recommended by Dr. Heller, and that Respondent is responsible and shall authorize same.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charmaine Mackowiak,

Petitioner,

21IWCC0115

vs.

NO: 11 WC 1742

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, maintenance and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission corrects the Arbitrator's decision at p.2 of the form decision to show that Petitioner is entitled to temporary total disability benefits from 12/21/10 through 6/17/14, for a period of *182* weeks (not 181-6/7 weeks), including the extra leap year day in 2012.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 9/28/18 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $887.13 per week for a period of 182 weeks, from 12/21/10 through 6/17/14, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $887.13 per week for a period of 6/7 weeks, from

21IWCC0115

11/24/15 through 11/29/15, under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses associated with the services provided by Mercy Works, Dr. Hurley, MacNeal Hospital, Dr. Patel, Dr. Warzocha and Dr. Salehi, as set forth in the Request for Hearing form (Arb. Ex#1) and in the Arbitrator's decision, totaling $83,002.74, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 15% person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including $2,658.88 as an advance against PPD; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

DATED: MAR 11 2021
o: 1/26/21
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MACKOWIAK, CHARMAINE
Employee/Petitioner

Case# **11WC001742**

CITY OF CHICAGO
Employer/Respondent

21IWCC0115

On 9/28/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.32% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0290 KARCHMAR & STONE
LARRY KARCHMAR
111 W WASHINGTON ST SUITE 1030
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
CHRISTOPHER JARCHOW
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0115

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Charmaine Mackowiak
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **11** WC **1742**

Consolidated cases: **Not Applicable**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **07/11/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0115

FINDINGS

On **12/20/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$69,196.40**; the average weekly wage was **$1,330.72**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$2,658.88 PPD Advance** for other benefits, for a total credit of **$2,658.88**.

Respondent is entitled to a credit of **$2,568.88** under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF **$887.13**/WEEK FOR **181 6/7** WEEKS, COMMENCING **DECEMBER 21, 2010** THROUGH **JUNE 17, 2014**, AS PROVIDED IN SECTION 8(B) OF THE ACT, AS SET FORTH IN THE CONCLUSIONS OF LAW ATTACHED HEREIN;

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF **$887.13**/WEEK FOR 6/7TH OF A WEEK, COMMENCING **NOVEMBER 24, 2015** THROUGH **NOVEMBER 29, 2015**, AS PROVIDED IN SECTION 8(A) OF THE ACT, AS SET FORTH IN THE CONCLUSIONS OF LAW ATTACHED HEREIN;

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES PROVIDED BY MERCY WORKS, DR. HURLY, MACNEAL HOSPITAL, DR. PATEL, DR. WARZOCHA AND DR. SALEHI, AS INDICATED ON THE REQUEST FOR HEARING (ARB. EX# 1), PURSUANT TO SECTION 8(A) AND 8.2 OF THE ACT AND SUBJECTED TO THE FEE SCHEDULE. RESPONDENT SHALL BE PROVIDED A CREDIT FOR MEDICAL SERVICES THAT HAVE BEEN PAID AND RESPONDENT SHALL HOLD PETITIONER HARMLESS FROM ANY CLAIMS BY ANY PROVIDERS OF SERVICES FOR WHICH RESPONDENT IS RECEIVING A CREDIT UNDER SECTION 8(J) OF THE ACT, AS SET FORTH IN THE CONCLUSIONS OF LAW ATTACHED HEREIN;

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $669.64/PER FOR 75 WEEKS BECAUSE THE INJURIES SUSTAINED CAUSED THE **15%** LOSS OF THE PERSON AS A WHOLE, AS PROVIDED IN **SECTION 8(D)(2)** OF THE ACT, AS SET FORTH IN THE CONCLUSIONS OF LAW ATTACHED HEREIN,

RESPONDENT IS ENTITLED TO A CREDIT IN THE AMOUNT OF **$2,658.88** FOR A PPD ADVANCE PAYMENT, AS SET FORTH IN THE CONCLUSIONS OF LAW ATTACHED HEREIN.

RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM DECEMBER 20, 2010 THROUGH JULY 11, 2018 AND SHALL PAY THE REMAINDER OF THE AWARD, IF ANY, IN WEEKLY PAYMENTS.

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

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

Signature of Arbitrator

9/27/2018
Date

SEP 28 2018

21IWCC0115

PROCEDURAL HISTORY

This matter was tired before Arbitrator Frank Soto on July 11, 2018. The disputed issues involve whether Petitioner sustained an accidental injury that arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to the injury, whether Respondent is liable for certain unpaid medical bills, whether Petitioner is entitled to TTD benefits from 12/20/2010 to 06/17/2014 and maintenance benefits from 06/18/2014 to 11/30/2015. The nature and extend to Petitioner's injury is also in dispute. Respondent seeks a credit for any disability benefits Petitioner received and a credit for any payments for medical bills paid by Petitioner's private group health carrier. The parties stipulated to notice and that Petitioner's average weekly wage, pursuant to Section of the Act, was $1,330.70. (Arb. Ex. #1)

FINDINGS OF FACT

Charmaine Mackowiak (hereinafter referred to as "Petitioner") testified that on December 20, 2010 she was 58-year-old and worked for Rodent Control Division as a truck driver for the City of Chicago (hereafter referred to as "Respondent"). Petitioner testified that she worked 20-25 years for Respondent in various jobs including driving a truck for the Department of Electricity, cashier at O'Hare and Midway airports, traffic services and as a dispatcher.

Petitioner testified that she did not finish high school and she did not obtain her GED or complete any other types of schooling or educational courses. Prior to working for Respondent Petitioner was employed as a maid. (T. 14).

Petitioner testified that, prior to her accident of December 20, 2010, she sustained two prior work injuries involving her lower back. The first injury occurred on December 30, 1997and she returned to work on March 26, 1998. The second injury occurred on March 18, 1999 and she returned to work, with restrictions, on June 30, 2004. For the second injury, Petitioner was diagnosed with chronic lumbar pain and degenerative disc disease. Petitioner returned to work restrictions of no lifting more than 10 pounds occasionally between waist and shoulder, avoid repetitive bending and change positions as needed. (T. 19-26). The Respondent was able to accommodate Petitioner's restrictions and Petitioner worked continuously from June 30, 2004 until December 20, 2010.

Petitioner testified that from June 30, 2004 until December 20, 2010, she was able to perform her job duties without missing any time from work. (T. 28). Petitioner testified that during this period she would occasionally seek treatment from her primary care physician, Dr. Dorothy Warzocha, and that she would take 5 milligrams of Vicodin two times a day to manage her pain levels. (T. 28, 62,66). Petitioner testified that driving the truck for work would aggravate her condition, but she could manage the pain. (T. 72). Dr. Michael Zindrick testified that, prior to December 20, 2010, Petitioner was proscribed 5 milligrams tables twice a day. (PX 7).

Petitioner testified that, on December 20, 2010, she arrived at work located at 2400 S. Ashland Avenue, in the City of Chicago, entered the building and "swipe in". Petitioner testified that she had to go up ten metal stairs to the second floor of the building to return a hand-held radio that she forgot to return the day before. Petitioner testified that it was a snowy day. Petitioner testified that she walked up ten metal stairs, after swiping in, opened the door at the top of the stairs and stepped into the doorway. As she entered the doorway, Petitioner testified that she stepped on a rug that slipped out from under her feet causing her to fall to the ground on her right side. Petitioner testified to feeling immediate pain in her back. Petitioner testified the rug was like a throw rug. (T. 30-34).

Petitioner testified that she had not experienced that level of pain since 2004. Petitioner testified that she got up and reported the accident to her supervisor. After completing an accident report, Petitioner was taken to MercyWorks by her supervisor. The Report of Occupational Injury or Illness, was entered into evidence without objection, stated that Petitioner was injured while going to the woman's washroom on the second floor, when she slipped on a rug and lost her balance landing on her right side. The Report also identifies the name and address of a witness, Ms. Clark, who appears to be employed by Respondent as a laborer. (PX 10). The witness was not called to testify at the trial.

Later that morning, Petitioner was examined at MercyWorks. Petitioner complained of low back pain and right hip pain. At that time, Petitioner reported pain levels of 6-7 out of 10. Petitioner provided a history of slipping and falling onto a cement floor injuring her low back and right hip. Petitioner was examined, and she could forward flexion to 20 degrees, extend to 5 degrees and her bilateral side bending was to 25 degrees and her bilateral straight leg raise was to 60 degrees. The examination noted tenderness in the lumbosacral spine and right hip. Petitioner

was diagnosed with a low back and right hip contusions and issued restrictions of no driving and no repetitive bending or twisting. (PX 4).

Petitioner saw her primary care physician, Dr. Warzocha, who ordered a lumbar MRI and referred Petitioner to Dr. Hurley who had previously treated Petitioner in 2004. On January 25, 2011, Petitioner was examined by Dr. Hurley. Petitioner reported low backpain after falling at work. Dr. Hurley noted Petitioner's prior diagnosed of disc disease at L4-5, L5-S1. Dr. Hurly reviewed the MRI and compared the MRI to a prior MRI and noted that there was no overt worsening between the two MRIs was observed. Dr. Hurley believed that Petitioner's pain was a combination of segmental pain, discogenic, facet joint and myofascial. Dr. Hurly recommended therapy and prescribed Medrol dosepak. Dr. Hurly restricted Petitioner from returning to work. (PX 5).

On February 8, 2011, Petitioner returned to Dr. Hurly. Petitioner reported that the Medrol dosepak was not helping and that she was experiencing pain while sitting. Dr. Hurley noted the MRI did not show signs of "overt" worsening but the pain appeared to be emanating from the disc annulus and the posterior longitudinal ligament. Dr. Hurley scheduled a L5 -S1 caudal or epidural steroid injection to "bathe" the posterior disc annulus and posterior ligament. Dr. Hurly believed the Petitioner's problems may involve an annular disc tear and internal disc disruption at L4-L5 and L5-S1. (PX 5).

Petitioner attended physical therapy at MacNeal Hospital. While at therapy, Petitioner reported her pain levels of 5-8 out of 10. Petitioner was not improving so the therapy was discontinued on May 11, 2011. (PX 2). On March 16, 2011, Petitioner returned to Dr. Warzocha who referred Petitioner to Dr. Patel, for pain management. Dr. Warzocha continued keeping Petitioner off work. (PX 1).

On April 27, 2011, pursuant to Section 12 of the Act, Petitioner was examined by Dr. Carl Graf. The evidence deposition of Dr. Graf occurred on August 11, 2011. At his deposition Dr. Graf opined that Petitioner's ongoing condition was chronic in nature a pre-existing and bore no relation to her injury of December 20, 2010. Dr. Graf further opined that Petitioner did not suffer a back injury on December 10, 2010 and that her current complaints involved persistent back pain which was preexisting. Dr. Graf noted that Petitioner, prior to December 10, 2010, had been experiencing back pain and taking a narcotic. Dr. Graf acknowledged that he did not review the treatment records from Dr. Warzocha, MacNeal Physical therapy and Dr. Patel. Dr. Graf further

acknowledged that medications Petitioner was taken for pain had increased after the accident, but he was lacking the records to verify it. (RX 2).

On June 20, 2011, Petitioner sought a second opinion with Dr. Michael Zindrick. The evidence deposition of Dr. Zindrick's was taking on October 22, 2012. Dr. Zindrick testified that Petitioner reported slipping and falling at work on a rug and experiencing back and leg pain radiating into the left buttock. Petitioner said that she had a history of back pain but, after her fall, the condition significantly worsened. Petitioner said that her Vicodin usage increased after the fall. Petitioner rated her pain level as 5-7 out of 10. (PX 7).

During the exam, Dr. Zindrick noted pain in the left buttock at the hip during the straight leg raise test. Dr. Zindrick believed that Petitioner's complaints involved an irritation of the L4-5 or L5-S1 nerves. Dr. Zindrick opined that Petitioner's fall at work on December 20, 2010 aggravated her pre-existing condition and causing increased pain levels. Dr. Zindrick noted that prior to her fall, Petitioner was not experiencing pain in the left buttock and left hip areas. Dr. Zindrick opined that Petitioner was totally disabled from working and that she has not reached maximum medical improvement. On cross examination, Dr. Zindrick testified that prior to her work fall, Petitioner's pain levels were at 3-4 out of 10 and Petitioner was able to maintain her existing pain by taking 5 milligram tablets twice a day but, after the accident, Petitioner's pain levels increased to 5-7 out of 10 and Petitioner was taking 7.5 milligrams of Vicodin 3 times a day and she could not manage her pain such that she could return to work. (PX 7).

Dr. Warzocha referred Petitioner to Dr. Amish Patel, of the MacNeal Pain Management Center. On August 24, 2011, Petitioner presented herself to Dr. Patel. Petitioner reported a history of ten years of chronic low back pain which had been exacerbated by her fall at work in December of 2010. Petitioner reported that she has been experienced increased pain radiating into her left posterior buttock. Petitioner reported that her pain worsened with prolonged sitting or standing or walking. Petitioner also reports occasional cramping and spasms in the back. Dr. Patel examined Petitioner and noted moderate tenderness to palpation over the left greater than right lumbosacral paravertebral musculature and tenderness to palpation of the left sacroiliac joint. Petitioner's extension was limited to 10-degress, due to significant increase in low back pain, and facet loading maneuvers also reproduced low back pain bilaterally.

Dr. Patel opined that based upon the clinical history, symptoms, as well as the MRI findings, Petitioner had multifactorial causes of her low back pain, including discogenic and

facetogenic causes, as well as overlying myofascial component. Dr. Patel indicated Petitioner's radiating symptoms into her left buttock could be referred pain from her facet joints or part of the radicular process and some of her pain could be caused by sacroiliac joint dysfunction. Dr. Patel prescribed Lidoderm patches and facet joint injections. (PX 3).

On August 29, 2011 patient underwent bilateral intra articular facet injections at L4-5 and L5-S1. (PX 3). On September 21, 2011, Petitioner followed up with Dr. Patel complaining of intermittent numbness in her left lower extremity. Petitioner stated that her pain level was 6 out of 10 and that she did not notice improvement after the facet injections. Dr. Patel opined that Petitioner's pain could be discogenic in nature because the facet joint injections did not help. Dr. Patel scheduled epidural steroid injections and referred Petitioner to Dr. Salehi for a surgical evaluation. On October 3, 2011, Petitioner underwent epidural steroid injections. (PX 3).

On October 31, 2011, Petitioner returned to Dr. Patel. Petitioner reported she did not experience pain relief after the epidural steroid injection. Petitioner rated her pain level as 6-7 out of 10. Dr. Patel noted that Petitioner's pain was consistent with both discogenic and facetogenic causes but, he noted, Petitioner did not have a positive response to the facet joint injections. Dr. Patel believed that most of Petitioner's pain could be discogenic in nature which, he said, was clinically consistent with her pain being worse with sitting. Dr. Patel prescribed Nortriptyline and referred Petitioner to Dr. Salehi for a surgical evaluation. (PX 3).

On November 2, 2011, Petitioner underwent the bilateral lumbar medical branch blocs of L3 to L5 nerves under fluoroscopy. Dr. Patel indicated that Petitioner may need radiofrequency ablations of the same medial branches if she has concordant pain response from the local anesthesia. Dr. Patel referred Petitioner to Dr. Salehi, again, for a surgical evaluation. (PX 3).

On December 5, 2011, Dr. Patel administered a left-sided medical branch nerve radiofrequency ablation. On January 23, 2012, Petitioner underwent right-sided medical branch nerve radiofrequency ablations. Dr. Patel referred Petitioner to Dr. Salehi, again, for a neurosurgeon evaluation because, he believed, Petitioner's symptoms could be discogenic. (PX 3).

On February 23, 2012, Petitioner followed up with Dr. Patel. Petitioner reported no significant change in her low back pain after the ablation medial branches. Dr. Patel opined that Petitioner's pain continues to be primarily discogenic given the lack of response to medial branch ablations but there could be a myofascial component to her pain, possibly related to the underlying degenerative disc disease. Dr. Patel recommend epidural steroid injections for the axial low back

symptoms. Petitioner underwent interlaminar epidural steroid injections at L4-5 on March 5, 2012. (PX 3).

On April 26, 2012, Petitioner returned to Dr. Patel reporting no pain relief from the injections. Petitioner continued complaining of low back pain and radiating symptoms into the left buttock and anterior thigh. Dr. Patel believed that most of Petitioner's pain was likely discogenic and chronic in nature. Dr. Patel noted that the MRI showed mild foraminal stenosis bilaterally L4-5 which could be contributing to some of the lower extremity symptoms. Dr. Patel opined that Petitioner's pain was likely multifactorial in nature and he referred Petitioner, again, to Dr. Salehi for a surgical evaluation. (PX 3).

On May 13, 2014, Petitioner was examined by Dr. Sean Salehi and his evidence deposition occurred on January 20, 2015. Dr. Salehi testified that Petitioner reported tripping and falling at work on December 20, 2010 which aggravated her low back pain. Petitioner reported that prior to the fall, she was experiencing low back pain but the pain not as significant. Dr. Salehi noted that Petitioner's pain was in the middle of the low back going to her left buttock and she was experiencing tingling around the left knee. Petitioner rated her pain as 6 out of 10. Dr. Salehi noted Petitioner was experiencing tenderness in the lumbosacral area and her range of motion was limited with flection and extension. Dr. Salehi diagnosed lumbar degeneration disc disease and lumbosacral spondylosis. (PX 9)

Dr. Salehi opined that Petitioner's trip and fall was a competent cause of her current condition. Dr. Salehi further opined that Petitioner's December 20, 2010 fall at work aggravated and worsened her prior condition. Dr. Salehi testified that he agrees with Dr. Zindrick's opinion that Petitioner's current low back condition is related, in part, to her work accident of December 20, 2010. Dr. Salehi further testified that prior to her fall at work on December 20, 2010, Petitioner was able to manage back pain and after the fall her pain intensity increased such that she was unable to perform her normal duties at work. (PX 9).

As to Petitioner's current condition, Dr. Salehi opined that Petitioner could not work beyond a light to medium physical demand job which, based upon the U.S. Department of Labor's definitions, involves no lifting more than 20 pounds, push or pull more than 35 pounds and no repeated bending or twisting more than three times an hour. Dr. Salehi further opined that Petitioner was unable to work driving a truck. Dr. Salehi testified that he found nothing to suggest Petitioner was malingering or that Petitioner was exaggerating her pain. Dr. Salehi indicated

Petitioner has two treatment options. Petitioner either attempt to manage her pain without surgery or she could proceed with lumbar fusion at L5-S1 surgery. (RX 9).

On November 24, 2015, Petitioner participated in a vocational rehabilitation assessment at Respondent's request. The assessment and report were completed by Lisa Helma of Vocamotive. It was noted in the report that Petitioner's restrictions include no driving and no repeated bending, twisting or bouncing. Ms. Helma opined that based upon the Injury on Duty Report, Petitioner is employable, but, Petitioner has lost access to her usual and customary line of occupation as a driver. Petitioner could work as a cashier, retail clerk, fast food clerk or food preparation worker. With computer training and a GED, Petitioner could find employment as a dispatcher, customer service representative, receptionist or office clerk. Ms. Helma opined that with a GED and computer skills, Petitioner most probable wage-earning potential is between $9.00 and $13.00 per hour. (PX 12).

Petitioner testified that she has been able to manage her pain because she is not currently working but that she would like to keep the option of surgery open. (T.46-47). Petitioner testified that she still sees her primary care physician and, as of March of 2018, she stopped taking Vicodin out of concern from prolonged use has on the liver and health (T. 49-50). Petitioner testified that she currently takes Alleve but that it is not that effective. Petitioner is still considering whether or not to have the lumbar fusion surgery. Petitioner testified that she is able manager her pain because she is not working. Petitioner retired on November 30, 2015. Petitioner testified that rarely drives and she can lay down when she experiences pain. (T. 77). Petitioner testified that she was paid benefits until the date of retirement and that she does not have any currently scheduled appointments with any doctors. (T. 55). Petitioner testified that since retiring that she has not looked for work. (T. 77,78).

The Arbitrator found the testimony of Petitioner to be credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below.

The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002).

WITH RESPECT TO ISSUE (C) DID PETITIONER SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his or her injury "arose out of" and "in the course of" the employment. *First Cash Financial Services v. Industrial Comm'n,* 367 Ill. App. 3d 102, 105 (2006). Both elements must be present at the time of the claimant's injury to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478 (1989). An injury "arises out of" one's employment if its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury. *Jewel Cos. V. Industrial Comm'n,* 57 Ill.2d 38, 310 N.E.2d 12 (1974). A claimant's injury "arises out of" employment if it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 2017 Ill. 2d 193, 203 (2003).

The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that she sustained an accidental injury to her low back on December 20, 2010 that arose out of and in the course of her employment, as set forth more fully below.

Petitioner testified that she arrived at work and after swiping in she walked up ten steps to return and/or exchange a handheld radio and to use the bathroom. Whether Petitioner was intending to use the bathroom before or after returning the radio is not relevant. After walking up the stairs, Petitioner stepped on a throw rug and slipped causing her to fall striking her back and right hip on the concrete floor. Petitioner testified that she felt immediate pain in her low back and right hip. Petitioner got up, reported the accident to her supervisor, and completed a Report of

Occupational Injury or Illness. The Arbitrator finds the description of her injury and symptoms listed on the Report of Occupational Injury or Illness consistent with Petitioner's trial testimony. The Report identifies a witness to the accident who was not called as a witness to contradict Petitioner's testimony. After completing the Report, Petitioner was taken to MercyWorks by her supervisor. The Arbitrator finds the history Petitioner provided at MercyWorks was consistent with her trial testimony and Report of Occupational Injury or Illinois. While at MercyWorks Petitioner complained of low back and right hip pain. The examination found tenderness in the lumbosacral spine and right hip. Petitioner was diagnosed with a low back and right hip contusion. (PX 4).

WITH RESPECT TO ISSUE (F) WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). If a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 2d 65, 67, 68 (1967), see also *Illinois Valley Irrigation v. Industrial Commission*, 362 N.E.2d 339 (1977). When a pre-existing condition is present, a claimant must show that a work related accidental injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury. *St. Elizabeth Hospital v. Workers' Compensation Commission,* 864 N.E.2d 266, 272, 273 (5th Dist. 2007). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting

deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that her current low back condition is causally connected to his work injury of December 20, 2010, as set forth more fully below.

Petitioner had a preexisting condition involving her low back and Petitioner was able to manage her pain and work from 2004 until her accident of December 20, 2010. After the fall at work, Petitioner pain levels increased, and she underwent extensive medical treatment. Petitioner was unable to return to work after December 20, 2010. Petitioner's pain levels increased after the fall and there was a corresponding increase in the medications she was taking to manage her pain. Despite the additional pain mediation and medical treatment, Petitioner was unable to return to work.

Drs. Salehi, Zindrick, Patel, Hurly and Warzocha opine that Petitioner's fall of December 20, 2010 aggravated her preexisting condition. Dr. Salehi testified that the December 20, 2010 fall at work aggravated and worsened Petitioner's prior condition. Dr. Salehi further testified that Petitioner was able to manager her prior condition, with medication, and continue to work but after her work injury, Petitioner's pain levels increased as well as the medications she was taking yet Petitioner was unable to manager her pain such that she could return to work. The Arbitrator finds the opinions of Drs. Salehi, Zindrick, Patel, Hurly and Warzocha to be persuasive.

The Arbitrator does not find the opinions of Dr. Graf to be persuasive. Dr. Graf did not have all of Petitioner's medical records to review when rendering his opinions. The Arbitrator finds that Dr. Graf failed to address the significance, if any, of Petitioner's increased symptoms after her fall and the increases in mediations proscribed to Petitioner after the fall. The Arbitrator finds that Dr. Graf failed to address what impact Petitioner's preexisting condition, if any, occurred as a result of her fall. The Arbitrator finds that Dr. Graf's opinions imply that nobody who has a preexisting condition, managing the condition with medication could experience a subsequent accident because the of the existing prior condition. The Arbitrator does not find Dr. Graf's opinions reliable or persuasive.

WITH RESPECT TO ISSUE (J) WHETHER THE MEDICAL SERVICES WERE REASONABLE AND NECESSARY AND WHETHER RESPONDENT HAS PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. Respondent did not proffer evidence that Petitioner's medical treatment was not reasonable or necessary. Respondent denied the treatment on the based upon liability. In lieu of the Arbitrator's findings above, the Arbitrator further finds that Petitioner's medical treatment was reasonable necessary to cure and/or relieve Petitioner from the effects of her accidental injury. As such the Respondent shall pay the medical providers listed below pursuant to Sections 8(a) and 8.2 of the Act, subjected to the fee schedule. Respondent shall be provided a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act.

a) MercyWorks..... $ 589.49
b) Dr. Daniel Hurley..... $ 337.00
c) MacNeal Hospital..... $57,180.25
d) Dr. Amish Patel..... $17,645.00
e) Dr. Dorothy Warzocha..... $ 5,676.00
f) Dr. Sean Salehi..... $ 1,575.00

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY BENEFITS, IF ANY, IS PETITIONER ENTITLED, THE ARBITRATOR FINDS AS FOLLOWS

Petitioner claims to be entitled to temporary total disability benefits from December 20, 2010 through June 17, 2014 and maintenance benefits from June 18, 2014 through November 30, 2015. Respondent denies liability for the benefits claiming that Petitioner did not sustain an accident that arose out of and in the course of employment and her current condition of ill-being was not causally connected to the December 20, 2010 injury.

A claimant is temporarily and totally disabled from the time an injury incapacitates her until such time as she is as far recovered or restored as the permanent character of her injury will

permit. *Westin Hotel. V. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007). In determining whether a claimant is no longer entitled to continue receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of return to the workforce. *Interstate Scaffolding, Inc. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). Once a claimant has reached MMI, her condition has become permanent and she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d. 107 (1990).

On June 17, 2014, Petitioner was last seen by Dr. Salehi. On that day, Petitioner elected not to proceed with the fusion surgery recommended by Dr. Salehi. In his report dated June 17, 2014, Dr. Salehi released Petitioner from further treatment or until her symptoms become intolerable and Petitioner becomes amendable to the lumbar fusion surgery. Dr. Salehi released Petitioner to work with light to medium physical demand with no driving a truck. (PX 14). Based upon the Arbitrator's findings above regarding accidental (issue "C") and causation (issue "F"), the Arbitrator further finds that Petitioner is entitled to temporary total benefits from December 21, 2010 through June 17, 2014.

The Arbitrator further finds that Petitioner's condition had stabilized when she was released from care and issued work restrictions by Dr. Salehi on June 17, 2014. Once an employee has reached MMI, the disabling condition has become permanent and she is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 359 Ill. App. 3d. 1067 (2004). To receive maintenance benefits the employee must be engaged in an active job search or under vocational rehabilitation. *Archer Daniels Midland v. Industrial Comm'n*, 138 Ill. App. 3d. 107 (1990). If the claimant's disability is limited in nature so that he is not obviously unemployable or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. *Valley Mold & Iron Co. v. Industrial Comm'n* 84 Ill.2d 538 (1971). Once a claimant shows that he is unable to perform and obtain regular and continuous employment for which his is qualified, the burden shifts to the employer to show evidence establishing that the employee is capable of engaging in some type of regular ad continuous employment and that such employment is reasonably available. *E.R. Moore co v. Industrial Comm'n* 17 Ill.2d 353 (1978). It is Petitioner's burden to prove that work is unavailable to a person in his or her circumstances. Unsuccessful, attempts to find employment will satisfy this burden. *Interlake, Inc. v. Industrial Comm'n,* 86 Ill.2d 168 (1981).

As of June 17, 2014, Petitioner was released to return to work with restrictions, which prohibit driving a truck. Petitioner testified that she did not seek work within her restrictions or apply for any jobs. The Arbitrator finds that Petitioner failed to meet her burden that she was unable to obtain regular or continuous employment for which she is qualified by not attempting to find employment.

For the reasons stated above, the Arbitrator finds that Petitioner is not entitled maintenance benefits from June 18, 2014 through November 23, 2015. However, at the request of Respondent, Petitioner participated in a vocational rehabilitation assessment on November 24, 2015. Petitioner retired on November 30, 2015. As such the Petitioner is entitled to maintenance from November 24, 2015 until November 29, 2015.

WITH RESPECT TO ISSUE (L) THE NATURE AND EXTEND OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that prior to her December 20, 2010 accident, Petitioner had work restrictions of no lifting more than 10 pounds occasionally between waist and shoulder, avoid repetitive bending and change positions as needed. (T. 19-26). On April 17, 2015, after receiving treatment, Petitioner was released to return to work at a light to medium physical demand level with no driving a truck by Dr. Salehi. (PX 14). Dr. Salehi testified that Petitioner could not work beyond a light to medium physical demand job, based upon the U.S. Department of Labor's definitions, involves no lifting more than 20 pounds, push or pull more than 35 pounds, no repeated bending or twisting more than three times an hour. Dr. Salehi testified that Petitioner was prohibited from driving a truck for work. (PX 9). The Arbitrator noted that Petitioner was unable to return to her prior occupation as a truck driver. The Arbitrator also notes that Petitioner's restrictions became less restrictive after treatment except for driving a truck.

The vocational report indicates that Petitioner was capable for working with or without obtaining a GED and receiving computer training. Petitioner decided to retire rather than reenter the work force or participate in additional vocational retraining services. Based upon the record, taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15 % loss of a person as a whole pursuant to Section 8(d)(2) of the Act.

WITH RESPECT TO ISSUE (O), WHETHER RESPONDENT IS ENTITLED TO A CREDIT FOR BENEFITS PAID BY THE PENSION FUND AND/OR PETITIONER'S PRIVATE GROUP HEALTH CARRIER AND/OR ADVANCES PAID FOR PPD, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator addressed the issue of payments made by private group health carriers above in Section (J) of the Conclusions of Law. In the Request for Hearing, Respondent was seeking a credit and Petitioner was seeking to be held harmless for bills paid by Petitioner's private group health provider. (Arb. Ex. #1).

Petitioner was paid an advance for PPD on March 3, 2011. (Arb. Ex. #1). Respondent paid Petitioner the sum of $2,658.88 for a PPD advance on March 3, 2011. (RX 7). The Arbitrator finds that Respondent is entitled to a credit for the PPD advance in the amount of $2,658.88 made on March 3, 2011.

The remaining issue involves whether Respondent is entitled to a credit for any disability benefits paid to Petitioner by a pension fund. Respondent failed to proffer any evidence demonstrating any disability benefits paid to Petitioner and Respondent's entitlement to receive a credit for those benefits. As such the Arbitrator finds that Respondent is not entitled to a credit for benefits paid by the pension funds for disability.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Sampson,

Petitioner,

21IWCC0116

vs.

NO: 17 WC 18716

Prairie Farms Dairy,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies two sentences on the Arbitration Decision Form. In the Order, the Arbitrator wrote that Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider **and shall provide payment information to Petitioner relative to any credit due**. The Arbitrator also wrote that Respondent shall pay unpaid and related medical expenses **and shall provide documentation with regard to said fee schedule payment calculations to Petitioner**. The Commission strikes this language from the Order. The Commission thus modifies the above-referenced sentences to read as follows:

> Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider.
>
> Respondent shall pay any unpaid, related medical expenses according to the fee schedule.

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

21IWCC0116

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

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

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

DATED: MAR 11 2021

o: 2/9/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SAMPSON, DAVID
Employee/Petitioner

Case# **17WC018716**

21IWCC0116

PRAIRIE FARMS DAIRY
Employer/Respondent

On 10/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

21IWCC0116

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Sampson
Employee/Petitioner

v.

Prairie Farms Dairy
Employer/Respondent

Case # **17** WC **18716**

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **August 12, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 16, 2016,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

Per the stipulation of the parties, in the year preceding the injury Petitioner earned **$44,985.72**; the average weekly wage was **$865.11**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **4** dependent children.

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

Respondent shall be given a credit of **$15,877.83** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** in non-occupational indemnity disability benefits, for a total credit of **$15,877.83.**

Respondent is entitled to a credit for medical bills paid in the amount of **$ALL AMOUNTS PAID** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services as included in **Petitioner's Exhibit 10** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$576.74/week** for **23 2/7 weeks**, for the timeframe of **December 17, 2016 through May 28, 2017,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$15,877.83** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** in non-occupational indemnity disability benefits, for a total credit of **$15,877.83.**

As to the issue of a temporary total disability overpayment, the Arbitrator finds that Respondent is entitled to a credit in the amount of $2,447.86 for temporary total disability benefits overpaid, with said overpayment to be credited towards Respondent's permanent partial disability liability.

Respondent shall pay Petitioner permanent partial disability benefits of **$519.07/week** for **50 weeks**, because the injuries sustained caused **10% loss of the person-as-a-whole**, as provided in Section 8(d)2 of the Act.

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

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

Melinda M. Pace-Gillman
Signature of Arbitrator

10/1/19
Date

OCT 3 - 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Sampson
Employee/Petitioner

Case # 17 WC 18716

v.

Consolidated cases: N/A

Prairie Farms Dairy
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he is currently employed by Respondent and that he began working for Respondent in October 2015. He testified that he was hired in as a second shift back dock worker, and that prior to being hired he had to had to undergo a physical examination. He denied having any physical problems prior to being employed as a dock worker. He testified that as a dock worker, he unloaded empty trailers that came in, he unloaded empty cases, and he ran the yard truck to move trailers around outside, among other tasks.

Petitioner testified that on December 16, 2016, he was working as a dock worker. He testified that on that date, there was an ice storm and that when he when he hooked up to a trailer at the cooler he slipped and fell while hooking up an airline, hitting his right elbow on the ground first, after which his right shoulder hit the ground and then his back. He testified that he was working second shift that day, and that the accident occurred about four hours into his shift. He testified that after his elbow hit the ground, it jarred his right shoulder. He testified that he was about 3-4 feet off the ground when he fell. He further testified that he fell onto his right side.

Petitioner testified that after he fell, he noticed that he could not move his right arm and that he was numb from his shoulder down to his hand, that his fingers were tingly and aching, and that it felt like he broke something and did not want to move it. He testified that when he got up off the ground he walked into the cooler office area and sat on the steps, that the transportation manager saw him and asked him if he was okay, and that he told him that he fell. He testified that "Mike" took him to the OSF emergency room to get checked out. He testified that at the emergency room the body part that was hurting the most was his right elbow, but that his arm was still numb from the shoulder down. He testified that the emergency room doctors took x-rays and a performed a physical examination, and that they gave him a brace and some painkillers.

Petitioner testified that he followed up with OSF Occupational Health, which was the facility to which Respondent directed him. Petitioner testified that when he went home after the emergency room visit his right arm was still numb, his elbow was hurting, and he did not sleep much during the night due to pain. He testified that the next morning his shoulder was hurting as well. He testified that his accident occurred on a Friday, and that he did not work on either Saturday or Sunday. He denied having had any right shoulder injuries prior to this accident.

Petitioner testified that when he was seen at OSF Occupational Health, he indicated to the physician that his shoulder was hurting. He testified that they wanted x-rays done, which he underwent at OSF. He testified that he continued to follow-up with Occupational Health for this accident on more than one occasion. He testified that he was also recommended to undergo an MRI of his right shoulder as well as his right elbow. He testified that after the MRIs were performed, they wanted him to go through therapy. He testified that he was then referred to Dr. Below.

Petitioner testified that he first saw Dr. Below in February 2017 and that he recommended more physical therapy initially, which he did. He testified that Dr. Below then began talking about surgery on his right shoulder. He testified that he underwent surgery on March 31, 2017 and that, to his knowledge, worker's compensation approved the surgery that he underwent on that date. He testified that after surgery, he followed-up with Dr. Below post-operatively. He testified that he underwent additional physical therapy.

Petitioner testified that while he was in physical therapy his right shoulder was slowly getting better. He testified that in September 2017 he was discharged from physical therapy, but that he continued to have right shoulder issues. He testified that he underwent an injection in his right shoulder and that Dr. Below recommended that he undergo an FCE, but that it was not approved. He testified that he was sent for an IME with Dr. Kostman, and that he underwent an additional injection with Dr. Below in February 2018. He testified that he did not think that the injection helped. He testified that he last saw Dr. Below on April 16, 2018, at which time he returned him to full duty work.

Petitioner testified that after his accident, he did not work. He testified that he was off work per OSF and Dr. Below from December 17, 2016 through May 28, 2017, and that when he returned to work on May 29, 2017 he did not go back to work as a dock worker. He testified that he was offered a job in maintenance. He testified that when he returned to work, he had restrictions from Dr. Below which Respondent accommodated up until the point he was discharged to work full duty.

Petitioner testified that as to his right shoulder as of the time of arbitration, he has aches, that once in a while he feels a stabbing pain, and that his shoulder "pops" now whenever he lifts his arm up over his head. He testified that his shoulder hurts worse with weather changes. He testified that he feels a stabbing pain at least once a week and that when it happens, he stops whatever he is doing and rests. He testified that his shoulder "pops" a couple of times per month, depending on how he moves it. He testified that the only medication that he takes for his shoulder is over-the-counter Tylenol, and that he also uses an ice pack or heating pad.

Petitioner testified that he is still employed as a maintenance worker. He testified that he sometimes experiences difficulties doing his job due to his right shoulder, and that he sometimes has to ask for help with lifting certain things. He testified that there are times that he has to stick his arm into a machine in a tight, small area, and that it takes time for him to get into a comfortable position because of his shoulder. He testified that he continues to work regular shifts and overtime.

Petitioner testified that before the accident he was able to play ball with his kids, but that now he has problems throwing the ball for them. He testified that he used to do automotive tasks at home, but that now he has to find someone else to help with the heavy lifting. He testified that he used to go out and garden, but that his garden is full of weeds now.

Petitioner testified that he did not undergo any surgery for his right elbow. He denied having any ongoing problems with his right elbow. He testified that it took about three months for the numbness and tingling in his right elbow going down to his fingers to go away completely. He denied having any problems with his right elbow prior to the accident.

On cross examination, Petitioner agreed that in May of 2018 he had injured his right hand at work and that he lost part of his fingers in right hand, which caused problems with lifting. He further agreed that losing his fingers limited his ability to throw.

Jason Emery was called as a witness by Respondent at the time of arbitration. He testified that he is the plant manager for Respondent and that he plays a supervisory role to Petitioner. He testified that he was not aware that Petitioner had asked co-workers to assist him with lifting weights, but that unless he was needed he might not be aware.

Mr. Emery testified that he had opportunity to observe Petitioner working or to critique his work product. He testified that he found Petitioner to be honest and forthcoming. He testified that Petitioner was involved in an additional accident in May 2018.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1.

The Workers' Compensation Claim Form was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. It was noted that the date of accident was that of December 16, 2016 and that Petitioner got out of the cab to unhook "glad hands" on the trailer, that he stepped on the platform and fuel tank, and that his foot slipped and he fell to the ground. The nature of injury or illness was noted to be that of right arm and elbow, as well as numbness in the right arm. It was noted that the accident was reported on December 16, 2016 to Dan Scheirer. (PX2).

The medical records of OSF St. Francis Medical Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on December 16, 2016 in the emergency room, at which time it was noted that his chief complaint was that of right elbow pain. It was noted that Petitioner presented to the emergency room for evaluation of right elbow pain secondary to slipping on ice 30 minutes ago, that he noted numbness and tingling to the right arm, that the numbness extended to the fingers of the right hand, and that he denied neck or back pain. It was noted that the physical examination revealed tenderness to the olecranon process, good extension of the right upper extremity, good extension of right hand digits, full range of motion of the right wrist and right elbow, pain with supination and pronation of the right forearm, no bony tenderness of the forearm, and full range of motion of the right shoulder. It was noted that Petitioner had a small skin avulsion to the lateral aspect of the 5th digit of the right hand and an abrasion over the olecranon process. Petitioner underwent x-rays of the right elbow on that date, which were interpreted as revealing no acute abnormality visualized of the right elbow and forearm; it patient continues to complain of pain, suggest MRI for further evaluation. Petitioner also underwent x-rays of the right forearm, which were interpreted as revealing no acute abnormality visualized of the right elbow and forearm; it patient continues to complain of pain, suggest MRI for further evaluation. The clinical impression was noted to be that of (1) fall on same level from slipping, tripping, or stumbling; (2) elbow abrasion, right; (3) elbow injury, right. Petitioner was given a prescription for Tylenol #3, was recommended to follow-up with his primary care physician, and was discharged home. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen on December 19, 2016, at which time he underwent x-rays of the right shoulder. It was noted that the films were interpreted as revealing no acute abnormality visualized in the right shoulder; if the patient continues to complain of pain, suggest MRI for further evaluation. It was noted that the referring provider was that of Dr. Edward Moody. At the time of the January 16, 2017 visit, Petitioner underwent an MRI of the right shoulder which was interpreted as revealing (1) partial-thickness, articular surface and intrasubstance tears involving supraspinatus and infraspinatus tendons, superimposed on rotator cuff tendinosis; no full-thickness tear; (2) mild degenerative and inflammatory changes at the acromioclavicular joint. It was noted that the referring provider was that of Dr. Homer Pena. The records reflect that Petitioner also underwent an MRI of the right elbow on that date as well, which was interpreted as revealing (1) mild to moderate dorsal elbow and

proximal forearm subcutaneous soft tissue edema could represent contusion; negative for drainable fluid collection; (2) negative for acute fracture or dislocation; (3) mild common extensor insertional tendinosis. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen on February 2, 2017 at the Center for Industrial Rehab for an Initial Evaluation. It was noted that Petitioner stated that he was trying to hook up an air line on the back of the truck when his foot slipped on some ice, and that he fell off the truck deck onto the right shoulder and elbow. The incident onset was noted to be that of December 16, 2016. It was noted that Petitioner was referred to occupational therapy and that he was very guarded with motion and activity with the right upper extremity due to reported pain. Petitioner's deficits were noted to include weakness, pain, decreased endurance, decreased strength, and decreased range of motion. At the time of the February 9, 2017 occupational therapy visit, it was noted that Petitioner stated that he wanted to try therapy for three weeks and then re-assess the progress, that he reported that the exercises were going fair, and that he reported that he got some popping in the shoulder with the pendulum and had some increased pain with one of the wand exercises. At the time of the February 13, 2017 occupational therapy visit, it was noted that Petitioner reported that he was doing about the same as he was the other day, that he stated that he tried to sleep on his stomach the other night and had quite a bit of pain with that, and that he reported that he picked up a container of strawberries the other day and that it resulted in a lot of pain also. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for occupational therapy on February 16, 2017, at which time it was noted that he reported that he had not been sleeping very well lately, that he stated that he woke up with quite a bit of pain, and that he rated his pain 3-4/10 and achy. At the time of the February 20, 2017 occupational therapy visit, it was noted that Petitioner reported that he was in quite a bit of pain over the weekend, that he reported that after the last treatment he had pain all weekend, and that his pain was 3/10 on that date. At the time of the February 27, 2017 occupational therapy visit, it was noted that Petitioner reported that he had started to have more pain in the shoulder, that he reported that he was having some stabbing pain in the front and back part of the shoulder as well as the superior aspect of the shoulder, that the pain was rated 2-3/10 on that date, and that he reported the pain was more constant and not easing up at all. At the time of the March 2, 2017 occupational therapy visit, it was noted that Petitioner reported that the shoulder had been painful lately, that he reported that he did not sleep well the night before due to some cramping, and that he rated his pan 3/10. It was noted that Petitioner stated that he felt that the shoulder was a little more mobile, but that he still could not handle any amount of weight with it. It was also noted that Petitioner demonstrated increased range of motion compared to the initial evaluation but was still lacking a significant amount, and that he demonstrated limited range of motion due to pain. Petitioner was recommended to continue per the plan of care. At the time of the March 7, 2017 occupational therapy visit, it was noted that Petitioner reported that he was going to be scheduled for surgery. It was noted that Petitioner was to continue at home with pullies and active assistance range of motion until surgery. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on April 13, 2017, at which time it was noted that he had surgery on March 31, 2017, that he was to see the physician on Monday, that he was wearing the immobilizer all night and day and the cryocuff, and that he denied leakage. It was noted that Petitioner needed to be able to lift 40# in order to be able to return to work. At the time of the April 17, 2017 physical therapy visit, it was noted that Petitioner reported performing the home exercise program as instructed and that he was using ice frequently. At the time of the April 19, 2017 physical therapy visit, it was noted that Petitioner called in at 1:00 because he was worried about right shoulder swelling and burning pain symptoms, that the therapist informed him that he could call the doctor if he thought he needed to, and that no increased redness or excessive swelling was noted in his right shoulder. It was noted that Petitioner had good compliance with the home exercise program. At the time of the April 21, 2017 physical therapy visit, it was noted that Petitioner reported

having some increased shoulder pain/soreness that afternoon due to falling asleep without the sling on and that he felt fine after the last session. At the time of the April 27, 2017 physical therapy visit, it was noted that Petitioner stated that his pain killers were kicking in and that he was feeling pretty good that day, that his exercises were going okay, and that he had no new complaints but once awhile got sharp pain in his shoulder. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on May 2, 2017, at which time it was noted that he was overall feeling pretty good, that he had some aches and pain in his upper arm, and that he mowed with a rider mower one-armed. At the time of the May 4, 2017 physical therapy visit, it was noted that Petitioner had no new complaints, that his shoulder was feeling pretty good, that he had a "nagging 3" right now, that he had pain pills prior to therapy, that the pain was to the upper arm, and that he stated the last two nights he slept in the bed. At the time of the May 9, 2017 physical therapy visit, it was noted that Petitioner stated that he was hurting, that he felt he did too much over the weekend, that he planted a garden over the weekend, and that he kept his arm in the sling. It was noted that Petitioner stated that his pain had been pretty good at night, that he took a pain pill and slept, that he used Tylenol during the day, that it felt like a pulled muscle in his shoulder, that he was "T rexing" it, using his arm in his sling, and that he stated that it was not popping like it used to. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on May 11, 2017, at which time it was noted that he reported his shoulder was aching but had improved since his previous treatment, and that his pain was at 2/10. At the time of the May 16, 2017 physical therapy visit, it was noted that Petitioner had seen the doctor the day before and they moved his arm beyond comfortable and his arm had hurt since, that he rated his pain currently 4/10 with Ibuprofen, that he no longer had to wear the sling, and that he could drive if comfortable. It was noted that Petitioner stated that the new exercises felt okay, that he had done them since hurting and did okay, that he had the air conditioning vent blowing on his shoulder, and that he would use the pain pill at night and use Tylenol or Ibuprofen during the day. At the time of the May 18, 2017 physical therapy visit, it was noted that Petitioner felt pretty good until last night when his shoulder popped around 1:00 a.m. and had hurt since, that he took pain pills last night, that he had been outside working a lot that day off and on trying to get the grass mowed, and that he felt he was doing more at home than he was supposed to be doing. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on May 23, 2017, at which time it was noted that he stated that his shoulder was 4/10, that he had not had any pain pills yet that day as he was working at the school, that he was up to a 7/10 on Sunday and was at softball games all day Sunday, and that he did not have any medications and only sat in a chair. It was noted that Petitioner stated that they felt the old medicine made him dizzy, that on Sunday they found him sitting on the floor, that he did not lose consciousness, and that he sat and called for his blood pressure cuff. It was also noted that Petitioner stated that Prairie Farms wanted him to go back to work on maintenance, that he was on a 5-pound weight restriction, and that he stated that he slept on his right side. At the time of the May 25, 2017 visit, it was noted that Petitioner stated that his shoulder was just achy that day, that he had not had any pain medications yet, that he stated that he pushed himself at times, and that he tried to lay off pain pills but ended up using them at night for going to bed. It was also noted that Petitioner was going to work on Monday. At the time of the June 13, 2017 physical therapy visit, it was noted that Petitioner was back to work with restrictions, that he worked maintenance with a 5-pound weight restriction and no work over shoulder, and that when it started to hurt he would take a break. It was noted that Petitioner was painting and doing minor maintenance, and that if there was lifting he was to get the shift supervisor. It was noted that Petitioner's pain at worst was 5/10 and an average of 2/10. (PX3).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on June 15, 2017, at which time it was noted that he stated that he had lack of sleep, that he had been aching all week, that he went to work and it was aching, and that his new exercises were going okay. At the time

of the June 20, 2017 physical therapy visit, it was noted that Petitioner stated that he was aching depending on what position he had it in, that it was 3/10 on that day, and that he stated that that day had not been a good day in general. At the time of the June 22, 2017 physical therapy visit, it was noted that Petitioner stated that he was aching last night and had to take pain pills to go to bed, that he had had a long day at work from 11:30 a.m.–11:00 p.m., and that he stated that he was back down to a 3/10 and had taken a couple of Tylenol. It was noted that Petitioner used his arm quite a bit at work the day before, that he denied any increase in pain from the exercises last session, and that he saw Dr. Braun and was still on a 5-pound restriction but stated that he was looking better. At the time of the June 27, 2017 physical therapy visit, it was noted that Petitioner stated that he swung a 16-ounce hammer yesterday, that he stated they were replacing a "house" around the motors, that his leg went through, and that he fell on his bottom. It was also noted that there was a brick wall and around the wall the ground gave way, and that Petitioner fell. (PX3).

The medical records of OSF Center for Occupational Health were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on February 13, 2017, at which time it was noted that he was seen for follow-up for his right shoulder and elbow injuries. It was noted that Petitioner had a diagnosis of contusion to the right elbow and a partial-thickness articular surface and intrasubstance tears of the supraspinatus and infraspinatus. It was noted that Petitioner saw Dr. Below on February 6, 2017 and opted for conservative care. At the time of the February 28, 2017 visit, it was noted that Petitioner's location of pain was the right shoulder and that the quality of his pain was noted to be that of aching, pins and needles, sharp, and throbbing. Petitioner was recommended to continue over-the-counter Ibuprofen and to continue physical therapy. At the time of the March 21, 2017 visit, it was noted that Petitioner was seen in follow-up for his right shoulder. It was noted that Petitioner had a constant ache in the right shoulder, that he had sharp pains with certain movements away from his body and above his chest, and that he had been in therapy without relief. It was also noted that Petitioner was doing home exercises for range of motion. It was noted that Petitioner had failed conservative treatment and that surgical treatment seemed reasonable. It was also noted that Petitioner was requesting a refill on Norco for nighttime pain control. Petitioner was issued work restrictions. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on April 25, 2017, at which time it was noted that he was status post right shoulder arthroscopic repair of rotator cuff tear, that he was doing well in therapy, and that he was using pain medications as needed at night. It was noted that Petitioner appeared to be healing well in this post-operative time. At the time of the May 23, 2017 visit, it was noted that Petitioner had been released to light duty by his surgeon, that he was in therapy, and that he had had the sling removed at the last doctor's visit. It was noted that Petitioner was improving in strength and range of motion, and that he had been released to light duty which Dr. Braun thought was reasonable. At the time of the June 21, 2017 visit, it was noted that Petitioner had completed some therapy and was making progress with range of motion, and that he had had improving range of motion and less pain. It was noted that Petitioner was progressing with therapy post-operatively as expected. At the time of the July 12, 2017 visit, it was noted that Petitioner saw Dr. Below recently and was progressing well, and that he was still in therapy. It was noted that Petitioner still had limited motion and was working on increasing range of motion with therapy. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on August 22, 2017, at which time it was noted that he was about 19 weeks post-op, that he was still in therapy to help his range of motion get back closer to baseline, that he had seen the orthopedic surgeon and had had some of his restrictions eased, and that he had minimal pain other than a constant "except" after therapy. It was noted that Petitioner still had some range of motion issues and that he was cleared to drive an industrial vehicle. At the time of the October 5, 2017 visit, it was noted that Petitioner was continuing to have right shoulder stiffness and soreness, that he received a subacromial injection from Dr. Below earlier that day, that he continued on Meloxicam and used Hydrocodone at bedtime one or two times a week, and that he had completed physical therapy. It was noted that Petitioner was still having problems with range of motion

and pain. Petitioner was issued work restrictions. At the time of the November 16, 2017 visit, it was noted that Petitioner reported that after his shoulder was injected he had a flare response for a few days, that at the present time he was having daily shoulder pain at rest, increased with lifting, and that he had finished physical therapy and was not having any upper extremity radicular symptoms. It was noted that they would await the orthopedic opinion regarding the future plan, that gradual reduction of restrictions in work conditioning were potential options if no further intervention was forthcoming, and that they would adjust work restrictions if necessary. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was issued a Medical Disposition Report dated October 17, 2017, at which time it was noted that he met DOT requirements. The Medical Examination Report Form dated October 13, 2017 noted that Petitioner was missing half of his right index finger and that his left little finger had been broken. The records reflect that Petitioner was seen on January 19, 2017, at which time it was noted that he presented in follow-up of right elbow and shoulder pain. It was noted that Petitioner had had MRIs done of both regions, that the shoulder MRI showed some partial thickness tears of the rotator cuff components, that the elbow MRI showed no internal derangement, and that Petitioner he had some mild inflammation of the extensor tendon and some soft tissue inflammation consistent with contusion. It was noted that Petitioner reported decreased range of motion of both the elbow and shoulder, that the pain was worse when he lifted his arm, and that he had been off work. The assessment was noted to be that of (1) right elbow injury; (2) right shoulder/rotator cuff issues. It was noted that Petitioner was reluctant to extend his elbow completely, and that Dr. Braun thought that a couple sessions of therapy would help him to work on range of motion and a home stretching program. As to Petitioner's right shoulder, it was noted that Dr. Braun thought that he had significant decreased range of motion and that he was to start physical therapy, as well as be referred to an orthopedic specialist. Petitioner was issued work restrictions and was recommended to follow-up with his original provider in three or four weeks. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on December 23, 2016, at which time it was noted that he was seen in follow-up for his right elbow proximal and posterior forearm contusion and associated intermittent right dorsal hand tingling. It was noted that Petitioner added that he jammed his right shoulder as he fell from a dock truck platform four feet onto the ground, and that he related that he slipped on ice and landed on his right side, mostly his elbow. It was noted that Petitioner felt that he was having very little improvement and that he also complained of right anterior shoulder and lateral outer chest area pain. It was noted that no neck pain had been noted and that Petitioner's injury was now seven days old. It was also noted that Petitioner also added that he could not full extend his elbow. The assessment was noted to be that of (1) one-week-old right elbow contusion along with proximal forearm contusion rule out internal derangement due to inability to fully extend; (2) right shoulder possible subscapularis and proximal biceps injury; rule out a possible labral injury with the mechanism described (*i.e.*, an axial force upward from the elbow to the shoulder). Petitioner was given a prescription for Vicodin, was recommended to undergo MRIs of the right shoulder and right elbow, and was recommended to follow-up after the testing was completed. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on December 19, 2016, at which time it was noted that he worked on the dock and operated a yard truck, that he was right-handed, that on Friday he was standing on the platform of a yard truck when hitching a trailer, and that he slipped on ice and fell to ground level. It was noted that Petitioner's feet were probably at a height of about 3-4 feet, that he landed on his right side, in particular his right elbow, and that he was unable to continue working and went to the emergency room, where x-rays were done and he was given pain medication. It was noted that Petitioner's chief complaint at that time was that of right elbow pain and sensitivity, that he was also having a slight numbness of his fourth and fifth fingers, and that he was also complaining of right shoulder pain and stiffness. It was noted that Petitioner underwent amputation of his right index finger about 13 years ago at the PIP joint, but had not had any other right upper extremity

surgeries. It was also noted that Petitioner was currently taking Tylenol with Codeine for pain control. Petitioner was recommended to discontinue use of the sling as it was likely only going to lead to stiffness, and it was noted that that he could return to sedentary duty. (PX4).

The medical records of Great Plains Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 5.[1] The records reflect that Petitioner was seen on February 6, 2017, at which time it was noted that he was involved in a workplace injury on December 16, 2016, that he was at Perry [*sic*] Farms and that he was going to hook up his truck and slipped on the ice, falling four feet to the ground and landing on his right shoulder and forearm area. It was noted that Petitioner said that it "jerked" his shoulder and that he denied any popping or clicking at that time. It was noted that Petitioner complained of pain over the anterior aspect of the shoulder, that he had pain with away from body and above-shoulder activities, and that he had pain when he lied on it at night. It was noted that Petitioner had been taking some Hydrocodone that he got from the emergency room and also some Ibuprofen. It was also noted that Petitioner was issued work restrictions by Dr. Moody and Dr. Pena. The assessment was noted to be that of right shoulder partial thickness rotator cuff tear, approximately 50% or slightly greater with impingement, bursitis, and AC joint primary osteoarthritis and which is inflamed. Petitioner was recommended to do a course of physical therapy and take anti-inflammatories. Petitioner was also issued work restrictions. (PX5).

The records of Great Plains Orthopedics reflect that Petitioner was seen on March 6, 2017, at which time it was noted that he returned with a diagnosis of right shoulder partial thickness articular surface and intrasubstance rotator cuff tendon tear with AC joint inflammation and degenerative changes, as well as a type 2 acromion and subacromial bursitis. It was noted that Petitioner continued to have tenderness over the anterolateral aspect of the shoulder, some in the posterior aspect, and that he had been doing physical therapy and taking anti-inflammatories. It was noted that Petitioner continued to have tenderness. It was noted that Dr. Below's assessment was fairly unchanged and that he recommended that Petitioner proceed with a right shoulder arthroscopy, arthroscopic open rotator cuff repair with subacromial decompression, acromioplasty, excision of distal clavicle, and evaluation of bicipital labral complex. At the time of the March 23, 2017 visit, Petitioner was seen for pre-operative clearance. At the time of the April 6, 2017 visit, it was noted that Petitioner was six days status post right shoulder arthroscopy, subacromial decompression, acromioplasty, excision of distal clavicle, extensive debridement of labral tear, with rotator cuff repair using one Arthrex SwiveLock anchor. It was noted that Petitioner was doing well, that his pain was controlled, that he had had a question of some fevers and had had one episode of chills, and that his wife noted a little bit of some redness with no definite signs of any cellulitis in the upper arm/lateral upper arm area. Petitioner was given Keflex and was recommended to monitor his temperature. Petitioner was also instructed to remain off work. (PX5).

The records of Great Plains Orthopedics reflect that Petitioner was seen on April 17, 2017, at which time it was noted that he was doing well, that he stated that his shoulder was feeling better, that he had some little bit of soreness in the subdeltoid area down just lateral to the shoulder, and that there was some minimal warmth but no signs of any fluctuance, minimal tenderness. Petitioner was recommended to continue the normal physical therapy protocol and was to return in three weeks. Petitioner was also given a refill on his pain medication. At the time of the May 15, 2017 visit, it was noted that Petitioner was doing well and that his pain was controlled. Petitioner was recommended to continue to progress in the normal therapy protocol and was to return in 6-8 weeks. It was noted that Petitioner stated that sometimes certain areas of the shoulder felt cold and sometimes they felt warm, and that Dr. Below could not answer why he was having some of those feelings but there was no sign of infection. Petitioner was recommended to continue to ice and do his therapy. At the time of the July 10, 2017 visit, it was noted that Petitioner stated that he was doing well, that he said there was some minimal improvement, and that he still had problems getting

[1] Any markings that appear in the exhibit were not made by the Arbitrator.

comfortable at night and sleeping. Petitioner was issued work restrictions and was given prescriptions for Mobic and Norco. Petitioner was also recommended to return in six weeks. (PX5).

The records of Great Plains Orthopedics reflect that Petitioner was seen on August 21, 2017, at which time it was noted that he stated that he still had some achiness in the shoulder, that sometimes it affected his sleeping, that he mainly had pain over the anterior aspect of the shoulder, and that he stated his motion was improving. It was noted that Petitioner was doing physical therapy and was back doing light duty. Petitioner was recommended to continue to slowly progress his activities and was to return in 6-8 weeks. Petitioner was also issued work restrictions and was given a refill on his Mobic. It was noted that Dr. Below thought that Petitioner was improving nicely. At the time of the October 5, 2017 visit, it was noted that Petitioner still had some occasional ache in his shoulder, that he was quite active and did a lot of climbing on trucks, that he had tenderness over the anterior and some lateral aspect of the shoulder, and that he had some stiffness at night. It was noted that Petitioner stated that it was better than it was two months ago, but that he still took some Mobic and Ibuprofen as needed and some Norco for pain. The assessment was noted to be that of right shoulder healing rotator cuff, status post right shoulder surgery, and rotator cuff repair with some minimal bursitis and tendonitis. Petitioner was recommended a right shoulder subacromial injection, which was given. Petitioner was also issued work restrictions and was recommended to return in six weeks, at which time he was to progress to normal duties. (PX5).

The records of Great Plains Orthopedics reflect that Petitioner was seen on November 16, 2017, at which time it was noted that he had been working with restrictions and had been doing almost his normal job except for some certain heavy lifting. Petitioner was recommended to proceed with an FCE. It was noted that Dr. Below thought that there could be some improvement, but that he thought that it would help clarify in terms of what Petitioner's capabilities were. Petitioner was issued work restrictions. At the time of the January 11, 2018 visit, it was noted that Petitioner stated that his shoulder was achy that day but that it was not too bad, that he said that he could tell when the weather changed, that he said he was doing his normal job but did have a 30-pound weight restriction, and that he said when he had to lift something heavy he got assistance either from a co-worker or his boss. It was noted that Petitioner did not proceed with his FCE as it was not approved by worker's compensation, and that he was sent to St. Louis for what sounded like an IME. Petitioner was recommended to continue to do his gentle stretching and home exercise program, and was to continue with the 30-pound weight limit max. It was noted that they would wait for the IME and that Dr. Below again recommended that Petitioner proceed with an FCE and then let him continue on and progress at his normal duties at work. At the time of the February 7, 2018 visit, it was noted that Petitioner had had an IME done on November 29, 2017 by Dr. Kostman who concurred with the treatment, but also believed that the patient had some biceps tendinitis and would recommend a cortisone injection into the bicep tendon sheath. Dr. Below recommended and performed a right shoulder biceps tendon sheath injection. Petitioner was issued work restrictions and was to return in six weeks. (PX5).

The records of Great Plains Orthopedics reflect that Petitioner was seen on March 29, 2018, at which time it was noted that he said that his shoulder seemed to be getting a little better, that he said the injection helped him for a couple of days and then the pain had returned, and that he said that he had a very labor-intensive job. It was noted that Petitioner said that he still had some achiness mainly over the anterior aspect of the shoulder, that it was achy sometimes due to the weather, that he still said he had some minimal weakness sometimes, and that he had a generalized continued complaint of shoulder pain. It was noted that because of Petitioner's continued tenderness, Dr. Below recommended a repeat MRI to more thoroughly evaluate the soft tissue and osseous structures. Petitioner was to continue to do his gentle exercises and continue his same work restrictions. At the time of the April 16, 2018 visit, it was noted that Petitioner returned with MRI results of his right shoulder which showed post-operative changes of the rotator cuff with suture anchor in the humeral head with no signs of any recurrent tears. It was noted that Petitioner said that his shoulder in the cold damp weather had some tenderness, but otherwise he was doing about the same. Petitioner was to progress back into his normal activities. It was noted that Petitioner stated that he

had been doing his normal job, but that Dr. Below would let him go back without restrictions. It was also noted that Petitioner had worked hard, had been an excellent patient, and had worked hard in therapy. (PX5).

The medical records of OSF Orthopedics – Kumpf were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records were effectively duplicative of those as contained in Petitioner's Exhibit 5. (PX6; PX5).

The medical records of OSF Orthopedics – Sommer were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records were effectively duplicative of those as contained in Petitioner's Exhibit 5. (PX7; PX5).

The Operative Report dated March 31, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner underwent surgery by Dr. Below at Great Plains Orthopaedics Ambulatory Surgery Center on that date. It was noted that there was a partial tear of the anterior, superior and posterior labrum, that there was greater than 75% articular surface supraspinatus rotator cuff tendon tear, and that the biceps tendon, subscapularis tendon, and infraspinatus tendon were intact. It was noted that there was noted to be extensive bursitis, that an arthroscopic subacromial decompression, acromioplasty and subacromial bursectomy were performed, and that the rotator cuff tear of the bursal surface was easily completed to a full-thickness tear with a gentle shaver. It was also noted that the acromioclavicular joint showed extensive degenerative changes. (PX8).

The transcript of the deposition of Dr. Steven Below dated November 1, 2018 was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. Dr. Below testified that he was board-certified in 2003 in orthopedic surgery, that he was subspecialty-certified in sports medicine surgery, and that his practice consists of knee and shoulder arthroscopy/reconstruction sports medicine. He testified that he is currently board-certified in orthopedic surgery. (PX9).

Dr. Below testified that Petitioner presented to his office on February 6, 2017 at the referral of OSF Occupational. He testified that Petitioner gave a history that he was involved in a workplace injury on December 16, 2016, that he was working at Prairie Farms, and that he was going to hook up his truck and slipped on the ice, falling about four feet to the ground landing on his right shoulder and forearm. He testified that Petitioner stated that it jerked his shoulder. He testified that his review of the MRI findings was that of a partial tear of the supraspinatus rotator cuff tendon of the right shoulder and also some subacromial bursitis and acromioclavicular degenerative joint disease, with some irritation and inflammation in that area. He testified that Petitioner's physical examination revealed some signs of bursitis in his shoulder and some irritation and tenderness at the acromioclavicular joint, as well as some rotator cuff weakness. He testified that his diagnosis was that of right shoulder partial thickness rotator cuff tear with impingement and bursitis, and some acromioclavicular joint arthritis with inflammation. He testified that he recommended trying a non-operative course consisting of some physical therapy and anti-inflammatories, and that Petitioner stated that he had been taking some Ibuprofen. (PX9).

Dr. Below testified that he next saw Petitioner on March 6, 2017, at which time it was noted that he continued to have tenderness over the outside and front of the shoulder, some in the back of the shoulder, and still some weakness. He testified that they talked about different treatment options again and that, due to the fact that Petitioner was approximately 4-5 months out from his injury and had been treated non-operatively with physical therapy, anti-inflammatories and rest to the shoulder with restrictions at work, they talked about the operative option. He testified that it was his recommendation to proceed with a right shoulder arthroscopy, subacromial decompression, acromioplasty, subacromial bursectomy, rotator cuff repair versus debridement, and excision of the distal clavicle. He testified that surgery was performed on March 31, 2017, and that it consisted of right shoulder arthroscopy with debridement of a partial labral tear which was noted intraoperatively and also a subacromial decompression, acromioplasty, distal clavicle

excision, and rotator cuff tear repair. When asked whether pre-operatively he saw any labral tear or noted any labral tear in Petitioner's right shoulder, Dr. Below responded that he thought that there was some inflammation but that it was on the MRI. He testified that the physical examination performed during the index visit that confirmed the diagnosis of a potential labral tear was that of a positive O'Brien's test, which could also be attributed to some of the tenderness of the acromioclavicular joint. (PX9).

Dr. Below testified that he repaired Petitioner's rotator cuff and that a distal clavicle excision was performed as there was inflammation of the joint. He testified that there were also degenerative changes at the joint, but that he thought the fall aggravated the distal clavicle area and that he was not aware of any complaints prior to Petitioner's injury of shoulder tenderness. He testified that he was not aware of any prior treatment that Petitioner had received to his right shoulder prior to December 16, 2016. He agreed that it would be correct to state that his opinions on causation were based on the fact that Petitioner did not have any preexisting condition. (PX9).

Dr. Below testified that as it related to Petitioner's December 16, 2016 fall, the diagnosis was that of a right shoulder partial rotator cuff tear, a partial labral tear, bursitis of the shoulder, and inflammation from his preexisting right acromioclavicular joint osteoarthritis. He testified that the kind of traumatic injuries that caused rotator cuff tears were jerking of the shoulder or a fall. He testified that there were no findings on diagnostic studies that could differentiate between a rotator cuff that was traumatic versus chronic in nature except by history. He testified that it was possible that the mechanism of injury as described by Petitioner was consistent with causing a rotator cuff tear. When asked of possible causes for labral tears Dr. Below responded that it could be a jerking of the shoulder and sometimes a dislocation of the shoulder, but that Petitioner did not have a dislocation. He testified that it was possible that the history of accident as described by Petitioner was consistent with causing a labral tear. (PX9).

Dr. Below testified that bursitis could be caused by a fall or an overuse-type injury. He testified that it was possible that the mechanism of injury as described by Petitioner was consistent with causing bursitis. He testified that inflammation of the AC joint was usually caused by a fall or contusion of the shoulder. He testified that it was possible that the mechanism of injury as described by Petitioner was consistent with causing AC joint inflammation. He testified that the surgery that was performed was to cure these diagnoses, and that there was nothing else performed surgically to treat something else. (PX9).

Dr. Below testified that Petitioner was seen post-operatively on April 6, 2017, at which time his sutures were removed and his wounds were healing nicely. He testified that he recommended that Petitioner start attending physical therapy. He testified that he next saw Petitioner on May 15, 2017, at which time that he recommended that he continue physical therapy. He testified that at the July 10, 2017 visit Petitioner was doing well, but there was minimal improvement noted in his range of motion and swelling and some of his strength. He testified that he allowed Petitioner to return to work with restrictions at that time. He testified that he next saw Petitioner in follow-up on August 21, 2017, at which time he still complained of some achiness in the shoulder which sometimes affected his sleep. He testified that Petitioner was back doing light duty, that he stated that his motion was improving, and that on physical examination his range of motion was improving and there seemed to be less tenderness. He testified that he proceeded with increasing Petitioner's activity level and gave him a refill on his Mobic. (PX9).

Dr. Below testified that he next saw Petitioner on October 5, 2017, at which time he still complained of some achiness and tenderness over the outside and front of the shoulder, as well as some stiffness. He testified that Petitioner stated that it was better than it was two months prior, and that he was still having some tenderness and was taking some pain medicine and anti-inflammatories. He testified that he thought that Petitioner had a little bit of some tendonitis and bursitis, so he offered him the option of a cortisone shot which was performed. When asked what was causing the tenderness and bursitis that he noted during this visit, Dr. Below responded that some patients could have a little bit of tendonitis and bursitis after

surgery as they progressed back into some of their normal duties and progressed their activities. He testified that the next follow-up visit was on November 16, 2017, at which time Petitioner stated that the injection helped a little bit but that he was still having some tenderness and was almost back to his normal job except for certain heavy lifting. When asked of the results of Petitioner's physical examination, Dr. Below responded that there was some minimal increase in his range of motion and that his rotator cuff strength was 5/5 and full strength. He testified that a functional capacity evaluation was recommended. He testified that Petitioner had a pretty physically demanding job and was still having some issues. (PX9).

Dr. Below testified that Petitioner was next seen in follow-up on January 11, 2018, and that the FCE was not performed by that time. He testified that he did not have the results from the IME during that visit. He testified that during that visit Petitioner discussed with him the issues he was having and the assistance he was requiring at work while working with a 30-pound weight restriction. He testified that he continued to recommend an FCE during this visit. He testified that at the February 7, 2018 visit, he had the IME report of Dr. Kostman and that he reviewed it with Petitioner. He testified that Petitioner had some clinical signs of biceps tendonitis and that he thought that it could be something that was causing some of his tenderness. He testified that he appreciated and concurred with Dr. Kostman that Petitioner had tenderness in that area. He testified that biceps tendonitis was a diagnosis formulated post-surgery and that it was possibly due to the normal healing process. He testified that the injection was administered that day. (PX9).

Dr. Below testified that he saw Petitioner in follow-up on March 29, 2018, at which time he was about one year out from his surgery. He testified that Petitioner stated that his shoulder seemed to be getting a little bit better, that he stated that the injection had helped him a couple of days and that the pain returned, and that he complained of some achiness and some minimal weakness sometimes. He testified that Petitioner's physical examination was not changed and that there was some minimal weakness in the repaired shoulder. He testified that he recommended further diagnostic studies due to the fact that Petitioner had continued to have some tenderness in his shoulder, and that on exam he was concerned of a slight minimal weakness or difference from the other shoulder. He testified that the MRI was performed and that the last office visit he had with Petitioner was on April 16, 2018. He testified that the MRI showed that the rotator cuff was healed and did not show any signs of a new tear and did not show any other pathology. He testified that he released Petitioner without any restrictions and recommended he follow-up on an as needed basis. He testified that he noted that Petitioner had worked hard in physical therapy and had been an excellent patient. (PX9).

Dr. Below testified that he was not aware of Petitioner having appeared to be engaged in symptom magnification and that if he had, he would have noted it in his medical records. He agreed that after April 16, 2018, Petitioner has not followed up with him. He testified that surgically and pre-surgically, his diagnosis for Petitioner was labral tear, rotator cuff tear, bursitis, and inflammation of AC joint osteoarthritis. He testified that post-operatively he diagnosed Petitioner with biceps tendonitis, which was during the recovery process. He testified that there was no diagnosis that he diagnosed for Petitioner that he was not relating to the December 16, 2016 accident. (PX9).

Dr. Below testified that his opinions on causation as to the possibility that the fall that Petitioner sustained caused the conditions that he identified pre-surgically and during the surgery, and that the basis of his opinion was his description of the fall and the fact that he was not having any problems to his shoulder prior to the fall and was now having problems. He testified that he was not aware of any other factor that Petitioner had that contributed to his condition in the right shoulder. (PX9).

Dr. Below testified that he diagnosed Petitioner with right shoulder impingement and that the basis for the diagnosis was that of his clinical exam and radiographic findings of a type 3 acromion, which could predispose him to the condition. When asked whether right shoulder impingement was a diagnosis that he

was relating to the December 16, 2016 accident, Dr. Below responded that Petitioner was having no problems with his shoulder prior to this and then had a fall which then inflamed that area, caused the bursitis and then, with his type 3 acromion, could lead to impingement syndrome. He testified that he disagreed with various causation opinions held by Dr. Kostman, but that he did not disagree with his opinion on causation with regards to the right shoulder biceps tendonitis condition. He testified that he thought that Petitioner's biceps tendonitis occurred in the post-operative time period. (PX9).

Dr. Below testified that it was his understanding that the job that Petitioner performed was a "heavy-duty" job and that prior to the accident of December 16, 2016, he was working full duty. He testified that all of the treatment that he had provided Petitioner had been reasonable and necessary to treat his right shoulder condition, and that it was causally related to the work accident that occurred on December 16, 2016. (PX9).

On cross examination, Dr. Below testified that he had not reviewed the emergency room records from December 16, 2016. He agreed that his opinions regarding causation for the right shoulder were assuming that the history given to him was accurate, and that if the history was inaccurate, his opinions regarding causation could change. When asked whether he expected someone to have right shoulder complaints at or near the time of the event given a history of falling four feet to the ground landing on their right shoulder and forearm areas and jerking the shoulder, Dr. Below responded in the affirmative and further testified that it depended on how they fell. He testified that they could have tenderness around the torso and other extremities, and then it started to identify itself or become more symptomatic in the post-fall days. (PX9).

On cross examination, Dr. Below agreed that it was possible that the rotator cuff tear was degenerative. He agreed that there was no way to know exactly when the tear would have occurred. He testified that it was a possibility that the labral tear was degenerative and that there was no way to know exactly when it occurred. He agreed that osteoarthritis in the AC joint was a degenerative condition and agreed that it was possible that the older one got, the more the osteoarthritis looked more severe. He agreed that when he "opened him up" Petitioner had several degenerative conditions of his shoulder, and further testified that there was also some inflammation in those areas as well which would mean more of an acute-type of process. (PX9).

On cross examination, Dr. Below testified that it was a possibility that he had seen rotator cuff pathology in other patients that did not have a specific injury. He agreed that the same possibility existed for the labral tear, but that there was some inflammation around those areas which would mean more of an acute-type process. He agreed that there was some inflammation around the bursitis. He agreed that he had performed other bursitis procedures due to age or other degenerative conditions not due to a specific injury, which was also similar for the AC joint. He agreed that if he had "opened up" Petitioner without the fall, it was possible that he would have seen the pathology seen on March 31, 2017. He testified that he did not know Dr. Kostman at all. He agreed that as far as he knew, Petitioner was not scheduled to see him. (PX9).

On redirect, Dr. Below testified that the pathology that existed pre-accident was that of the degenerative changes in the acromioclavicular joint and possibly some labral partial tears. He agreed that there was inflammation around the labrum to indicate that the tear was traumatic or acute in nature, and further testified that there was a lot of irritation in the joint. He agreed that it was his opinion that the labral tear was traumatically caused. He agreed that there was also inflammation in the subacromial space and also around the acromioclavicular joint, which would be suggestive of some sort of traumatic injury. (PX9).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 10.

Additional Physical Therapy Records from OSF St. Francis Medical Center dated June 29, 2017 through September 5, 2017 were entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The records reflect that Petitioner was seen for physical therapy on June 29, 2017, at which time it was noted that he hurt and had trouble sleeping last night, that he was working a 12-hour shift yesterday, and that he stated that he did more at work than he probably should have. At the time of the July 6, 2017 physical therapy visit, it was noted that Petitioner stated that he worked 12's all week and was to work 12 that day, the next and Monday, that he stated that he hurt and was not sleeping good, and that he had to find a comfortable position to sleep. It was noted that Petitioner's pain at worst was 7/10 last night, and that after work he worked on his son's go-cart and had to get the axle out. It was noted that Petitioner hit his left hand with a hammer, and that a piece of metal broke off his hammer and cut his upper arm. At the time of the July 11, 2017 physical therapy visit, it was noted that Petitioner stated that he only slept two hours as he had to work 13 hours the day before and that his shoulder hurt, 3/10, but that he had not taken any pain pills yet. It was noted that Petitioner was doing his job at work, and that he just had assistance with anything over his weight restriction. (PX11).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on July 13, 2017, at which time it was noted that he stated that his shoulder hurt, that he took a pain pill before he went to bed, that he could reach the first shelf of the cabinet, that he was back to work light duty, and that he could bathe and dress a little easier but still had problems reaching some and doing some things. At the time of the July 18, 2017 physical therapy visit, it was noted that Petitioner stated that he went "mudding" this weekend, that his shoulder ached, that he stated that he worked 12 hours yesterday, and that he did not take his medications yet that day. At the time of the July 20, 2017 physical therapy visit, it was noted that Petitioner did not get home from work until after midnight, that he spent eight hours without a break fighting a blow mold, and that he was hurting as usual and once in a while he would feel a stabbing pain. At the time of the July 25, 2017 physical therapy visit, it was noted that Petitioner stated that it ached like always and that he really felt it in the joint that day. At the time of the July 27, 2017 physical therapy visit, it was noted that Petitioner stated that he had to use his arms at shoulder-level with a 10# drill, and that he was holding the drill with his left arm and using his right to do the trigger. It was noted that Petitioner's right arm was bent and that he leaned against a tank for extra pressure. It was noted that Petitioner's shoulder hurt. (PX11).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on August 1, 2017, at which time it was noted that he continued to have shoulder pain and difficulty raising his arm actively above 90 degrees, and that he felt like his shoulder "gets found up." It was noted that Petitioner noted continued arm weakness and difficulty propping himself or supporting himself at work, and that he was getting assistance at work for heavy tasks. At the time of the August 3, 2017 physical therapy visit, it was noted that Petitioner had been working on his truck and that his shoulder was aching, 4/10 currently. At the time of the August 8, 2017 physical therapy visit, it was noted that Petitioner stated that he was about the same, that he was aching that day, and that it was hurting that morning when he got up. It was noted that Petitioner had been busy at work and that the positions that he got into when sleeping woke him in the middle of the night, hurting. At the time of the August 10, 2017 physical therapy visit, it was noted that Petitioner had some pain going to bed last night, that he thought he used his arm to push or pull with rolling over last night, and that he stated that he woke at 5 that morning with pain. At the time of the August 15, 2017 physical therapy visit, it was noted that Petitioner cleaned and moved stuff around in the garage over the weekend, that he stated his shoulder was aching, and that driving and the bumps in the road started to aggravate it. (PX11).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen for physical therapy on August 17, 2017, at which time it was noted that he was on a liquid diet that day as he was to have testing done tomorrow, and that he stated that he had been in the bathroom a lot. At the time of the August 22, 2017 physical therapy visit, it was noted that Petitioner had seen the doctor and was to see Dr. Braun

after therapy. At the time of the August 24, 2017 physical therapy visit, it was noted that Petitioner had a stabbing ache in his shoulder and that he had no new complaints. At the time of the August 29, 2017 physical therapy visit, it was noted that Petitioner worked 18 hours yesterday, that he saw Dr. Braun and Dr. Below, and that he was crushing tomatoes this weekend for canning. At the time of the August 31, 2017 physical therapy visit, it was noted that Petitioner only slept two hours last night, that he was working a lot of hours, and that he was in maintenance at Prairie Farms. At the time of the September 5, 2017 physical therapy visit, it was noted that Petitioner stated that he was still trying to recover from yesterday when he worked 19 hours, that he had been working long hours, and that he stated that at the present time he was able to do his job. It was noted that Petitioner had reached maximum benefit from therapy and was to be discharged. (PX11).

The medical records pertaining to OSF Occupational Health were entered into evidence at the time of arbitration as Petitioner's Exhibit 12. The records reflect that a Medical Disposition Report was issued on October 9, 2015, indicating that there were no medical contraindications for placement and that Petitioner met the DOT requirements. The Employer indicated was that of Prairie Farms Dairy. The Prairie Farms Distributing Functional Test dated October 9, 2015 noted that Petitioner demonstrated abilities consistent with the described job demands. (PX12).

The transcript of the deposition of Dr. Christopher Kostman dated November 13, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Kostman testified that he is board-certified in orthopedic surgery. (RX1).

Dr. Kostman testified that he performed an IME on November 29, 2017. He testified that his IME report detailed the history that was obtained from Petitioner, and that he told him that he was not having any shoulder pain when he went to the emergency room. He testified that Petitioner indicated to him that he complained of shoulder pain to the company physician that his shoulder pain started on Sunday. After detailing the findings of the physical examination he performed, Dr. Kostman testified that x-rays of Petitioner's right shoulder performed in his office showed a prior acromioplasty and distal claviculectomy, no evidence of fracture, and no other abnormality. (RX1).

Dr. Kostman testified that he reviewed the emergency room records from December 16, 2016, and that they showed an elbow abrasion and injury on the right elbow, that Petitioner described numbness and tingling in the right arm, that the numbness extended to the fingers of the right hand, that he had no neck or back pain, and that he had tenderness to the olecranon process at the elbow. He testified that he reviewed the x-rays of Petitioner's right shoulder dated December 19, 2016, and that they showed some degenerative change of his AC joint, no evidence of fracture or dislocation, and a type II acromion. He testified that he also reviewed the MRI dated January 16, 2017, and that it revealed a partial-thickness articular surface and intrasubstance tears involving the supraspinatus and infraspinatus tendons superimposed on rotator cuff tendinitis; no full-thickness tear; mild degenerative and inflammatory change of the AC joint; some signal within the rotator cuff which may be consistent with an interlaminar or partial-thickness rotator cuff tear. He further testified that he reviewed x-rays of the rights shoulder dated February 6, 2017, which revealed degenerative changes involving the AC joint and type II acromion. (RX1).

Dr. Kostman testified that his diagnosis of Petitioner's right shoulder condition as of November 29, 2017 was that of right shoulder impingement, right shoulder 75% articular surface supraspinatus rotator cuff tear, right shoulder partial anterior superior and posterior labral tear, right shoulder osteoarthritis of the acromioclavicular joint, and status post right shoulder labral debridement, right shoulder subacromial decompression, right shoulder arthroscopic cuff repair, and right shoulder arthroscopic excision distal clavicle. He testified that it was his opinion that Petitioner may additionally demonstrate some current findings consistent with bicipital tendinitis. When asked whether he recommended any additional treatment for Petitioner's right shoulder at that time, Dr. Kostman responded that it was his impression that he might

benefit from a corticosteroid injection to the right bicipital sheath. He further testified that it was his opinion that Petitioner did not require restrictions as of November 29, 2017 for his right shoulder. (RX1).

As to Petitioner's right elbow condition as of the IME date, Dr. Kostman testified that the diagnosis was that of a contusion of the right elbow with underlying degenerative arthritis of the right elbow. He testified that he did not recommend any additional treatment for Petitioner's right elbow, and that he did not believe that he required any restrictions for the right elbow. He testified that as of the date of the IME Petitioner was at maximum medical improvement for the right elbow, and that he believed that he reached maximum medical improvement for the right elbow on January 19, 2017. (RX1).

When asked whether he had opinion as to whether the alleged incident from December 16, 2016 was a cause of or permanently aggravated the diagnosis of right shoulder impingement, Dr. Kostman responded that it was his impression that it did not and that the basis for his opinion was that of Petitioner's anatomic findings of a type III or type II/III acromion which could predispose an individual to shoulder impingement, and that his diagnosis of right shoulder impingement was not specifically related to his injury. When asked whether the incident from December 16, 2016 was a cause of or permanently aggravated the diagnosis of right shoulder 75% articular surface supraspinatus rotator cuff tear, Dr. Kostman responded that it was his impression that it did not. He testified that articular surface tears could be degenerative particularly in patients who had other degenerative findings, and that Petitioner had degenerative findings involving both his acromioclavicular joint and his labrum. He testified that Petitioner's MRI scan did not demonstrate any edema evident in the acromion or humeral head greater tuberosity region of the rotator cuff partial thickness tear, which may be inconsistent with a traumatic cause. He testified that it was his impression the partial thickness articular surface rotator cuff tear represented a degenerative condition, and that Petitioner denied any shoulder symptoms on the initial emergency room evaluation. (RX1).

When asked whether the incident from December 16, 2016 was a cause of or permanently aggravated the diagnosis of right shoulder partial anterior superior and posterior labral tears, Dr. Kostman responded that he did not believe that it did as the superior and posterior labral tears were common as degenerative findings, and that in multiple locations as described were not consistent with a fall onto the elbow or forearm and were consistent with degenerative labral tears. (RX1).

When asked whether the incident from December 16, 2016 was a cause of or permanently aggravated the diagnosis of right shoulder osteoarthritis of the AC joint, Dr. Kostman responded that he did not believe that it did. He testified that Petitioner had no evidence of a fracture involving the AC joint or AC joint separations as a cause of his osteoarthritis, and that it was his impression that it was a preexisting condition. When asked whether the incident from December 16, 2016 was a cause of or permanently aggravated the diagnosis of right shoulder bicipital tendinitis, Dr. Kostman responded that he did not believe that it did as the long head of the biceps was not identified on the MRI scan as having bicipital tendinitis or inflammation or any tear. (RX1).

Dr. Kostman testified that he reviewed x-rays of the right shoulder dated March 29, 2018 as well as the MRI of the right shoulder dated April 4, 2018. He testified that his review of the additional records and radiographic studies did not change any of his opinions outlined in his previous reports. He testified that his review of the color operative photographs from the March 31, 2017 surgery and the deposition transcript from Dr. Below dated November 1, 2018 did not change any of his previously-held opinions regarding Petitioner. (RX1).

On cross examination, Dr. Kostman testified that in the operative images that he was provided, he did not note any inflammation within the shoulder joint. He testified that the cloudiness in one of the images may be because of poor image quality or could indicate some degree of inflammation. He testified that inflammation of the subacromial space could be consistent with impingement or subacromial bursitis. He testified that it could be due to trauma. He agreed that in order to assess a shoulder condition as to whether

there was inflammation in the shoulder, the best way would be to actually go arthroscopically rather than review the images post-surgically. (RX1).

On cross examination, Dr. Kostman testified that he was not aware of any medical treatment that Petitioner was seeking or received for his right shoulder prior to December 16, 2016. He testified that he would classify Petitioner's job at Respondent as a heavy-duty job based on his description. He testified that he did not know for approximately how long Petitioner was doing the job. He testified that he did not know whether Petitioner was encountering any problems while performing his job in his right shoulder prior to the December 16, 2016 accident. He testified that he did not know whether the physical examination for pre-employment clearance was normal or abnormal with regard to Petitioner's right shoulder. (RX1).

On cross examination, Dr. Kostman testified that the mechanism of accident as reported to him by Petitioner could be consistent with causing a rotator cuff tear. He testified that the mechanism could also be consistent with causing a labral tear, but that the type of labral tear associated with trauma was typically associated with a shoulder dislocation and not the labral tear that was found by imaging.

On cross examination, Dr. Kostman testified that he agreed with Petitioner's diagnosis of shoulder bursitis. He agreed that the shoulder bursitis could be caused by the mechanism of accident that Petitioner sustained on December 16, 2016, and he further agreed that it could be consistent with causing inflammation of the AC joint. He testified that biceps tendinitis was not typically caused as a result of surgical intervention, but that he had seen biceps tendinitis develop post-operatively in surgical patients. He testified that in his personal experience treating patients, it was more common to develop without surgery. (RX1).

The TTD and Medical Payouts were entered into evidence at the time of arbitration as Respondent's Exhibit 2. Petitioner's Timecards were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The Calendars for Years 2016-2018 were entered into evidence at the time of arbitration as Respondent's Exhibit 4.

The medical records of OSF St. Francis Medical Center were entered into evidence at the time of arbitration as Respondent's Exhibit 5. The records reflect that Petitioner was seen on September 3, 2018 for a right index finger laceration. It was noted that Petitioner was missing his distal right 2nd finger at the PIP joint and his right 5th digit. The clinical impression was noted to be that of laceration of the right index finger without foreign body without damage to nail. Petitioner was recommended to call Dr. Beratio in 10 days for suture removal. (RX5).

The medical records of OSF Glen Park were entered into evidence at the time of arbitration as Respondent's Exhibit 6. The records reflect that Petitioner was seen on September 6, 2018, at which time it was noted that he presented to the office complaining that he thought that the laceration to his right hand had become red and swollen. It was noted that Petitioner started noticing that it was red yesterday morning, and that he became concerned because the area of erythema had increased and hurt. The assessment was noted to be that of wound infection. Petitioner was given a prescription for Keflex. (RX6).

The medical records of OSF Morton were entered into evidence at the time of arbitration as Respondent's Exhibit 7. The records reflect that Petitioner was seen on September 13, 2018 for suture removal. It was noted that Petitioner was working on a motor unit for an SUV window and that as he was taking it apart, a spring-loaded piece came around and hit his MTP area of the 1st digit on his right hand. It was noted that Petitioner had very mild tenderness and no open area, swelling, or drainage. At the time of the December 21, 2018 visit, it was noted that Petitioner was seen for a follow-up of new onset diabetes mellitus type 2, hypertension, and concern of fatigue. It was noted that Petitioner had been gaining weight since he had not been working and that he felt fatigued. It was noted that Petitioner had mild tolerable low back pain without radiculopathy, and that he thought it was due to his weight gain. At the time of the March

25, 2019 visit, it was noted that Petitioner was seen for follow-up of his diabetes mellitus type 2 and other chronic medical conditions. It was noted that Petitioner did not lose weight and that he was back to work since January, so he thought he could lose weight with moving a lot at work. Petitioner was recommended to return in six months. (RX7).

The Notice of Job Opening, Request for Bids was entered into evidence at the time of arbitration as Respondent's Exhibit 8. The Notice was dated May 17, 2017 and noted that a second shift maintenance job was open for bids. (RX8).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of December 16, 2016.

Having reviewed the considered the entirety of the medical evidence in this case, the Arbitrator places greater weight upon the opinions proffered by Dr. Below in this case as compared to those proffered by Dr. Kostman. Dr. Below testified that surgically and pre-surgically, his diagnosis for Petitioner was labral tear, rotator cuff tear, bursitis, and inflammation of AC joint osteoarthritis. He further testified that post-operatively he diagnosed Petitioner with biceps tendonitis, which was during the recovery process. He testified that there was no diagnosis that he diagnosed for Petitioner that he was not relating to the December 16, 2016 accident. (PX9). Of note, Dr. Below testified that the kind of traumatic injuries that caused rotator cuff tears were jerking of the shoulder or a fall. (*Id.*). When asked of possible causes for labral tears Dr. Below responded that it could be a jerking of the shoulder and sometimes a dislocation of the shoulder, but that Petitioner did not have a dislocation. (*Id.*). He testified that it was possible that the history of accident as described by Petitioner was consistent with causing a labral tear. (*Id.*). Significantly, the Arbitrator notes that Petitioner testified at arbitration that after his right elbow hit the ground, it jarred his right shoulder.

Additionally, the Arbitrator notes that the medical records of OSF St. Francis Medical Center records reflect that Petitioner was seen on December 16, 2016 in the emergency room, at which time it was noted that his chief complaint was that of right elbow pain. It was noted that Petitioner presented to the emergency room for evaluation of right elbow pain secondary to slipping on ice 30 minutes ago, that he noted numbness and tingling to the right arm, that the numbness extended to the fingers of the right hand, and that he denied neck or back pain. (PX3). While the emergency room records admittedly made no mention of right shoulder-related complaints, Petitioner testified at the time of arbitration that after he fell he noticed that he could not move his right arm and that he was numb from his shoulder down to his hand, that his fingers were tingly and aching, and that it felt like he broke something and did not want to move it. Petitioner further testified that at the emergency room the body part that was hurting the most was his right elbow, but that his arm was still numb from the shoulder down. The Arbitrator notes that the next treatment note dated December 19, 2016 at OSF Occupational Health noted that Petitioner's chief complaint at that time was that of right elbow pain and sensitivity, that he was also having a slight numbness of his fourth and fifth fingers, and that he was also complaining of right shoulder pain and stiffness. (PX4). That said, the medical evidence demonstrates that Petitioner made complaints relative to the right shoulder within three days of the fall at issue.

Furthermore, the Arbitrator finds to be significant in this matter Dr. Kostman's cross examination testimony that the mechanism of accident as reported to him by Petitioner could be consistent with causing a rotator cuff tear, that the mechanism could be consistent with causing a labral tear, that the shoulder bursitis could be caused by the mechanism of accident that Petitioner sustained on December 16, 2016 and

that it could also be consistent with causing inflammation of the AC joint, and that he had seen biceps tendinitis develop post-operatively in surgical patients. (RX1). This particular testimony of Dr. Kostman, when coupled with the fact that the Arbitrator finds Petitioner to have been a credible witness at the time of arbitration, causes the Arbitrator to find that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of December 16, 2016.

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to his work accident of December 16, 2016. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 10 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issues (K) pertaining to temporary total disability benefits and (N) pertaining to an overpayment of temporary total disability benefits, the Arbitrator notes that Petitioner claims that he is entitled to temporary total disability benefits for the timeframe of December 17, 2016 through May 28, 2017. (AX1).

In light of the Arbitrator's findings as to causation and based upon Petitioner's testimony at the time of arbitration as to the timeframe for which he was off work, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the timeframe of December 17, 2016 through May 28, 2017, a period of 23 2/7 weeks, thereby totaling $13,429.97.

The Arbitrator further finds that Respondent is entitled to a credit of $15,877.83 for temporary total disability benefits paid as agreed to by the parties at the time of arbitration. (AX1). As to the issue of a temporary total disability overpayment, the Arbitrator finds that Respondent is entitled to a credit in the amount of $2,447.86 for temporary total disability benefits overpaid, with said overpayment to be credited towards Respondent's permanent partial disability liability in this matter.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injuries, and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that neither party submitted an AMA impairment. As a result thereof, the Arbitrator gives no weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he was a dock worker for Respondent at the time of the accident at issue. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 50 years old on the date of the accident at issue. In light of Petitioner's release to full duty by his treating physician, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he returned to work as a maintenance worker for Respondent upon the completion of his medical treatment.

As there was no evidence proffered at arbitration to demonstrate that Petitioner's work accident has impaired or otherwise affected his future earnings capacity, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that as to his right shoulder as of the time of arbitration, he has aches, that once in a while he feels a stabbing pain, and that his shoulder "pops" now whenever he lifts his arm up over his head. Petitioner testified that his shoulder hurts worse with weather changes. Petitioner testified that he feels a stabbing pain at least once a week and that when it happens, he stops whatever he is doing and rests. Petitioner testified that his shoulder "pops" a couple of times per month, depending on how he moves it. Petitioner testified that the only medication that he takes for his shoulder is over-the-counter Tylenol, and that he also uses an ice pack or heating pad. At the time of the April 16, 2018 visit with Dr. Below, it was noted that Petitioner returned with MRI results of his right shoulder which showed post-operative changes of the rotator cuff with suture anchor in the humeral head with no signs of any recurrent tears. It was noted that Petitioner said that his shoulder in the cold damp weather had some tenderness, but otherwise he was doing about the same. Petitioner was to progress back into his normal activities. It was noted that Petitioner stated that he had been doing his normal job, but that Dr. Below would let him go back without restrictions. It was also noted that Petitioner had worked hard, had been an excellent patient, and had worked hard in therapy. (PX5). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration was mostly corroborated by his treating records at the conclusion of his treatment. The Arbitrator accordingly places greater weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **10% loss of use of the person-as-a-whole** as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TINA COX,

Petitioner,

vs. NO: 13 WC 13610

STATE OF ILLINOIS,

Respondent.

21IWCC0117

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, average weekly wage, medical, temporary disability, and permanent disability, and being advised of the facts and law, affirms the finding that Petitioner sustained an accidental injury arising out of her employment on April 1, 2013 but applies different reasoning to reach its conclusion.

In concluding Petitioner's fall was compensable, the Arbitrator found Petitioner to be a traveling employee: "Petitioner was a Personal Assistant that traveled to her clients' homes to provide care. As such, she is considered a traveling employee." Arb. Dec., p. 5. While it is undisputed that Petitioner's job duties require her to travel away from Respondent's premises, the Commission finds the focus on Petitioner's traveling employee status is misplaced. As the Court held in *Pryor v. Illinois Workers' Compensation Commission*, 2015 IL App (2d) 130874WC, ¶ 22, 27 N.E.3d 678, "An injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, *i.e.*, during a work-related trip." (Emphasis added). Here, Petitioner was not traveling, for work or otherwise; rather, she was actually on-site at Respondent's premises when she slipped and fell. As such, the traveling employee analysis is inapplicable and instead the standard arising out of analysis applies.

"The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with,

or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). To determine whether a claimant's injury arose out of her/his employment, "we must first determine the type of risk to which [s/he] was exposed." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284. As the Supreme Court of Illinois recently reiterated in *McAllister v. Illinois Workers' Compensation Commission*:

> Examples of employment-related risks include 'tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling.' *First Cash Financial Services*, 367 Ill. App. 3d at 106. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. (Citation). 2020 IL 124848, ¶40 (Emphasis added).

Here, Petitioner slipped on rock salt and debris on the metal doorsill of the only entrance to the Public Aid building. The Commission finds this hazardous condition at Respondent's premises constitutes an employment-related risk. Therefore, Petitioner's fall arose of out her employment.

Correction

The Commission observes the awarded period of temporary total disability benefits encompasses 26 weeks, and the decision is corrected to so reflect.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 25, 2019, as modified above, is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's average weekly wage is $498.46.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $332.31 per week for a period of 26 weeks, representing April 2, 2013 through September 30, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay $29,913.35 as provided in §8(a) and subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any

claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $299.08 per week for a period of 59.125 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused 27.5% loss of use of the left leg.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: MAR 11 2021

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

O: 1/19/21

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Stephen J. Mathis

Stephen Mathis

DISSENT

I respectfully dissent in part from the opinion of the majority. While I agree with the majority's ultimate conclusion that Petitioner sustained an injury due to an accident arising out of and in the course of her employment, I would affirm the Arbitrator's conclusion that Petitioner is a traveling employee. I believe the Arbitrator applied the correct legal theory in deciding this case in light of the facts. I otherwise agree with the opinion of the majority.

Thomas J. Tyrrell

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COX, TINA
Employee/Petitioner

Case# **13WC013610**

STATE OF ILLINOIS
Employer/Respondent

21IWCC0117

On 7/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
SUSAN E FRANSEN
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

4980 ASSISTANT ATTORNEY GENERAL
COLIN KICKLIGHTER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

JUL 25 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TINA COX
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # **13** WC **013610**

Consolidated cases: **N/A**

21IWCC0117

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Kankakee, Illinois**, on **6/19/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 1, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**25,919.92**; the average weekly wage was $**498.46**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, and **$3,270.76** for medical under Sec 8(j).

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $332.31 per week for 25-6/7 weeks, from April 2, 2013 to September30, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay $29,913.35 for reasonable and necessary medical services as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $299.08/week for 59.125 weeks, because the injuries sustained caused permanent partial disability to the left knee/leg to the extent of 27-1/2% under Section 8(e) of the Act.

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

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

Signature of Arbitrator

7/24/19
Date

JUL 25 2019

FINDINGS OF FACT

Petitioner was employed part-time as a Personal Assistant with State of Illinois, Department of Rehabilitation Services ("DORS"), and had been since October 7, 2010. As a Personal Assistant for DORS, her work duties included cleaning, cooking and caring for a customer. Petitioner stated that she also worked concurrently with another entity that provided similar services by the name of Help-at-Home. Payment ledgers submitted show she began working at Help at Home on December 8, 2011. (PX 15) Petitioner testified that Respondent had knowledge of her concurrent employment with Hep at Home. Petitioner stated she reported the hiring to Respondent via a supervisor she believed was named Pat. Petitioner stated that she regularly met with Pat to confirm that there was no overlap with hours worked and to review her work schedule to ensure that there were no conflicts with Help at Home.

Petitioner testified that on April 1, 2013, she went to the DORS facility on 285 Schuyler Ave, in Kankakee to turn in her timesheets covering the period from March 15th through March 31st. To get to the DORS office or drop box, to turn in her time sheets, Petitioner had to go through the Public Aid Office and get "buzzed in." Petitioner stated she was not actually working with a client at the time but was only there to turn in her time sheets, in a way dictated by Respondent. Petitioner stated she only had five days to turn in her time sheets. If the sheets were not turned in by the prescribed time frame, she would have to wait until the next pay period to get paid. Petitioner testified that as dictated by Respondent, there was only two ways the time sheets could be delivered, i.e., in person, or through regular mail. Petitioner stated she did not use the mail as she was afraid the time sheets would not arrive timely. She indicated that she always used the drop box to submit her time sheets.

Petitioner testified that after turning in her time sheet, she exited through double doors. As she exited the facility, she slipped on rock salt and gravel that was present on the platform outside of the entrance to the facility. Petitioner described falling with her legs separated in a split position while bracing the fall with her hands. Petitioner noted immediate pain in her shoulders and knees. Petitioner stated that there was a security guard at the building who saw her fall and came to her immediate assistance. Petitioner submitted photographs of where she fell. (PX Group 16, 1-3) According to Petitioner, the photos were taken the day following the occurrence. She said they accurately depict the location of where the accident occurred but there was more debris and rock salt on the platform the day before. Petitioner provided that she did not fall anywhere near the street and although there is a sidewalk visible in the photos, she fell on the platform.

Petitioner proceeded to the emergency room at Provena St. Mary's Hospital. According to the hospital's records, she presented on April 1, 2013 with a chief complaint of knee pain. Petitioner reported a history of leaving work when she tripped and fell forward on her knees and hands. She reported severe left knee pain, mild right knee pain and mild bilateral shoulder pain. (PX 2, p. 2) X-rays taken of the left knee demonstrated moderate degenerative changes with small knee effusion and x-rays of the right knee showed moderate degenerative changes without effusion. Bilateral x-rays of the shoulders were unremarkable. (PX 2, pp. 13-16) Petitioner was discharged with diagnoses of 1.) fall; 2.) left knee abrasion; and 3.) bilateral shoulder spasms. Petitioner was taken off work and referred to ortho. (PX 2, pp. 16-17)

On April 3, 2013, Petitioner presented to Oak Orthopedics where she saw Dr. Alexander Michalow. Petitioner conveyed a history of left knee pain after falling two (2) days previously. Dr. Michalow noted that a prior left knee arthroscopy was performed in 2001 and she had been doing well until recently. After performing an examination, Dr. Michalow assessed left knee sprain, medial and lateral meniscus tears. Also noted was early

degenerative joint disease, left knee. A left knee MRI was ordered and Dr. Michalow administered an injection of Marcaine and Kenalog. Petitioner was also taken off work until further notice. (PX 10, pp. 1-3)

Petitioner underwent the prescribed MRI on April 10, 2013. The results demonstrated tricompartmental degenerative arthritis, most pronounced in the patellofemoral compartment. There was slight lateral patellar subluxation and small joint effusion (PX 10, p. 27)

Petitioner returned to Dr. Michalow on April 10, 2013. After reviewing the MRI, the doctor assessed medial meniscal tear with chondromalacia and possible loose bodies. Surgery was recommended and Petitioner was continued off work. (PX 10, pp. 4-6)

Petitioner underwent preoperative testing at the Medical Group of Kankakee, Dr. Daidi Hashim, on April, 30, 2013. (PX 8) On May 9, 2013, Dr. Michalow performed a left knee arthroscopy, medial meniscectomy, removal of loose bodies, chondroplasty of trochlea and patella, microfracture ablation, and arthroplasty of the medial femoral condyle. (PX 11)

Postoperatively, Petitioner underwent a course of physical therapy at ATI from July 23, 2013 through September 20, 2013. (PX 13) During this period she continued with Dr. Michalow. On August 19, 2013, the doctor administered a left knee cortisone injection. (PX 10, p. 10) On August 26, 2013, Dr. Michalow recommended and commenced a series of Supartz injections to the left knee. The second Supartz injection was administered on September 4, 2013; the third was administered on September 11, 2013; the fourth injection was administered on September 18, 2013; and the fifth was administered on September 25, 2013. At that visit, an examination revealed her range of motion was still not full but was close. Tenderness and soreness was noted at the medical and lateral. She also had a limp favoring the left side. Dr. Michalow noted Petitioner received pain relief, and had increased mobility. The doctor indicated Petitioner could return to work in two (2) weeks and released her from care. (PX 10, pp. 16 – 24)

Petitioner testified that she returned to full duty work for both employers as of September 30, 2013. She stated that she no longer works for Help at Home, but still works for Respondent. She also indicated that she worked at Jewel after Help at Home but left that job also. Petitioner stated that she now works anywhere from 25-30 hours for Respondent and she still follows the same procedure regarding submitting her time sheets.

Petitioner testified that she sustained a prior injury to her left knee. She provided that the injury occurred approximately 20 years ago when she slipped sustained a fracture behind her kneecap. Petitioner stated that over the ensuing years, she would experience some pain here and there, but was basically normal. As to Petitioner's right knee, she had never sustained any injuries to this area nor had any prior bilateral shoulder complaints.

Petitioner testified that her right knee recovered normally and that she no longer feels pain in her shoulders. Petitioner testified that she currently has a daily catching sensation in her left knee. Petitioner stated that experiences pain and swelling in the knee and that it "clicks" when she walks. She complained of difficulty going up and down stairs stating she traverse one foot at a time to descend stairs. Petitioner provided that she is able to perform the functions of her job with Respondent as there is not a lot of lifting or kneeling involved.

Ms. Tammy Nemeth testified on behalf of Respondent. She is employed as a Public Service Administrator who oversees the Kankakee, Joliet, and Danville Division of Rehab Services. Ms. Nemeth testified that she does not manage Personal Assistants. Ms. Nemeth stated that Respondent had no role in scheduling Personal Assistants work hours as it is done between the customers and the Personal Assistant. She only gets involved with Personal Assistants if there is a complaint or a concern.

Ms. Nemeth was familiar with the time sheets and stated that they are submitted two times a month through the agency after approval by the customer. It is the responsibility of the customer or the Personal Assistant to get the time sheet in timely. She believed but was not sure that Personal Assistants had six (6) or seven (7) days to turn in the time sheets. She stated that Personal Assistants are allowed to turn in time sheets by mail or in-person at one of the two drop boxes. She added that the customers can also turn in the Personal Assistants' time sheet.

Ms. Nemeth testified that Personal Assistants are required to notify Respondent of secondary employment and complete what is called a Secondary Employment Form. Because she is only familiar with Petitioner because of the present matter, Ms. Nemeth accessed Petitioner's employment records. According to Ms. Nemeth she was only able to identify a secondary employment form, dated October 29, 2014, detailing Petitioner's concurrent employment with Jewel. She did not find a form for Help at Home.

Ms. Nemeth testified that she did not believe the State of Illinois owns or maintain the sidewalk in front of the entranceway and that the pictures Petitioner submitted into evidence did not appear to be the actual front entrance to the DORS facility in question. She could not identify the platform where Petitioner fell.

Petitioner testified on rebuttal that the photos (Petitioner's Exhibit 16) accurately depict the entranceway to the Public Aid Office, leading to the DORS office. Petitioner stated she did complete a concurrent employment form for her Help at Home job. She further testified that while the customers pick the hours they want the Personal Assistants, Respondent has to approve the same to verify availability.

With respect to (C.) Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds the following:

Relying on Petitioner's credible testimony, the photos submitted, and the medical records admitted into evidence, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent.

Petitioner was a Personal Assistant that traveled to her clients' homes to provide care. As such, she is considered a traveling employee. Her burden to prove she sustained an accident arising out of and in the course of her employment is different than that of a regular employee. It is well settled that if a situation is reasonably foreseeable, it is generally covered. This is true, even if Respondent is not responsible for the area where a Petitioner fell, specifically here, the platform right outside of the entrance door.

Respondent's witness, Ms. Tammy Nemeth, admitted that Personal Assistants travel to the homes of "customers." They only get paid when they are with the "customers." Petitioner also testified that she only gets paid when she is with the "customer." On April 1, 2013, Petitioner went to the DORS facility in Kankakee to turn in her timesheets covering the period from March 15th through March 31st. Petitioner credibly testified that she was only there to turn in her time cards, in a way dictated by Respondent. Petitioner stated she only had five days to turn in her time sheets. If the sheets were not turned in by the prescribed time frame, she would have to wait until the next pay period to get paid. Petitioner credibly testified that as dictated by Respondent, there was only two ways the time sheets could be delivered, i.e., in person, or through regular mail. Petitioner stated she did not use the mail as she was afraid the time sheets would not arrive timely. She always used the drop box to submit her time sheets. After turning in her time sheet, she exited through double doors. As she exited the facility, she slipped and fell on rock salt and gravel that was present on the platform outside of the entrance to the facility.

Petitioner was only at the DORS location in the Public Aid building to turn in her timesheets. It is reasonably foreseeable that Petitioner could have an accident on that platform filled with debris and rock salt.

There is a dispute as to whether Petitioner fell on the platform or on the sidewalk. The Arbitrator finds Petitioner's testimony credible that she fell on the platform as opposed to falling on the sidewalk near the street. The Arbitrator notes that even if Petitioner had fallen on the sidewalk, she is a traveling employee. Petitioner was injured leaving the Public Aid office on the platform she identified. She stepped out onto the platform and slid on the debris and rock salt that was present. It does not matter how it got there, or who did or did not maintain that area. Using the traveling employee analysis, it was reasonably foreseeable that this could happen. As a matter of law, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent.

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

Respondent's dispute regarding causal relationship stems from its dispute regarding accident. Having found in favor of Petitioner on the issue of accident, the Arbitrator finds that a causal relationship exists between Petitioner's condition of ill-being and the accident sustained.

After the work accident of April 1, 2013, Petitioner presented to Provena St. Mary's Hospital with complaints of a fall, bilateral knee pain and bilateral shoulder pain. Her symptoms were the most severe on her left knee. Petitioner was discharged with diagnoses of 1.) fall; 2.) left knee abrasion; and 3.) bilateral shoulder spasms.

Petitioner followed up at OaK Orthopedics, with Dr. Alexander E. Michalow, on April 3, 2013, giving a consistent history and with complaints of pain in primarily her left knee. Dr. Michalow noted that a prior left knee arthroscopy was performed in 2001 and she had been doing well until recently. After performing an examination, Dr. Michalow assessed left knee sprain, medical and lateral meniscus tears. A left knee MRI was ordered and Dr. Michalow administered an injection of Marcaine and Kenalog. The MRI when completed demonstrated tricompartmental degenerative arthritis, most pronounced in the patellofemoral compartment. There was slight lateral patellar subluxation and small joint effusion. When Petitioner returned to Dr. Dr. Michalow, after undergoing the MRI, the doctor assessed medial meniscal tear with chondromalacia and possible loose bodies. Surgery was recommended.

On May 9, 2013, Dr. Michalow performed a left knee arthroscopy, medial meniscectomy, removal of loose bodies, chondroplasty of trochlea and patella, microfracture ablation, and arthroplasty of the medial femoral condyle. Postoperatively, Petitioner underwent a course of physical therapy at ATI from July 23, 2013 through September 20, 2013. Due to continual complaints, Dr. Michalow recommended and administered a series of five (5) Supartz injections to the left knee. On September 25, 2013, Dr. Michalow noted Petitioner's range of motion was still not full but was close. Petitioner received pain relief and had increased mobility. The doctor released her from care.

Petitioner testified that her right knee recovered normally and that she no longer feels pain in her shoulders. Petitioner credibly testified that she currently has a daily catching sensation in her left knee. Petitioner stated that she experiences pain and swelling in the knee and that it "clicks" when she walks. She complained of difficulty going up and down stairs stating she traverse one foot at a time to descend stairs. Petitioner provided that she is able to perform the functions of her job with Respondent as there is not a lot of lifting or kneeling involved.

Based on all the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work accident of April 1, 2013.

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

Petitioner alleges an AWW of $537.83 and Respondent alleges an AWW of $153.90.

Petitioner testified she was first hired by Respondent in 2010. After this, in 2011, she obtained employment with Help at Home. Petitioner testified that she needed to clear this concurrent employment with DORS as they provide the same type of service and Petitioner was afraid of conflicts. Petitioner testified credibly that she not only discussed this with Respondent, she also completed a second employment form with Respondent. Ms. Nemeth testified that she looked through employment records and did not find a completed form for Help at Home. Petitioner testified that she talked to someone named Pat at DORS and then different people monthly to go over the schedule and availability.

Wage records from Help at Home show that Petitioner earned a total of $17,917.17 for fifty-two (52) weeks preceding the injury, or an average of $344.56 per week. (PX15) Adding the agreed upon amount Petitioner earned with Respondent, or $153.90 per week, the Arbitrator finds that Petitioner average weekly wage was $498.46 under Section 10 of the Act.

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

Incorporating the findings in the paragraphs C. and F., the Arbitrator awards the below medical expenses:

Petitioner's Exhibit 1 – Medical bill from Provena St. Mary's Hospital in the amounts of $4,812.34 and 200.50;
Petitioner's Exhibit 3 – Medical bills from various places, including from Associated Radiologists from April 1, 2013 in the amount of $224.40, several from OAK Orthopedics, and The Medical Group of Kankakee;
Petitioner's Exhibit 4 – Medical bill from Consultants in Pathology PCCL in the amount of $8.75;
Petitioner's Exhibit 5 – Medical bill from Sisco in the amount of $153.00;
Petitioner's Exhibit 6 - Medical bill from EMP of Kankakee County in the amount of $454.95;
Petitioner's Exhibit 7 – Medical bills from The Medical Group of Kankakee County in the amounts of $132.00 and $151.00;
Petitioner's Exhibit 9 – Medical bill from Orthopedic Associates Kankakee in the amount of $11,145.00;
Petitioner's Exhibit 12 – Medical bill from ATI in the amount of $12,855.81.

With respect to (K.) What temporary benefits (TTD) are in dispute, the Arbitrator finds the following:

Petitioner initially sought treatment at Provena St. Mary's Hospital when she presented on April 1, 2013. At that time she was taken off work and referred to Dr. Alexander Michalow. Petitioner saw Dr. Michalow on April 3, 2013, at which time, the doctor took Petitioner off work until further notice. Petitioner treated with Dr. Michalow through September 25, 2013 when the doctor indicated Petitioner could return to work in two (2) weeks and released her from care. Petitioner testified that she returned to full duty work for both employers as of September 30, 2013.

Based on the above, the Arbitrator finds that Petitioner was temporarily and totally disabled from work for the period of April 2, 2013 to September 30, 2013, or a total of 25-6/7 weeks.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds the following facts:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Personal Assistant. Petitioner testified that she continues to work in that capacity and is able to perform the essential functions of her job as there is not a lot of lifting or kneeling involved. Based upon this consideration, the Arbitrator assigns moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 43 years old at the time of the accident. Because she has a long work life expectancy, the Arbitrator assigns greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was introduced as to Petitioner's future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that as result of the accident sustained, Petitioner underwent a left knee arthroscopy, medial meniscectomy, removal of loose bodies, chondroplasty of trochlea and patella, microfracture ablation, and arthroplasty of the medial femoral condyle. Postoperatively, she underwent a cortisone injection and a series of five (5) Supartz injections to the left knee. When she last saw her treating physician, Dr. Michalow, on September 25, 2013, an examination revealed that her range of motion was still not

full but was close. Tenderness and soreness was noted at the medical and lateral. She also had a limp favoring the left side. Dr. Michalow noted Petitioner received pain relief, and had increased mobility. The doctor released her from care. At trial, Petitioner testified that she currently has a daily catching sensation in her left knee. Petitioner stated that she experiences pain and swelling in the knee and that it "clicks" when she walks. She complained of difficulty going up and down stairs stating she traverse one foot at a time to descend stairs. Lastly, Petitioner testified that her right knee recovered normally and that she no longer feels pain in her shoulders. The Arbitrator finds Petitioner's testimony credible.

Based on all the above, the Arbitrator finds that Petitioner sustained permanent partial disability to the left leg/knee to the extent of 27-1/2% under Section 8(e) of the Act.

With respect to M.) Is Petitioner entitled to Penalties and Fees, the Arbitrator finds the following:

The Arbitrator finds that a legitimate dispute existed with respect to whether Petitioner sustained an accident within the meaning of the Workers' Compensation Act. As such, penalties are denied.

21IWCC0118

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Daciolas,

Petitioner,

vs.

Nos. 15 WC 11389
15 WC 32525
17 WC 15385
17 WC 15386

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

In case No. 17 WC 15385, the Commission finds the date of accident to be March 1, 2017, with an aggravation on March 15, 2017.

Turning to the medical bills awarded by the Arbitrator, Respondent correctly points out that many of the bills are unrelated or paid. The Commission therefore modifies the Arbitrator's decision to award only the *related* bills in evidence pursuant to sections 8(a) and 8.2 of the Act, giving Respondent credit for the payments made toward the related bills.

Correspondingly, the Commission modifies the award of section 19(k) penalties and section 16 attorney fees to exclude the unrelated medical bills and the related, but paid medical bills. The Commission affirms the part of the award of penalties and attorney fees for non-payment of temporary total disability benefits for a period of 679 days or 97 weeks.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of: (1) $920.57 per week for the period of 1 week, from March 14, 2014 to March 20, 2014; (2) $943.72 per week for the period of 81 2/7 weeks, from June 4, 2015 to December 23, 2016; and (3) $978.67 per week for the period of 130 3/7 weeks, from April 5, 2017 to October 4, 2019—those being the periods of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary compensation, medical benefits or of compensation for permanent disability, if any. Respondent shall have credit of $110,352.84 for the temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the *related* medical bills in evidence pursuant to §§8(a) and 8.2 of the Act. Respondent shall have credit for the payments made toward the related bills.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide, pursuant to §§8(a) and 8.2 of the Act, prospective medical care consisting of: the cervical spine surgery recommended by Dr. Salehi; a consultation with Dr. Dennis Nam regarding a right knee replacement; treatment, including a right knee replacement, recommended by Dr. Nam; and attendant postoperative care.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay section 19(k) penalties of $47,465.50; section 16 attorney fees of $18,986.20; and section 19(l) penalties of $10,000.00. These are the penalties and attorney fees for non-payment of temporary total disability benefits for a period of 679 days or 97 weeks. Further, Respondent shall pay additional section 19(k) penalties and section 16 attorney fees for non-payment of related medical bills in evidence.

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

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

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

21IWCC0118

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

MAR 11 2021

DATED:
o-01/06/2021
SM/sk
44

Stephen Mathis

Marc Parker

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its "award" of penalties and fees pursuant to Sections 19(k) and 16 of the Act regarding unpaid medical expenses. As to this award, I respectfully dissent.

The Arbitrator in his decision awarded penalties and fees based upon the "total trial award [of] $128,051.18." *Arbitration Decision*, p. 12. The award encompassed $94,930.99 for unpaid temporary total disability benefits and $33,120.19 for allegedly unpaid medical expenses. As such, the Arbitrator levied penalties pursuant to Section 19(k) of 50% of the total award equaling $64,025.59 and attorneys' fees pursuant to Section 16 of 20% of the total award equaling $25,610.23. *Arbitration Decision*, 12-13. The Commission affirmed the award of penalties and fees as it relates to the unpaid temporary total disability benefits with which I agree but modified the award of penalties and fees as to it relates to unpaid medical expenses stating "the Respondent shall pay additional section 19(k) penalties and section 16 attorney fees for non-payment of related medical bills in evidence."

Penalties and fees awarded pursuant to Sections 19(k) and 16 are discretionary. See *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515, 702 N.E. 2d 545 (1998) ("In contrast to section 19(l), section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory."). Therefore, I believe the Commission must 1) determine the amount of unpaid medical expenses (Respondent's Exhibit 3 indicates the only unpaid bill equals $455) and then 2) utilize its discretionary authority to determine if penalties and fees are warranted, and if so, in what amount. I do not believe that it is the parties' obligation to determine their culpability, and if so, to what monetary extent.

Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

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

DACIOLAS, KENNETH 21IWCC0118 Case# **15WC011389**

Employee/Petitioner

15WC032525
17WC015385
17WC015386

CITY OF CHICAGO - DEPT OF FORESTRY

Employer/Respondent

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0010 CITY OF CHICAGO
DONALD TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0118

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b), 8(a)

Kenneth Daciolas
Employee/Petitioner
v.
City of Chicago – Department of Forestry
Employer/Respondent

Case # **15** WC 11389, **15 WC 32525, 17 WC 15385, 17 WC 15386**
Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **10/4/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accidents, **3/10/14, 6/3/15, 3/15/17, 4/3/17** Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **various amounts** ; the average weekly wage was $**1,380.86 (3/10/14 injury), $1,415,58 (6/3/15 injury), $1,465.52 (3/15/17 injury), $1,468.00 (4/3/17 injury)** .

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $**110,352.84** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**110,352.84**

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $33,120.19, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$33,120.19** See Petitioner's Exhibit #1 , as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $33,120.19, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $0.00 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of (1) $920.57 for dates 3/14/14 to 3/20/14 for a period of 1 week, (2) $943.72 for dates 6/4/15 to 12/23/16 for a period of 81 2/7 weeks, and (3) $978.67 for dates 4/5/17 to 10/4/19 for a period of 130 3/7 weeks as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 3/14/14 through 10/4/19, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $110,352.84 for temporary total disability benefits that have been paid.

Penalties

Respondent shall pay to Petitioner penalties of $**25,610.23**, as provided in Section 16 of the Act; $**64,025.59**, as provided in Section 19(k) of the Act; and $**10,000.00**, as provided in Section 19(l) of the Act.

Prospective Medical Care

The Arbitrator awards Petitioner the cervical (C5-6) posterior foraminotomy surgery prescribed by Dr. Sean Salehi on March 1, 2019.

The Arbitrator awards Petitioner the right knee total knee replacement surgery consultation with Dr. Dennis Nam. If Dr. Nam agrees with Dr. Bush-Joseph that the total knee replacement surgery is warranted, the right knee total knee replacement surgery is awarded.

The Arbitrator further awards Petitioner all post-surgical care following his surgeries required for him to achieve Maximum Medical Improvement (MMI) status pursuant to Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

December 20, 2019
Date

ICArbDec19(b)

DEC 20 2019

Kenneth Daciolas

v.

City of Chicago

15 WC 11389
15 WC 32525
17 WC 15385
17 WC 15386

STATEMENTS OF FACTS

3/10/14 Injury (15 WC 11389)

Petitioner was working for the City of Chicago – Department of Forestry on the injury date. Petitioner lacerated his left index finger while cutting a tree branch. A gas powered saw lacerated his left index finger and Petitioner was sent to Presence Medical Group for treatment (Pet. Ex. #4).

6/3/15 Injury (15 WC 32525)

Petitioner was working for the City of Chicago – Department of Forestry on the injury date. Petitioner injured his left shoulder on that date when the saw he was using got stuck in a tree branch. The weight of the branch pulled on Petitioner's left arm causing injury to Petitioner's left shoulder. The Petitioner injured his left shoulder rotator cuff on the 6/3/15 injury date. Petitioner treated with Dr. Bernard Bach at Midwest Orthopedics at Rush for his left shoulder work injury (Pet. Ex. # 6). Dr. Bach performed two surgeries on Petitioner's left shoulder (11/3/15 and 6/2/16). Petitioner was released to return to work by Dr. Bach with no restrictions on December 20, 2016 and Petitioner returned to work for Respondent.

3/15/17 Injury (17 WC 15385)

Petitioner was working for the City of Chicago – Department of Forestry on the injury date. Petitioner was pulling on a tree branch on that day when he injured his neck and his left thumb.

On March 1, 2017 Petitioner was working in a bucket attached to a truck when the bucket suddenly dropped jarring the Petitioner's body. However, Petitioner clarified at trial that his significant symptoms did not start until after the March 15, 2017 incident. Both incidents were in March of 2017. The Respondent sent Petitioner for medical care for his injury to U.S. Health Works on the injury date (Pet. Ex. # 3). Petitioner sought follow up care for his neck injury with Dr. Gary Shapiro (Pet. Ex. # 5). The Petitioner saw Dr. Shapiro on October 24, 2017. Dr. Shapiro ordered Petitioner off work pending a cervical MRI test that he ordered. The Petitioner's cervical MRI was not authorized initially. Petitioner did have the cervical MRI on July 28, 2018 (Pet. Ex. #8). Petitioner testified Respondent would not authorize follow up care with Dr. Shapiro so he switched physician's to Dr. Sunavo Dasgupta at Elmwood Park Medical (Pet. Ex. #9, #10). Dr. Dasgupta referred Petitioner for follow up orthopedic care for his cervical spine to Dr. Sean Salehi. Dr. Salehi initially evaluated the Petitioner on December 10, 2018. Dr. Salehi diagnosed Petitioner with work related cervical spondylosis (Pet. Ex. #2). Petitioner saw Dr. Salehi in follow up on March 1, 2019 (Pet. Ex. #2). Dr. Salehi recommended cervical spine surgery for Petitioner at the March 1, 2019 appointment (Pet. Ex. #2). The Petitioner has not had the surgery but he testified he wished to have the surgery when it is authorized so his neck can get better and he can get back to work (TR. at 17).

Respondent did not call any witnesses at trial to rebut Petitioner's testimony. Respondent sent Petitioner for an IME with Dr. Rahul Gokhale on August 2, 2017. Dr. Gokhale agrees Petitioner's cervical symptoms are a work related aggravation of a prior condition.

4/3/17 Injury (17 WC 15386)

Petitioner was working for the City of Chicago – Department of Forestry on the injury date. Petitioner twisted his right knee while stepping over tree branches while working for Respondent

on April 3, 2017. Petitioner testified he stepped on some tree brush causing his foot to slide forward and his right knee to twist (TR. at 19). Petitioner testified to two prior ACL surgeries on his right knee. Petitioner was evaluated at US Healthworks for his right knee injury on April 4, 2017 (Pet. Ex. # 3). Petitioner followed up with Dr. Charles Bush- Joseph for evaluation of his right knee injury on August 1, 2017 (Pet. Ex. # 11). Petitioner was familiar with Dr. Bush-Joseph from prior right knee injuries that he treated with Dr. Bush-Joseph for. Dr. Bush-Jospeh evaluated Petitioner and noted that the only indicated surgical procedure for Petitioner's injury is right knee total knee replacement (Pet. Ex. #11). Dr. Bush-Joseph kept Petitioner in a sedentary work capacity as of August 1, 2017 (Pet. Ex. #11). Dr. Bush-Joseph referred Petitioner for a surgical consultation with Dr. Dennis Nam on January 31, 2018 for consideration of a right knee total knee replacement surgery (Pet. Ex. #11). Petitioner has not had the right knee surgical consultation with Dr. Nam or right knee total knee replacement surgery to date. Petitioner is waiting for authorization to be evaluated by Dr. Nam and to proceed with surgery.

Respondent sent Petitioner for an IME for his right knee injury with Dr. Pietro Tonino on July 31, 2017. Dr. Tonino does feel that Petitioner aggravated his prior knee condition with his April 3, 2017 work injury. Dr. Tonino recommended further treatment and a light duty restriction for Petitioner at the time of the IME.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a

preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. The arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d 213 (1980). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's

testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

The Arbitrator finds, after observing Petitioner testify at trial, that Petitioner was entirely credible. He testified in a manner consistent with the medical records, incident reports and all other documentary evidence admitted as exhibits. Petitioner's demeanor at trial and the manner in which he answered questions was entirely sincere. There were no witnesses offered by Respondent to refute any testimony given by Petitioner.

IN REGARD TO (F), WHETHER PETITIONER'S CURRENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO HIS WORK INJURIES, THE ARBITRATOR FINDS THE FOLLOWING FACTS IN SUPPORT OF THE PETITIONER:

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. *R & D Thiel v. Workers' Compensation Comm'n,* 398 Ill. App. 3d 858, 867 (2010). Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. *Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n,* 409 Ill. App. 3d 943, 948 (2011). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." *Int'l Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. *Schroeder v. Ill. Workers' Comp. Comm'n*, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

All of Petitioner's injuries are causally related to his work injuries for the Respondent as follows:

1. Petitioner injured his left index finger on March 10, 2014 when a work saw lacerated his left index finger. Petitioner was sent to Presence Medical Group for treatment (Pet. Ex. #4). Respondent did not contest causation for this injury at trial. Accordingly, the Arbitrator finds Petitioner's current condition of ill being in his left index finger causally related to his March 10, 2014 work accident.
2. Petitioner injured his left shoulder on June 3, 2015 cutting a branch when his saw got stuck. Petitioner testified that the weight of the branch pulled his arm and causing a tear in his shoulder. Petitioner underwent two surgeries on his left shoulder performed by Dr. Bernard Bach (Pet. Ex. #6). Respondent did not contest causation for this injury at trial. Accordingly, the Arbitrator finds Petitioner's current condition of ill being in his left shoulder causally related to his June 3, 2015 work accident.
3. Petitioner injured his cervical spine on March 15, 2017. Petitioner was pulling on a tree branch on that day when he injured his neck and his left thumb. On March 1, 2017 Petitioner was working in a bucket attached to a truck when the bucket suddenly dropped jarring the Petitioner's body. However, Petitioner clarified at trial that his significant symptoms did not start until after the March 15, 2017 incident. Both incidents were in March of 2017. Petitioner sought treatment on the date of his injury, March 15, 2017 at U.S. Healthworks, a facility he was sent to by Respondent (Pet. Ex. #3). The records from U.S. Healthworks document the March 1, 2017 incident, but confirm that Petitioner's cervical symptoms started on March 15, 2017 (Pet. Ex. #3). This is consistent with Petitioner's trial testimony. Petitioner sought follow up

care with Dr. Gary Shapiro for his cervical injury. Petitioner then sought a second opinion for his cervical injury at Elmwood Park Medical Center and the physician at that facility, Dr. Sunavo Dasgupta, referred Petitioner to Dr. Sean Salehi, an orthopedic spine surgeon (Pet. Ex. #9,10). Petitioner has a cervical MRI that demonstrates stenosis at the C5-6 level with corresponding nerve root impingement (Pet. Ex. #8). On December 10, 2018 Dr. Salehi personally reviewed Petitioner's MRI films and felt the MRI demonstrated bilateral foraminal stenosis at C5-6 (Pet. Ex. #2). Dr. Salehi diagnosed Petitioner with cervical spondylosis (Pet. Ex. #2). Dr. Salehi's notes indicate that Petitioner's cervical condition is secondary to Petitioner's described work injury (Pet. Ex. #2). Petitioner previously had a neck injury years ago but did not have the symptoms he currently does prior to his March 15, 2017 work injury (TR. at 26). Petitioner testified that he currently has stiffness, pain, and some numbness in his arm that he did not have prior to his March 15, 2017 work injury (TR. at 26). Petitioner testified that he has had those symptoms consistently in his neck since the March 15, 2017 work injury (TR. at 26). Petitioner's trial testimony was unrebutted as Respondent did not call any witnesses at trial.

Respondent did send Petitioner for an IME on August 2, 2017 with Dr. Rahul Gokahle. Dr. Gokhale opined that Petitioner's cervical injury is work related by way of an aggravation of a pre-existing condition.

Accordingly, all of the medical evidence points to a causal connection between Petitioner's current condition of ill being in his cervical spine and his March 15, 2017 work injury. The Arbitrator finds Petitioner's current condition of ill being in his

cervical spine is causally connected to his March 15, 2017 work injury with the Respondent.

4. Petitioner's current condition of ill being in his right knee is causally connected to his April 3, 2017 work injury with the Respondent. Petitioner twisted his right knee while stepping over tree branches while working for Respondent on April 3, 2017. Petitioner testified he stepped on some tree brush causing his foot to slide forward and his right knee to twist (TR. at 19). Petitioner testified to two prior ACL surgeries on his right knee. Petitioner was evaluated at US Healthworks for his right knee injury on April 4, 2017 (Pet. Ex. # 3). Petitioner followed up with Dr. Charles Bush-Joseph for evaluation of his right knee injury on August 1, 2017 (Pet. Ex. # 11). Petitioner was familiar with Dr. Bush-Joseph from prior right knee injuries that he treated with Dr. Bush-Joseph for. Petitioner testified to having no pain in his right knee prior to his April 3, 2017 work injury (TR. at 26). Petitioner testified to consistent pain and numbness in his right knee since his April 3, 2017 work injury (TR. at 27). Petitioner did testify candidly about prior surgeries that he had, in the past, on his right knee. However, the prior surgeries were years ago and Petitioner was back to working on a full duty basis prior to his April 3, 2017 work injury. Petitioner's testimony in regards to his right knee injury was unrebutted. Respondent sent Petitioner to an IME for his April 3, 2017 work injury with Dr. Pietro Tonino. In the July 31, 2017 IME report, Dr. Tonino agrees that Petitioner's right knee injury is causally related to his April 3, 2017 work accident. Accordingly, all of the medical evidence points to a causal connection between Petitioner's current condition of ill being in his right knee and his April 3, 2017 work

injury. The Arbitrator finds Petitioner's current condition of ill being in his right knee is causally connected to his April 3, 2017 work injury with the Respondent.

IN REGARD TO (J), WHETHER PETITIONER'S MEDICAL TREATMENT WAS REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR THE REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS THE FOLLOWING FACTS IN SUPPORT OF THE PETITIONER:

Petitioner's medical for his injuries was reasonable and necessary and Respondent has not paid all appropriate charges. Petitioner's treatment has consisted of doctor's visits, physical therapy, diagnostic testing, injections, and surgeries. All of these treatment measures are standard, reasonable and necessary medical treatments required for Petitioner to achieve Maximum Medical Improvement (MMI) for his injuries. Petitioner has $33,120.19 in outstanding medical bills related to his work injuries (Pet. Ex. #1). The Arbitrator awards Petitioner payment of the $33,120.19 in outstanding medical bills to be paid to Petitioner direct, as part of the trial award, pursuant to the Illinois Fee Schedule.

IN REGARD TO (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS THE FOLLOWING FACTS IN SUPPORT OF THE PETITIONER:

The Arbitrator awards Petitioner the cervical surgery prescribed by Dr. Sean Salehi on March 1, 2019 and the right knee total knee replacement surgery consultation with Dr. Dennis Nam prescribed by Dr. Charles Bush-Joseph (Pet. Ex. # 2, #11). If Dr. Nam agrees with his partner, Dr. Bush-Joseph, that the total knee replacement surgery is warranted, the Arbitrator awards the right knee total knee replacement surgery. In addition, the Arbitrator awards all post-

surgical medical care, including physical therapy, required for Petitioner to achieve Maximum Medical Improvement (MMI) pursuant to Section 8(a) of the Act.

IN REGARD TO (L), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS THE FOLLOWING FACTS IN SUPPORT OF THE PETITIONER:

The Arbitrator awards Petitioner TTD benefits for three time periods totaling 212 5/7 weeks: (1) 3/14/14- 3/20/14, (2) 6/4/15-12/23/16, and (3) 4/5/17- 10/4/19. The TTD periods of 3/14/14-3/20/14 and 6/4/15- 12/23/16 were stipulated to by the parties at trial.

The third period of TTD from April 5, 2017 to the trial date of October 4, 2019 is awarded by the Arbitrator as well. This is the TTD period following Petitioner's March 2017 neck injury and April 2017 right knee injury. Respondent stipulated at trial that Petitioner should be paid TTD from April 5, 2017 to November 24, 2017 only. Respondent stopped paying Petitioner TTD as of November 24, 2017 with no legal basis for termination of his TTD benefits. Petitioner was still actively treating for his right knee injury and his neck injury. On August 1, 2017 Petitioner's orthopedic knee physician, Dr. Charles Bush-Joseph provided Petitioner a light duty work restriction indicating Petitioner can only work in a sedentary duty capacity (Pet. Ex. #11). This restriction is pending a visit with Dr. Dennis Nam for an evaluation for a right knee total knee replacement surgery which Respondent has not authorized the visit with Dr. Nam to date so the sedentary work restriction for Petitioner's right knee remains in place. Petitioner testified that he remains under the light duty restriction for his right knee prescribed by Dr. Bush-Joseph on August 1, 2017. Respondent has not accommodated Petitioner with light duty work.

Petitioner has also been in an off work or light duty status for his neck beginning October 24, 2017 by Dr. Gary Shapiro, continuing with Dr. Sunavo Dasgupta at Elmwood Park Medical,

and at present by Dr. Sean Salehi (Pet. Ex. #2, #5, #9, #10). Respondent has not accommodated Petitioner with light duty work for his neck injury (TR. at 18).

Respondent presented no witnesses to rebut Petitioner's testimony of no light duty work available for him. Further, Respondent's IME physicians both agreed Petitioner's injuries are work related and Dr. Tonino ***agreed*** Petitioner should only work in a light duty capacity.

Accordingly, the Arbitrator awards Petitioner TTD benefits for three time periods totaling 212 5/7 weeks: (1) 3/14/14- 3/20/14, (2) 6/4/15-12/23/16, and (3) 4/5/17- 10/4/19.

IN REGARD TO M, SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING FACTS IN SUPPORT OF THE PETITIONER:

The unreasonable and vexatious nature of the Respondent's conduct warrants the payment of 20% attorney's fees under Section 16 of the Act and penalties under Section 19(k).

In determining whether to impose penalties and assess attorney fees under Workers' Compensation Act for an employer's nonpayment of workers' compensation benefits, the test is whether an employer's conduct is reasonable under the circumstances presented. *Miller v. Industrial Com'n, App.*, 255 Ill.App.3d 974, 979-80 (1993). A higher standard is required for the imposition of section 19(k) penalties and section 16 attorney fees than an award of additional compensation under section 19(l). *McMahan v. Industrial Comm'n,* 183 Ill.2d 499, 514 (1998). Where, however, the overwhelming weight of the evidence supports a finding of causal connection, refusal to pay benefits is unreasonable and vexatious. *General Refractories v. Indus. Comm'n,* 55 Ill.App.3d 925, 931 (Ill.App.3d 1994).

In *General Refractories,* the Court affirmed the imposition of penalties under Section 19(l) and Section 16 attorneys' fees where the overwhelming weight of the evidence supported a finding that the injury was an exacerbation of a preexisting condition rather than a product of the

natural degeneration process. *General Refractories,* 55 Ill.App.3d at 932. The respondent relied upon the fact that the Petitioner was a candidate for back surgery prior to his work accident in refusing to pay benefits. *Id.* at 931. The appellate court affirmed the award of penalties because there was direct medical evidence identifying the work injury as the exacerbating force. *Id.*

In this case, the Respondent has no medical evidence to rely on in refusing to pay Petitioner TTD or authorize and pay for his medical treatment. In fact, both of Respondent's Section 12 physicians agree: (1) that Petitioner sustained a work related injury, (2) that Petitioner was not at MMI as of the date of the IME exam, and (3) Petitioner warranted further medical care for his injuries. Further, Respondent presented no witnesses at trial to rebut the Petitioner's credible testimony. Respondent could have ordered follow up Section 12 examinations for Petitioner to address his current work restrictions and medical treatment recommendations but chose not to do so. While it appears that Respondent made a mistake when it failed to look at Petitioner's medical condition and four separate workers' compensation claims as a whole when making decisions to cut off TTD, that cannot save Respondent from penalties. Simply put, if Petitioner cannot return to work because of one claimed injury, Respondent cannot take the position that Petitioner could return to work because with regard to a separate injury there was a dispute. Accordingly, all of the evidence in this case weights in Petitioner's favor and in favor of penalties and attorney's fees being awarded against Respondent for unreasonable and vexatious conduct.

There is 97 weeks of unpaid TTD benefits to Petitioner based on a TTD rate of $978.67 (AWW on 4/3/17 injury date is $1,468.00) for a total of $94,930.99 in unpaid TTD benefits. In addition, there is $33,120.19 in unpaid medical bills. The total trial award is $128,051.18. The Arbitrator awards the 19(k) penalty of 50% of the total trial award or $64,025.59.

The Arbitrator awards Section 16 attorney's fees at 20% of the total trial award or $25,610.23

In addition, penalties under Section 19(l) are awarded. Section 19(l) is awarded at $30.00 per day for late payment of TTD up to a maximum of $10,000.00. Pursuant to Section 19(l), a delay in payment of TTD for more than 14 days creates a rebuttable presumption of unreasonable delay in payment of TTD benefits. In this case, Respondent was 679 days late (November 25, 2017 to October 4, 2019) in paying Petitioner's TTD benefits. The 19(l) penalty for 679 days of late TTD payment ($20,370.00) is reduced to the statutory maximum of $10,000.00. The Arbitrator awards the maximum $10,000.00 penalty against Respondent pursuant to Section 19(l).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Reynaldo Trujillo,

Petitioner,

21IWCC0119

vs.

No. 19 WC 04555

J&A Sheet Metal, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

During and following oral argument, Petitioner's counsel complained that the Commission unfairly enforced a time limit against him. The Commission does not believe it acted improperly. The Commission therefore denies the oral motion for a rehearing and/or to transfer Panels.

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

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

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

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

DATED: MAR 11 2021
o-02/03/2021
SM/sk
44

Stephen Mathis

L. Elizabeth Coppoletti

Thomas Tyrrell

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

TRUJILLO, REYNALDO
Employee/Petitioner

Case# 19WC004555

J&A SHEET METAL INC
Employer/Respondent

21IWCC0119

On 3/20/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5015 ESR LAW GROUP LLC
EDWARD S RUEDA
33 N LASALLE ST SUITE 3300
CHICAGO, IL 60602

4412 ACCIDENT FUND HOLDINGS
GRACE A DIGERLANDO
PO BOX 40785
LANSING, MI 48901

21IWCC0119

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

21IWCC0119

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Reynaldo Trujillo
Employee/Petitioner

Case # **19 WC 4555**

v.

Consolidated cases: **NA**

J&A Sheet Metal, Inc.
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On **01/28/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $42,825.12; the average weekly wage was $823.56.

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

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

Respondent shall be given a credit of $**5,510.12** for TTD, $**0** for TPD, $**0** for maintenance, and $**941.76** for all medical bills paid under Section 8(j) of the Act, for a total credit of $**6,451.88**.

ORDER

Because the Arbitrator finds no causal connection exists between Petitioner's injury of January 28, 2019, and treatment rendered post February 25, 2019, any and all benefits post February 25, 2019, are denied.

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

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

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

Signature of Arbitrator

March 19, 2020
Date

MAR 20 2020

FINDINGS OF FACT

The petitioner testified that he was injured at work January 28, 2019. He testified that he had been employed by J&A Sheet Metal (hereinafter "the respondent") for 27 years. The petitioner testified that on his date of injury he arrived at work at 6:30 a.m. He testified that when he arrived, he punched in and put his apron on, so that he would be ready to start working at 7:00 a.m. The petitioner testified that he worked up until the time of his injury, which occurred approximately one to one and a half hours later. (TX 9-10)

The petitioner testified that he had knowledge of the respondent's surveillance system. He testified that the respondent had one of the best systems of video cameras there was. The petitioner testified that everyone that worked for the respondent knew that they were under surveillance and being recorded for their entire shift. (TX 10-11)

The petitioner testified that after he put his apron, he spoke to the owner, "Joe," about his tasks for the day. He recalled that he had to form a big box of metal on January 28, 2019. The petitioner testified that they began to move the metal forward and backward because they needed to punch holes where the screws would be placed. He testified that he had to use both arms because the metal was long and heavy. Next, the petitioner testified that they were to take the metal to the second department where it would get shaped. The petitioner testified that for the first hour of work he was performing heavy work. (TX 11-12)

The petitioner testified that when he got to the machine with his assistant, they placed the sheet into the machine. When the machine came down, the petitioner testified that the sheet would go up and vice versa. Because the sheet was very long and heavy, the petitioner testified that when it was coming down, he tried to "detain" it and that's when he felt a strong pain in his shoulder. Prior to that injury, the petitioner testified that he never had pain in his left shoulder or injured his left shoulder. (TX 12-13)

The petitioner testified that he immediately reported his injury to the owner. He testified that he did not finish his shift on that day, but rather went to Fullerton Occupational Medicine where he was authorized off of work. The petitioner testified that he then began treating with Dr. David Schafer on February 13, 2019. He testified that he attended physical therapy and ultimately underwent surgery on May 15, 2019. The petitioner testified that he underwent an Independent Medical Examination on April 15, 2019 and that the examination took approximately 3 minutes. (TX 13-17)

The petitioner testified that he was feeling a little better post surgery. He testified that he paid for his shoulder surgery with the insurance he had through work. The petitioner testified that wished to continue treating with Dr. Schafer. (TX 18)

On cross examination, the petitioner testified that he met with the owner of the company every day after he punched in. He testified that the length of those meetings varied. The petitioner

testified that he did not recall how long his meeting was with the owner, Joe Favilla, on January 28, 2019. (TX 19-20)

On cross examination, the petitioner testified that on January 28, 2019 his job was to form a big sheet of metal into a box. Prior to forming the box, the petitioner testified that he and his assistant had to move the metal, which was on top of "some trucks with wheels," so they pushed and pulled the truck to move it. He testified that, prior to forming the metal, they first punched the holes, then cleaned the metal and then moved the metal to the machine where it was formed. (TX 20-22)

On cross examination, the petitioner testified that when he punched the holes and cleaned the metal, the metal was on the truck, which was about the height of the desk (i.e. approximately 3 to 3.5 feet). He testified that one had to push and pull the metal in order to punch the holes. After the metal was punched and cleaned, the metal was moved on the truck to the machine where it would be formed. The petitioner testified that the only thing he did on the morning of January 28, 2019, prior to moving the metal to be formed, was to clean and punch the metal. (TX 22-23)

On cross examination, the petitioner testified that when punching the sheet, he pulled the sheet on the truck (again, approximately 3 to 3 ½ feet high) with both arms. The petitioner testified that he sustained his injury in the area where the metal was formed. He testified that the sheet was too long and too heavy and moving too fast and when he tried to stop it that was when he felt the pain in his arm. The petitioner testified that at the time of his injury, both of his arms were up above his head and that when he tried to hold the metal and felt the pain. (TX 23-25)

On cross examination, the petitioner testified that after he reported the injury to Mr. Favilla, he left work for the day and he believed that it was before 9:00 a.m. He testified that he was evaluated by Dr. Alpert at the request of the insurance company. The petitioner testified that he answered all of Dr. Alpert's questions honestly and that he advised Dr. Alpert of all of his complaints. (TX 25-26)

On cross examination, the petitioner testified that he was aware that a video of his workplace incident was taken on January 28, 2019 and that the same had been sent to his attorney. He testified that he had the opportunity to view that video. The petitioner was shown Respondent's Exhibit #1, which was a video date stamped January 28, 2019 at 7:20 a.m. and 45 seconds. He testified that he was in the video in the left hand corner in a blue shirt on the date of his injury. The petitioner testified that the video depicted him putting his apron on. When asked if the video evidences him guiding his left arm through the apron with his right, the petitioner testified that "it got stuck." (TX 27-29)

On cross examination, the petitioner testified that the next video was dated January 28, 2019 and time stamped 8:23 and 41 seconds. He testified that during the one hour and 2 minute gap between video clips, he was punching and cleaning the metal in preparation for what was next depicted on the video. The petitioner testified that the video time stamped 8:23 and 41 seconds depicted him on the right hand side in a blue shirt when he was guiding the metal into the machine. He testified that he was lifting with his left arm and his left elbow was on the truck. The petitioner testified that his left arm then lifted off the table a couple of inches and then it came down and he

felt the pain in his shoulder, which was when he injured himself. He testified that the aforementioned was the last work he performed for the day. Following his injury, the petitioner testified that he walked around due to pain and then went into the office to report his injury. The petitioner testified that the video he viewed accurately depicted the incident that occurred to his left shoulder on January 28, 2019. (TX 30-35)

Mr. Giuseppe (aka "Joe") Favilla testified on behalf of the respondent company. Mr. Favilla testified that he was employed by the respondent and had been for 30 years. He testified that he was the owner and president of the respondent company. Mr. Favilla testified that he was a working owner and that his job duties entailed taking orders, putting orders in the shop, coordinating jobs, loading trucks, maintaining vehicles and machines, working on the machines, performing payables and receivables. He testified that he was an active member of Union Local 73. (TX 36-38)

Mr. Favilla testified that he was not disputing that what was depicted on Respondent's Exhibit # 1 was an accurate depiction of what occurred on January 28, 2019. He testified that he was at work the morning of January 28, 2019. Mr. Favilla testified that there was an hour gap in the video between the time that the petitioner put his apron on and his injury. He testified that the reason for the gap was that he only put "what needed to be seen" on the video (RX 1) and that he did not believe the hour gap would be relevant. He testified that there was no way to retrieve that hour gap at this time as the recorder only holds video for approximately 4 weeks. (TX 38-40)

Mr. Favilla testified that between 7:20 a.m. and approximately 8:30 a.m., he agreed with the petitioner's testimony in that the petitioner would have been punching and cleaning the metal during that time period. He testified that no incident or injury occurred at work prior to the incident shown on the video at approximately 8:30 a.m. Mr. Favilla testified that the petitioner reported the injury and he offered the petitioner an ambulance, which was declined. (TX 40-42)

Mr. Favilla testified that the petitioner would have been working with one individual to clean and punch the metal, but that metal that size was normally formed by 4 people. He testified that he converted the video in Respondent's Exhibit #1 to DVD or CD format and that the video had not been altered by him in any way. Mr. Favilla testified that the Respondent's Exhibit #1 accurately depicted the respondent's facility on January 28, 2019 and the area where the petitioner was working on that date. (TX 42-44)

Mr. Favilla testified that the petitioner carried group insurance through the respondent company and that the respondent company paid into the petitioner's group coverage. He testified that the petitioner did not pay for any portion of his insurance coverage. (TX 44)

On cross examination, Mr. Favilla testified that he preserved the video of January 28, 2019 because the petitioner did not seem to be in pain. He testified that when forming a part, the part is usually bent where your hands go over your head and the petitioner's part only went six inches off the table, which raised "a little awareness," so he recorded that section. Mr. Favilla testified that he then wanted to see what the petitioner did prior, which is when he noticed that when the petitioner went to put his "loosely fitted apron" on, the left arm limped through and was pulled through, which is why that section was also recorded. He testified that he also noticed that the

petitioner did not grab his shoulder until 22 seconds after the incident and he testified that if you got injured, you usually grab that part, which was suspicious. (TX 44-47)

On cross examination, Mr. Favilla testified that the petitioner did not complain of injuring himself prior to bending the part. Additionally, Mr. Favilla testified that no lifting is performed while punching a part. He testified that the machine and table are the same height (i.e. give or take an inch), so you might have to lift the metal off of the table a little to get it to the machine, but you did not lift the part up and off of the table to get it onto the machine. (TX pp. 47-48)

On cross examination, Mr. Favilla testified that he did not find it insulting that the petitioner filed a workers' compensation claim against the respondent. He testified that the petitioner had been with his company since 1992. Mr. Favilla testified that the he felt that the video "supported what happened." (TX 49-50)

On re-direct examination, Mr. Favilla testified that the video in question, Respondent's Exhibit #1, was a complete video depiction of the petitioner's alleged injury. He testified that had the petitioner informed him that he was injured while punching and cleaning parts, he would have copied that video and that video would have been present at trial. Mr. Favilla testified that the petitioner never told him that he was injured punching or cleaning the metal. He testified that when the petitioner advised him that he had allegedly hurt himself, the petitioner did not seem to be in pain based upon his body language and facial expressions. (TX 53-54)

MEDICAL FACTS:

On January 28, 2019, the petitioner presented to Fullerton Occupational Medicine & Immediate care with complaints of left shoulder pain after lifting heavy equipment at work on that same date at 9:15 a.m. Medications were prescribed along with an MRI of the left shoulder. The petitioner was authorized off of work. (PX 1)

On February 4, 2019, the petitioner underwent an MRI of his left shoulder. Reportedly, the MRI exhibited: 1) moderate degenerative acromioclavicular osteoarthropathy; 2) partial thickness articular surface tear of the supraspinatus tendon; 3) partial thickness tear of the subscapularis muscle and tendon; 4) partial thickness tear of the long head of biceps brachii; 5) bone contusion in the head of the humerus, predominantly the greater tuberosity; 6) moderate subacromial – subdeltoid bursitis; and, 7) marked subcoracoid – subscapularis bursitis. (PX 1)

On February 6, 2019, the petitioner was referred to an orthopedic surgeon. (PX 1)

On February 13, 2019, the petitioner was evaluated by Dr. David Schafer. Reportedly, the petitioner was right hand dominant. He alleged that on January 28, 2019 he was supporting a 200 pound piece of sheet metal just above shoulder level with a co-worker when the metal became unbalanced and his left arm was forcefully extended at the elbow. Dr. Schafer noted that he reviewed the report of the left shoulder MRI. Medications were prescribed along with physical therapy and a steroid injection administered into the left proximal biceps. The petitioner was authorized off of work. Thereafter, the petitioner continued to treat with Dr. Schafer and shoulder surgery was recommended. (PX 2)

On April 15, 2019, the petitioner underwent an Independent Medical Examination with Dr. Joshua Alpert. At that time, the petitioner reported that on January 28, 2019 he was working and carrying sheet metal. Allegedly, the metal weighed approximately 250 pounds. The petitioner reported that the metal started coming down and he held it and felt pain in the left shoulder. He denied any prior left shoulder problems. (RX 2)

Dr. Alpert noted that he reviewed some workplace videos taken on January 28, 2019. Reportedly, the petitioner is seen on the video putting on an apron at 7:20 am. According to Dr. Alpert, the petitioner appeared to put the apron on awkwardly and winced a little bit while moving his left shoulder. On that same date at 8:23 and 59 seconds, there is a video of what appeared to be the petitioner holding a piece of sheet metal at waist level with another person. As the piece of metal is pushed at waist level into what appears to be a machine, Dr. Alpert noted that the petitioner appears to awkwardly drop the metal. According to Dr. Alpert, the petitioner is not seen lifting above waist level with his left arm. (RX 2)

After evaluating the petitioner, reviewing the MRI films, medical records and workplace video, Dr. Alpert diagnosed the petitioner with left AC joint arthritis, partial rotator cuff tear, partial thickness biceps tear and subacromial bursitis, "all of which appear to be pre-existing and degenerative in nature." Based upon the videos of the petitioner at the workplace on January 28, 2019, which Dr. Alpert reviewed, he opined that he did not see any significant mechanism of injury where the petitioner was lifting above waist or shoulder level with his left arm and shoulder. Also, when the petitioner was putting on his apron, Dr. Alpert noted that he had a difficult time doing the same with his left arm and shoulder and winced while donning the apron. Based upon his review of the January 28, 2019 videos and the medical records provided, Dr. Alpert opined that, "at maximum," the petitioner's work activities of January 28, 2019 may have temporarily aggravated is pre-existing AC joint arthritis, partial rotator cuff tear, and partial thickness biceps tear and caused some left shoulder symptoms. However, Dr. Alpert opined that the petitioner had "certainly" reached maximum medical improvement for any injuries sustained on January 28, 2019 and he believed that no additional medical treatment was reasonably necessary to diagnose or treat any possible injury sustained on January 28, 2019. Again, Dr. Alpert noted that the petitioner appeared to have a pre-existing condition based upon his appearance and difficulty putting on his apron on January 28, 2019. (RX 2)

Dr. Alpert opined that he believed the petitioner could return to light duty work with no lifting above waist level with his left arm; however, those restrictions were related to the petitioner's pre-existing degenerative condition and not any work related injury. Dr. Alpert noted that he did not believe the petitioner sustained any permanent disability as a result of his work injury and that he would have reached MMI within four weeks after any possible temporary aggravation injury sustained on January 28, 2019. Since that time, Dr. Alpert opined that the petitioner had not had any work restrictions due to the "possible" work related injury. In Dr. Alpert's opinion, the petitioner may have temporarily aggravated his pre-existing degenerative left shoulder condition on January 28, 2019 and treatment for the same for a four week period, including once cortisone injection and physical therapy were reasonable and necessary for the possible injury sustained. According to Dr. Alpert, any care or treatment after that four week

period was due to the petitioner's pre-existing degenerative condition, not any work related injury. (RX 2)

On April 18, 2019, Dr. Schafer noted that he "discussed the independent medical evaluation" with the petitioner and noted that the evaluator reportedly reviewed a video and claimed that the petitioner was in pain prior to work on the date in question. Reportedly, the petitioner denied the same. Dr. Schafer also noted that the IME physician released the petitioner to regular work duties and that he did not believe the same was appropriated. Surgery was again recommended. (PX 2)

On May 15, 2019, the petitioner underwent a left shoulder arthroscopy with debridement of the labrum, subacromial decompression, rotator cuff repair and open biceps tenodesis. Thereafter, he continued to follow up with Dr. Schafer and on June 13, 2019 a course of physical therapy was prescribed. The petitioner continued to be authorized off of work. (PX 2)

The petitioner attended physical therapy at ATI. (PX 3)

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hegeler Zinc. Co. V. Industrial Board, 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. Board of Trustees v. Industrial Commission, 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. The arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is

inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980).

The Arbitrator finds, after observing Petitioner testify at trial and a review of the records, that Petitioner was only partially credible. Petitioner's demeanor at trial and the way he answered questions seemed sincere but there was little to no eye contact and the Arbitrator detected unusual pauses when Petitioner answered questions about getting his apron on at the beginning of his shift which proved crucial. The medical records generally support the testimony of Petitioner except in the small detail of the manner in which Petitioner was holding a heavy metal plate. Mr. Favilla, Respondent's witness, was passionate in his testimony and gave clear, direct, and combative answers. While there is no question that Mr. Favilla recorded the entirety of Petitioner's shift on the date of the alleged accident, and then edited the same to only about 7 minutes of Petitioner's shift, the video is not doctored in any way and shows crucial moments relevant to the case. The Arbitrator found his testimony credible.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F) IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

The burden lies with the claimant to establish the elements of his right to compensation. Wal-Mart Stores, Inc. v. Industrial Comm'n, 326 Ill.App.3d 438, 443, 761 N.E.2d 768, 773, 260 Ill.Dec.585, 590 (4th Dist. 2001) (citing *Nabisco Brands, Inc. v. Industrial Comm'n,* 266 Ill.App.3d 1103, 1106, 204 Ill.Dec. 354, 641 N.E.2d 578, 581 (1994)). This includes the burden of proving the existence of a causal relationship between the injury and the condition of ill-being. Beattie v. Industrial Comm'n, 276 Ill.App.3d 446, 449, 657 N.E.2d1196, 1199, 212Ill.Dec.851, 854 (1st Dist. 1995). An injury arises out of and in the course of employment where the origin of injury is somehow connected or incidental to the employment so that a causal connection exists between the injury and the employment. Warren v. Industrial Comm'n, 61 Ill. 2d 373, 376 (1975). The mere existence of testimony does not require its acceptance. Bernard v. Industrial Commission, 25 Ill.2d 254, 184 N.E.2d 864 (1962).

The Arbitrator finds that the petitioner failed to prove, by a preponderance of the evidence, that his current condition of ill being was somehow connected or incidental to his job duties for the respondent on January 28, 2019. After weighing the evidence in this case, the Arbitrator concludes that the petitioner established that he sustained, at most, a minor temporary aggravation of his pre-existing degenerative left shoulder condition as a result of his alleged work injury of January 28, 2019. In forming this opinion, the Arbitrator relies upon the credible opinions of Dr. Joshua Alpert and finds that the petitioner failed to prove a causal connection between his medical condition subsequent to February 25, 2019 and his injury of January 28, 2019. Specifically, the Arbitrator finds that the petitioner's left shoulder surgery, performed on May 15, 2019, was not causally related to his injury of January 28, 2019.

First and foremost, the Arbitrator finds that the video evidence shows conclusively that Petitioner exhibited difficulty putting on his work apron at the beginning of his shift. He could not lift his left arm as one would normally do to put on an apron. Petitioner had to reach over with his right arm to get his left arm through the arm hole. This alone supports the conclusion that Petitioner had an injured left shoulder at the beginning of the shift before the alleged accident.

Second, the Arbitrator notes that the petitioner informed his treating surgeon, Dr. Schafer, on February 13, 2019, that he was injured when supporting a 200 pound piece of sheet metal just above shoulder level with a co-worker when the metal became unbalanced and his left arm was forcefully extended at the elbow. Furthermore, the petitioner testified at trial that, at the time of his injury, both of his arms were overhead. The Arbitrator notes that video of the workplace accident admitted into evidence, which the petitioner viewed and admitted was an accurate depiction of his work place injury, neither exhibited the petitioner lifting overhead nor his elbow being forcefully extended. In fact, the video admitted into evidence merely exhibits the petitioner lifting at waist level for a matter of seconds. As such, the Arbitrator finds that any causation opinions rendered by Dr. Schafer or inferred from Dr. Schafer's records are irrelevant as they are based upon an inaccurate and false description of the petitioner's alleged injury. In so finding, the Arbitrator notes that a treating doctor's findings and opinions can be undermined, *or even disregarded,* through reliance on inaccurate and incomplete information. Horath v. Indus. Comm'n, 96 Ill.349, 449 N.E.3d 1345 (1980); Comer v. Nabisco, 99 IIC 256.

The Arbitrator notes that Dr. Alpert, respondent's IME physician, was able to view the video of the petitioner's workplace injury and Dr. Alpert credibly opined that no significant mechanism of injury occurred where the petitioner was seen lifting above waist or shoulder level with his left arm and shoulder. Furthermore, Dr. Alpert accurately noted that when the petitioner was seen putting on his apron, approximately one hour before his alleged injury, he winced and had a difficult time doing so with his left arm and shoulder. The Arbitrator notes that from his own viewing of the video taped evidence of the petitioner's injury, the petitioner does not lift above waist level and is seen pulling his left arm through his work apron with his right arm. Although the petitioner testified that he did not suffer any injury or pain in his left arm/shoulder prior to his injury, the videotaped evidence of the petitioner donning his apron suggest otherwise as the petitioner is clearly unable to move the left shoulder and arm in a normal manner. Based upon the aforementioned, the Arbitrator finds the opinions of Dr. Alpert to be credible and compelling. Furthermore, the Arbitrator finds Dr. Alpert's opinions to be more persuasive than those of Dr. Schafer as Dr. Schafer was not informed of an accurate mechanism of injury. In accord with Dr. Alpert's opinions, the Arbitrator finds that the petitioner reached a state of maximum medical improvement without need for additional treatment by late February of 2019.

The Arbitrator also notes that critical to the determination of causal connection is the petitioner's credibility and the weight of his testimony depends upon the same. Once the petitioner's credibility is questioned, the concept of truthfulness becomes critical. The Arbitrator notes that compensation has been denied by the Commission and affirmed by the Courts in numerous instances when the claimant's credibility was suspect and the contemporaneous medical histories conflicted with and/or failed to corroborate the claimant's testimony. See Elliott v. Industrial Commission, 303 Ill.App.3d 185, 707 N.E.2d 228 (1999); McRae v. Industrial

Commission, 285 Ill.App.3d 448, 674 N.E.2d 512 (1996); Banks v. Industrial Commission, 134 Ill.App.3d 312, 480 N.E.2d 139; Luby v. Industrial Commission, 82 Ill.2d 353, 412 N.E.2d 439 (1980). Furthermore, when an Arbitrator finds that a petitioner has lied on a particular issue, the arbitrator may then find the petitioner is not credible as to other issues. Parro v. Industrial Commission, 167 Ill.2d 385, 657 N.E.2d 882 (1995).

Although the Arbitrator has already provided several bases for finding that the petitioner's condition subsequent to February of 2019 was not causally related to his work injury, the Arbitrator notes certain significant discrepancies in the petitioner's testimony and his medical records, which call the petitioner's credibility into question. Again, at the time of trial, the petitioner testified that both of his arms were overhead at the time of his injury. Furthermore, the petitioner advised Dr. Schafer that his left arm was above shoulder level at the time of his injury. Again, the Arbitrator notes that the petitioner provided an inaccurate and false description of his injury, which was video recorded by the respondent company. Thus, causation cannot be based upon Dr. Schafer's reliance upon the same.

The Arbitrator finds that the petitioner failed to prove that his condition of ill being subsequent to February 25, 2019 was causally related to his injury of January 28, 2019. In so finding, the Arbitrator finds the petitioner's testimony relative to his mechanism of injury to be both incredible and false and he relies upon the credible IME opinions of Dr. Alpert. After viewing the evidence in its entirety, the Arbitrator adopts the opinions of Dr. Alpert and finds that that, at most, the petitioner sustained a temporary aggravation of his pre-existing left shoulder condition, which would have resolved within 4 weeks post January 28, 2019. As such, the Arbitrator finds no causal connection between the petitioner's condition of ill being subsequent to February 25, 2019 and his injury of January 28, 2019.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO THE PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES, (K) IS THE PETITOINER ENTITLED TO PROSPECTIVE MEDICAL CARE, AND (N) IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS THE FOLLOWING:

As the Arbitrator finds no causal connection between the petitioner's medical condition post February 25, 2019 and his injury of January 28, 2019, the Arbitrator denies any and all medical expenses incurred by the petitioner post February 25, 2019. The respondent will receive a credit for all medical bills paid by the group carrier prior to February 25, 2019 under Section 8(j) of the Act as stipulated to at the time of trial. Additionally, respondent will be given a credit of $701.06 for medical paid. (RX 3) As the Arbitrator finds no causal connection between the petitioner's injury and his treatment post February 25, 2019, all medical care post February 25, 2019 is denied, including prospective medical care.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L) WHAT IS TEMPORARY TOTAL DISABILITY BENEFITS ARE DUE AND OWING AND (N) IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS THE FOLLOWING:

As the Arbitrator finds no causal connection between the petitioner's medical condition post February 25, 2019 and his injury of January 28, 2019, the Arbitrator denies any and all temporary total disability benefits incurred post February 25, 2019. The Arbitrator notes that temporary total disability benefits were paid by the respondent from January 29, 2019 through April 15, 2019, the date of Dr. Alpert's IME, in the sum of $5,510.12. The Arbitrator finds that no additional temporary total disability benefits are due and owing and the respondent will receive a credit for all temporary total disability benefits paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sherry Buckhorn,
Petitioner,

vs.

Three Springs Lodge,
Respondent.

21IWCC0120

NO: 18 WC 9956

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020, is hereby affirmed and adopted.

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

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

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

DATED: MAR 15 2021
o1/21/21
DLS/rm
046

Deborah L. Simpson
Deborah L. Simpson

Barbara N. Flores

Marc Parker
Marc Parker

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

21IWCC0120

BOCKHORN, SHERRY
Employee/Petitioner

Case# **18WC009956**
18WC009957

THREE SPRINGS LODGE
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

5657 MORROW WILLNAUER CHURCH LLC
KIM M PARKS
500 N BROADWAY SUITE 1500
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Sherry Bockhorn
Employee/Petitioner

v.

Three Springs Lodge
Employer/Respondent

Case # 18 WC 09956

Consolidated cases: 18 WC 09957

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on February 24, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, February 14, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $30,413.00; the average weekly wage was $583.49.

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

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

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

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

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, all compensation benefits are awarded in case number 18 WC 09957.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 28, 2020
Date

APR 2 - 2020

Findings of Fact

Petitioner filed two Amended Applications for Adjustment of Claim which alleged she sustained accidental injuries arising out of and in the course of her employment by Respondent. In case 18 WC 09956, the Amended Application alleged that on February 14, 2017, Petitioner was "Picking up residents recliner" and sustained an injury to her "Left forearm elbow, left hand, rt shoulder/arm/hand." In case 18 WC 09957, the Amended Application alleged that on February 22, 2017, Petitioner was "Picking up residents bed to untangle wires" and sustained an injury to her "Left forearm elbow, left hand, rt shoulder/arm/hand" (Arbitrator's Exhibit 2). The cases were previously consolidated. They were tried in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and maintenance benefits as well as prospective medical treatment (Arbitrator's Exhibit 1).

Respondent stipulated Petitioner sustained work-related accident on both February 14, and February 22, 2017, but disputed liability on the basis of causal relationship. In regard to temporary total disability benefits, Petitioner and Respondent stipulated Petitioner was entitled to temporary total disability benefits for 68 weeks, commencing February 24, 2017, through January 25, 2018, and June 19, 2018, through November 5, 2018. In regard to maintenance benefits, Petitioner claimed she was entitled to maintenance benefits of 52 weeks, commencing February 26, 2019, through February 24, 2020 (date of trial). Respondent disputed Petitioner was entitled to maintenance benefits for the aforestated period of time, and claimed Petitioner was entitled to maintenance benefits of 18 2/7 weeks, commencing February 26, 2019, through June 4, 2019, and October 18, 2019, through November 15, 2019 (Petitioner's Exhibit 1).

Petitioner became employed by Respondent in 2009, as a manager/housekeeper. Petitioner testified that although she was a supervisor, she was a working supervisor and performed the same cleaning duties performed by her subordinates. On February 14, 2017, Petitioner sustained an injury to her left elbow while moving furniture. On February 22, 2017, Petitioner sustained another injury to her left elbow while lifting a resident's bed.

Petitioner did not seek any medical treatment until after the second accident. On February 24, 2017, Petitioner was seen by Dr. Mark Preuss, her family physician. At that time, Dr. Preuss noted he was seeing Petitioner for a follow-up evaluation for a neck and right shoulder condition. He noted Petitioner had received an injection in the subacromial bursa and received physical therapy. At that time, Petitioner advised her neck and right shoulder symptoms had "completely resolved," but had sustained an injury to her left arm. On examination, Dr. Preuss noted Petitioner's left arm was swollen and he diagnosed Petitioner with left lateral epicondylitis of the left pronator muscles with radial nerve entrapment. Dr. Preuss prescribed medication and put Petitioner's left arm in a sling (Petitioner's Exhibit 3).

Medical records of Dr. Preuss for right shoulder/arm treatment he provided to Petitioner prior to the accidents were received into evidence at trial. When Dr. Preuss saw Petitioner on January 6, 2017, she complained of right shoulder/arm pain which had been present for two weeks. Petitioner gave a history of moving a recliner and having neck and right shoulder/arm pain afterward. Dr. Preuss opined Petitioner had sustained a right rotator cuff injury and had cervical

disc disease with radiculopathy in the right arm. At that time, he administered an injection into the subacromial area of the right shoulder (Respondent's Exhibit 2).

Petitioner saw Dr. Preuss on March 7, 2017. At that time, Petitioner advised Dr. Preuss of the details of the accidents of February 14, and February 22, 2017. Petitioner advised the left arm symptoms began on February 14, but she experienced intensified pain when she sustained the accident on February 22. Dr. Preuss ordered an MRI of Petitioner's left elbow and forearm and indicated he would refer Petitioner to an orthopedic specialist (Petitioner's Exhibit 3).

MRI scans of Petitioner's left elbow and left forearm were performed on March 15, 2017. According to the radiologist, the MRI of Petitioner's left elbow revealed a partial tear of the common extensor tendon and a partial tear of the lateral collateral ligament. According to the radiologist, the MRI of Petitioner's left forearm revealed an injury to the common extensor tendon which extended to the proximal myotendinous junction (Petitioner's Exhibit 4).

Dr. Preuss saw Petitioner on March 20, 2017, and reviewed the MRI scans. He recommended referral to a specialist in elbow injuries (Petitioner's Exhibit 3).

On April 13, 2017, Petitioner was evaluated by Dr. Charles Goldfarb, an orthopedic surgeon. Dr. Goldfarb examined Petitioner and reviewed the MRI of Petitioner's left elbow. He opined Petitioner had lateral epicondylitis. He recommended modified work duties and therapy hoping to avoid surgery (Petitioner's Exhibit 5).

Dr. Goldfarb again saw Petitioner on May 11, June 22, and July 27, 2017. Petitioner's condition did not improve and, when Dr. Goldfarb saw Petitioner on July 27, 2017, he opined Petitioner had radial tunnel syndrome and possibly, cubital tunnel syndrome. He ordered EMG/nerve conduction studies (Petitioner's Exhibit 5).

On August 23, 2017, EMG/nerve conduction studies were performed on Petitioner's left arm. They were negative for ulnar neuropathy, median/radial neuropathy and cervical radiculopathy (Petitioner's Exhibit 5).

When Dr. Goldfarb saw Petitioner on August 31, 2017, he reviewed the diagnostic studies. At that time, he recommended Petitioner undergo surgery consisting of tennis elbow debridement, radial tunnel decompression and cubital tunnel decompression versus transposition (Petitioner's Exhibit 5).

Dr. Goldfarb performed surgery on October 11, 2017. The procedure consisted of left lateral epicondylitis debridement, left radial tunnel decompression and left cubital tunnel decompression (Petitioner's Exhibit 7).

Dr. Goldfarb saw Petitioner on October 26, 2017, and noted she was doing well post surgery. He prescribed medication and ordered physical therapy. When Dr. Goldfarb saw Petitioner on January 25, 2018, he noted she still had some discomfort, but authorized her to return to work at full duty (Petitioner's Exhibit 5).

Dr. Goldfarb last saw Petitioner on March 8, 2018. At that time, Petitioner continued to complain of left arm symptoms of aching and swelling as well as tingling in the ring and little fingers. Petitioner advised she had returned to work, but her job required heavy lifting and repetitive activities. Dr. Goldfarb opined Petitioner was at MMI; however, he noted that another opinion might be appropriate (Petitioner's Exhibit 5).

Petitioner was seen by Dr. Preuss on March 16, 2018. Petitioner informed Dr. Preuss that Dr. Goldfarb had performed surgery on her elbow, but she still had complaints referable to her left arm/hand. Petitioner suggested that she be evaluated by Dr. Shawn Kutnik, an elbow/hand specialist and Dr. Preuss was in agreement (Petitioner's Exhibit 3).

Dr. Kutnik evaluated Petitioner on April 11, 2018. At that time, Petitioner advised Dr. Kutnik of her work-related accidents and the medical treatment she received thereafter. Petitioner complained of ongoing left arm symptoms which were moderate to severe and aggravated by repetitive use. Petitioner indicated the symptoms were primarily in the lateral aspect of the elbow which radiated into the forearm as well as tingling in the ring and little fingers. He ordered an EMG/nerve conduction study and an MRI of Petitioner's left arm (Petitioner's Exhibit 8).

The EMG/nerve conduction study was performed on April 24, 2018. The study revealed a mild left focal ulnar neuropathy, no median neuropathy and no cervical radiculopathy (Petitioner's Exhibit 9).

The MRI was performed on April 25, 2018. According to the radiologist, the MRI suggested a probable partial tear of the common extensor tendon (Petitioner's Exhibit 4).

Dr. Kutnik saw Petitioner on May 16, 2018. At that time, he reviewed the diagnostic studies that had just been performed. He opined the MRI revealed additional tearing in the lateral aspect of the left elbow. Dr. Kutnik diagnosed Petitioner with recurrent epicondylitis and cubital tunnel syndrome. Dr. Kutnik recommended Petitioner undergo revision surgery (Petitioner's Exhibit 8).

Dr. Kutnik performed surgery on June 19, 2018. The procedure consisted of left revision lateral epicondylar debridement with reattachment and left revision cubital tunnel release with anterior submuscular transposition (Petitioner's Exhibit 10).

Dr. Kutnik saw Petitioner on July 2, 2018, and Petitioner's left arm symptoms had improved. When he saw Petitioner on July 16, 2018, he ordered physical therapy/work conditioning. Dr. Kutnik again saw Petitioner on October 17, 2018, and he imposed a lifting restriction of 20 pounds in regard to her left arm. He noted Petitioner had significant subjective complaints, but the findings on examination were benign (Petitioner's Exhibit 8).

When Dr. Kutnik saw Petitioner on November 9, 2018, Petitioner had returned to work, but was having considerable difficulty working even in a light duty capacity. Petitioner complained of tingling in the first three fingers of her left hand which Dr. Kutnik noted was a new complaint. Dr. Kutnik was not certain as to the exact cause of Petitioner's ongoing symptoms. He ordered an EMG/nerve conduction study of Petitioner's left arm (Petitioner's Exhibit 8).

The EMG/nerve conduction study was performed on December 19, 2018. The study revealed a mild left focal neuropathy, no median neuropathy and no cervical radiculopathy (Petitioner's Exhibit 9).

Dr. Kutnik saw Petitioner on January 14, 2019, and reviewed the EMG/nerve conduction study. He opined there were no signs of additional nerve compression to explain her ongoing numbness. He ordered a functional capacity evaluation (FCE). In the interim, he imposed a lifting restriction of two pounds in regard to the left arm (Petitioner's Exhibit 8).

The FCE was performed on January 31, 2019. The examiner noted Petitioner had subjective complaints during the testing; however, he opined Petitioner most likely participated with full effort. He noted Petitioner's ability to return to work would be limited because of her having to perform frequent reaching and lifting tasks. He opined Petitioner's functional abilities were not consistent with the full duty demands of her job (Petitioner's Exhibit 6).

Dr. Kutnik saw Petitioner on February 22, 2019, and reviewed the report of the FCE. Dr. Kutnik opined Petitioner was at MMI and imposed permanent restrictions of the lifting more than 15 pounds on a frequent basis, no lifting more than 25 pounds on an occasional basis and no pushing/pulling more than 30 pounds on an occasional basis (Petitioner's Exhibit 8).

Petitioner last saw Dr. Kutnik on March 11, 2019. At that time, Petitioner had a new complaint of pain in her right shoulder, primarily when lifting or doing overhead activities. She also complained of numbness in her right hand. Petitioner thought her right arm symptoms were because of overcompensation because of her left arm condition. Dr. Kutnik opined Petitioner had right shoulder impingement and possible cervical radiculopathy. He also noted that the condition could occur as the result of "overuse stress." He recommended Petitioner attempt a course of physical therapy (Petitioner's Exhibit 8).

Petitioner was evaluated by Dr. George Paletta, an orthopedic surgeon, on May 6, 2019. At that time, Petitioner advised Dr. Paletta of the fact she had a work-related left arm condition and the medical treatment she had received. Dr. Paletta opined Petitioner had right shoulder pain of uncertain etiology and possible neurogenic thoracic outlet syndrome. He ordered an MRI scan of Petitioner's right shoulder. He also imposed work restrictions of no overhead work and no lifting above chest level (Petitioner's Exhibit 11).

The MRI of Petitioner's right shoulder was performed on May 8, 2019. According to the radiologist, the MRI revealed a moderate partial tear of the biceps tendon, a possible subscapularis tear and moderate supraspinatus tendinopathy without full thickness tear (Petitioner's Exhibit 12).

Dr. Paletta saw Petitioner on May 8, 2019, and reviewed the MRI scan. He opined it revealed a partial thickness tear of the biceps tendon and supraspinatus tendinopathy with a low grade partial thickness undersurface tear, but no full thickness tear. He recommended Petitioner undergo an injection in the glenohumeral joint, followed by physical therapy. If Petitioner failed nonsurgical treatment, Dr. Paletta opined arthroscopic surgery would be indicated (Petitioner's Exhibit 11).

Dr. Paletta saw Petitioner on June 12, 2019. At that time, Petitioner informed him she was diabetic and had responded poorly to injections in the past. He noted Petitioner had been receiving physical therapy, but had made little progress. Dr. Paletta opined Petitioner had persistent adhesive capsulitis of the right shoulder and he recommended Petitioner undergo surgery. The work restrictions Dr. Paletta imposed on May 6, 2019, remained in place (Petitioner's Exhibit 11).

At the direction of Respondent, Petitioner was examined by Dr. Frank Petkovich, an orthopedic surgeon, on September 26, 2018, and June 4, 2019. In connection with his examination of Petitioner, Dr. Petkovich reviewed medical records provided to him by Respondent. In regard to his examination of September 26, 2018, he diagnosed Petitioner with left elbow lateral epicondylitis, left radial nerve compression and left ulnar nerve compression, which he related to the accidents of February 14, and February 22, 2017. At that time, he opined Petitioner was not at MMI and four weeks of additional physical therapy was indicated. He also opined Petitioner could return to work with a lifting restriction of 20 pounds in regard to her left arm (Respondent's Exhibit 1; Deposition Exhibit B).

In regard to his examination of June 4, 2019, Dr. Petkovich reviewed the FCE report of January 31, 2019, and opined it was an invalid study because it was based on Petitioner's subjective complaints and not objective findings and evidence based medicine. In regard to Petitioner's right shoulder, he noted Petitioner had right shoulder complaints prior to the accident at work and reference the record of Dr. Preuss dated January 6, 2017. In regard to the MRI of Petitioner's right shoulder, Dr. Petkovich opined the findings noted therein were chronic and unrelated to the accidents of February 14, and February 22, 2017. In regard to Petitioner's left arm conditions, Dr. Petkovich opined they had resolved and Petitioner was at MMI and could return to work without restrictions (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Petkovich was deposed on July 31, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Petkovich's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, he noted he reviewed the FCE, but that it was not reliable. Dr. Petkovich testified that FCEs are "...highly subjective, dependent upon the person being evaluated, and they are highly subjective upon the person doing the evaluation." Dr. Petkovich stated that his experience as a physician was superior to an individual doing an examination for a couple of hours. He testified the FCE was a waste of money, and stated "The therapists make a lot of money doing these and they want to do them for that reason." (Respondent's Exhibit 1; pp 28-29).

In regard to his opinions regarding the cause of Petitioner's right shoulder condition, Dr. Petkovich noted Petitioner had been seen by Dr. Preuss in January, 2017, and received physical therapy. Further, he noted Petitioner did not complain of right shoulder symptoms until March, 2018, and the MRI findings were degenerative, not acute findings (Respondent's Exhibit 1; pp 31-32).

On cross-examination, Dr. Petkovich was interrogated about his testimony being barred in another case because he refused to provide data regarding the income he derived from being an

expert medical witness. He acknowledged his testimony was barred, but stated he did not know the specifics as to why. He also denied any knowledge of the judge in that proceeding referring to him as a "prolific testifier." (Respondent's Exhibit 1; pp 43-47).

Dr. Petkovich was cross-examined about his opinion regarding FCEs. He agreed they were "...useful for some conditions" and he had ordered them in the past. However, he testified they were now a "racket" and "...money maker for some of these physical therapy outfits to generate income." (Respondent's Exhibit 1; pp 58-59).

In regard to Petitioner's right shoulder, Dr. Petkovich agreed that if Petitioner had to use her right arm/shoulder on a more frequent basis because of weakness in her left arm/elbow, she could develop pain in her right shoulder. He again noted Petitioner did not have right shoulder complaints until March, 2018, but acknowledged that it was, in fact, March, 2019, when Petitioner first had right shoulder complaints (Respondent's Exhibit 1; pp 65-66).

Dr. Paletta prepared a letter dated August 12, 2019, directed to Petitioner's counsel. Dr. Paletta noted that when Petitioner returned to work in November, 2018, she was doing her job one handed because of the restrictions in regard to the use of her left arm. Petitioner did not describe a single incident/injury to her right shoulder, but experienced a gradual onset of right shoulder pain. Dr. Paletta opined the findings noted in the MRI of the right shoulder would account for her shoulder complaints, but not the numbness/tingling in the upper extremity. He opined Petitioner's working one handed would not have caused the pathology in the right shoulder, but could have resulted in an increase of symptoms related to the underlying condition (Petitioner's Exhibit 11).

Dr. Paletta saw Petitioner on August 14, 2019, and noted that when Petitioner was working one handed, she did laundry, folded clothes, carried clothes and pushed 55 gallon trash buckets of clothes both wet and dry using just her right arm. Petitioner advised she experienced the gradual onset of right shoulder symptoms when she performed these activities. Dr. Paletta reaffirmed his opinion that Petitioner should undergo arthroscopic surgery on the right shoulder. He also noted Petitioner's "...symptoms began in conjunction with increased overuse of the right arm as a result of primarily one handed duty" (Petitioner's Exhibit 11).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on August 20, 2019. The procedure consisted of debridement of partial thickness rotator cuff tear, debridement of superior labrum, partial synovectomy, lysis of adhesions and subacromial decompression, bursectomy and acromioplasty (Petitioner's Exhibit 10).

Dr. Paletta saw Petitioner on September 9, 2019, and noted the range of motion of the right shoulder was "outstanding" and Petitioner was doing well. He ordered physical therapy and imposed work restrictions of no lifting in excess of five pounds above chest level and no repetitive overhead activities (Petitioner's Exhibit 11).

Dr. Kutnik was deposed on September 24, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kutnik's testimony in regard to his diagnosis and treatment of Petitioner's left elbow condition was consistent with his medical records and he

reaffirmed the opinions contained therein. Dr. Kutnik testified he ordered the FCE and it revealed Petitioner could function at the medium physical demand level, but that it would not meet her regular job demand duties. He specifically noted Petitioner had given a "good effort" meaning the test was "probably reflective of her actual abilities." Based upon the FCE, Dr. Kutnik imposed permanent work restrictions (Petitioner's Exhibit 15; pp 30-31).

Dr. Kutnik also testified he considered the FCE to be reliable and disagreed with Dr. Petkovich's opinion that it was an invalid study. He stated FCEs are based on both subjective complaints and objective findings. Specifically, he noted that during the course of an evaluation, the individual's heart rate is checked to see if it increases and physical signs of exertion are checked as well. Dr. Kutnik stated the tests are valid if performed correctly. He opined the FCE in this case was a good/valid study (Petitioner's Exhibit 15; pp 31-32).

In regard to Petitioner's right shoulder condition, Dr. Kutnik did not opine as to its causality. He testified he would defer to Petitioner's shoulder specialist. Dr. Kutnik also stated he referred Petitioner to a shoulder specialist, but did not identify who it was (Petitioner's Exhibit 15; pp 35-36).

On cross-examination, Dr. Kutnik agreed that he saw Petitioner on November 9, 2018, January 14, 2019, and February 22, 2019, and she had no complaints of right shoulder pain on those occasions. He agreed Petitioner first complained of right shoulder pain when he saw her on March 11, 2019 (Petitioner's Exhibit 15; pp 51-52).

Dr. Paletta was deposed on September 27, 2019, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's right shoulder conditions, Dr. Paletta's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Paletta testified Petitioner had adhesive capsulitis which developed as a consequence of the partial tear of the rotator cuff and biceps tendon. In regard to causality, Dr. Paletta testified Petitioner's right shoulder conditions were causally related to or contributed by Petitioner's work activities of using her right arm for her job duties (Petitioner's Exhibit 16; pp 11-12).

Dr. Paletta testified he believed Petitioner was referred to him by Dr. Kutnik, but he was not 100% certain. He also stated he had received patients from Dr. Kutnik in the past (Petitioner's Exhibit 16; pp 6-7).

On cross-examination, Dr. Paletta agreed that some of the findings in Petitioner's right shoulder could be age related; however, he testified the biceps tendon tear, the thickened capsule and ongoing synovitis were not age related. He agreed he was not aware if Petitioner had any prior right shoulder treatment or not (Petitioner's Exhibit 16; pp 29-30).

At the request of Respondent, Dr. Petkovich reviewed Dr. Paletta's operative report of August 20, 2019. He opined the surgery was performed because of degenerative conditions in Petitioner's right shoulder which were not related to either accident (Respondent's Exhibit 6).

Dr. Paletta saw Petitioner on October 23, 2019, and he noted the range of motion of Petitioner's right shoulder was "excellent", but Petitioner continued to experience right shoulder pain. He referred Petitioner to Dr. Helen Blake for diagnostic injections to determine the cause of the pain. Because of her diabetic condition, these would not be steroid injections. He continued to impose work restrictions of no lifting more than five pounds above chest level and no overhead activities (Petitioner's Exhibit 11).

Dr. Blake saw Petitioner on November 4, 2019. At that time, she administered a glenohumeral joint injection and a subacromial bursa injection. The glenohumeral injection did not provide Petitioner with any relief of her symptoms, but the subacromial injection significantly improved Petitioner's pain symptoms (Petitioner's Exhibit 14).

Dr. Paletta saw Petitioner on November 4, 2019. Based upon the results of the injections, he opined the primary source of Petitioner's right shoulder pain was the subacromial space. He ordered an MRI and arthrogram of Petitioner's right shoulder (Petitioner's Exhibit 11).

The MRI and arthrogram were performed on November 22, 2019. According to the radiologist, the MRI revealed supraspinatus tendinosis without partial thickness or full thickness tears, a partial thickness tear of the infraspinatus tendon, a partial thickness tear of the subscapularis tendon, medial subluxation of the long head of the biceps tendon and fluid throughout the subacromial/subdeltoid bursa suggestive of bursitis. According to the radiologist, the arthrogram did not reveal a full thickness rotator cuff tear (Petitioner's Exhibit 12).

Dr. Paletta saw Petitioner on December 5, 2019, and reviewed the diagnostic studies. His reading of the MRI was consistent with that of the radiologist. He recommended Petitioner undergo arthroscopic surgery of the right shoulder (Petitioner's Exhibit 11).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on January 14, 2020. The procedure consisted of biceps tenotomy with subpectoral biceps tenodesis, rotator cuff repair of the subscapularis tendon, subacromial decompression, bursectomy and acromioplasty (Petitioner's Exhibit 10).

Dr. Paletta last saw Petitioner on January 27, 2020. At that time, he ordered physical therapy. In regard to restrictions, Dr. Paletta restricted Petitioner to one handed duty with the right arm assisting on light tasks only, no lifting, no overhead activities and Petitioner was limited to clerical or sedentary only (Petitioner's Exhibit 11).

At trial, Petitioner testified she worked on light duty from November, 2018, through February, 2019. Subsequent to the FCE being performed and the permanent restrictions that were imposed, Petitioner's employment was terminated by Respondent. While working from November, 2018, through February, 2019, Petitioner was limited to using her right arm when she performed her job duties because of her left arm condition. Petitioner had to lift/move wet laundry, do overhead dusting, etc. Petitioner stated that, over time, she developed right shoulder symptoms.

In regard to Dr. Paletta, Petitioner testified she was referred to Dr. Paletta by her attorney. Petitioner has not returned to work since she was fired by Respondent and, at the direction of her attorney, has sought vocational assistance.

Two of Respondent's employees, Tiffany Couch and Sheila Braun, testified at trial. They were both called by Petitioner's counsel.

Tiffany Couch was Respondent's secretary and she was aware Petitioner had sustained left elbow injuries and, from November, 2018, through February, 2019, Petitioner had lifting restrictions in regard to her left arm. Couch had no knowledge if Petitioner had right shoulder problems or not. She further testified she had no specific knowledge as to what Petitioner's job duties were when she worked on light duty.

Sheila Braun was one of Petitioner's subordinates. After Petitioner's employment was terminated, Braun became the housekeeping supervisor. Braun testified Petitioner did not do a lot of physically demanding work and Petitioner actually spent most of her time in an office. However, she agreed she did not work side-by-side with Petitioner and Petitioner may have performed some physically demanding tasks that she was not aware of. She could not recall if Petitioner complained of right shoulder symptoms or not when Petitioner was working light duty.

Petitioner testified in rebuttal and stated Braun's testimony was not truthful. Petitioner stated Braun would only come in the laundry room to take out the trash and typically spent most of her time stripping and waxing floors. Petitioner testified she spent approximately one hour a day in her office, but the remainder of her time she was working.

Conclusion of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of February 14, 2017; however, all compensation benefits are awarded in case number 18 WC 09957 in regard to the accident of February 22, 2017.

In support of this conclusion the Arbitrator notes following:

Both of the accidents of February 14, 2017, and February 22, 2017, involved injuries to Petitioner's left elbow, but Petitioner did not seek any medical treatment until after the accident of February 22, 2017.

In regard to disputed issues (J), (K) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (F).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (with explanation)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sherry Bockhorn,

Petitioner,

vs.

Three Springs Lodge,

Respondent.

21IWCC0121

NO: 18 WC 9957

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Decision of the Arbitrator while further acknowledging that Petitioner did not exceed her choice of physicians permitted under §8(a) of the Illinois Workers' Compensation Act. In relevant part, §8(a) provides:

> "[T]he employer's liability to pay for such medical services selected by the employee shall be limited to: (1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second

> service provider. Thereafter the employer shall select and pay for all necessary medical, surgical and hospital treatment and the employee may not select a provider of medical services at the employer's expense unless the employer agrees to such selection…" 820 ILCS 305/8(a).

Following Petitioner's work accidents on February 14, 2017 and February 22, 2017, Petitioner first presented for treatment with Dr. Mark Preuss on February 24, 2017. This established Dr. Preuss as Petitioner's first choice of physician under §8(a). While continuing to provide treatment for Petitioner's left elbow injury, Dr. Preuss referred Petitioner to Dr. Charles Goldfarb. Specifically, on March 20, 2017, Dr. Preuss recommended consultation with an orthopedist who specialized in elbow injuries after diagnosing Petitioner with a partial muscle tear of the lateral left elbow and a meniscal tear. When Petitioner presented to Dr. Goldfarb on April 13, 2017, Dr. Goldfarb also noted that he was asked to see Petitioner by Dr. Preuss.

Following Petitioner's subsequent treatment with Dr. Goldfarb, which included surgical intervention, Dr. Goldfarb placed Petitioner at maximum medical improvement for her left elbow on March 8, 2018. At that time, Dr. Goldfarb indicated that he did not have any additional intervention to offer Petitioner. However, due to her ongoing left elbow symptoms, Petitioner sought a second opinion from Dr. Shawn Kutnik on April 11, 2018. When asked on a patient intake form to name the doctor who had referred her, Petitioner crossed out the word "doctor" and wrote in her attorney's name. This established Dr. Kutnik as Petitioner's second choice of physician allotted to her under §8(a).

Thereafter, in addition to her left elbow complaints, Petitioner began to experience new right shoulder pain, which she attributed to returning to work with one-handed light duty restrictions from November of 2018 to February of 2019. Dr. Kutnik placed Petitioner at maximum medical improvement and released her with permanent restrictions for her left elbow injury on February 22, 2019. However, shortly thereafter on March 11, 2019, Petitioner returned to Dr. Kutnik with the new complaints of right shoulder pain allegedly due to overcompensation from her left arm injury. Dr. Kutnik diagnosed Petitioner with right shoulder impingement and possible cervical radiculopathy. Petitioner testified that when she complained to Dr. Kutnik about this right shoulder pain, he indicated that she needed to see a shoulder specialist. At his deposition, Dr. Kutnik confirmed that he had referred Petitioner to a shoulder specialist, because his practice was limited to the elbow and distal areas.

On May 6, 2019, Petitioner presented to Dr. George Paletta, a board certified orthopedic surgeon whose treatment focused on Petitioner's shoulder. Dr. Paletta testified that he believed Petitioner was referred to him by Dr. Kutnik. In consideration of Dr. Kutnik's testimony that he had referred Petitioner to a shoulder specialist and Dr. Paletta's belief that Petitioner came to him upon referral from Dr. Kutnik, the Commission finds that Dr. Paletta fell within the chain of referrals provided by Dr. Kutnik.

The Commission therefore finds that Petitioner did not exceed her choice of physicians as permitted by §8(a) by treating with Dr. Paletta. All of the medical providers Petitioner saw fell within her choice of physicians allotted by §8(a) and their chain of referrals. The Decision of the Arbitrator is accordingly affirmed and adopted in its entirety.

21IWCC0121

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner did not exceed her choice of physicians permitted under §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 15 2021

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 1/21/21
46

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

21IWCC0121

BOCKHORN, SHERRY
Employee/Petitioner

Case# **18WC009957**

18WC009956

THREE SPRINGS LODGE
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

5657 MORROW WILLNAUER CHURCH LLC
KIM M PARKS
500 N BROADWAY SUITE 500
ST LOUIS, MO 63101

21IWCC0121

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Sherry Bockhorn
Employee/Petitioner

Case # 18 WC 09957

v.

Consolidated cases: 18 WC 09956

Three Springs Lodge
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on February 24, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, February 22, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $30,413.00; the average weekly wage was $583.49.

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

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

Respondent shall be given a credit of $26,451.32 for TTD, $0.00 for TPD, $7,112.96 for maintenance, and $0.00 for other benefits, for a total credit of $33,564.28. The parties stipulated all TTD benefits were paid in full.

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

ORDER

Respondent shall pay for reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment for Petitioner's right shoulder conditions to be determined by Dr. George Paletta.

Respondent shall pay Petitioner maintenance benefits of $388.99 per week for 52 weeks commencing February 26, 2019, through February 24, 2020, as provided in Section 8(a) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 28, 2020
Date

APR 2 – 2020

Findings of Fact

Petitioner filed two Amended Applications for Adjustment of Claim which alleged she sustained accidental injuries arising out of and in the course of her employment by Respondent. In case 18 WC 09956, the Amended Application alleged that on February 14, 2017, Petitioner was "Picking up residents recliner" and sustained an injury to her "Left forearm elbow, left hand, rt shoulder/arm/hand." In case 18 WC 09957, the Amended Application alleged that on February 22, 2017, Petitioner was "Picking up residents bed to untangle wires" and sustained an injury to her "Left forearm elbow, left hand, rt shoulder/arm/hand" (Arbitrator's Exhibit 2). The cases were previously consolidated. They were tried in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and maintenance benefits as well as prospective medical treatment (Arbitrator's Exhibit 1).

Respondent stipulated Petitioner sustained work-related accident on both February 14, and February 22, 2017, but disputed liability on the basis of causal relationship. In regard to temporary total disability benefits, Petitioner and Respondent stipulated Petitioner was entitled to temporary total disability benefits for 68 weeks, commencing February 24, 2017, through January 25, 2018, and June 19, 2018, through November 5, 2018. In regard to maintenance benefits, Petitioner claimed she was entitled to maintenance benefits of 52 weeks, commencing February 26, 2019, through February 24, 2020 (date of trial). Respondent disputed Petitioner was entitled to maintenance benefits for the aforestated period of time, and claimed Petitioner was entitled to maintenance benefits of 18 2/7 weeks, commencing February 26, 2019, through June 4, 2019, and October 18, 2019, through November 15, 2019 (Petitioner's Exhibit 1).

Petitioner became employed by Respondent in 2009, as a manager/housekeeper. Petitioner testified that although she was a supervisor, she was a working supervisor and performed the same cleaning duties performed by her subordinates. On February 14, 2017, Petitioner sustained an injury to her left elbow while moving furniture. On February 22, 2017, Petitioner sustained another injury to her left elbow while lifting a resident's bed.

Petitioner did not seek any medical treatment until after the second accident. On February 24, 2017, Petitioner was seen by Dr. Mark Preuss, her family physician. At that time, Dr. Preuss noted he was seeing Petitioner for a follow-up evaluation for a neck and right shoulder condition. He noted Petitioner had received an injection in the subacromial bursa and received physical therapy. At that time, Petitioner advised her neck and right shoulder symptoms had "completely resolved," but had sustained an injury to her left arm. On examination, Dr. Preuss noted Petitioner's left arm was swollen and he diagnosed Petitioner with left lateral epicondylitis of the left pronator muscles with radial nerve entrapment. Dr. Preuss prescribed medication and put Petitioner's left arm in a sling (Petitioner's Exhibit 3).

Medical records of Dr. Preuss for right shoulder/arm treatment he provided to Petitioner prior to the accidents were received into evidence at trial. When Dr. Preuss saw Petitioner on January 6, 2017, she complained of right shoulder/arm pain which had been present for two weeks. Petitioner gave a history of moving a recliner and having neck and right shoulder/arm pain afterward. Dr. Preuss opined Petitioner had sustained a right rotator cuff injury and had cervical

disc disease with radiculopathy in the right arm. At that time, he administered an injection into the subacromial area of the right shoulder (Respondent's Exhibit 2).

Petitioner saw Dr. Preuss on March 7, 2017. At that time, Petitioner advised Dr. Preuss of the details of the accidents of February 14, and February 22, 2017. Petitioner advised the left arm symptoms began on February 14, but she experienced intensified pain when she sustained the accident on February 22. Dr. Preuss ordered an MRI of Petitioner's left elbow and forearm and indicated he would refer Petitioner to an orthopedic specialist (Petitioner's Exhibit 3).

MRI scans of Petitioner's left elbow and left forearm were performed on March 15, 2017. According to the radiologist, the MRI of Petitioner's left elbow revealed a partial tear of the common extensor tendon and a partial tear of the lateral collateral ligament. According to the radiologist, the MRI of Petitioner's left forearm revealed an injury to the common extensor tendon which extended to the proximal myotendinous junction (Petitioner's Exhibit 4).

Dr. Preuss saw Petitioner on March 20, 2017, and reviewed the MRI scans. He recommended referral to a specialist in elbow injuries (Petitioner's Exhibit 3).

On April 13, 2017, Petitioner was evaluated by Dr. Charles Goldfarb, an orthopedic surgeon. Dr. Goldfarb examined Petitioner and reviewed the MRI of Petitioner's left elbow. He opined Petitioner had lateral epicondylitis. He recommended modified work duties and therapy hoping to avoid surgery (Petitioner's Exhibit 5).

Dr. Goldfarb again saw Petitioner on May 11, June 22, and July 27, 2017. Petitioner's condition did not improve and, when Dr. Goldfarb saw Petitioner on July 27, 2017, he opined Petitioner had radial tunnel syndrome and possibly, cubital tunnel syndrome. He ordered EMG/nerve conduction studies (Petitioner's Exhibit 5).

On August 23, 2017, EMG/nerve conduction studies were performed on Petitioner's left arm. They were negative for ulnar neuropathy, median/radial neuropathy and cervical radiculopathy (Petitioner's Exhibit 5).

When Dr. Goldfarb saw Petitioner on August 31, 2017, he reviewed the diagnostic studies. At that time, he recommended Petitioner undergo surgery consisting of tennis elbow debridement, radial tunnel decompression and cubital tunnel decompression versus transposition (Petitioner's Exhibit 5).

Dr. Goldfarb performed surgery on October 11, 2017. The procedure consisted of left lateral epicondylitis debridement, left radial tunnel decompression and left cubital tunnel decompression (Petitioner's Exhibit 7).

Dr. Goldfarb saw Petitioner on October 26, 2017, and noted she was doing well post surgery. He prescribed medication and ordered physical therapy. When Dr. Goldfarb saw Petitioner on January 25, 2018, he noted she still had some discomfort, but authorized her to return to work at full duty (Petitioner's Exhibit 5).

Dr. Goldfarb last saw Petitioner on March 8, 2018. At that time, Petitioner continued to complain of left arm symptoms of aching and swelling as well as tingling in the ring and little fingers. Petitioner advised she had returned to work, but her job required heavy lifting and repetitive activities. Dr. Goldfarb opined Petitioner was at MMI; however, he noted that another opinion might be appropriate (Petitioner's Exhibit 5).

Petitioner was seen by Dr. Preuss on March 16, 2018. Petitioner informed Dr. Preuss that Dr. Goldfarb had performed surgery on her elbow, but she still had complaints referable to her left arm/hand. Petitioner suggested that she be evaluated by Dr. Shawn Kutnik, an elbow/hand specialist and Dr. Preuss was in agreement (Petitioner's Exhibit 3).

Dr. Kutnik evaluated Petitioner on April 11, 2018. At that time, Petitioner advised Dr. Kutnik of her work-related accidents and the medical treatment she received thereafter. Petitioner complained of ongoing left arm symptoms which were moderate to severe and aggravated by repetitive use. Petitioner indicated the symptoms were primarily in the lateral aspect of the elbow which radiated into the forearm as well as tingling in the ring and little fingers. He ordered an EMG/nerve conduction study and an MRI of Petitioner's left arm (Petitioner's Exhibit 8).

The EMG/nerve conduction study was performed on April 24, 2018. The study revealed a mild left focal ulnar neuropathy, no median neuropathy and no cervical radiculopathy (Petitioner's Exhibit 9).

The MRI was performed on April 25, 2018. According to the radiologist, the MRI suggested a probable partial tear of the common extensor tendon (Petitioner's Exhibit 4).

Dr. Kutnik saw Petitioner on May 16, 2018. At that time, he reviewed the diagnostic studies that had just been performed. He opined the MRI revealed additional tearing in the lateral aspect of the left elbow. Dr. Kutnik diagnosed Petitioner with recurrent epicondylitis and cubital tunnel syndrome. Dr. Kutnik recommended Petitioner undergo revision surgery (Petitioner's Exhibit 8).

Dr. Kutnik performed surgery on June 19, 2018. The procedure consisted of left revision lateral epicondylar debridement with reattachment and left revision cubital tunnel release with anterior submuscular transposition (Petitioner's Exhibit 10).

Dr. Kutnik saw Petitioner on July 2, 2018, and Petitioner's left arm symptoms had improved. When he saw Petitioner on July 16, 2018, he ordered physical therapy/work conditioning. Dr. Kutnik again saw Petitioner on October 17, 2018, and he imposed a lifting restriction of 20 pounds in regard to her left arm. He noted Petitioner had significant subjective complaints, but the findings on examination were benign (Petitioner's Exhibit 8).

When Dr. Kutnik saw Petitioner on November 9, 2018, Petitioner had returned to work, but was having considerable difficulty working even in a light duty capacity. Petitioner complained of tingling in the first three fingers of her left hand which Dr. Kutnik noted was a new complaint. Dr. Kutnik was not certain as to the exact cause of Petitioner's ongoing symptoms. He ordered an EMG/nerve conduction study of Petitioner's left arm (Petitioner's Exhibit 8).

The EMG/nerve conduction study was performed on December 19, 2018. The study revealed a mild left focal neuropathy, no median neuropathy and no cervical radiculopathy (Petitioner's Exhibit 9).

Dr. Kutnik saw Petitioner on January 14, 2019, and reviewed the EMG/nerve conduction study. He opined there were no signs of additional nerve compression to explain her ongoing numbness. He ordered a functional capacity evaluation (FCE). In the interim, he imposed a lifting restriction of two pounds in regard to the left arm (Petitioner's Exhibit 8).

The FCE was performed on January 31, 2019. The examiner noted Petitioner had subjective complaints during the testing; however, he opined Petitioner most likely participated with full effort. He noted Petitioner's ability to return to work would be limited because of her having to perform frequent reaching and lifting tasks. He opined Petitioner's functional abilities were not consistent with the full duty demands of her job (Petitioner's Exhibit 6).

Dr. Kutnik saw Petitioner on February 22, 2019, and reviewed the report of the FCE. Dr. Kutnik opined Petitioner was at MMI and imposed permanent restrictions of the lifting more than 15 pounds on a frequent basis, no lifting more than 25 pounds on an occasional basis and no pushing/pulling more than 30 pounds on an occasional basis (Petitioner's Exhibit 8).

Petitioner last saw Dr. Kutnik on March 11, 2019. At that time, Petitioner had a new complaint of pain in her right shoulder, primarily when lifting or doing overhead activities. She also complained of numbness in her right hand. Petitioner thought her right arm symptoms were because of overcompensation because of her left arm condition. Dr. Kutnik opined Petitioner had right shoulder impingement and possible cervical radiculopathy. He also noted that the condition could occur as the result of "overuse stress." He recommended Petitioner attempt a course of physical therapy (Petitioner's Exhibit 8).

Petitioner was evaluated by Dr. George Paletta, an orthopedic surgeon, on May 6, 2019. At that time, Petitioner advised Dr. Paletta of the fact she had a work-related left arm condition and the medical treatment she had received. Dr. Paletta opined Petitioner had right shoulder pain of uncertain etiology and possible neurogenic thoracic outlet syndrome. He ordered an MRI scan of Petitioner's right shoulder. He also imposed work restrictions of no overhead work and no lifting above chest level (Petitioner's Exhibit 11).

The MRI of Petitioner's right shoulder was performed on May 8, 2019. According to the radiologist, the MRI revealed a moderate partial tear of the biceps tendon, a possible subscapularis tear and moderate supraspinatus tendinopathy without full thickness tear (Petitioner's Exhibit 12).

Dr. Paletta saw Petitioner on May 8, 2019, and reviewed the MRI scan. He opined it revealed a partial thickness tear of the biceps tendon and supraspinatus tendinopathy with a low grade partial thickness undersurface tear, but no full thickness tear. He recommended Petitioner undergo an injection in the glenohumeral joint, followed by physical therapy. If Petitioner failed nonsurgical treatment, Dr. Paletta opined arthroscopic surgery would be indicated (Petitioner's Exhibit 11).

Dr. Paletta saw Petitioner on June 12, 2019. At that time, Petitioner informed him she was diabetic and had responded poorly to injections in the past. He noted Petitioner had been receiving physical therapy, but had made little progress. Dr. Paletta opined Petitioner had persistent adhesive capsulitis of the right shoulder and he recommended Petitioner undergo surgery. The work restrictions Dr. Paletta imposed on May 6, 2019, remained in place (Petitioner's Exhibit 11).

At the direction of Respondent, Petitioner was examined by Dr. Frank Petkovich, an orthopedic surgeon, on September 26, 2018, and June 4, 2019. In connection with his examination of Petitioner, Dr. Petkovich reviewed medical records provided to him by Respondent. In regard to his examination of September 26, 2018, he diagnosed Petitioner with left elbow lateral epicondylitis, left radial nerve compression and left ulnar nerve compression, which he related to the accidents of February 14, and February 22, 2017. At that time, he opined Petitioner was not at MMI and four weeks of additional physical therapy was indicated. He also opined Petitioner could return to work with a lifting restriction of 20 pounds in regard to her left arm (Respondent's Exhibit 1; Deposition Exhibit B).

In regard to his examination of June 4, 2019, Dr. Petkovich reviewed the FCE report of January 31, 2019, and opined it was an invalid study because it was based on Petitioner's subjective complaints and not objective findings and evidence based medicine. In regard to Petitioner's right shoulder, he noted Petitioner had right shoulder complaints prior to the accident at work and reference the record of Dr. Preuss dated January 6, 2017. In regard to the MRI of Petitioner's right shoulder, Dr. Petkovich opined the findings noted therein were chronic and unrelated to the accidents of February 14, and February 22, 2017. In regard to Petitioner's left arm conditions, Dr. Petkovich opined they had resolved and Petitioner was at MMI and could return to work without restrictions (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Petkovich was deposed on July 31, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Petkovich's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, he noted he reviewed the FCE, but that it was not reliable. Dr. Petkovich testified that FCEs are "...highly subjective, dependent upon the person being evaluated, and they are highly subjective upon the person doing the evaluation." Dr. Petkovich stated that his experience as a physician was superior to an individual doing an examination for a couple of hours. He testified the FCE was a waste of money, and stated "The therapists make a lot of money doing these and they want to do them for that reason." (Respondent's Exhibit 1; pp 28-29).

In regard to his opinions regarding the cause of Petitioner's right shoulder condition, Dr. Petkovich noted Petitioner had been seen by Dr. Preuss in January, 2017, and received physical therapy. Further, he noted Petitioner did not complain of right shoulder symptoms until March, 2018, and the MRI findings were degenerative, not acute findings (Respondent's Exhibit 1; pp 31-32).

On cross-examination, Dr. Petkovich was interrogated about his testimony being barred in another case because he refused to provide data regarding the income he derived from being an

expert medical witness. He acknowledged his testimony was barred, but stated he did not know the specifics as to why. He also denied any knowledge of the judge in that proceeding referring to him as a "prolific testifier." (Respondent's Exhibit 1; pp 43-47).

Dr. Petkovich was cross-examined about his opinion regarding FCEs. He agreed they were "...useful for some conditions" and he had ordered them in the past. However, he testified they were now a "racket" and "...money maker for some of these physical therapy outfits to generate income." (Respondent's Exhibit 1; pp 58-59).

In regard to Petitioner's right shoulder, Dr. Petkovich agreed that if Petitioner had to use her right arm/shoulder on a more frequent basis because of weakness in her left arm/elbow, she could develop pain in her right shoulder. He again noted Petitioner did not have right shoulder complaints until March, 2018, but acknowledged that it was, in fact, March, 2019, when Petitioner first had right shoulder complaints (Respondent's Exhibit 1; pp 65-66).

Dr. Paletta prepared a letter dated August 12, 2019, directed to Petitioner's counsel. Dr. Paletta noted that when Petitioner returned to work in November, 2018, she was doing her job one handed because of the restrictions in regard to the use of her left arm. Petitioner did not describe a single incident/injury to her right shoulder, but experienced a gradual onset of right shoulder pain. Dr. Paletta opined the findings noted in the MRI of the right shoulder would account for her shoulder complaints, but not the numbness/tingling in the upper extremity. He opined Petitioner's working one handed would not have caused the pathology in the right shoulder, but could have resulted in an increase of symptoms related to the underlying condition (Petitioner's Exhibit 11).

Dr. Paletta saw Petitioner on August 14, 2019, and noted that when Petitioner was working one handed, she did laundry, folded clothes, carried clothes and pushed 55 gallon trash buckets of clothes both wet and dry using just her right arm. Petitioner advised she experienced the gradual onset of right shoulder symptoms when she performed these activities. Dr. Paletta reaffirmed his opinion that Petitioner should undergo arthroscopic surgery on the right shoulder. He also noted Petitioner's "...symptoms began in conjunction with increased overuse of the right arm as a result of primarily one handed duty" (Petitioner's Exhibit 11).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on August 20, 2019. The procedure consisted of debridement of partial thickness rotator cuff tear, debridement of superior labrum, partial synovectomy, lysis of adhesions and subacromial decompression, bursectomy and acromioplasty (Petitioner's Exhibit 10).

Dr. Paletta saw Petitioner on September 9, 2019, and noted the range of motion of the right shoulder was "outstanding" and Petitioner was doing well. He ordered physical therapy and imposed work restrictions of no lifting in excess of five pounds above chest level and no repetitive overhead activities (Petitioner's Exhibit 11).

Dr. Kutnik was deposed on September 24, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kutnik's testimony in regard to his diagnosis and treatment of Petitioner's left elbow condition was consistent with his medical records and he

reaffirmed the opinions contained therein. Dr. Kutnik testified he ordered the FCE and it revealed Petitioner could function at the medium physical demand level, but that it would not meet her regular job demand duties. He specifically noted Petitioner had given a "good effort" meaning the test was "probably reflective of her actual abilities." Based upon the FCE, Dr. Kutnik imposed permanent work restrictions (Petitioner's Exhibit 15; pp 30-31).

Dr. Kutnik also testified he considered the FCE to be reliable and disagreed with Dr. Petkovich's opinion that it was an invalid study. He stated FCEs are based on both subjective complaints and objective findings. Specifically, he noted that during the course of an evaluation, the individual's heart rate is checked to see if it increases and physical signs of exertion are checked as well. Dr. Kutnik stated the tests are valid if performed correctly. He opined the FCE in this case was a good/valid study (Petitioner's Exhibit 15; pp 31-32).

In regard to Petitioner's right shoulder condition, Dr. Kutnik did not opine as to its causality. He testified he would defer to Petitioner's shoulder specialist. Dr. Kutnik also stated he referred Petitioner to a shoulder specialist, but did not identify who it was (Petitioner's Exhibit 15; pp 35-36).

On cross-examination, Dr. Kutnik agreed that he saw Petitioner on November 9, 2018, January 14, 2019, and February 22, 2019, and she had no complaints of right shoulder pain on those occasions. He agreed Petitioner first complained of right shoulder pain when he saw her on March 11, 2019 (Petitioner's Exhibit 15; pp 51-52).

Dr. Paletta was deposed on September 27, 2019, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's right shoulder conditions, Dr. Paletta's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Paletta testified Petitioner had adhesive capsulitis which developed as a consequence of the partial tear of the rotator cuff and biceps tendon. In regard to causality, Dr. Paletta testified Petitioner's right shoulder conditions were causally related to or contributed by Petitioner's work activities of using her right arm for her job duties (Petitioner's Exhibit 16; pp 11-12).

Dr. Paletta testified he believed Petitioner was referred to him by Dr. Kutnik, but he was not 100% certain. He also stated he had received patients from Dr. Kutnik in the past (Petitioner's Exhibit 16; pp 6-7).

On cross-examination, Dr. Paletta agreed that some of the findings in Petitioner's right shoulder could be age related; however, he testified the biceps tendon tear, the thickened capsule and ongoing synovitis were not age related. He agreed he was not aware if Petitioner had any prior right shoulder treatment or not (Petitioner's Exhibit 16; pp 29-30).

At the request of Respondent, Dr. Petkovich reviewed Dr. Paletta's operative report of August 20, 2019. He opined the surgery was performed because of degenerative conditions in Petitioner's right shoulder which were not related to either accident (Respondent's Exhibit 6).

Dr. Paletta saw Petitioner on October 23, 2019, and he noted the range of motion of Petitioner's right shoulder was "excellent", but Petitioner continued to experience right shoulder pain. He referred Petitioner to Dr. Helen Blake for diagnostic injections to determine the cause of the pain. Because of her diabetic condition, these would not be steroid injections. He continued to impose work restrictions of no lifting more than five pounds above chest level and no overhead activities (Petitioner's Exhibit 11).

Dr. Blake saw Petitioner on November 4, 2019. At that time, she administered a glenohumeral joint injection and a subacromial bursa injection. The glenohumeral injection did not provide Petitioner with any relief of her symptoms, but the subacromial injection significantly improved Petitioner's pain symptoms (Petitioner's Exhibit 14).

Dr. Paletta saw Petitioner on November 4, 2019. Based upon the results of the injections, he opined the primary source of Petitioner's right shoulder pain was the subacromial space. He ordered an MRI and arthrogram of Petitioner's right shoulder (Petitioner's Exhibit 11).

The MRI and arthrogram were performed on November 22, 2019. According to the radiologist, the MRI revealed supraspinatus tendinosis without partial thickness or full thickness tears, a partial thickness tear of the infraspinatus tendon, a partial thickness tear of the subscapularis tendon, medial subluxation of the long head of the biceps tendon and fluid throughout the subacromial/subdeltoid bursa suggestive of bursitis. According to the radiologist, the arthrogram did not reveal a full thickness rotator cuff tear (Petitioner's Exhibit 12).

Dr. Paletta saw Petitioner on December 5, 2019, and reviewed the diagnostic studies. His reading of the MRI was consistent with that of the radiologist. He recommended Petitioner undergo arthroscopic surgery of the right shoulder (Petitioner's Exhibit 11).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on January 14, 2020. The procedure consisted of biceps tenotomy with subpectoral biceps tenodesis, rotator cuff repair of the subscapularis tendon, subacromial decompression, bursectomy and acromioplasty (Petitioner's Exhibit 10).

Dr. Paletta last saw Petitioner on January 27, 2020. At that time, he ordered physical therapy. In regard to restrictions, Dr. Paletta restricted Petitioner to one handed duty with the right arm assisting on light tasks only, no lifting, no overhead activities and Petitioner was limited to clerical or sedentary only (Petitioner's Exhibit 11).

At trial, Petitioner testified she worked on light duty from November, 2018, through February, 2019. Subsequent to the FCE being performed and the permanent restrictions that were imposed, Petitioner's employment was terminated by Respondent. While working from November, 2018, through February, 2019, Petitioner was limited to using her right arm when she performed her job duties because of her left arm condition. Petitioner had to lift/move wet laundry, do overhead dusting, etc. Petitioner stated that, over time, she developed right shoulder symptoms.

In regard to Dr. Paletta, Petitioner testified she was referred to Dr. Paletta by her attorney. Petitioner has not returned to work since she was fired by Respondent and, at the direction of her attorney, has sought vocational assistance.

Two of Respondent's employees, Tiffany Couch and Sheila Braun, testified at trial. They were both called by Petitioner's counsel.

Tiffany Couch was Respondent's secretary and she was aware Petitioner had sustained left elbow injuries and, from November, 2018, through February, 2019, Petitioner had lifting restrictions in regard to her left arm. Couch had no knowledge if Petitioner had right shoulder problems or not. She further testified she had no specific knowledge as to what Petitioner's job duties were when she worked on light duty.

Sheila Braun was one of Petitioner's subordinates. After Petitioner's employment was terminated, Braun became the housekeeping supervisor. Braun testified Petitioner did not do a lot of physically demanding work and Petitioner actually spent most of her time in an office. However, she agreed she did not work side-by-side with Petitioner and Petitioner may have performed some physically demanding tasks that she was not aware of. She could not recall if Petitioner complained of right shoulder symptoms or not when Petitioner was working light duty.

Petitioner testified in rebuttal and stated Braun's testimony was not truthful. Petitioner stated Braun would only come in the laundry room to take out the trash and typically spent most of her time stripping and waxing floors. Petitioner testified she spent approximately one hour a day in her office, but the remainder of her time she was working.

Conclusion of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of February 22, 2017.

In support of this conclusion the Arbitrator notes the following:

In regard to Petitioner's left elbow, there was no dispute Petitioner's left elbow conditions were related to the accident of February 22, 2017.

The primary dispute was whether Petitioner's right shoulder conditions were related to the accident of February 22, 2017.

Petitioner credibly testified that, because of the restrictions imposed on the use of her left arm, she performed essentially all of her job duties with her right arm from November, 2018, through February, 2019, and that she gradually developed right shoulder symptoms.

The testimony of Tiffany Couch had no probative value because she only knew Petitioner had sustained left elbow injuries and had lifting restrictions from November, 2018, through February, 2019. She had no knowledge whatsoever if Petitioner had right shoulder problems or not.

The testimony of Sheila Braun had, at best, minimal probative value because she opined Petitioner was not required to perform physically demanding tasks, but spent an extremely limited amount of time working with her. Braun's knowledge of what job duties Petitioner performed on a day-to-day basis was minimal, at most.

Petitioner had some right shoulder symptoms for which she sought medical treatment in January, 2017; however, those symptoms "completely resolved" prior to her sustaining the injuries to her left elbow.

Petitioner informed Dr. Paletta, her primary treating physician for her right shoulder, of her having to work using only her right arm.

Dr. Paletta opined Petitioner's right shoulder conditions were causally related to or contributed by her work activities. Specifically, he noted Petitioner's symptoms began with overuse of the right arm because of her having performed job duties one handed. While Dr. Paletta noted there were some age related findings in Petitioner's right shoulder, the various abnormalities for which he performed surgery were not age related.

Respondent's Section 12 examiner, Dr. Petkovich, opined Petitioner's right shoulder conditions were not work-related because neither accident involved a right shoulder injury. He initially noted Petitioner did not complain of any right shoulder symptoms until March, 2018, until it was pointed out to him when he was deposed that was actually March, 2019.

Dr. Petkovich opined the findings noted in the MRI scan of Petitioner's right shoulder were not related to the accident; however, he agreed that if Petitioner had to use her right arm/shoulder on a more frequent basis because of restrictions in regard to her left arm/elbow, Petitioner could experience pain in her right shoulder.

Based on the preceding, the Arbitrator finds the opinion of Dr. Paletta to be more persuasive than that of Dr. Petkovich in regard to causality of Petitioner's right shoulder conditions.

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

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

Respondent shall pay for reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

In regard to the treatment provided by Dr. Paletta, when he was deposed, he stated that he thought Petitioner was referred to him by Dr. Kutnik, but he was not 100% certain. When Dr. Kutnik was deposed, he testified he was going to refer Petitioner to a shoulder specialist, but did not identify who. When Petitioner testified at trial, she stated she was referred to Dr. Paletta by her attorney.

Based on the preceding, it is not completely clear to the Arbitrator how Petitioner became a patient of Dr. Paletta. Hypothetically, an issue could have been raised as to whether Petitioner exceeded the chain of medical providers permitted by the Act. However, this was not indicated as a disputed issue in the stipulation, so the Arbitrator considers this issue as having been waived.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment for her right shoulder conditions to be determined by Dr. Paletta.

In support of this conclusion the Arbitrator notes the following:

Dr. Paletta last saw Petitioner on January 27, 2020, ordered physical therapy, imposed work restrictions and did not find Petitioner to be at MMI.

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

Because of the stipulation entered into by Petitioner and Respondent, the Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 68 weeks commencing February 24, 2017, through January 25, 2018, and June 19, 2018, through November 5, 2018.

The Arbitrator concludes Petitioner is entitled to maintenance benefits of 52 weeks commencing February 26, 2019, through February 24, 2020.

In support of this conclusion the Arbitrator notes the following:

Petitioner's primary treating physician for her left elbow conditions, Dr. Kutnik, imposed work restrictions that will not permit Petitioner to return to work to her regular job. These restrictions were based on the FCE ordered by Dr. Kutnik.

Respondent's Section 12 examiner, Dr. Petkovich, disagreed with the work restrictions imposed by Dr. Kutnik, and referred to the FCE performed on Petitioner as "invalid" and FCEs, in general, as being a "racket" and nothing more than a source of income for physical therapists. Dr. Petkovich opined that FCEs are based upon totally subjective responses of the person being examined.

Dr. Kutnick testified the FCE was valid and based on both subjective and objective findings.

The Arbitrator also notes Dr. Petkovich's testimony was barred in another proceeding because of his refusal to provide data regarding the income he has derived from his testifying as a medical expert witness.

In addition to the preceding, Dr. Paletta has imposed work restrictions because of Petitioner's right shoulder conditions.

Petitioner has not been able to return to work and has sought vocational assistance.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rena Vantreece,

Petitioner,

21IWCC0122

vs.

NO: 19 WC 22482

Comprehensive Behavioral Health,

Respondent.

DECISION AND OPINION ON REVIEW

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

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of permanent disability. The decision of the Arbitrator delineates the facts relating to the issue in detail.

In addressing permanent disability, the Arbitrator properly addressed the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b. In addressing subsection (iv) of section 8.1b, the employee's future earning capacity, the Arbitrator found no evidence that the injury had any effect on the Petitioner's future earning capacity and assigned no weight to this factor. While the Commission generally adopts the Arbitrator's analysis and findings with regard to permanency, we view the evidence slightly differently than the Arbitrator with regard to the weight to be assigned to subsection (iv) in particular. Although Petitioner has returned to full duty, it is not lost on the Commission that she did so while enduring ongoing soreness and occasional pain related to the instant accident. Thus, the Commission would assign some weight to this factor, but such a modification to the subsection (iv) analysis does not, in itself, justify a mitigation of

21IWCC0122

the permanent disability award in this case. The Commission affirms the Arbitrator's award of a 5% loss of Petitioner's person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 16, 2020, is hereby affirmed and adopted, but changed with respect to the permanent disability analysis, as the Commission herein assigns some weight to subsection (iv) of section 8.1b of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 15 2021
o: 2/18/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0122

VANTREECE, RENA
Employee/Petitioner

Case# **19WC022482**

COMPREHENSIVE BEHAVIORAL HEALTH CENT
Employer/Respondent

On 4/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH COOKSEY & CHAPPELL P
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0507 RUSIN & MACIOROWSKI LTD
KYLEE J JORDAN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

21IWCC0122

21 IWCC0122

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Rena Vantreece
Employee/Petitioner

v.

Comprehensive Behavioral Health Cent.
Employer/Respondent

Case # 19 WC 22482

Consolidated cases: n/a

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on February 27, 2020. By stipulation, the parties agree:

On the date of accident, May 21, 2019, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $672.80.

At the time of injury, Petitioner was 61 years of age, single, with 1 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $403.68 per week for 25 weeks because the injury sustained caused the five percent (5%) loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from January 14, 2020, through February 27, 2020, and shall pay the remainder of the award, if any, in weekly payments.

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

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

William R. Gallagher, Arbitrator

April 1, 2020
Date

APR 16 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on May 21, 2019. According to the Application, Petitioner was "Attacked by aggressive patient" and sustained an injury to her "Back/left leg/body as a whole" (Arbitrator's Exhibit 2). At trial, Petitioner and Respondent stipulated that the only disputed issue was the nature and extent of disability (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a home healthcare provider. On May 21, 2019, Petitioner was at the home of a client, a child, who lived with his grandmother. The client became physically and verbally aggressive toward his grandmother. When Petitioner attempted to intervene, she sustained a low back/leg injury (Petitioner's Exhibit 8).

Following the accident, Petitioner was seen in the ER of Belleville Memorial Hospital. At that time, Petitioner complained of sharp pain in the left buttock which radiated into the left thigh. X-rays of the left hip and left knee were obtained, both of which revealed osteoarthritic changes. Petitioner was diagnosed with sciatica, prescribed medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Tara Helfrich, a Nurse Practitioner, on May 29, 2019. At that time, Petitioner complained of low back and left leg pain. NP Helfrich diagnosed Petitioner with sciatica and ordered physical therapy (Petitioner's Exhibit 4).

Petitioner received physical therapy from June 1, 2019, through August 7, 2019. Petitioner experienced improvement of her symptoms and was able to perform activities of daily living (Petitioner's Exhibit 5).

On August 6, 2019, Petitioner was examined by Loren Vandergriff, a Nurse Practitioner, associated with Dr. Kevin Rutz, an orthopedic surgeon. At that time, Petitioner informed NP Vandergriff of the accident she sustained and the treatment she received thereafter. Petitioner's leg pain had resolved, but she continued to complain of low back pain. NP Vandergriff ordered an x-ray of Petitioner's lumbar spine. It revealed a grade 1 spondylolisthesis at L4-L5 with disc space narrowing at L5. NP Vandergriff noted Petitioner had benefited from physical therapy, but still had low back symptoms (Petitioner's Exhibit 7).

Petitioner was again seen by NP Vandergriff on December 18, 2019. At that time, Petitioner advised she had experienced parasthesias/aching in the right thigh with worsening of her symptoms with prolonged standing/walking. NP Vandergriff opined Petitioner had lumbar radiculopathy and spondylolisthesis. NP Vandergriff ordered and MRI scan (Petitioner's Exhibit 6).

The MRI was performed on January 9, 2020. According to the radiologist, the MRI revealed disc bulges at L4-L5 and L5-S1 as well as foraminal stenosis at L3-L4, L4-L5 and L5-S1 (Petitioner's Exhibit 7).

Petitioner was evaluated by Dr. Rutz on January 14, 2020. Dr. Rutz examined Petitioner and reviewed the MRI scan. At that time, Petitioner complained of low back pain which went into her left buttock and leg. Petitioner also complained of right thigh pain. Dr. Rutz suggested Petitioner undergo an epidural steroid injection at L4-L5 if the symptoms worsened (Petitioner's Exhibit 6).

At trial, Petitioner testified she had no low back/leg symptoms prior to the accident. Petitioner stated she continued to experience soreness in her low back, especially when she would sit for a long period of time to when she went up/down stairs. Petitioner stated she also continues to experience periodic symptoms in both her right and left legs. Petitioner was able to return to work to her job with Respondent.

Conclusion of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of five percent (5%) loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a home healthcare provider at the time she sustained the accident. Petitioner was able to return to work to that job. The Arbitrator gives this factor minimal weight.

Petitioner was 61 years old at the time she sustained the accident. Petitioner is close to normal retirement age, but will have to live with the effects of the injury for the remainder of her working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Subsequent to the accident, Petitioner experience symptoms in her low back in both legs and was diagnosed with sciatica/radiculopathy. Diagnostic studies revealed Petitioner had a spondylolisthesis at L4-L5, disc bulges at L4-L5 and L5-S1 as well as foraminal stenosis at L3-L4, L4-L5 and L5-S1. Petitioner continues to experience symptoms referable to her low back and both legs consistent with the injury she sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES PARRA,

Petitioner,

vs. NOS: 12 WC 43353; 13 WC 609

ADMIRAL HEATING AND VENTILATING, 21IWCC0123

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and prospective medical, permanent disability, penalties under §19(k) and §19(l) and attorney's fees under §16, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings while Petitioner participates in vocational rehabilitation and for a determination of the amount of maintenance, costs and expenses incidental thereto as provided in §8(a) of the Act while Petitioner is participating in vocational rehabilitation, the amount of compensation for penalties on the unpaid causally related medical bills, and permanent disability, if any.

The Commission affirms and adopts the Arbitrator's Decision with respect to causal connection, medical expenses, temporary total disability and maintenance, however, vacates penalties assessed for non-payment of maintenance and medical, vacates the award of permanent total disability under §8(f) and further remands this case to the Arbitrator for Petitioner to participate in vocational rehabilitation and for a determination of whether or not additional

penalties under §19(k) and §16 are due on causally related unpaid medical bills, for the following reasons.

Vocational Rehabilitation

> Awards for vocational rehabilitation are granted pursuant to section 8(a) of the Act, which provides, in pertinent part, that an employer shall compensate an injured employee "for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee ...." 820 ILCS 305/8(a) (West 2010). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. 820 ILCS 305/8(a) (West 2010). Yet, section 8(a) is flexible and does not limit rehabilitation to formal training. See *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004) (citing *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265, 120 Ill. Dec. 354 (1988)).

W. B. Olson v. Ill. Workers' Comp. Comm'n, 2012 IL App (1st) 113129WC, P31-P33, 981 N.E.2d 25, 34-35, 2012 Ill. App. LEXIS 907, *17-20, 366 Ill. Dec. 960, 969-970 (Ill. App. Ct. 1st Dist. November 5, 2012)

The Commission finds that Petitioner is entitled to vocational rehabilitation based upon the reports and testimony of both vocational counselors. The Commission further finds that the work status note dated November 3, 2017, and the physical residual function capacity statement authored by Dr. Tulipan, were based primarily on Petitioner's self-reported pain complaints. No actual functional capacity evaluation was provided. The Commission finds that Dr. Tulipan's testimony confirmed that he was of the opinion that the Respondent's insurance company was responsible for ordering a functional capacity evaluation (FCE), however, the Commission is not vested with the statutory authority to order an FCE. See *W. B. Olson v. Ill. Workers' Comp. Comm'n*, 2012 IL App (1st) 113129WC, 981 N.E.2d 25, 2012 Ill. App. LEXIS 907, 366 Ill. Dec. 960 (Neither section 12 nor section 19(c) of the Act provides statutory authority for the assertion that either an employer or the Commission may require a claimant to submit to an evaluation by a physical therapist.) The Commission finds that Dr. Fernandez's opinion regarding Petitioner's restrictions are more credible than Dr. Tulipan's in the absence of a valid functional capacity evaluation based upon the following.

Dr. David Tulipan's testimony

On direct examination, Dr. Tulipan testified that on November 3, 2017, his office generated a work restrictions note that stated that Petitioner had persistent restrictions of "not more than five-pound lifting, avoid any repetitive use of the right arm,"... "and it was predated from June of 2016." (PX7A, 17) Dr. Tulipan further testified that he had not seen Petitioner at any time for the almost ten months between January 19, 2017, and November 3, 2017, when the work restrictions

note was authored, nor did he see Petitioner on November 3, 2017. *Id.* The office generated the work status/restrictions note, not Dr. Tulipan. "There were several telephone conferences." *Id.* The Commission finds that the admission that the office generated the note significantly undermines Dr. Tulipan's credibility because the November 3, 2017 "To Whom It May Concern Letter" specifically states that, "The patient was seen on November 3, 2017 by David Tulipan, MD." (PX7ADepX3) Further, the letter states "these restrictions have been in effect from 6/16/16 thru present day."

Dr. Tulipan was asked the reason that he was of the opinion that Petitioner had those restrictions, and he testified that "it was really more of a pain management issue than anything. He continued to complain of significant discomfort and I felt that anything more than that would be too painful." (PX7A, 18)

PX7A, Deposition Exhibit 4 (DepX4) was identified by Dr. Tulipan as a form that he signed but was not one of his office forms. (PX7A, 18-19) Dr. Tulipan's opinion as of the date of the form, February 5, 2018, regarding Petitioner's functional capacity was that he could work but with a very light duty, low repetition type of activity with a five-pound lifting restriction and that he would need to rest periodically during the course of the day. Dr. Tulipan testified, "He was capable of using his uninjured arm and obviously his lower extremities." (PX7A, 19)

Dr. Tulipan eventually saw the Petitioner on July 5, 2018, and the Petitioner reported chronic pain on the right. (PX7A, 19-20) The Commission notes that this visit was 1-1/2 years after Petitioner's last office visit. Dr. Tulipan opined that Petitioner might be a candidate for disability on a permanent basis. (PX7A, 20) Petitioner returned to Dr. Tulipan on October 23, 2018. At that time, Petitioner gave Dr. Tulipan a history of having injured his right shoulder while reaching for something on his nightstand. *Id.* Dr. Tulipan gave him a cortisone injection and referred Petitioner to a colleague for shoulder treatment. According to Dr. Tulipan, Petitioner still complained of chronic pain in that arm and he felt "that the restrictions that he had previously discussed with Petitioner were permanent in nature." (PX7A, 21) Dr. Tulipan testified his feeling at that time "was that he had limited function of that arm with chronic pain and would not be able to function normally with that extremity." (PX7A, 21) Dr. Tulipan opined that the only issue that he felt was related to the work accident was Petitioner's ulnar nerve problem. "The shoulder, the cervical spine, lumbar spine were unrelated" to his work injury on November 14, 2012. (PX7A, 22)

Dr. Tulipan testified that the last time he examined Petitioner they "talked about a five-pound lifting restriction, no repetitive use, and occasional period of rest during the course of the day at least according to this form I filled out." When asked, Dr. Tulipan agreed the work restriction would be permanent. (PX7A, 22-23)

Dr. Tulipan testified that he could not recall ever ordering an FCE. When asked how he assigned work restrictions, he was asked, and he answered, as follows:

Q. Okay. What did you do that was objective to determine his pain tolerance?
A. There's no objective way of measuring pain.
Q. How about functional capacity? Is there an objective way to test functional capacity?
A. There is a functional capacity evaluation if the insurance company is willing to order one.
Q. Did you ever recommend a functional capacity evaluation of Jim Parra?
A. I don't remember.
Q. I looked through your notes and I never saw one. Is there somewhere else I could look to see if a functional capacity evaluation was ever ordered.
A. No.
Q. Okay. Is that—a FCE an objective way to determine if someone can handle certain types of ability & work capabilities and functions.
A. It can be, yes. (PX7A, 31,32)

Dr. Tulipan testified that the lifting restrictions of five pounds was based on his examination of Petitioner, a clinical evaluation. He never had him actually lift five pounds to make that determination. The restriction regarding repetitive use of the right arm was based on the fact that when he moved his right arm, he had pain. Dr. Tulipan, "thought if he did it repetitively, it would be uncomfortable for him."

On cross-examination, Dr. Tulipan testified that he could not recall if Petitioner was sitting with him when he completed the form identified as DepX4, a physical residual function capacity statement. Although he marked, "yes," Dr. Tulipan did not know or could not explain the significance of the date on page 1, number 8, "Have your patient's impairments, symptoms and limitations lasted since June 24, 2016, the date your patient claims he/she could no longer work?" Dr. Tulipan testified that he assumed that he used the Petitioner's self-reported history to answer the questions on the form. (PX7A, 45-46) Dr. Tulipan marked "frequently" when he answered Number 10 on the form, "How often during a typical workday is your patient's pain severe enough to interfere with the attention and concentration needed to perform simple work tasks?" Dr. Tulipan testified that he presumed that he based that answer on Petitioner's self-reported description, "from the patient himself." Dr. Tulipan then testified, "Not been with him at work, I can't answer objectively about that." He reiterated that he answered the question, "Just from what I got from the patient." (PX7A, 46-47)

In answer to Number 11, Dr. Tulipan marked "frequently" based on the same reasons as Number 10. (PX7A, 47, PX7B, 59) Dr. Tulipan could not remember where Petitioner was doing physical therapy or what a ten pound occasional carry in a competitive work environment was based on. (PX7A, 47)

At the continued evidence deposition (PX7B) Dr. Tulipan again testified that in answer to the questions on the form, that obviously, "I am relying heavily on what he said" and that an FCE was never ordered by the company. (PX7B, 59) When asked, he testified that the form he

completed, and marked that Petitioner can left five pounds occasionally was not based on any type of actual assessment, just his own evaluation of Petitioner's clinical status; "but no functional capacity evaluation, as I said, was ever obtained." (PX7B, 60)

On redirect examination, when asked if he thought that the restrictions that he placed on Petitioner were a true and accurate limitation of his abilities, Dr. Tulipan testified that at the time it was the best assessment that he could make. "I think a functional capacity evaluation, if Dr. Fernandez would have ordered one, would have been helpful." ((PX7B, 97) On re-cross examination, when asked if he believed a functional capacity evaluation could be helpful in determining Petitioner's true work capabilities, he responded, "I always think they are helpful. I use them in my practice." (PX7B, 99) He testified that he was the treating physician not the independent medical evaluator like Dr. Fernandez. Usually, in his experience, "it is the second opinion that asks for it." (PX7B, 99-100) When asked, "You think it is up to the insurance company to ask for it. Is that what you were saying?" Dr. Tulipan responded "Yeah." (PX7B, 100)

Dr. John Fernandez's Section 12 Opinion

Dr. Fernandez saw Petitioner at the Respondent's request pursuant to §12 on January 10, 2018. Dr. Fernandez opined that he would place the Petitioner into a five to ten pound range restriction with regard to force, pushing, and pulling with some restrictions on repetition less than one-half of the workday of the work cycle. This would essentially be a sedentary to light use restriction involving the affected arm. This is based on the objective findings and losses. (RX4)

Kari Stafseth's Testimony

On August 8, 2018, Kari Stafseth, (Stafseth) a certified vocational rehabilitation counselor from Vocamotive, interviewed the Petitioner and authored an Initial Evaluation Report dated August 22, 2018. Stafseth testified via evidence deposition on January 10, 2019 regarding her report and opinions therein. Of the medical records reviewed, Stafseth reviewed a pain report, a document entitled physical residual function capacity statement believed to be dated July 5th, 2018. She also reported an independent medical evaluation of Dr. John Fernandez dated January 10, 2018, and a work status report of Dr. Tulipan dated November 3, 2017. (PX7A, 18-19) Stafseth testified that she reviews medical records "[i]n order to get an understanding of what the restrictions are so that we can go forward with making opinions with regards to what if any employment options are out there for an individual." (PX9, 19-20)

Stafseth Deposition Exhibit 2 (PX9DepX2) is the pain report furnished to Stafseth by Petitioner. (PX9, 19-20) Stafseth Deposition Exhibit 3 (PX9DepX3) is the physical residual function capacity statement that she reviewed and referenced at the bottom of Page 5 and top of Page 6 of her report. (PX9, 21) Stafseth testified that Petitioner had lost access to his usual and customary job of sheet metal worker. Further, based on the records of Dr. Tulipan, including what was outlined in this physical residual function capacity statement, it was her opinion that Petitioner would be prospectively employable given the physical abilities outlined within the documents.

However, secondary to the opinions with regards to lack of attention and/or concentration, being off task for more than 30% of a work day and being absent from work more than five days per month secondary to physical and/or mental impairments, it was her opinion that Petitioner would not be able to maintain employment with any stable labor market as he would not be a productive or reliable worker. (PX9, 30)

Given consideration solely to the opinion of Dr. Fernandez, Petitioner was capable of sedentary to light use of the affected arm, lifting five to ten pounds, and he was prospectively employable assuming that he is capable of that level of work for the course of an 8 hour work day, five days per week. Further, he would be a viable, vocational rehabilitation candidate. (PX9, 30, 31) Stafseth then testified that she created a vocational rehabilitation plan, (PX9DepX4) based upon Dr. Fernandez's opinion and what Dr. Tulipan opined in his work status report without taking into consideration what was outlined in the physical residual function capacity statement. (PX9, 36) Stafseth testified that the rehabilitation plan would not be something Petitioner would need to follow because he would then not have access to a viable, stable labor market taking into consideration all that is outlined in that physical residual function capacity statement. (PX9, 36)

On cross-examination, Stafseth testified that she never reviewed Petitioner's personnel records from his union or from Admiral Heating & Ventilation or any of his personnel records from past employers. She spent 2.8 hours with Petitioner on August 8, 2018. When she drafted her Initial Evaluation Report, PX9DepX5, she assumed everything Petitioner told her was true. In part, her plans were based on what he provided. Petitioner told Stafseth his most recent appointment with Dr. Tulipan was on November 3, 2017. (PX9, 44) Although Petitioner reported experiencing anxiety, stress, and a lack of focus, she could not independently verify those claims. (PX9, 45) On Page 5 of the report, Petitioner reported a five pound lifting restriction. Stafseth testified the basis for the statement on Page 5 was Dr. Tulipan's medical record dated November 3, 2017. (PX9, 46)

Stafseth further testified that she believed DepX3, Dr. Tulipan's work note, was authored by Dr. Tulipan, however, she did not independently verify that this was authored or answered by Dr. Tulipan. She obtained a copy of the statement from Petitioner on August 8, 2018. (PX9, 49) On Page 5 of her report, she referred to DepX3, Question 10 on that document, where it says Petitioner's pain is severe enough to interfere with the attention and concentration needed to perform simple work tasks on a frequent basis. She admitted that the document did not state specifically the basis of the response. (PX9, 49) The answers to Question 10, and to Question 11, how often during a typical workday is your patient's experiences of stress severe enough to interfere with attention and concentration needed to perform simple work tasks, were both marked "frequently." Stafseth did not independently verify the response, not through medical or treatment records. (PX9, 50, 57) Petitioner did not produce a job search log. Stafseth admitted, she did not ask for one. (PX9, 50)

In her report, Stafseth opined that vocational rehabilitation interventions should include vocational testing in order to assist Mr. Parra's aptitudes and interests. Rehabilitation services would also include the development of keyboard proficiency and computer literacy utilizing

Microsoft word and Excel. Additional services would include facilitation of on the job training opportunities, assistance with letter development, completion of mock interviews and participation in a self-directed and supervised job search. (PX9DepX4)

Carolyn Ward-Kniaz's Testimony

Carolyn Ward-Kniaz, a certified vocational rehabilitation counselor from Triune Health Group, interviewed the Petitioner on December 17, 2018, at Respondent's request and authored a report dated June 9, 2019. (RX2) Ward-Kniaz testified at the Arbitration hearing regarding her report and opinions therein. Ward-Kniaz reviewed medical notes and medical reports regarding physical restrictions, including an IME report from Dr. Fernandez, who had authorized sedentary to light duty. (T, 76) She came to the conclusion that Petitioner had knowledge of the construction industry, knowledge of tools and equipment and had the ability to read maps and follow basic instructions which could make him a candidate for entering a building inspection program, an option based on his interviewing skills and ability to complete the twelve week program. (T, 78-79) Petitioner did not produce a job search log when he met with Ward-Kniaz. (T, 79) She was aware of only one job that he attempted to obtain since November 2012. (T, 80, 81)

Ward-Kniaz did not provide a rehabilitation plan for Petitioner but would have provided one if she was working with an individual in job placement. (T, 81-82) Ward-Kniaz opined that if Petitioner were to engage in searching for new employment within his restrictions, it could be beneficial for someone to assist him in doing future job searches. He could use assistance with interviewing skills, filling out job applications and depending on the type of work he was looking for, computer skills, would also be beneficial since he reported that he did not have any computer skills. (T, 82-83) If he were to engage in some limited computer training to improve his computer skills, there would be various positions he could perform earning $12 to $16 per hour.

On cross-examination Ward-Kniaz testified that Petitioner could do dispatch work, customer service and building sales work. There would be options for him, and computer skills would assist with him obtaining gainful employment. (T, 87) In her report, Ward-Kniaz opined that a basic aptitude and achievement test would be helpful as well in terms of determining if formal vocational training would be appropriate. (RX2)

The Commission rejects Stafseth's conclusion that the rehabilitation plan would not be something Petitioner would need to follow because he would then not have access to a viable, stable labor market taking into consideration all that is outlined in that physical residual function capacity statement. Dr. Tulipan's medical records and pertinent testimony confirm that the restrictions on the November 3, 2017 work status report were assigned by the office and without an office visit on that day or the prior 10 months. The physical residual function capacity statement was not based on any physical objective test and is not a functional capacity evaluation provided by a physical therapist nor was there any basis except Petitioner's self-reported pain "severe enough to interfere with the attention and concentration needed to perform simple work tasks." The Petitioner attended physical therapy between mid-April and May 2019, for an unrelated right

shoulder rotator cuff condition. On May 6, 2019, the office notes of Dr. Rahul Gokhale's under Assessment/Plan document that that his symptoms are out of proportion to any MRI findings for the shoulder. Pain management records include a functional assessment that confirm that Petitioner is able to complete all activities of daily living, i.e. eating, bathing, bathroom, dressing and getting up from a bed and chair independently. Therefore, without a functional capacity evaluation, with validity testing, the Commission is not persuaded that the Petitioner is unable to work as a result of the work restrictions to his right elbow.

Permanent Disability

The Commission strikes the Arbitrator's Findings and Conclusions under Section L, "What is the nature and extent of injury?" in the Arbitrator's Decision. Further, the Commission incorporates its findings related to Vocational Rehabilitation herein.

There are three ways a claimant can demonstrate he is permanently totally disabled: 1) by a preponderance of medical evidence; 2) by showing a diligent, but unsuccessful job search; or 3) by demonstrating that because of his age, training, education, experience and condition, no jobs are available to a person in his circumstances. *ABB C-E Services v. Industrial Comm'n*, 316 Ill.App.3d 745, 737 N.E.2d 682 (2000).

Here, Petitioner is not opined to be medically permanently and totally disabled by any doctor and he did not search for work after 2013, before he retired from the Union, except when he worked at the gas station for four days in 2018. (T, 47-48) Thus, The Commission turns to whether Petitioner has established permanent and total disability under the "odd-lot" theory espoused in the third prong. *Id.*, at 749-50. The Commission finds Petitioner has failed to prove that because of his age, training, education, experience and condition, no jobs are available to a person in his circumstances. Clearly without consideration of Dr. Tulipan's physical residual function capacity statement, both certified vocational counselors determined that Petitioner would benefit from a vocational rehabilitation plan. Therefore, the Commission vacates the Arbitrator's award of permanent and total disability benefits as provided in §8(f) of the Act and remands the case to the Arbitrator so that Petitioner can undergo vocational rehabilitation.

Maintenance

The Petitioner reached maximum medical improvement (MMI) on May 20, 2017. The Petitioner testified that he did not look for any job after his 2013 retirement from the Union until he applied for the position of cashier at a gas station in 2018. (T, 45-46) The Petitioner further testified that he had no job search log. *Id.* The Commission finds Petitioner did not sustain his burden of proving a diligent self-directed job search after May 17, 2017, the date he reached MMI, however, in April 2018, Petitioner was hired at a gas station for a cashier position. Thereafter, he met with the vocational counselor Kari Stafseth in August 2018, who filed one vocational assessment and a rehabilitation plan that she did not recommend. For those reasons, the award of maintenance between May 20, 2017 and August 22, 2018 is affirmed.

Both parties failed to maintain quarterly vocational assessments as required by Rule 9110.10 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission.[1] The Arbitrator awarded permanent disability benefits commencing on August 23, 2018, which the Commission has vacated. The Commission declines to award further maintenance benefits pending Petitioner's participation in vocational rehabilitation. Once Petitioner begins a vocational rehabilitation program, he will be entitled to maintenance commencing with the initiation of the rehabilitation plan.

Medical Bills

> The claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under section 8(a). *Max Shepard, Inc. v. Industrial Comm'n,* 348 Ill. App. 3d 893, 903, 810 N.E.2d 54, 284 Ill. Dec. 401 (2004). Questions as to the reasonableness of medical charges or their causal relationship to a work-related injury are questions of fact to be resolved by the Commission, and its resolution of such matters will not be disturbed on review unless against the manifest weight of the evidence. *Max Shepard, Inc.,* 348 Ill. App. 3d at 903.

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 546, 865 N.E.2d 342, 359, 2007 Ill. App. LEXIS 296, *42-43, 310 Ill. Dec. 18, 35

The Commission finds that Respondent is liable solely for the medical bills causally related to Petitioner's right elbow condition, however, it is unclear which of those medical bills submitted into evidence are actually causally related or unpaid. The Commission requires an itemization of those causally related unpaid medical bills in order to assess penalties, if any, that remain unpaid as of the date of the Arbitration hearing.

Therefore, the Commission vacates the penalties assessed by the Arbitrator for unpaid medical bills related only to the injured right elbow, and remands the case to the Arbitrator. The Petitioner shall provide an itemization or accounting of those specific unpaid bills and charges related to the Petitioner's right elbow condition as of close of proofs on August 28, 2019, and thereafter Respondent shall provide evidence of any contract negotiated fee reductions or

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[1]Section 9110.10 Vocational Rehabilitation a) An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. When the period of total incapacity for work exceeds 365 days, the written assessment required by this subsection shall likewise be prepared. b) The assessment shall address the necessity for a plan or program that may include medical and vocational evaluation, modified or limited duty, and/or retraining, as necessary. c) At least every 4 months thereafter, or until the matter is terminated by Order or Award of the Commission or by written agreement of the parties approved by the Commission, the employer, or his or her representative, in consultation with the employee and, if represented, with his or her representative, shall: 1) if the most recent previous assessment concluded that no plan or program was then necessary, prepare a written review of the continued appropriateness of that conclusion; or 2) if a plan or program had been developed, prepare a written review of the continued appropriateness of that plan or program, and make in writing any necessary modifications.

entitlement to fee schedule reductions under §8.2. This will then quantify the amount of unpaid medical that can then be reduced to the Respondent's liability pursuant to §8.2 of the Act by applying the contracted rate or fee schedule, so that the amount of penalties under §19(k) and attorney's fees under §16 if any, can be assessed.

Penalties

With regard to the Arbitrator's Decision, Section M, The Commission affirms and adopts the Arbitrator's findings with regard to penalties under §19(k) and §19(l) and attorney's fees under §16 assessed against Respondent for non-payment of TTD except the Commission corrects the Arbitrator's scrivener's error, the corrected number of weeks for which Petitioner is entitled to TTD is 233-3/7 weeks. Thus the calculations will be based on the corrected number of weeks and the Arbitrator's Decision is modified accordingly.

The Commission calculates the TTD for the period commencing November 29, 2012, through May 20, 2017, (233-3/7 weeks) X $1,084.93 (TTD rate) = $253,254.13 less the TTD benefits paid by Respondent, $45,993.92 = $207,260.21. Therefore, the Commission awards Petitioner attorney's fees of $41,452.04 pursuant to §16 of the Act (20% of $207,260.21); penalties of $103,630.11 pursuant to §19(k) of the Act (50% of $207,260.21); and penalties of $10,000.00, as provided in section 19(l) of the Act.

The Commission vacates the penalties the Arbitrator assessed for non-payment of medical bills and unpaid maintenance for the reasons explained in the respective sections above and incorporated herein. Consistent with vacating the penalties for maintenance, on page 24 of the Arbitrator's Decision, the Commission strikes the words, "and Maintenance" from the fifth paragraph second sentence.

The Commission remands the case to the Arbitrator for a determination of whether or not additional penalties under §19(k) and §16 are due on causally related unpaid medical bills to be determined after Petitioner provides an itemization or accounting of those specific unpaid bills and charges related solely to the Petitioner's right elbow condition as of close of proofs on August 28, 2019, and thereafter Respondent provides evidence of any contract negotiated fee reductions or entitlement to fee schedule reductions of those causally related unpaid medical bills pursuant to §8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed October 17, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of penalties as provided in §19(k) and attorney's fees as provided in §16 of the Act for non-payment of maintenance is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of penalties as provided in §19(k) and attorney's fees as provided in §16 of the Act for unpaid medical bills causally related to the Petitioner's right elbow condition is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of permanent and total disability benefits as provided in §8(f) of the Act is hereby vacated and the case is remanded to the Arbitrator for further proceedings consistent with this Decision, for Respondent to provide and pay for Petitioner to participate in vocational rehabilitation as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,084.93 per week for a period of 233-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $1,084.93 per week for a period of 65-3/7 weeks, commencing May 21, 2017, through August 22, 2018, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay reasonable and necessary medical services of $98,617.49, as provided in §8(a) and §8.2 of the Act, regarding all unpaid medical bills related only to the injured right elbow, said amounts to be determined after those specific bills and charges are identified and paid and after calculating any fee schedule reductions.

IT IS FURTHER ORDERED BY THE COMMISSION that the case be remanded to the Arbitrator for further proceedings consistent with this Decision, wherein Petitioner shall provide an itemization of those specific unpaid medical bills and charges related to the Petitioner's right elbow condition as of close of proofs on August 28, 2019, and thereafter Respondent shall provide to the Arbitrator evidence of entitlement to any contract negotiated fee reductions or to fee schedule reductions under §8.2. Thereafter, the Arbitrator will determine the exact amount of unpaid medical charges for which Respondent is liable, if any, and penalties to be awarded on that amount, if any, under §19(k) and attorney's fees under §16.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall reimburse Medicaid for payments made on Petitioner's behalf, in the amount of $4,166.73, and shall hold Petitioner harmless from any claims for this amount, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given credit of $43,481.15 for medical benefits that have been paid by Petitioner's group health insurance carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner attorney's fees of $41,452.04 pursuant to §16 of the Act (20% of $207,260.21); penalties of $103,630.11 pursuant to §19(k) of the Act (50% of $207,260.21); and penalties of $10,000, as provided in section 19(l) of the Act.

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

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

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

DATED: MAR 15 2021
KAD/bsd
O1/12/21
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Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

DISSENT

I disagree with the majority regarding the imposition of §19(k) penalties and §16 attorney's fees for non-payment of TTD.

The purpose of penalties explained by the 1st District Appellate Court is as follows:

> The intent of sections 16, 19(k), and 19(l) is to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301, 412 N.E.2d 468, 45 Ill. Dec. 117 (1980). Awards under section 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 504-05, 702 N.E.2d 545, 234 Ill. Dec. 205 (1998). That is, the refusal to pay must result from bad faith or improper purpose. *McMahan*, 183 Ill. 2d at 515. An award under section 19(*l*) is more in the nature of a late fee, so an award under that section is appropriate if an

> employer neglects to make payment without good and just cause. *McMahan*, 183 Ill. 2d at 515; *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 15, 981 N.E.2d 1193, 367 Ill. Dec. 465. The employer has the burden of showing that it had a reasonable belief that the delay was justified. *Roodhouse Envelope C. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579, 658 N.E.2d 838, 213 Ill. Dec. 89 (1995).

Pisano v. Ill. Workers' Comp. Comm'n, 2018 IL App (1st) 172712WC, P85, 123 N.E.3d 409, 429-430, 2018 Ill. App. LEXIS 972, *46-47, 428 Ill. Dec. 680, 700-701.

In the case at bar, the Appellate Court's final Decision from the initial §19(b) arbitration hearing was not final until December 23, 2016. (PX18) Respondent's defense, aside from the issue of accident that was appealed after the initial hearing, relied on the fact that Petitioner resigned from his Union as early as mid-Nov 2013 and signaled that Petitioner was taking himself out of the job market. In addition, Petitioner applied for Social Security Disability Insurance (SSDI) in 2014, and testified that he never searched for a job after 2013 when he retired from the Union until he applied for the position at the gas station in 2018, all of which comports with the Respondent's good faith defense that Petitioner took himself out of the job market, and as such, was not entitled to ongoing TTD benefits. (see *Kieffer & Co. v. Industrial Comm'n (Spomer)*, 263 Ill. App. 3d 294, 300-301, 636 N.E.2d 7, 11, 1994 Ill. App. LEXIS 921, *14, 200 Ill. Dec. 816, 820 (Decedent exposed to toxic substances that caused an occupational disease, failed to prove that he sustained any temporary total disability as the result of this exposure because he voluntarily removed himself from the employment market and testified that he didn't look for any work after that date.)) (see also *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d 587, 594, 630 N.E.2d 1341, 1346, 1994 Ill. App. LEXIS 394, *15, 197 Ill. Dec. 217, 222 (denying odd-lot status to employee who did not appear at scheduled job interviews..."It is widely accepted that the primary goal of rehabilitation is to return the injured employee to work." *Hartlein v. Illinois Power Company* (1992), 151 Ill. 2d 142, 165, 601 N.E.2d 720, 176 Ill. Dec. 22. Simply stated, the evidence shows that the claimant did not want to return to work. Effort to rehabilitate the claimant is not logical.))

In *Sharwarko v. Ill. Workers' Comp. Comm'n,* 2015 IL App (1st) 131733WC, P49, 28 N.E.3d 946, 956, 2015 Ill. App. LEXIS 128, *21-22, 390 Ill. Dec. 293, 303 the Petitioner was off work following surgery when Respondent offered retirement which he voluntarily decided to accept. The Commission found that Petitioner was not entitled to TTD as of the date he retired, and by voluntarily retiring and not looking for work thereafter, the claimant indicated that he had no intention of returning to the workforce in any capacity, at any time. The Commission concluded that the claimant's voluntary retirement was the equivalent of refusing the accommodated duty which the Village had provided before the claimant's surgery, and as a consequence he was not entitled to TTD benefits after October 31, 2006. The Appellate Court agreed, holding,

> The purpose of the Act is to compensate an employee for lost earnings resulting from work-related injuries. *Freeman United Coal Mining Co. v. Industrial*

> *Comm'n*, 99 Ill. 2d 487, 496, 459 N.E.2d 1368, 77 Ill. Dec. 119 (1984). When, as in this case, work within an injured employee's medical restrictions is available and the employee does not avail himself of the opportunity by voluntarily retiring, continued payment of TTD benefits does not further that purpose. In such a case, the employee's lost earnings are the result of his volitional act of removing himself from the work force, not his work-related injuries. As we have held before, to establish entitlement to TTD benefits, an injured employee must prove not only that he did not work, but also that he was unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002). We believe, as did the Commission, that when work for an injured employee falling within his medical restrictions is available, the employee's voluntary retirement is the equivalent to a refusal to work within those restrictions, authorizing the termination of TTD benefits before the employee has reached MMI. See *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827, 217 Ill. Dec. 158. (1996).

Respondent also relied upon what was posited as two intervening accidents, the right hand dog bite and the motor vehicle accident, which raised doubts regarding the causal connection to Petitioner's ongoing treatment to the work accident. Even Dr. Fernandez's opinion that the motor vehicle accident did not affect his symptoms was based solely on Petitioner's self-reported assessment. There is no evidence that the Respondent's defense was based upon bad faith or improper purpose, therefore, penalties under §19(k) and attorney's fees under §16 for non-payment of TTD are not warranted.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARRA, JAMES
Employee/Petitioner

Case# **12WC043353**
13WC000609

ADMIRAL HEATING AND VENTILATING
Employer/Respondent

21IWCC0123

On 10/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0700 GREGORIO & MARCO
SEAN C STEC
TWO N LASALLE ST SUITE 1650
CHICAGO, IL 60602

5077 WARMOUTH LAW PC
WILLIAM T WARMOUTH
17 N WABASH AVE SUITE 650
CHICAGO, IL 60602

21IWCC0123

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Parra,
Employee/Petitioner

v.

Admiral Heating and Ventilating,
Employer/Respondent

Case # **12** WC **43353**

Consolidated cases: **13 WC 609**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **May 29, 2019 and August 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 14, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**84,624.80**; the average weekly wage was $**1,627.40**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**19,724.02** for TTD, $**0.00** for TPD, $**26,269.90** for maintenance, and $**0.00** for other benefits, for a total credit of $**45,993.92**.

Respondent is entitled to a credit of $**43,481.15** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,084.93**/week for **233-2/7** weeks, commencing **November 29, 2012** through **May 20, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$1,084.93**/week for **65-3/7** weeks, commencing **May 21, 2017** through **August 22, 2018**, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of **$98,617.49**, as provided in Sections 8(a) and 8.2 of the Act, regarding all unpaid **medical bills** related **only** to the injured right elbow, said amounts to be determined after those specific bills and charges are identified and paid and after calculating any fee schedule reductions.

Respondent shall reimburse Medicaid for payments made on Petitioner's behalf, in the amount of **$4,166.73**, and shall hold Petitioner harmless from any claims for this amount, as provided in Section 8(j) of the Act.

Respondent shall be given a credit of **$43,481.15** for medical benefits that have been paid by Petitioner's group health insurance carrier, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner attorney's fees of $**55,618.01**, as provided in Section 16 of the Act (20% of $278,090.17); penalties of $**139,045.08**, as provided in Section 19(k) of the Act (50% of $278,090.17); and penalties of $**10,000.00**, as provided in Section 19(l) of the Act. Further, Respondent shall pay Petitioner **additional** penalties under Sections 19(k) and attorneys' fees under Section 16 regarding all unpaid **medical bills** related only to the injured right elbow, said amounts to be determined after those specific bills and charges are identified and paid and after calculating any fee schedule reductions.

Respondent shall pay Petitioner permanent and total disability benefits of $**1,084.93**/week for life, commencing **August 23, 2018**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Dated: October 17, 2019

OCT 17 2019

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The Arbitrator notes these two consolidated claims have traveled a difficult and complicated journey through the litigation labyrinth. There has been conspicuous discord between the parties, as noted, in part, in the record as a whole.

But while the Arbitrator acknowledges this, he also must note that Respondent raised many assertions that served only to foment this dispute and detour from the relevant issues at hand. This included considerable discussion and argumentation attempting to diminish Petitioner's credibility, a legitimate pursuit – but not so much when much of that attack focused on testimony found in the original 2013 hearing and on peripheral matters. It is obvious Respondent agreed with those Arbitration Decisions – (the one at issue later being reversed) - finding Petitioner failed to prove his claims and he was found to be not credible. However, the Appellate Court did not agree, and, more significantly, the Appellate Court made no finding that Petitioner was not credible. In fact, the Appellate Court specifically found, "Thus, claimant's testimony establishes an injury occurred…" Respondent had argued that Petitioner's testimony lacked credibility, but the Appellate Court found that the Commission's finding on credibility was not against the manifest weight of the evidence. Respondent's lengthy arguments assailing Petitioner's credibility on multiple fronts border on trying to overturn - or ignore - the law of the case and to relitigate those matters.

Respondent also raises multiple other issues in its efforts to attack Petitioner's credibility and his claim, such as his alleged drug use, minor offenses, general assaults on his character, resigning for his union, and his poor memory recall. However, while there are instances where Petitioner's testimony seemed unreliable, **where it ultimately really mattered, Respondent had nothing to offer:** that is, the opinions of Respondent's Section 12 examining expert Dr. Fernandez were all in Petitioner's favor and the Arbitrator finds and concludes those opinions consequently carry great weight, reliance and credibility. That conclusion is unavoidable. There was nothing in Petitioner's testimony - or his history or character - that lessens the value or weight of Dr. Fernandez' opinions (or those of Dr. Tulipan). Had Dr. Fernandez offered well-reasoned and fact-based opinions against Petitioner, Respondent would have had a sound basis to support its many disputes. But that is not the case.

This matter was previously tried filed before the Honorable Arbitrator Robert Williams on May 17, 2013. James Parra (hereinafter "Petitioner") claimed benefits under the Illinois Workers' Compensation Act

(hereinafter referred to as "the Act") for injuries sustained while working for Admiral Heating and Ventilating, Inc. (hereinafter "Respondent") on August 17, 2011 and November 14, 2012. (Petitioner's Group Exhibit #18).

On June 12, 2013, Arbitrator Williams issued Decisions pursuant to Section 19(b) of the Act on both claims. With respect to 12 WC 43353, Arbitrator Williams found that Petitioner failed to prove that he sustained accidental injuries to his right elbow and lower back arising out of and in the course of Petitioner's employment with Respondent on November 14, 2012. In addition, Arbitrator Williams found that Petitioner failed to prove that he provided timely notice of his claim of injury. (Petitioner's Group Exhibit #18).

With respect to 13 WC 000609, Arbitrator Williams found Petitioner failed to prove that he sustained accidental injuries to his right elbow and lower back, arising out of and in the course of his employment with Respondent on August 17, 2011. Arbitrator Williams also found Respondent failed to prove Petitioner provided Respondent timely notice of his claim of injury. (Petitioner's Group Exhibit #18).

On June 21, 2013, Petitioner filed a Petition for Review of Arbitration Decision before the Commission. On May 16, 2014, the Commission issued its Decision and Opinion on Review. The Commission affirmed and adopted the Decision of the Arbitrator with respect to Petitioner's claimed accident on August 17, 2011 (13 WC 606). However, with respect to 12 WC 43353, the Commission reversed the Decision of the Arbitrator and found that Petitioner sustained an accidental injury arising out of and in the course of his employment on November 14, 2012 with regard to his right elbow, that his current right elbow condition was causally connected to said accident, that Petitioner provided timely notice as required under Section 6(c) of the Act, and that Petitioner was temporarily totally disabled with regard to his right elbow condition from November 29, 2012 through the date of the 19(b) hearing, May 17, 2013. The Commission affirmed and adopted the Decision of the Arbitrator that Petitioner failed to prove that his low back condition is causally related to his November 14, 2012 work accident. (Petitioner's Group Exhibit #18).

On June 16, 2014, Respondent initiated an administrative review of the Commission's Decision with the Circuit Court of Cook County. On November 14, 2014, Judge Robert Cepero remanded the case to the Commission stating that the Commission's decision was "...substantively and procedurally deficient in a number of areas – including an articulation for the bases for its Decision and the reasonableness of its Decision." (Petitioner's Exhibit #18).

On August 25, 2015, the Commission issued its Corrected Decision and Opinion on Remand. Once again, the Commission affirmed and adopted the Decision of the Arbitrator with respect to Petitioner's claimed accident on August 17, 2011 (13 WC 606). With respect to 12 WC 43353, the Commission again reversed the Decision of the Arbitrator and found that Petitioner sustained an accidental injury arising out of and in the course of his employment on November 14, 2012 with regard to his right elbow, that his current right elbow

condition was causally connected to said accident, that Defendant provided timely notice as required under Section 6(c) of the Act, and that Defendant was temporarily totally disabled with regard to his right elbow condition from November 29, 2012 through the date of the 19(b) hearing, May 17, 2013. Further, the Commission again affirmed and adopted the decision of the Arbitrator that Petitioner failed to prove that his low back condition is causally related to his November 14, 2012 work accident. (Petitioner's Group Exhibit #18).

On September 18, 2015, Respondent initiated an administrative review of the Commission's Corrected Decision and Opinion on Remand with the Circuit Court of Cook County. On February 9, 2016, Judge Kay Hanlon reversed the decision of the Commission and reinstated the Decision of the Arbitrator. (Petitioner's Exhibit #18).

On February 16, 2016, Petitioner filed a Notice of Appeal of the Decision of the Circuit Court of Cook County to the Appellate Court of Illinois, First District. On December 23, 2016, the Appellate Court of Illinois, First District, determined that the Commission's finding, that Petitioner sustained an accident arising out of and in the course of his employment with Respondent on November 14, 2012 (right elbow), was *not* against the manifest weight of the evidence. In addition, the Court determined that the Commission's finding, that the condition of ill-being of Petitioner's right elbow is causally related to Petitioner's work accident of November 14, 2012, was *not* against the manifest weight of the evidence. Further, the Court determined that the Commission's finding, that Petitioner provided timely notice of his November 14, 2012 injury, was *not* against the manifest weight of the evidence. Lastly, the Court determined that the Commission's award of 24-1/7 weeks of temporary total disability benefits was *not* against the manifest weight of the evidence. (Petitioner's Group Exhibit #18).

At the time of the first hearing, May 17, 2013, Petitioner was under active medical care with Dr. Howard Freedberg. (TR p. 19). Dr. Freedberg examined Petitioner on May 8, 2013 and recommended that he continue his physical therapy program for his right elbow to recover from the surgery that Dr. Freedberg performed on January 9, 2013. Dr. Freedberg also directed Petitioner to remain off work. In addition, the doctor directed Petitioner to continue care for his lower back with Dr. Dmitry Novoseletsky. (Petitioner's Exhibit #1). The Arbitrator notes that the treatment for Petitioner's lower back condition has been determined to be unrelated to Petitioner's work accident on November 14, 2012. (Petitioner's Group Exhibit #18).

Petitioner continued his physical therapy program at Suburban Orthopaedics and returned to see Dr. Freeburg on June 26, 2013. Dr. Freedberg noted that Petitioner was still experiencing a "crunching" sensation when extending his right elbow. The doctor directed Petitioner to continue his physical therapy and to remain off work. (Petitioner's Exhibit #1).

On July 24, 2013, Dr. Freedberg examined Petitioner again. Petitioner continued to complain of weakness and numbness from his right wrist to his right elbow. The doctor again recommended that Petitioner continue his physical therapy program and remain off work. (Petitioner's Exhibit #1).

On August 21, 2013, Petitioner returned to see Dr. Freedberg and advised him that he was having gripping problems with his right hand and numbness in the middle two fingers of his right hand radiating down his right arm from the elbow. Dr. Freedberg directed Petitioner to continue his physical therapy program and to remain off work. (Petitioner's Exhibit #1).

Petitioner was again examined by Dr. Freedberg on September 18, 2013. Petitioner still complained of problems with gripping and strength in his right hand and numbness from his right elbow to his middle two fingers after therapy. In addition, Petitioner complained of tightness at the end of the day and a "crunching" sensation when extending his right arm. Dr. Freedberg directed Petitioner to continue his physical therapy program and to obtain an EMG of his upper extremities. In addition, the doctor provided Petitioner with light duty work restrictions of no lifting greater than 25 pounds, no stooping, no repeated bending, and no climbing. (Petitioner's Exhibit #1).

On October 16, 2013, Petitioner returned to see Dr. Freedberg. Because Petitioner had completed the EMG the day before his appointment, October 15, 2013, it was not available for the doctor to review at the time of his examination. Dr. Freedberg directed Petitioner to continue his physical therapy program, to hold off on an MRI Arthogram of his right elbow pending the results of the EMG, and to continue his light duty work restrictions. (Petitioner's Exhibit #1).

Petitioner testified that he spoke with his union regarding the availability of light duty work and was advised that there was no light duty work in the Sheet Metal Union. Petitioner was directed to schedule an appointment with a doctor for a disability examination by his union at that time. (TR p. 21). Before seeing the disability doctor, Petitioner contacted contractors from his union to see if any of them had light duty work available. (TR p. 48).

On October 31, 2013, Petitioner was examined by Dr. Steven J. DeAngeles. Dr. DeAngeles found that Petitioner should be considered disabled to work as a sheet metal worker, dating back to November 14, 2012. The doctor found that Petitioner would have difficulty using his right arm for full employment and could only perform work with a minimal use of tools. The doctor also opined that petitioner would have difficulty holding objects greater than five to ten pounds on a regular basis and would have difficulty using tools such as a drill, power saw and a hammer. (Petitioner's Exhibit #2). Based on the recommendations of Dr. DeAngeles, Petitioner initiated steps to resign from his labor union. (TR p. 31).

Dr. Freedberg examined Petitioner again on November 13, 2013. Petitioner reported that he had discontinued his physical therapy because of the pain and numbness in his right arm. Petitioner also complained of continued problems with grip strength and range of motion. Dr. Freedberg reviewed the EMG of Petitioner's upper extremities, that was completed on October 15, 2013, and found evidence of right moderate carpal tunnel syndrome and mild left ulnar neuropathy at the elbow. Dr. Freedberg directed Petitioner to hold off on obtaining an MRI Arthogram of his right elbow and to hold off on physical therapy. In addition, Dr. Freedberg directed Petitioner to proceed with right sided carpal tunnel release surgery and directed him to remain off work. (Petitioner's Exhibit #1).

On March 5, 2014, Petitioner returned to see Dr. Freedberg. Petitioner continued to complain of numbness and tingling in his right arm. Dr. Freedberg again suggested that Petitioner proceed with right hand carpal tunnel release surgery and that he remain off work. (Petitioner's Exhibit #1).

On March 14, 2014, Dr. Freedberg performed a right carpal tunnel decompression, release of Guyon's canal and median nerve neurolysis surgery for Petitioner at Ashton Center for Day Surgery. (Petitioner's Exhibit #3).

Petitioner was examined by Dr. Freedberg again on March 20, 2014. At that time, Petitioner advised Dr. Freedberg that the numbness and tingling in his right arm continued. Dr. Freedberg recommended physical therapy for his right wrist and directed Petitioner to remain off work. Dr. Freedberg also indicated that Petitioner would require right (mistakenly indicated as "left") sided ulnar nerve transposition surgery after recovering from carpal tunnel surgery. (Petitioner's Exhibit #1).

On April 17, 2014, Petitioner returned to see Dr. Freedberg. Petitioner continued to complain of numbness on the ulnar side of his right hand into his index finger and little finger and pain in his right elbow. Dr. Freedberg directed Petitioner to continue physical therapy for his right wrist and to proceed with right elbow cubital tunnel decompression and possible ulnar nerve transposition surgery. In addition, Dr. Freedberg directed Petitioner to remain off work. (Petitioner's Exhibit #1).

On May 9, 2014, Dr. Freedberg performed surgery on Petitioner's right elbow. The doctor performed a right ulnar nerve decompression with a submuscular transposition, release of the Arcade of Struthers, flexor fascia and resection of the medial intermuscular septum at Ashton Center for Day Surgery. (Petitioner's Exhibit #3).

Petitioner returned to see Dr. Freedberg on May 19, 2014. The doctor recommended that Petitioner proceed with physical therapy for his right wrist and right elbow and directed Petitioner to remain off work. (Petitioner's Exhibit #1). On June 9, 2014, Dr. Freedberg examined Petitioner and directed him to continue

physical therapy for his right wrist and right elbow. In addition, Dr. Freedberg directed Petitioner to remain off work. (Petitioner's Exhibit #1).

On July 14, 2014, Petitioner was examined again by Dr. Freedberg. The doctor noted that Petitioner still complained of numbness and tingling from underneath his right armpit to his right ring and little finger and pain when lifting weights from waist to shoulder level and back down in physical therapy. Petitioner also complained of similar numbness and tingling in his left arm. Dr. Freedberg directed Petitioner to continue physical therapy for his right wrist and right elbow, directed Petitioner to remain off work, and recommended left elbow cubital tunnel decompression and possible ulnar nerve transposition surgery. (Petitioner's Exhibit #1).

On August 28, 2014, Petitioner returned to see Dr. Freedberg. The pain levels in Petitioner's right hand, forearm, and right elbow persisted and he continued to experience numbness and tingling in the 4th and 5th digits of his right hand. Once again, Dr. Freedberg recommended that Petitioner continue his physical therapy program for his right wrist and right elbow and directed him to remain off work. Dr. Freedberg also recommended that Petitioner obtain an MRI of his right elbow. In addition, Dr. Freedberg suggested that Petitioner proceed with left elbow cubital tunnel decompression and possible ulnar nerve transposition surgery. (Petitioner's Exhibit #1).

On September 3, 2014, Petitioner obtained an MRI of his right elbow at Suburban MRI. (Petitioner's Exhibit #1). Petitioner returned to see Dr. Freedberg on September 10, 2014, at which time the doctor reviewed the MRI of Petitioner's right elbow and directed Petitioner to continue physical therapy and home exercises for his right elbow and right hand. In addition, Dr. Freedberg recommended that Petitioner remain off work and that he proceed with left elbow cubital tunnel decompression and possible ulnar nerve transposition surgery. (Petitioner's Exhibit #1).

Dr. Freedberg examined Petitioner again on January 29, 2015. Petitioner complained to the doctor that he could not extend his right arm and only had 50% usage of the arm along with weakness and loss of range of motion. Dr. Freedberg again suggested that Petitioner undergo left elbow surgery and that he hold off on physical therapy for his right elbow and right wrist until after he had left elbow surgery. In addition, Dr. Freedberg directed Petitioner to remain off work.

On February 10, 2015, Petitioner was involved in a motor vehicle accident. Petitioner injured his neck, his lower back and his left side in that accident. (TR pp. 23-24). Petitioner testified that the symptoms in his right arm did not change in any way as a result of the motor vehicle accident. (TR p. 24).

On March 21, 2016, Petitioner was examined by Dr. David Tulipan. Petitioner was still experiencing pain, numbness and tingling in his right arm and went to see Dr. Tulipan for a second opinion. (TR pp. 24-25).

Petitioner told Dr. Tulipan that he never improved following his second surgery with Dr. Freedberg and complained of pain and sensitivity in his right arm. Dr. Tulipan noted that Petitioner exhibited a positive Tinel sign at the cubital tunnel and a positive Tinel sign at the wrist, along with a positive flexor compression test on the right. Dr. Tulipan also noted that Petitioner lacked 30 to 35 degrees of elbow extension. The doctor diagnosed Petitioner with persistent ulnar and median nerve irritation of the right elbow and directed Petitioner to obtain a repeat EMG. (Petitioner's Exhibit #5).

Petitioner completed the EMG as directed by Dr. Tulipan. The day before Petitioner was set to review the EMG with Dr. Tulipan, March 27, 2016, Petitioner was bit on the right hand by a dog. Petitioner is not claiming any injury to his right hand as part of the instant workers' compensation claim. (TR pp. 25-26).

On March 28, 2016, Petitioner returned to see Dr. Tulipan to review the EMG of his upper extremities. Dr. Tulipan noted that the EMG showed good resolution of his carpal tunnel when compared to his previous EMG, but worsening cubital tunnel, particularly proximal to the elbow. Dr. Tulipan recommended that Petitioner proceed with a surgery to re-explore the right ulnar nerve and perform a submuscular transposition. In addition, Dr. Tulipan examined Petitioner's dog bite wound to his right hand and provided treatment for that unrelated injury. (Petitioner's Exhibit #5). On March 29, 2016 and March 31, 2016, Petitioner returned to see Dr. Tulipan for further treatment for the dog bite on his right hand. (Petitioner's Exhibit #5).

On May 2, 2016, Petitioner returned to see Dr. Tulipan. The doctor noted that there was no follow up needed for Petitioner's right hand and that Petitioner was able to proceed with right elbow ulnar nerve submuscular transposition surgery. (Petitioner's Exhibit #8). On May 20, 2016, Dr. Tulipan performed a right ulnar nerve epineurolysis and submuscular transposition surgery at Elmhurst Memorial Hospital. (Petitioner's Exhibit #8).

On June 16, 2016, Petitioner returned to see Dr. Tulipan. The doctor noted that Petitioner was still lacking range of motion and was still in significant discomfort. The doctor also noted that Petitioner had some similar symptoms on the left, which he thought might be thoracic outlet syndrome. Dr. Tulipan recommended that Petitioner participate in a physical therapy program and provided him with a light duty work restriction of 5 pounds with no repetitive use of the right arm. (Petitioner's Exhibit #5).

On June 23, 2016, Petitioner initiated a physical therapy program at Edward Hospital Occupational Therapy. Petitioner participated in physical therapy until September 15, 2016. (Petitioner's Exhibit #16).

On August 2, 2016, Petitioner was again examined by Dr. Tulipan. He reported to the doctor that he was improving in physical therapy. Dr. Tulipan directed Petitioner to continue his physical therapy program and to return to see him in 4 weeks. (Petitioner's Exhibit #5). Petitioner returned to see Dr. Tulipan on September 12,

2016. At that time, Petitioner continued to complain of pain down his right arm. Dr. Tulipan directed Petitioner to participate in a home exercise program. (Petitioner's Exhibit #5).

On January 19, 2017, Petitioner returned to see Dr. Tulipan. At that time, the doctor advised Petitioner that there was little more that he could do for Petitioner's medial elbow pain from a surgical standpoint and referred Petitioner to a pain management specialist. (Petitioner's Exhibit #5).

Petitioner was examined by Dr. Paul Manganelli, a pain management specialist, on February 28, 2017. Dr. Manganelli diagnosed Petitioner with right arm pain status post right ulnar nerve epineurolysis and submuscular transposition and recommended that Petitioner obtain a repeat EMG of his right upper extremity and an MRI of his cervical spine. On April 5, 2017, Petitioner completed the EMG/NCV of his bilateral upper extremities, as directed by Dr. Paul Manganelli. Dr. Ellen I. Voronov performed the EMG/NCV and found no evidence to suggest mononeuropathy on either side. (Petitioner's Exhibit #5).

On May 30, 2017, Petitioner was examined at Rolling Ridge Pain Specialty at DuPage Medical Group. At that time, his repeat EMG was reviewed and it was confirmed that Petitioner did not exhibit mononeuropathy on either side. Petitioner was diagnosed with cervical radiculitis following a motor vehicle accident and was directed to obtain an MRI of his cervical spine. (Petitioner's Exhibit #5).

On September 5, 2017, Petitioner was examined by Dr. John Gashkoff at the Pain Management Clinic of DuPage Medical Group. Dr. Gashkoff had an MRI of Petitioner's cervical spine taken and recommended a trial of cervical epidural steroid injections. Dr. Gashkoff also refilled Petitioner's Norco prescription. (Petitioner's Exhibit #5). On October 30, 2017, Petitioner was again examined by Dr. Tulipan. The doctor diagnosed Petitioner with chronic pain of the upper extremity and directed him to proceed with the cervical epidural injections that were recommended by Dr. Gashkoff. (Petitioner's Exhibit #5).

Petitioner returned to the pain management clinic at DuPage Medical Group on November 1, 2017. At that time, he was scheduled for a cervical epidural steroid injection for his unrelated motor vehicle accident and his prescription for Norco was renewed. (Petitioner's Exhibit #4). On November 3, 2017, Dr. Tulipan completed a work status note that indicated that Petitioner had work restrictions of no lifting greater than 5 pounds and no repetitive use of the right arm from June 16, 2016 through the present. (Petitioner's Exhibit #6).

On January 8, 2018, Petitioner was examined by Dr. Gashkoff. The doctor noted that Petitioner had pain in his right arm radiating to the 4th and 5th digits of his right hand. The doctor refilled his pain medication prescription at that time. (Petitioner's Exhibit #4).

Also on January 8, 2018, Petitioner filed a Petition for Penalties and Attorneys' Fees, pursuant to Sections19(k), 19(l), and 16 of the Act, based on Respondent's refusal to make Temporary Total Disability and

Maintenance benefit payments to Petitioner and Respondent's refusal to provide vocational rehabilitation. (Petitioner's Exhibit #15).

On January 10, 2018, Petitioner was examined by Respondent's Section 12 medical examiner, Dr. John J. Fernandez. Dr. Fernandez found that Petitioner exhibited paresthesias and numbness along the medial elbow in the medial antebrachial cutaneous nerve distribution and numbness extending into the ring and small finger, irritability of the ulnar nerve along the elbow anteriorly with radiation distally and positive Tinel sign and compression test. Dr. Fernandez found that Petitioner had pain to palpation along the medial epicondyle and at the transposition site anteriorly. In addition, Petitioner had pain posterolaterally with crepitus on rotator through the forearm with a sense of mild instability posterolaterally. Further, Dr. Fernandez found that Petitioner exhibited grinding and clicking emanating all the way to the distal radio-ulnar joint and moderate tenderness at the lateral epicondyle with increased pain on resisted wrist and long finger extension indicative of some residual epicondylitis complaints. (Respondent's Exhibit #4).

Dr. Fernandez indicated that the mechanism of Petitioner's work injury initially caused the injury to his lateral epicondyle and collateral ligament and that he developed complications of ulnar neuropathy after surgery, as a result of the initial injury. Dr. Fernandez also found that the treatment Petitioner had received was reasonable, necessary, and related to Petitioner's work injury. Dr. Fernandez indicated that the left sided cubital tunnel syndrome would not be related to Petitioner's work injury. **In addition, Dr. Fernandez agreed with Dr. Tulipan's work restrictions of 5 to 10 pounds of force, pushing and pulling, and restriction on repetitive use of the right arm to one half of the work day. Dr. Fernandez characterized Petitioner's work restrictions as a sedentary to light use restriction with the right arm.** (Respondent's Exhibit #4).

On March 5, 2018, Petitioner was examined in the pain clinic at DuPage Medical Group at which time his medication was refilled. (Petitioner's Exhibit #4). In April of 2018, Petitioner applied for a job as a cashier at a Mobil gas station in Schaumburg, Illinois, earning $10.00 per hour. Petitioner was only able to perform that job for 4 days because he was asked to unload trucks and stock shelves which was outside the scope of his doctor's restrictions. (TR pp. 32-33).

On May 1, 2018, Petitioner was examined by Dr. Gashkoff. The doctor noted that Petitioner tried to work as a cashier at a gas station but that he was unable to tolerate restocking the shelves. The doctor refilled Petitioner's medication. (Petitioner's Exhibit #4). On June 26, 2018, Petitioner was examined by Dr. Manganelli who continued his medication management. (Petitioner's Exhibit #4).

Dr. Tulipan examined Petitioner again on July 5, 2018. At that time, the doctor noted that Petitioner was experiencing chronic pain in his right arm. **Dr. Tulipan indicated that Petitioner would have difficulty**

using his right arm for the rest of his career and that he was a good candidate to go on disability. (Petitioner's Exhibit #4).

On July 23, 2018, Petitioner was examined by Dr. Manganelli. The doctor recommended that Petitioner continue medication management for the foreseeable future. (Petitioner's Exhibit #4).

On August 8, 2018, Petitioner met with Ms. Kari Stafseth, a rehabilitation counselor for Vocamotive, Inc. Ms. Stafseth issued a report dated August 22, 2018. Within her report, Ms. Stafseth found that Petitioner had lost access to his usual and customary line of employment as a Sheet Metal Worker. In addition, Ms. Stafseth opined that, given the consideration of the medical records of Dr. Tulipan, including what Dr. Tulipan indicated on the Physical Residual Function Capacity Statement, Petitioner would be prospectively employable. However, based on the additional medical evidence regarding Petitioner's lack of attention and/or concentration and Petitioner's anticipated absenteeism based on his physical and/or mental impairments, **Stafseth was of the opinion that Petitioner would not be able to maintain employment within a stable labor market as he would not be a productive or reliable worker.** (Petitioner's Exhibit #9, Stafseth Deposition Exhibit #5).

On August 30, 2018 and October 1, 2018, Petitioner was examined at the pain clinic at DuPage Medical Group, at which time his medication was refilled. (Petitioner's Exhibit #4).

On October 23, 2018, Petitioner returned to Dr. Tulipan. At that time, the doctor recorded a history that states, "[h]e was doing fairly well under the care of a pain management doctor until he injured his shoulder on the right reaching for something on his nightstand. Dr. Tulipan diagnosed Petitioner with right shoulder rotator cuff irritation compounded by limited use of the right arm. Dr. Tulipan provided Petitioner with a cortisone injection to his right shoulder and directed him to continue with pain management and to return in a few weeks. (Petitioner's Exhibit #4). On November 7, 2018, Petitioner was examined in the pain clinic at DuPage Medical Group at which time he received a medication refill. (Petitioner's Exhibit #4).

On November 27, 2018, Petitioner returned to see Dr. Tulipan. At that time, Dr. Tulipan ordered an MRI for Petitioner's right shoulder and advised Petitioner there was little more that he could offer by way of treatment to his right elbow. **Dr. Tulipan reiterated that Petitioner's work restrictions would continue, as before, and be permanent, and directed Petitioner to return as needed. That was the last time, prior to hearing, that Petitioner was examined by Dr. Tulipan.** (Petitioner's Exhibit #4).

On December 10, 2018, Petitioner followed up with the Pain Clinic at DuPage Medical Group. Petitioner's medication was refilled at that time. (Petitioner's Exhibit #4).

On December 17, 2018, Caroline V. Ward-Kniaz, a vocational rehabilitation counselor for Triune Health Group, met with Petitioner at Respondent's request. Ward-Kniaz completed an initial vocational report dated January 9, 2019. Ward-Kniaz recommended that Petitioner engage in computer classes to increase his computer

knowledge and use, and that Petitioner take a basic aptitude and achievement test to determine if formal vocational training would be appropriate. In addition, Ward-Kniaz opined that Petitioner, "...may be potentially capable of working as a building inspector with further training." Ward-Kniaz also indicated that Petitioner would be capable of performing dispatch work, customer service, or building sales work. Ward-Kniaz indicated Petitioner would benefit from assistance with job seeking skills training, identifying employers, resume completion and seeking out appropriate employment. (Respondent's Exhibit #2).

On January 14, 2019, Petitioner was examined at the Pain Clinic of DuPage Medical Group again in order to have his pain medication refilled. (Petitioner's Exhibit #4).

On February 1, 2019, Petitioner was examined by Dr. Rahul Gokhale for his right shoulder. Dr. Gokhale directed Petitioner to obtain an MRI of his right shoulder. (Petitioner's Exhibit #4).

An MRI was performed on Petitioner's right shoulder on February 7, 2019. Petitioner returned to see Dr. Gokhale for his right shoulder on February 11, 2019 (Petitioner's Exhibit #4). On February 18, 2019. Petitioner returned to the Pain Clinic at DuPage Medical Group. Petitioner's pain medication was refilled again. (Petitioner's Exhibit #4).

Aside from the 4 days Petitioner worked at the Mobil gas station in Schaumburg, Illinois, he has not worked in any capacity since November 14, 2012. (TR p. 33). Respondent has never offered Petitioner light duty work. (TR p. 32).

Petitioner sees the physician's assistant for Dr. Manganelli monthly in order to monitor his medication and Petitioner still takes Hydrocodone approximately one time per day for his right arm symptoms. (TR pp. 29-30).

CONCLUSIONS OF LAW

(F) Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator makes the following findings and conclusions:

The Findings of Fact, as stated above, are adopted and incorporated herein.

The Arbitrator finds that Petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being as it relates to his right elbow is causally related to the work injury sustained on November 14, 2012.

. The Arbitrator emphasizes that on May 16, 2014, the Commission found that Petitioner's current condition of ill-being was causally connected to his work accident on November 14, 2012. The Commission's finding regarding causation was affirmed and adopted by the Appellate Court of Illinois, First District, on

December 23, 2016. (Petitioner's Group Exhibit #18). The Arbitrator therefore finds that the Decision of the Commission with respect to causation is the **law of the case.**

Respondent argues, "The arbitrator finds that the Petitioner was involved in an independent, intervening accident that aggravated his right elbow complaints, namely cervical radiculopathy into the Petitioner's right arm." This presumably refers to the motor vehicle accident and/or the dog bite. However, significantly, **Respondent offers no requisite expert medical opinion to support this assertion. Without such opinion, Respondent's assertion has no foundation, and consequently, no merit or value.**

Petitioner, to the contrary, offers the favorable causation opinions of two medical experts, treating physician Dr. Tulipan and Respondent's Section 12 expert Dr. Fernandez, who both offer causation opinions supporting Petitioner. This fact Respondent does not address.

The Arbitrator notes that Petitioner's treating physician, Dr. Tulipan, testified that Petitioner's right elbow condition is causally related to his work injury. Dr. Tulipan also testified that his referral of Petitioner to pain management was causally related to Petitioner's right elbow condition and therefore Petitioner's work injury. (Petitioner's Exhibit #7(a), p. 24).

In further support of the Commission's Decision finding causation, the Arbitrator notes that Respondent's Section 12 expert medical examiner, Dr. Fernandez, also opined that Petitioner's right elbow condition is casually related to his work accident. Specifically, Dr. Fernandez indicated:

> "Mechanism of the work injury appears to be one of an avulsion or posterolateral stress injury, which initially caused the injury to the lateral epicondyle and collateral ligament. In addition, postoperatively, it appears that he developed complications of the ulnar neuropathy after surgery as a result of that initial injury…The right-sided ulnar nerve surgeries would be indirectly related. It appears that he developed first onset of neurologic symptoms and a diagnosis of cubital tunnel syndrome following the surgery for the lateral collateral ligament complex and collateral ligament. This [does] not likely to have occurred randomly or by coincidence. The mechanism would be postoperative swelling and the immobilization process in flexion, which can lead to ulnar neuropathy...**I do believe that the right-sided arm complaints that are currently residual are related to the initial injury laterally and indirectly related to the injury from the surgery with relationship to the medial nerve symptoms**." (Respondent's Exhibit #4).

The Arbitrator further emphasizes Respondent has not offered any expert medical evidence to dispute - let alone rebut - the causal relationship between Petitioner's current condition of ill-being as it relates to his right elbow and his work accident on November 14, 2012.

With respect to the motor vehicle accident that occurred on February 10, 2015, the Arbitrator notes Petitioner testified the symptoms in his right arm **did not change** in any way as a result of the motor vehicle accident. (TR p. 24). In addition, the Arbitrator notes Petitioner informed Dr. Fernandez that his motor vehicle

accident did not affect his right elbow in any way and he did not require any medical treatment for his right elbow as a result of that incident. (Respondent's Exhibit #4).

Further, the Arbitrator notes Dr. Tulipan was specifically asked about whether the motor vehicle accident had any effect on Petitioner's right elbow. Dr. Tulipan testified that he did not believe that Petitioner suffered a direct injury to his right ulnar nerve in the motor vehicle accident. Dr. Tulipan explained that a direct injury to the right ulnar nerve in the motor vehicle incident would be the only situation that could have an impact on his opinion regarding causation. (Petitioner's Exhibit #7(b), p. 95). **Because there is no evidence that Petitioner's right elbow was injured in any way in his motor vehicle accident, the Arbitrator finds and concludes this motor vehicle accident had no impact on causation. In other words, Respondent has not proven that the motor vehicle accident did not break the chain of causation.**

Similarly, the Arbitrator finds and concludes that the dog bite that Petitioner sustained on his right hand on March 27, 2016 also had no impact on the issue of causation with respect to the right elbow. The Arbitrator notes Petitioner was examined by Dr. Tulipan on March 21, 2016, two days *before* the dog bite occurred. At that time, Petitioner was experiencing pain, numbness and tingling in his right arm. (TR pp. 24-25). Petitioner complained to Dr. Tulipan of pain and sensitivity in his right arm. Dr. Tulipan noted Petitioner exhibited a positive Tinel sign at the cubital tunnel and a positive Tinel sign at the wrist, along with a positive flexor compression test on the right. Dr. Tulipan also noted Petitioner lacked 30 to 35 degrees of elbow extension. Dr. Tulipan diagnosed Petitioner with persistent ulnar and median nerve irritation of the right elbow. (Petitioner's Exhibit #5). In addition, the Arbitrator notes Petitioner completed the EMG NCS *prior* to suffering the dog bite. (TR p. 25).

The Arbitrator emphasizes Dr. Tulipan specifically testified the dog bite had nothing to do with Petitioner's right elbow condition. (Petitioner's Exhibit #7(b), pp. 95-96). In addition, significantly, Respondent has not offered any expert medical evidence that indicates Petitioner's condition of ill-being with respect to his right elbow was in any way affected by the dog bite he sustained to his right hand. In other words, Respondent has not proven the motor vehicle accident did not break the chain of causation.

Based on the foregoing, the Arbitrator finds Petitioner has proved by a preponderance of the credible evidence, that his current condition of ill-being, as it relates to his right elbow, is causally related to his work accident on November 14, 2012.

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

The Findings of Fact, as stated above, are adopted and incorporated herein.

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence that the medical services provided to Petitioner were reasonable and necessary. In addition, the Arbitrator finds and concludes Respondent has *not* paid all appropriate charges for all reasonable and necessary medical services.

As discussed above, Dr. Tulipan specifically related Petitioner's medical treatment for his right elbow, and the pain management treatment Petitioner received for his right elbow symptoms, to his work accident on November 14, 2012. (Petitioner's Exhibit #7(a), pp. 22, 24). In addition, the Arbitrator notes that Dr. Tulipan specifically testified that the medical care he provided to Petitioner, including the surgery that he performed on May 20, 2016, was reasonable and necessary. (Petitioner's Exhibit #7(a), p. 23).

In addition, the Arbitrator emphasizes that Respondent's Section 12 expert medical examiner, Dr. John J. Fernandez, stated that the treatment Petitioner received and referenced in his report, "...has been reasonable and necessary and related to the work injury." (Respondent's Exhibit #4).

The Arbitrator emphasizes that Respondent actually has not presented any evidence to dispute the reasonableness or necessity of the medical treatment Petitioner received. Nonetheless, the Arbitrator notes that Respondent has failed to pay a significant amount of Petitioner's medical bills. The Arbitrator notes Petitioner presented unpaid medical bills totaling $98,617.49. (Petitioner's Exhibit #10). The Arbitrator awards these bills to Petitioner, payable pursuant to the Medical Fee Schedule, but only those charges related to Petitioner's compensable right elbow injury are Respondent's liability, and Petitioner shall make certain that only such bills shall be submitted to Respondent for payment, and any and all unrelated charges shall be separated and removed.

The Arbitrator also notes that Medicaid paid $4,166.73 for medical treatment to Petitioner's right elbow. (Petitioner's Exhibit #14). The Arbitrator finds and concludes Respondent shall reimburse Medicaid for these payments and shall hold Petitioner harmless for the total amount paid, of $4,166.73, pursuant to Section 8(j) of the Act.

In addition, the Arbitrator finds and concludes Petitioner's group health insurance, through Sheet Metal Workers Local 73, paid a total of $43,481.15 in medical benefits on behalf of Petitioner for treatment to his right elbow. The Arbitrator finds that Respondent shall reimburse Sheet Metal Workers Local 73 Welfare Fund in the amount of $43,481.15 for those payments made to Petitioner and Respondent shall hold Petitioner harmless for the total amount paid of $43,481.15, pursuant to Section 8(j) of the Act.

(K) What temporary benefits are in dispute? The Arbitrator finds and concludes as follows:

The Findings of Fact, as stated above, are adopted and incorporated herein.

The Arbitrator finds and concludes that the Petitioner was temporarily totally disabled from November 29, 2012 through May 20, 2017, a period of 233 2/7 weeks. In addition, the Arbitrator finds that Petitioner is entitled to maintenance benefits from May 21, 2017 through August 22, 2018, a period of 65 3/7 weeks, pursuant to Section 8(a) of the Act.

The Arbitrator notes that the Commission awarded to Petitioner Temporary Total Disability benefits from November 29, 2012 through May 17, 2013, the date of the prior hearing, a period of 24-1/7 weeks. (Petitioner's Group Exhibit #18). The Arbitrator notes Petitioner was under active medical care with Dr. Freedberg and was recovering from right elbow surgery at that time. (Petitioner's Exhibit #1).

From May 8, 2013 through September 18, 2013, Dr. Freedberg directed Petitioner to remain off work. (Petitioner's Exhibit #1). On September 18, 2013, Dr. Freedberg provided Petitioner light duty work restrictions of no lifting greater than 25 pounds, no stooping, no repeated bending, and no climbing. (Petitioner's Exhibit #1). Petitioner testified he was never offered light duty by Respondent and he never refused an offer to return to light duty work. (TR p. 32). This testimony was unrebutted.

Dr. Freedberg continued Petitioner's light duty work restrictions until March 5, 2014, at which time he directed Petitioner to remain off work completely pending carpal tunnel release surgery. (Petitioner's Exhibit #1). The Arbitrator finds and concludes that although the carpal tunnel syndrome in Petitioner's right wrist is not causally connected to Petitioner's work accident, it is reasonable to infer that, had surgery on Petitioner's right wrist not been performed, Dr. Freedberg would have continued Petitioner's light duty work restrictions for his causally related right elbow condition.

On May 9, 2014, Dr. Freedberg performed a second surgery on Petitioner's right elbow. (Petitioner's Exhibit #3). Following surgery, Dr. Freedberg directed Petitioner to remain off work each time that he examined him through his last examination with Petitioner on January 29, 2015. (Petitioner's Exhibit #1). **The Arbitrator notes there is no evidence in the record that Petitioner was able to return to any type of work from Petitioner's last visit with Dr. Freedberg, through his next right elbow surgery, which was performed by Dr. Tulipan on May 20, 2016.** (Petitioner's Exhibit #8).

Dr. Tulipan testified that he did not release Petitioner to light duty work until he examined him on June 16, 2016. At that time, the doctor testified that he released Petitioner to return to "extremely light duty with a five-pound lifting restriction." (Petitioner's Exhibit #7(a), p. 15).

On November 3, 2017, Dr. Tulipan completed a work status note that indicated that Petitioner had work restrictions of no lifting greater than 5 pounds and no repetitive use of the right arm from June 16, 2016 through the present. (Petitioner's Exhibit #6).

In addition, the Arbitrator notes Dr. Tulipan completed a Physical Residual Function Capacity Statement on February 5, 2018. This form indicated that Petitioner was restricted to light duty work with low repetition activity and no lifting greater than 5 pounds. (Petitioner's Exhibit #7(a), Tulipan Deposition Exhibit #4).

The Arbitrator notes Dr. Tulipan testified that as of the date of his last examination of Petitioner on November 27, 2018, it was his opinion that Petitioner had a permanent five-pound lifting restriction with no repetitive use of the right arm and occasional periods of rest throughout the day. (Petitioner's Exhibit #7(a), pp. 22-23).

Dr. Tulipan further testified that Petitioner would have reached maximum medical improvement for his right elbow condition approximately 12 months after his final right elbow surgery. (Petitioner's Exhibit #7(a), p. 25). Given that Petitioner's final right arm surgery was on May 20, 2016, it would be the opinion of Dr. Tulipan that Petitioner reached maximum medical improvement on May 20, 2017, approximately.

The Arbitrator emphasizes notes that Respondent's Section 12 expert medical examiner, Dr. Fernandez, does not offer any opinion to contradict Petitioner's claimed period of Temporary Total Disability.

In fact, the Arbitrator notes Dr. Fernandez opined, "**I do agree with Dr. Tulipan's restrictions. I would place into 5 to 10-pound range with regards to force, pushing and pulling with some restrictions o[r] repetition less than one half of the workday of the work cycle."** (Respondent's Exhibit #4). The Arbitrator finds it very significant that Respondent has not offered any evidence to dispute the period of Petitioner's claimed Temporary Total Disability. Respondent has also not attempted to impeach its own expert medical witness.

Based on the foregoing, the Arbitrator finds and concludes Petitioner has proved by a preponderance of the credible evidence that he was Temporarily Totally Disabled from November 29, 2012 through May 20, 2017, a period of 233-2/7 weeks.

The Arbitrator notes that following May 20, 2017, Petitioner filed a Petition for Penalties and Attorneys' Fees on January 8, 2018. Within the Petition, Petitioner specifically alleged that he made requests to Respondent to accommodate his permanent light duty work restrictions and, if no light duty work was available,

to provide vocational rehabilitation, pursuant to Section 8(a) of the Act. (Petitioner's Exhibit #15). Respondent did not file a response to Petitioner's Petition.

On August 8, 2018, Petitioner met with Kari Stafseth, a vocational rehabilitation counselor. Stafseth issued a report dated August 22, 2018. Within her report, Stafseth found that Petitioner had lost access to his usual and customary line of employment as a Sheet Metal Worker. In addition, Stafseth opined that, given the consideration of the medical records of Dr. Tulipan, including what Dr. Tulipan indicated on the Physical Residual Function Capacity Statement, Petitioner would be prospectively employable. However, based on the additional medical evidence regarding Petitioner's pain level causing lack of attention and/or concentration and Petitioner's anticipated absenteeism based on his physical and/or mental impairments, Stafseth opined Petitioner would not be able to maintain employment within a stable labor market as he would not be a productive or reliable worker. (Petitioner's Exhibit #9, Stafseth Deposition Exhibit #5).

Based on the opinions of Stafseth, the Arbitrator finds that Petitioner falls within the "odd lot" category of permanent total disability, pursuant to Section 8(f) of the Act, effective the day after Ms. Stafseth's report, August 23, 2018.

Accordingly, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that he is entitled to maintenance benefits, pursuant to Section 8(a) of the Act, from May 21, 2017 through August 22, 2018, a period of 65-3/7 weeks.

(L) What is the nature and extent of the injury? The Arbitrator finds and concludes as follows:

The Findings of Fact, as stated above, are adopted and incorporated herein.

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence that is permanently and totally disabled under the "odd-lot theory" as a result of his work injury, **and his overall condition,** as provided under case law, effective August 23, 2018. Therefore, Respondent shall pay Petitioner permanent and total disability benefits of $1,084.93 per week for life, commencing August 23, 2018, as provided in Section 8(f) of the Act.

> An employee is permanently and totally disabled if he or she is obviously unemployable, *i.e.*, unable to make some contribution to industry sufficient to justify the payment of wages or there is medical evidence to establish a claim of permanent and total disability. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 53; *Lanter Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 10 (1996) (Rarick, J., concurring in part and dissenting in part). However, an employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87 (1983). If an employee's disability is limited and it is not

> obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving he or she fits within the "odd lot" category. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). **The odd-lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market."** *Valley Mould & Iron Co.v. Industrial Comm'n*, 84 Ill. 2d 538, 547 (1981) (citing 2 Arthur Larson *et al.*, Workmen's Compensation § 57.51, at 10-164.24 (1980)). **An employee generally fulfills the burden of establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance**. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 34; *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534-35 (1996). If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. *Westin Hotel*, 372 Ill. App. 3d at 544.

Here, the preponderance of the evidence indicates that while Petitioner is not altogether incapacitated for work, he is so handicapped that he will not be employed regularly in any well-known branch of the labor market. While it is true the record evidences indicates Petitioner did not engage in a diligent but unsuccessful job search (and his testimony regarding same is dubious), and he did retire from his union in 2013, it is not established that Petitioner voluntarily removed himself from the employment market as Respondent asserts; rather, Petitioner was placed under serious work restrictions which would have, and did, render him virtually unemployable, regardless of a job search. Further, Petitioner has demonstrated that because of his age, training, education, experience **and condition,** there are no available jobs for a person in his circumstances. Petitioner has multiple co-morbidities when, combined with his accident-related elbow condition, render him realistically unemployable in a stable labor market for a person in his circumstances.

In support of his decision, the Arbitrator adopts the opinion of vocational counselor Kari Stafseth. The Arbitrator notes that Stafseth testified that if she were only to take into consideration the work restrictions placed on Petitioner by Dr. Tulipan and Dr. Fernandez, it was her opinion Petitioner would no longer be able to work in his previous occupation as a sheet metal worker and would likely be able to earn between $10.00 and $13.00 per hour. (Petitioner's Exhibit #9, pp. 29-32). However, Stafseth also testified that, after taking into consideration the physical residual functional capacity evaluation completed by Dr. Tulipan on February 5, 2018, and the pain report completed by Dr. Manganelli on July 23, 2018, it **was her opinion that there is not a stable labor market for Petitioner.** (Petitioner's Exhibit #9, pp. 32-33). Specifically, Stafseth testified, "[s]o if the individual is not able to concentrate on a task at hand or complete the task at hand, they're not going to be able to fulfill what the job entails." (Petitioner's Exhibit #9, p. 33). On August 8, 2018, Petitioner met with Kari

Stafseth, a vocational rehabilitation counselor. Stafseth issued a report dated August 22, 2018. Within her report, Stafseth found that Petitioner had lost access to his usual and customary line of employment as a Sheet Metal Worker. In addition, Stafseth opined that, given the consideration of the medical records of Dr. Tulipan, including what Dr. Tulipan indicated on the Physical Residual Function Capacity Statement, Petitioner would be prospectively employable. However, based on the additional medical evidence regarding Petitioner's pain level causing lack of attention and/or concentration and Petitioner's anticipated absenteeism based on his physical and/or mental impairments, Stafseth opined Petitioner would not be able to maintain employment within a stable labor market as he would not be a productive or reliable worker. (Petitioner's Exhibit #9, Stafseth Deposition Exhibit #5).

The Arbitrator notes Stafseth's opinion is corroborated by the fact that Petitioner attempted to perform an entry level job as a cashier, earning $10.00 per hour, at a Mobil gas station, in April of 2018, but was only able to work in that capacity for 4 days. (TR pp. 32-33).

By comparison, the Arbitrator finds the opinion of Respondent's retained vocational rehabilitation counselor, Caroline V. Ward-Kniaz, highly speculative and les credible and reliable. Ward-Kniaz suggested in her report that Petitioner should enroll in computer classes and take a basic aptitude test. (Respondent's Exhibit #2). However, despite her recommendations, Respondent inexplicably did not offer either of these programs to Petitioner. On cross examination, Ward-Kniaz admitted that finding a job performing dispatch work, customer service, or building sales work would increase his options with regard to returning to work. (TR p. 87). Ward-Kniaz also suggested that Petitioner "...may be potentially capable of working as a Building Inspector with further training." (Respondent's Exhibit #2). Once again, Respondent did not offer enrollment in the Building Inspection Training program to Petitioner.

It is axiomatic that employers take their employees as they find them. *Sisbro, Inc. v. Industrial Commission,* 207 Ill. 2d 193, 205 (2003). While it is true that the only condition that is causally related to Petitioner's work injury is his right elbow, the Arbitrator notes that Dr. Tulipan specifically testified that the pain management Petitioner is receiving, as it relates to his right elbow, is also related to his work injury. (Petitioner's Exhibit #7(a), p. 24). Further, the Arbitrator notes that Petitioner's pain management for his cervical and lumbar spine, the treatment he has received for right sided carpal tunnel syndrome, and the injury Petitioner sustained to his right shoulder, **all have a bearing on his employability**. All of this must be taken into account when assessing Petitioner's **overall condition and his likely employability – because "employers take their employees as they find them."**

Within her report, Ward-Kniaz indicated she reviewed the Pain Report from Dr. Manganelli and the Physical Residual Function Capacity statement completed by Dr. Tulipan. However, Ward-Kniaz failed to

address how Petitioner's chronic pain, diminished ability to sustain concentration and attention, and inability to work in a competitive work setting, would affect his employability. For these reasons, the Arbitrator affords more weight to the opinion of Stafseth than the opinion Ms. Ward-Kniaz. The Arbitrator also finds it significant that no medical expert has offered an opinion in opposition to those Stafesth offered (or, in fact, in support of Ward-Kniaz).

The Arbitrator also finds that the totality of the medical evidence supports a finding that Petitioner fits into the "odd-lot" permanent total classification.

On January 10, 2018, Petitioner was examined by Respondent's Section 12 medical examiner, Dr. John J. Fernandez. Dr. Fernandez found that Petitioner exhibited paresthesias and numbness along the medial elbow in the medial antebrachial cutaneous nerve distribution and numbness extending into the ring and small finger, irritability of the ulnar nerve along the elbow anteriorly with radiation distally and positive Tinel sign and compression test. Dr. Fernandez found that Petitioner had pain to palpation along the medial epicondyle and at the transposition site anteriorly. In addition, Petitioner had pain posterolaterally with crepitus on rotator through the forearm with a sense of mild instability posterolaterally. Dr. Fernandez found Petitioner exhibited grinding and clicking emanating all the way to the distal radio-ulnar joint and moderate tenderness at the lateral epicondyle with increased pain on resisted wrist and long finger extension indicative of some residual epicondylitis complaints. (Respondent's Exhibit #4).Dr. Fernandez indicated that the mechanism of Petitioner's work injury initially caused the injury to his lateral epicondyle and collateral ligament and that he developed complications of ulnar neuropathy after surgery, as a result of the initial injury. **(Dr. Fernandez indicated that the left sided cubital tunnel syndrome would not be related to Petitioner's work injury; however, as an employer takes its employees as it finds them, it is obvious that an additional condition of ill-being to Petitioner's left arm only makes him overall <u>less</u> employable). In addition, <u>Dr. Fernandez agreed with Dr. Tulipan's work restrictions</u> of 5 to 10 pounds of force, pushing and pulling, and restriction on repetitive use of the right arm to one half of the work day. Dr. Fernandez characterized Petitioner's work restrictions as a sedentary to light use restriction with the right arm.** (Respondent's Exhibit #4).

Based on the foregoing, the Arbitrator finds and concludes Petitioner has proved by a preponderance of the credible evidence that he falls within the "odd lot" category of permanent total disability under Section 8(f) and he is permanently and totally disabled as a direct result of his work injury, effective August 23, 2018.

(M) Should penalties or fees be imposed upon the Respondent? The Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner has proven, and the record so corroborates, that Respondent has engaged in conduct that warrants and justifies the imposition of penalties and fees under Sections 19(l), 19k) and 16.

. The Arbitrator finds and concludes that penalties should be imposed upon Respondent in the amount of $139,045.08, as provided in Section 19(k) of the Act. Further, penalties in the amount of $10,000.00 as provided in Section 19(l) of the Act, should also be imposed upon Respondent. Lastly, attorney's fees in the amount of $55,618.01, as provided in Section 16 of the Act, should be imposed upon Respondent.

As indicated above, Petitioner was Temporarily Totally Disabled from November 29, 2012 through May 20, 2017, a period of 233-2/7 weeks. In addition, Petitioner is entitled to maintenance benefits from May 21, 2017 through August 22, 2018, a period of 65-3/7 weeks. This equates to a total period of time of 298-5/7 weeks. At Petitioner's benefit rate of $1,084.93 per week, Petitioner is owed $324,084.09 for this period of time ($1,084.93 x 298-5/7 = $324,084.09). Respondent has paid Petitioner a total of $45,993.92 for his lost time. (Arbitrator's Exhibit #1). Accordingly, Petitioner is owed $278,090.17 in outstanding benefits since November 29, 2012 ($324,084.09 - $45,993.92 = $278,090.17).

Respondent has not offered any credible evidence to reasonably dispute Petitioner's period of claimed temporary Total Disability or maintenance benefits. In addition, the Arbitrator notes that Respondent's *own* medical examiner, Dr. Fernandez, agrees that Petitioner is unable to return to his previous line of work as a sheet metal worker and agreed with the permanent restrictions. (Respondent's Exhibit #4). Further, Respondent failed to respond in any way to Petitioner's Petition for Penalties and Attorneys' Fees, which was filed on January 8, 2018. (Petitioner's Exhibit #15). Nonetheless, Respondent has refused to pay Petitioner as required by the Act.

Therefore, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that Respondent's refusal to pay Petitioner's Temporary Total Disability and Maintenance benefits is unreasonable, vexatious, and in bad faith.

Accordingly, the Arbitrator imposes attorneys' fees in the amount of $55,618.01 (20% of $278,090.17), pursuant to Section 16 of the Act. In addition, the Arbitrator imposes penalties, in the amount of $139,045.08 (50% of $278,090.17), pursuant to Section 19(k) of the Act. Lastly, the Arbitrator imposes penalties pursuant to Section 19(l), in the amount of $10,000.00 ($30.00 per day for each day that benefits have been withheld, not to exceed $10,000.00). **Further,** Respondent shall pay Petitioner **additional** penalties under Sections 19(k) and attorneys' fees under Section 16 regarding all unpaid **medical bills** related **only** to the injured right elbow, said amounts to be determined after those specific bills and charges are identified and paid and after calculating any fee schedule reductions.

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Date: October 17, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JONNIE RAMSEY,

Petitioner,

vs. NO: 18 WC 6292

ZF TRW AUTOMOTIVE,

Respondent.

21IWCC0124

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 3, 2020 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 15 2021

Thomas J. Tyrrell

TJT/tdm
O: 1/19/21
051

Stephen Mathis

DISSENT

I respectfully dissent. I find Petitioner failed to prove her current left knee condition and need for treatment is causally related to her accident of September 11, 2016.

Petitioner sustained an undisputed accident on September 11, 2016 when she twisted and fell onto her left knee. T. 27; Stipulation Sheet. Petitioner sought medical treatment and came under the care of Dr. Plowgian. Dr. Plowgian reviewed the MRI of October 1, 2016 and felt Petitioner did not sustain any structural damage to her knee. PX2. Dr. Plowgian diagnosed an MCL sprain, bone contusion, and aggravation of arthritis. PX2. Following a course of conservative treatment which included physical therapy and injections, Dr. Plowgian released Petitioner to return to work without restrictions on March 24, 2017 and placed Petitioner at MMI on April 12, 2017. PX2.

Petitioner testified she continued to perform her job duties, albeit with pain for over nine months, without any additional medical treatment. T. 48-49. On February 18, 2018, Petitioner sought treatment with Dr. Brewer who is presently recommending a total knee replacement.

On August 26, 2019, Dr. Brewer provided his opinions via evidence deposition. PX11. Dr. Brewer testified Petitioner's accident aggravated her knee condition which led to the need for the currently recommended surgery. PX11, p. 25-26. As for the basis of his opinion, Dr. Brewer testified "[b]ecause she was asymptomatic prior to the injury and then she had the injury and then became symptomatic." PX11, p. 26. Dr. Brewer confirmed he did not review Dr. Plowgian's

records nor did he know the date Petitioner was placed at MMI for her work-related injury. PX11, p. 30.

On October 25, 2019, Dr. Young provided his opinions via evidence deposition. RX3. Dr. Young testified he evaluated Petitioner on April 16, 2019 at Respondent's request. RX3, p. 9. Dr. Young testified Petitioner suffered a high grade MCL tear due to her injury of September 11, 2016 which was appropriately treated through the date of MMI. RX3, p. 13. As to Petitioner's current condition of ill-being, Dr. Young testified Petitioner's MCL tear was healed, and she presently suffered from arthritis which was neither caused nor aggravated by her work accident. RX3, p. 18. Dr. Young explained he based his opinion on the MRI which did not evidence acute cartilage damage, and more importantly, the type of injury Petitioner sustained- a MCL tear- off loads the area of arthritis. RX3, p. 19.

I afford greater weight to the opinions of Dr. Young over those of Dr. Brewer. "An expert opinion is only as valid as the reasons for the opinion." *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC. Dr. Young persuasively explained Petitioner suffered from a MCL sprain which resolved following appropriate conservative care. His opinion is consistent with Dr. Plowgian's treatment and records which evidence that Petitioner was released to full duties in March of 2017 and placed at MMI for her injury as of April 12, 2017.

As the Court noted in *County of Cook v. Industrial Commission*:

> Every employee whose disease or preexisting condition disables him while at work is not automatically entitled to recovery under the Workmen's Compensation Act…'In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. 68 Ill. 2d 24, 31-32, 368 N.E.2d 1292 (1977).

For the above-stated reasons, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

RAMSEY, JONNIE
Employee/Petitioner

Case# **18WC006292**

ZF TRW AUTOMOTIVE
Employer/Respondent

21IWCC0124

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

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2847 TAPELLA & EBERSPACHER LLC
DANIEL C JONES
6009 PARK DR
CHARLESTON, IL 61920

1256 HOLTKAMP LIESE SCHULTZ ET AL
R KENT SCHULTZ
217 N 10TH ST SUITE 400
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JONNIE RAMSEY
Employee/Petitioner

v.

ZF TRW AUTOMOTIVE
Employer/Respondent

Case # **18** WC **6292**

Consolidated cases: _____

21IWCC0124

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis S. O'Brien**, Arbitrator of the Commission, in the city of **Urbana**, on **January 17, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **9/11/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**22,888.32**; the average weekly wage was $**440.16**.

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

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

Respondent shall be given a credit of $**7,545.60** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**7,545.60**.

ORDER

The Arbitrator finds that Petitioner's bone and soft tissue contusion of the left knee, the medial cruciate ligament sprain in the left knee, the pes anserine tendinitis of the left knee, as well as the aggravation and exacerbation of preexisting tricompartmental arthritis in the left knee are all causally related to the accident of September 11, 2016

The Arbitrator finds that Respondent shall pay reasonable and necessary medical services for the bills contained in Petitioner's Exhibits #6, #7, #8, #9 and #10 , as provided in Section 8(a) of the Act, pursuant to Section 8.2 of the Act. The Arbitrator further finds that Respondent is entitled to credit for any amounts paid on said bills prior to the issuance of this decision.

The Arbitrator finds that a total knee replacement of Petitioner's left knee is reasonable and necessary to treat and/or cure Petitioner's injuries from the accident of September 11, 2016. Respondent shall pay for reasonable and necessary prospective medical services as recommended by Dr. Brewer, to wit a total knee replacement of Petitioner's left knee, as well as ancillary medical services relating to said total knee replacement of Petitioner's left knee, as provided in Section 8(a) of the Act, pursuant to Section 8.2 of the Act.

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

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

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

Dennis J. O'Brien

Signature of Arbitrator

February 27, 2020
Date

ICArbDec19(b)

MAR 3 - 2020

Findings of Fact

SUMMARY OF TESTIMONY

Petitioner testified that on September 11, 2016 she was working at the packing station at Respondent's automotive parts plant in Marshall, Illinois. She said it was a large plant which produced safety parts such as braking, air bags and front facing cameras. She said at the time of the accident she was earning $440.16 per week and had worked for Respondent since 2013. She began as a runner and clerk but as of the date of accident and the date of arbitration was working assembly. She said that before getting hurt she was a clerk, working overtime as a runner on weekends. She would push a cart around the aisles collecting parts that had problems and take them to the room where analysis was done on them and, when that was completed she would take the parts back out to the lines where she had earlier collected them. She said this involved constant walking. She said that her Fitbit indicated that on an average day she would walk seven to nine miles, and that on her highest day she walked 16.9 miles.

Petitioner said that from the time she started work as a runner in 2013 up to September 13, 2016 she had not had any problems with either of her legs or knees, nor had she had medical treatment for either knee. She said it was a grueling job as they are on their feet constantly. She said she would train new clerks and runners who were hired, and not a lot of people could handle the work. She said that prior to September 11, 2016 she had not performed any assembly work.

On September 11, 2016 Petitioner said she was working at the pack station where parts coming down the line are picked up off of a belt, checked for problems and packed in a box. When the box was full you would turn around and place the box on a skid behind you. The work was constant. There were usually a couple of people packing as it is a quick process. They would run out of boxes periodically and the worker would have to make boxes while parts continued to come down the line. The worker would be in constant movement. On that date she leaned over to get a part and she moved to get a box and her foot got caught underneath the framework. When she moved she said should couldn't move her foot, she lost her balance and twisted her knee, falling to the right on to her left knee and her right hand. She said her knee twisted on its way down and she landed directly on the left kneecap.

Petitioner said that in doing her work prior to this she had performed twisting and pivoting activities as part of her job but had never had an issue doing that. She said that immediately after her fall she had pain, with a stretching pain on the inside of the left knee. She demonstrated that her knee had rotated inward while outer leg seemed to rotate laterally,

outwards. She said that after she pulled her foot out from the framework she was able to stand, but that it hurt immediately. She reported the accident to her supervisor that same day. She did not get immediate medical attention as she wanted to see how it went. She thought it would go away as she was in good shape. She was sent on September 16 to the emergency room of Union Hospital in Terre Haute, Indiana. At that time she said she had a terrible purple bruise on the inner part of her leg, indicating the area from her mid-thigh to right below her knee. She said the darkest part was right around the knee area. She said she had not fallen in the meantime nor had any pressure been placed on that knee in those four or five days. X-rays were taken at the hospital, she was told her diagnosis was an MCL strain, she was told to ice and elevate the knee, and she was told to limit her work to five pounds of pushing, pulling, and lifting. She said she was not allowed to work light duty, but Respondent paid her temporary total disability benefits while she was off work.

She then saw a nurse practitioner at the Union Hospital facility, and was referred to a Terre Haute, Indiana orthopedist, Dr. Plowgian at Union Associated Physicians. She treated with that doctor through Mid-April 2017. She said she neither sought nor received treatment for her right knee, her right knee was not painful and she did not lose time from work due to her right knee. She said Dr. Plowgian injected her left knee with Lidocaine on October 27, 2016. The injection helped from about a week or two but did not cause the pain to go away completely. The pain gradually came back. On December 12, 2016 she received an injection of Marcaine and Kenalog from Dr. Plowgian. She said the effects of that injection only lasted for a day or two before the pain came back. She was sent for a course of physical therapy at Marshall Physical Therapy beginning on November 1, 2016 and continuing through January 24, 2017 when it ended as the workers' compensation carrier would no longer pay for it. The therapy resumed on February 10, 2017. She said it seemed to ease the pain. She was also icing it and was still off work. She said she was doing better as long as she was not on it a lot.

She said her knee area remained bruised for quite some time, it was bruised when she started physical therapy. She said the knee would pop, she could hear it pop at times. She felt she had decreased strength and flexibility in the leg. She said she had no problems with her right leg while undergoing physical therapy.

Petitioner said that on March 15, 2017 Dr. Plowgian told her she could go back to work, having given her another Lidocaine injection that day. She said the effects of the shot lasted a week or two. Upon her return to work she said her left knee was sore, the pain had never gone away, but she had to work, she could not go without a job.

Petitioner said she last saw Dr. Plowgian on April 12, 2017. She said she still had quite a bit of pain at that time, though she could not remember if it was a 4 or a 5. She said she had continued

getting physical therapy through May 1, 2017, and that at the conclusion of that therapy she still had no pain in her right knee.

Petitioner said she received no treatment to the left knee from May 1, 2017 until February 12, 2018 as Dr. Plowgian thought she was too young for the surgery which was the only thing that would give her relief. She said she therefore went back to work for as long as she could handle the pain and do her job. She said the pain in her left knee never went away. She said it was on the inside of her knee and underneath the kneecap at the joint itself. She said she has constant throbbing pain and occasionally it feels like someone is jabbing an ice pick in her knee.

Petitioner said that upon her return to work she performed the same duties, though she could no longer do the running, which was her overtime work, so she just worked her normal job, the packing, both standing and sitting. She said the knee pain got worse over time, as she was working three 12 hour shifts in a row and her leg would swell by the end of the day and would feel like it was very hot. But she indicated that they tried to be good to her, letting her sit and stand, but the pain was constantly there.

On February 12, 2018 she went to see Dr. Brewer at Sarah Bush Lincoln in Mattoon, Illinois for a second opinion as the pain had gotten to the point where she thought she needed treatment. During her first visit with Dr. Brewer that physician gave her a Lidocaine injection which helped for a small amount of time. Dr. Brewer also started her on a series of three viscosupplementation shots. She said the effect of those lasted longer but still wore off over time. She said Dr. Brewer wanted to do knee replacement surgery, which is what she was seeking through this hearing.

Petitioner said he was seen by Dr. Young for an independent medical examination. She said she spoke with him for eight to ten minutes during which time he had her lift her leg up and he took it back and forth and asked her if she had pain. She said he did the exam to both legs and he spoke to her about what she could do. He asked her if his examination procedure hurt.

As of the date of arbitration Petitioner said she was still doing the packing job, though the location of the work had changed to a different part of the plant in mid-2019, and they no longer pack, they work with robots and run a labeler, which allows you to sit and stand at your preference, and the robot drops the part in a box rather than them taking them off the assembly line. She said she performs her job both standing and sitting as she can't really stand or sit for too long a period of time. She said her knee continues to hurt as she works, and it is the same type of pain she had spoke of earlier, under her kneecap and on the side of the knee. She could work overtime if they needed extra work in her area, but she could not do the running overtime. She said that the week of arbitration had been bad as she wasn't running the labeler but was instead helping to assemble cameras, which required her to stand to put a small computer board

inside the camera. This caused the inside of her leg to go numb. That was the first time she had stood for ten hours and it caused her leg to swell a lot and to ache. She said she had trouble walking after doing that job, but she always has some trouble walking. She said that pain had not totally gone away yet, and she was taking Tramadol and Aleve for it. She said she was still not having any trouble with her right knee.

Petitioner said she still wanted the surgery Dr. Brewer had been recommending as she felt it was the only thing that was left, that was what she was seeking in this proceeding.

On cross-examination Petitioner agreed that her independent medical examination with Dr. Young took place in April of 2019. She said her employer had her examined by another physician of their choosing in February of 2017. She agreed that in September of 2016 she was five foot four inches and weighted about 215 pounds. She has since gained weight, based upon how she fits into her clothing, but she did not know how much.

Petitioner agreed that Dr. Plowgian released her from his care in April of 2017, releasing her to return to work full duty without restrictions.

She said when she saw Dr. Brewer in February of 2018 she told him of worsening of her knee pain in the past few months. She said that Dr. Brewer on more than one occasion recommended physical therapy but she was not able to do that as she did not have a car.

SUMMARY OF MEDICAL EVIDENCE

The records of Union Hospital indicate their seeing Petitioner on September 20, 2016. She gave a history of a fall at her work station about a week earlier, landing on her left knee. She said the pain had progressively worsened since then. Physical examination at that time showed pain with range of motion, both active and passive, and swelling of the knee was noted. Slight bruising was also noted. X-rays showed no fractures. Petitioner was discharged with a prescription for Naprosyn and crutches, which she was to use as necessary for ambulation. A diagnosis of left knee contusion was made at that time and Petitioner was given a release to return to work with no lifting, no prolonged standing, no overhead working, no continuous working at heights, no climbing ladders, and no operating dangerous machinery restrictions. (PX #1)

Petitioner then saw staff members of Union Hospital Center for Occupational Health on September 19 and 26, 2016. The found her to have a swollen bursa and patella area, swelling in the patellar area, medial joint line tenderness, and pain with full flexion. They gave her work restrictions effective September 19, 2016 and since her knee was feeling worse, they ordered an

found her MCL to no longer be lax, though it was still painful. He told her to continue wearing her hinged brace on the knee and he injected her pes anserine tendon, which gave her immediate relief. (PX #2)

Dr. Plowgian saw Petitioner ten days later, on December 22, 2016. He noted that while Petitioner reported some relief of pain, she still had pain in the medial aspect of the knee. She said the hinged brace had helped her walk. On physical examination Dr. Plowgian said her contusion and MCL sprain were improving, as was the pes anserine tendinitis, but the corticosteroid injection from October was wearing off and Petitioner had increased joint line tenderness, as well as some continuing tenderness of the pes anserine tendinitis. He told her to continue her physical therapy, continue wearing the hinged brace and noted that he thought she would benefit from hyaluronic acid injection for the osteoarthritis in her knee, which he felt might give her longer lasting relief than the corticosteroid injections. He said he would seek approval for the series of three injections from the workers' compensation carrier. PX #2)

Respondent had Petitioner examined by Dr. Milne pursuant to Section 12 on February 14, 2017. She gave him a consistent history of falling onto her anterior knee at work. Petitioner was complaining at that time of pain in the anterior and medial aspects of her left knee as well as the pes bursa. He found her to have noticeable effusion at the pes bursa, mild knee joint effusion, pain at the end of her range of motion, mild palpable patellofemoral crepitus, and weakness of her quad and hamstring groups. He noted subtle narrowing of the medial joint space on x-rays as well as mild tricompartmental osteoarthritic changes. Dr. Milne was of the opinion that the treatment Petitioner had received was appropriate but he did not think she needed viscosupplemental injections to treat her work injury. He said he did feel she had a persistent MCL sprain with bony edema and that this could often take months to resolve. He noted, "I do believe her work injury explains her current symptoms. I do believe she has some normal age-related underlying arthrosis that I don't think is terribly clinically relevant based on her physical exam and MRI findings. I think that she primarily has a medial collateral ligament sprain and bony edema and this often takes a long time to resolve." He recommended she remain on light duty restrictions of no bending, stooping, kneeling, squatting or climbing. (RX #2)

Dr. Plowgian reported on March 15, 2017 that the hyaluronic acid injections had not been approved. Petitioner on that date noted she would like to return to work, but since they did not have light duty, she needed a release to return to work with no restrictions. She told him that the October corticosteroid injection had helped and she would like another. On physical examination she was found to still have tenderness on the medial and lateral joint tines as well as around the patella and pes anserine tendon insertion. Resisted knee flexion and hamstring stretch caused pain and she had a positive patellar grind. Dr. Plowgian provided Petitioner with another corticosteroid injection, told her to discontinue use of the hinged brace and allowed her to return to work effective March 24, 2017 if she could tolerate the pain. (PX #2)

Petitioner returned to see Dr. Plowgian on April 12, 2017 reporting that her knee had been pain free after the corticosteroid injection for a few weeks, with just mild soreness at the end of the day, but for the last week her pain had been slowly increasing. She had been able to continue to work, but the pain was worse at the end of the day, with occasional swelling. Dr. Plowgian found mild medial and lateral joint line tenderness of physical examination, though it was no longer tender over the pes anserine tendon insertion. She had normal range of motion, but had pain on deep flexion. She was also found to have positive patellar grind. Dr. Plowgian diagnosed her as having osteoarthritis of the left knee as well as pes anserine tendinitis, improved. He warned her that the pes anserine tendinitis could return as a result of antalgic gait. She said she could do her essential duties at work and did not want restrictions. The doctor noted again that the hyaluronic acid injections had not been authorized and Petitioner did not want surgery at that time, she thought she'd be able to manage her symptoms. He therefore released her to return as necessary and declared her to be at maximum medical improvement. (PX #2)

Petitioner had her final physical therapy session on May 1, 2017. In the discharge summary the physical therapist reported that Petitioner had returned to work and felt 75% back to normal. Her worst pain as of that time was a 3, her best was a 0 and her pain on that day was a 1. She described her pain as dull and achy. They found her to have some decrease in left knee function, some decrease in left knee range of motion, some decrease in left knee strength and noted she was unable to jog. They said all of her long terms physical therapy goals had been met except for range of motion (90%) and ability to jog (unable). They also noted that she could not walk with a proper heel strike/toe off gait. (PX #4)

Petitioner was next seen for a second opinion nine months later, on February 12, 2018, by Dr. Brewer. Her complaints at that time were of dull, achy pain on the medial aspect of her knee, worse with long periods of ambulation and standing at work. She said the pain had gotten worse in the past few months. X-rays taken that day showed left knee moderate to severe degenerative joint disease of the medial compartment with mild patellofemoral joint disease, with significant medial sided joint space narrowing and osteophyte formation. Dr. Brewer found her to have mild effusion of the left knee and significant tenderness on the medial joint line as well as mild tenderness of the left MCL. She had a positive patellofemoral grind test. She had not had a corticosteroid injection in eleven months so Dr. Brewer gave her a Lidocaine injection that day. (PX #5)

When seen five weeks later, on March 19, 2018, Petitioner told Dr. Brewer that the injection had only helped for one week and then the pain returned. She had not been in physical therapy as she did not have a car. Her physical examination was the same as her previous visit, and Dr.

Brewer spoke to her about Visco supplementation and gave Petitioner her first Gelsyn injection. He also prescribed Tramadol for her knee pain. (PX #5)

Petitioner returned for her second Gelsyn injection on April 2, 2018 and advised Dr. Brewer that she did not see any real difference after her first injection. She said the Tramadol was helping her sleep. She received her second Gelsyn injection at that time. (PX #5)

Petitioner was seen by Dr. Brewer for her third, and last, Gelsyn injection on April 9, 2018. She again said she had not seen a change after her last injection. (PX #5)

On June 4, 2018 when he next saw Petitioner, Dr. Brewer said that the Visco did not give Petitioner relief, she was still experiencing aching medial pain, worse at the end of the day after a long period of standing and ambulation. She was now show some weakness in her hip flexor strength, having trouble getting her foot over a step. Her left knee range of motion was somewhat improved, up to 130 degrees from a previous 125, she had a negative patellofemoral grind test and she continued to be tender on the medial joint line. Dr. Brewer said Petitioner had mild relief from the injections though the medial pain was keeping her up at night. He felt physical therapy would help her and buy her time before an eventual total knee replacement, which she would eventually need, and he gave her another Lidocaine injection. (PX #5)

Dr. Brewer's next visit, and last medical record is from February 11, 2019, eight months later. X-rays of both knees were taken on that occasion, and the right knee showed no significant joint space narrowing, while the left knee showed severe medial compartment joint space narrowing and small to moderate sized tricompartmental osteophytes. Petitioner reported that her pain had worsened, she was having trouble squatting and was having trouble doing her job secondary to pain and weakness. Dr. Brewer's exam on that date was basically unchanged. He described the x-rays as showing medial compartment collapse, saying the degenerative joint disease had gotten progressively worse in the last year, that she now had bone-on-bone articulation with no cartilage left in the medial joint space. He said that Petitioner had gotten to the point where she could not walk or be on her feet for long due to pain and she said she was now ready for surgery. Even though having another corticosteroid injection would delay surgery to decrease the risk of infection, Petitioner wanted such an injection and he provided a Depo-Medrol injection on that visit. Dr. Brewer said he would perform a total knee replacement once she had pre-surgical clearance. (PX #5)

TESTIMONY OF DR. ERIC BREWER

Dr. Brewer testified for Petitioner via deposition. He said he was a board certified orthopedist. He had last seen Petitioner on August 24, 2019, three days before his deposition. That office note was not contained in Petitioner's Exhibit #5. At that last visit Petitioner was suffering

significant pain and said she was unable to do her work, and therefore wanted surgery for pain relief. He felt she needed that surgery in February of 2019 and that she still needed that surgery. (PX #11 p. 12,13,23,24)

Dr. Brewer testified that he was of the opinion that Petitioner's current condition was exacerbated by the work injury of September 11, 2016, as was her current need for surgery. The basis for that opinion is her being asymptomatic prior to the injury and then becoming symptomatic after the injury. He said she is not at maximum medical improvement. He testified that while she had underlying disease prior to the injury, "it was asymptomatic before and she was able to do her job, then she fell, and she was unable to do her job and had significant changes. So I think it was exacerbated but not solely caused by." (PX #11 p. 25-28)

On cross-examination Dr. Brewer said the MCL sprain would have been related to her work injury and the MRI also showed the degenerative changes which would have been a preexisting condition. He said it showed grade 3 chondromalacia, which is pretty advanced. He noted that the first x-rays when he saw Petitioner did not show bone-on-bone, it was to a lesser extent, but the more recent x-rays did show bone-on-bone. Dr. Brewer said that degenerative joint disease is a condition which can be caused by wear and tear on the knee and naturally progresses over time, and that this is especially true in an obese person. (PX #11 p.28-33)

Dr. Brewer said that one of the reasons for his causation opinion was that Petitioner was totally asymptomatic prior to the work injury and was symptomatic afterwards. (PX #11 p.33,34)

He agreed he could not say that by February of 2018 she might have not had the same symptoms without the fall at work on September 11, 2016, but said that would be speculation. (PX #11 p.35)

On re-direct examination Dr. Brewer said Petitioner's chances of having pain would increase when she has a work injury. (PX #11 p.35,36)

TESTIMONY OF DR. JASON YOUNG

Dr. Young testified for Respondent via deposition. He said that he was a board certified orthopedist and that based on his review of the records, history and his physical examination Petitioner suffered a higher grade MCL tear as a result of this accident. He said that Petitioner was obese, with a BMI of 36, and that obesity was a risk factor for producing arthritis n the knee and for making arthritis in the knee symptomatic. He said arthritis progresses quicker for someone who is heavier than for someone who is lighter. During his physical examination of April 16, 2019 he found Petitioner to have some fluid in the knee, tenderness over the medial side of the knee, some crepitation under the kneecap, a little limitation of motion, an inability to

full straighten the left leg and an ability to only flex the left knee 95 to 100 degrees. (RX #3 p.13-15)

He said x-rays of that date showed bony opposition of the medial compartment with severe arthritis and osteophytes. He said the patellofemoral compartment had moderate to severe arthrosis with joint space collapse and osteophyte formation as well as subchondral cysts. He did not compare these new x-rays with her earlier x-rays. Dr. Young's diagnosis for Petitioner was that of a MCL tear that had healed. He said an MCL tear actually reduces stress on medial sided arthritis as it off loads the area of the arthritis, so it would not be an accelerating or exacerbating factor of any kind. He believed Petitioner reached MMI in April of 2017. When asked if Petitioner's being asymptomatic before the work accident would change his causal connection opinion Dr. Young said it would not, "The natural history of this type of arthritis is that eventually symptoms will become apparent and I think it's just as possible that its coincidental that her symptoms developed in and around the time of this particular incident." He did believe Petitioner was a candidate for a total knee replacement. (RX #3 p.17-22)

On cross-examination Dr. Young testified that his physical examination showed small effusion, a build up of fluid inside the knee, which indicated an inflammatory response inside the knee, and would have been caused by arthritis. He said his exam did reveal crepitus, vibration due to the joint not being smooth, a condition also caused by arthritis. He said Petitioner's right knee had no fluid on it, and had range of motion of zero to 135 degrees, which was normal, while her left knee lacked 5 degrees of extension, it couldn't fully straighten, and only had 95 to 100 degrees of flexion. He said the cause of the loss of motion was arthritis, that arthritis was more significant on her left side. He then repeated his belief that Petitioner's work injury had nothing to do with the difference between the knees, that the injury had not exacerbated it. (RX #3 p.30-33)

Dr. Young said Dr. Brewer was not lying when he gave his opinion that Petitioner's current condition had been exacerbated by the work accident, saying that was Dr. Brewer's opinion, and that opinion was just different than his. (RX #3 p.33)

Assessment of Credibility

The Arbitrator finds that Petitioner's testimony at arbitration was credible. Her history of accident, complaints and treatment were consistent with the medical records introduced into evidence. Her complaints both in the medical records and at arbitration did not appear out of proportion to her objective physical findings.

Conclusions of Law

In regards to whether Petitioner's current condition of ill-being is causally related to the injury the Arbitrator makes the following findings:

Petitioner testified that prior to the undisputed accident of September 11, 2016 she had performed her work for Respondent which included twisting and pivoting activities, and she had never had a problem doing those activities. She further testified that prior to the date of this accident she had not had any problems with either of her legs or knees and had not received medical treatment for either knee. On September 11, 2016 while performing her work and moving to get a box her foot got caught underneath the framework, she could not move her foot, she lost her balance, twisted her left knee, and fell directly onto her left knee and right hand. She then felt immediate pain on the inside of the left knee, she pulled her foot out from under the framework and was able to stand, though in pain. She immediately reported the accident to her supervisor that day. She said her left thigh and knee produced a large, dark bruise and in the days following the accident she sought medical attention as the pain continued.

Petitioner testified to ongoing left knee complaints from the date of the accident until the date of arbitration. Respondent stipulated that she was temporarily totally disabled as a result of her injuries from this accident for 25 5/7 weeks, from September 25, 2016 through March 23, 2017. (Arb. Exh. #1) The medical records of Union Hospital, Union Hospital Center for Occupational Health and Dr. Plowgian at AP Bone & Joint Center contain histories from Petitioner which are consistent, persistent complaints relating to not only Petitioner's MCL sprain but to her pes anserine tendinitis and patellar grind. An early MRI showed a cartilage defect on the central patella and severe edema in Hoffa's space.

Dr. Plowgian as early as October 27, 2016 was noting that Petitioner "does have evidence of underlying arthritis in the knee that was likely aggravated by her fall, and she has suffered additional injuries including a sprain of the medial collateral ligament, bone and soft tissue contusion and she demonstrates tenderness over the pes anserine tendon insertion, which may have resulted from antalgic gait over the last 6 weeks." (PX #2)

Petitioner continued treating, made consistent complaints and had consistent physical findings on examination by Dr. Plowgian and Dr. Brewer. At no time following this accident is there evidence indicating Petitioner was symptom free. Dr. Plowgian wanted to provide additional treatment, a series of hyaluronic acid injections, but approval does not appear to have been given by the workers' compensation carrier, no doubt due to the opinion of Dr. Milne in his IME report that those injections were not needed to treat her work injury. Dr. Plowgian provided Petitioner with another corticosteroid injection on March 15, 2017. It was on that date

that Petitioner noted that she would like to return to work but that Respondent would not accept her back with restrictions. She at that point stated that she wished to be released to return to work without restrictions as she thought she would be able to handle her symptoms. Dr. Plowgian therefore gave her the release to return to work without restrictions effective March 24, 2017.

Petitioner told Dr. Plowgian that the corticosteroid injection provided temporary relief for a few weeks but the pain was slowly increasing as of April 12, 2017 when he saw her. While Dr. Plowgian released her to unrestricted work on April 12, 2017, and declared her to be at maximum medical improvement, that is not the equivalent of saying she is cured or not in need of future medical treatment. During that same office visit she was noting that the pain temporarily aided by the injection at her last appointment was already returning. Indeed, she had been diagnosed with degenerative joint disease, and, as noted by Dr. Brewer, arthritis progressively gets worse. As of the end of her physical therapy on May 1, 2017, the therapists reported Petitioner was 75% back to normal, still had pain which was dull and achy, had a decrease in left knee function, range of motion, and strength.

Dr. Brewer's findings and treatment recommendations were consistent with the findings and treatment recommendations of Dr. Plowgian. He did not believe Petitioner had reached maximum medical improvement. He felt Petitioner needed the total knee replacement surgery. He testified that in his opinion the accident of September 11, 2016 was the cause for her need for that surgery, "(her degenerative joint disease) was asymptomatic before and she was able to do her job, then she fell, and she was unable to do her job and had significant changes. So I think it was exacerbated but not solely caused by."

The Arbitrator finds, based upon both a chain-of-events theory of causal connection and upon the medical records and opinions of Dr. Plowgian and Dr. Brewer that Petitioner's bone and soft tissue contusion of the left knee, the medial cruciate ligament sprain in the left knee, the pes anserine tendinitis of the left knee, as well as the aggravation and exacerbation of preexisting tricompartmental arthritis in the left knee are all causally related to the accident of September 11, 2016 based on the testimony of Petitioner that her left and right knee were both asymptomatic prior to her accident of September 11, 2016, which involved not only a twisting of the left knee causing a sprain of the medial collateral ligament in the area of the eventually collapsed medial compartment of the left knee, but also a fall directly on the knee, the location of both the pes anserine tendinitis and patellofemoral arthritis which became symptomatic, and that the uninjured right knee showed no progression of arthritis during this same period of time while being subjected to the same other risks, obesity and age, relied upon by Dr. Young in his contrary opinions, which are specifically rejected.

The Arbitrator further finds that Petitioner had not reached maximum medical improvement as of April 12, 2017, or as of the date of arbitration, based upon all of Petitioner's ongoing complaints to treating physicians and their physical examination findings and radiographic findings, the discharge summary findings of her physical therapists and the fact that a recommended treatment had not been provided as it had not been approved by Respondent's insurance carrier.

In regards to whether the medical services provided to Petitioner reasonable and Necessary and whether Respondent had paid all appropriate charges for reasonable and necessary medical services, and credit for amounts paid for medical bills the Arbitrator makes the following findings:

The findings of fact in regards to causal connection, above, are incorporated herein by reference.

The medical bills contained in Petitioner's Exhibits #6, #7, #8, #9 and #10 all appear to be for medical services provided to cure or relieve Petitioner from the effects of the accidental injury of September 11, 2016.

The Arbitrator finds that Respondent shall pay reasonable and necessary medical services for the bills contained in Petitioner's Exhibits #6, #7, #8, #9 and #10 , as provided in Section 8(a) of the Act, pursuant to Section 8.2 of the Act.

The Arbitrator further finds that Respondent is entitled to credit for any amounts paid on said bills prior to the issuance of this decision.

In regards to the necessity of prospective medical treatment recommended by Dr. Brewer the Arbitrator makes the following findings:

The findings of fact in regards to causal connection, above, are incorporated herein by reference.

Dr. Brewer's records reflect that as of February 11, 2019 x-rays of Petitioner's left knee showed severe medial compartment joint space narrowing and small to moderate sized tricompartmental osteophytes. Petitioner reported that her pain had worsened, she was having trouble squatting and was having trouble doing her job secondary to pain and weakness. Dr. Brewer described the x-rays as showing medial compartment collapse, saying the degenerative joint disease had gotten progressively worse in the last year, that she now had bone-on-bone articulation with no

cartilage left in the medial joint space. He said that Petitioner had gotten to the point where she could not walk or be on her feet for long due to pain and she said she was now ready for surgery. Dr. Brewer said he would perform a total knee replacement once she had pre-surgical clearance.

Dr. Young in his testimony said he believed Petitioner was a candidate for a total knee replacement.

The Arbitrator finds that a total knee replacement of Petitioner's left knee is reasonable and necessary to treat and/or cure Petitioner's injuries from the accident of September 11, 2016. Respondent shall pay for reasonable and necessary prospective medical services as recommended by Dr. Brewer, to wit a total knee replacement of Petitioner's left knee, as well as ancillary medical services relating to said total knee replacement of Petitioner's left knee, as provided in Section 8(a) of the Act, pursuant to Section 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAN D. FARMER,

Petitioner,

vs. NO: 18 WC 6678

MURPHYSBORO CUSD #186,

Respondent.

21IWCC0125

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 18, 2020 is hereby affirmed and adopted.

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

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

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

21IWCC0125

DATED: MAR 15 2021
TJT/pm
O: 1/19/2021
051

Thomas J. Tyrrell

Stephen J. Mathis

DISSENT

I respectfully dissent. I would reverse the Arbitrator's Decision and deny the matter in its entirety.

Petitioner testified she is a custodian, and on August 15, 2017 while disposing of excessively heavy garbage, she injured her right shoulder. T. 15-16. Petitioner timely reported her accident which was not disputed by Respondent. T. 18; Stipulation Sheet. Petitioner testified she continued to perform her work duties without issue. T. 18-19. Approximately six months following the accident on January 15, 2018, Petitioner sought medical care for the first time with Dr. Kupferer. T. 20.

On February 13, 2018, an MRI of the shoulder was performed which evidenced a "near complete massive tear of the rotator cuff with mild bursal distention." PX2. Eventually, Petitioner came under the care of Dr. Davis who performed surgery on February 27, 2018 with attendant follow-up care. PX3.

On October 22, 2018, Dr. Davis provided his opinions via evidence deposition. PX3. Dr. Davis testified Petitioner sustained a traumatic work injury which led to her shoulder condition and need for surgery. PX3, p. 13. When questioned as to the basis of his opinion, Dr. Davis testified "based, again, solely on her history, she wasn't having any problems prior and was having problems after. And, therefore, I relate her shoulder condition and subsequent treatment to her work injury." PX3, p. 14. Dr. Davis confirmed Petitioner never reported hearing a pop in her shoulder. PX3, p. 20.

On February 4, 2019, Dr. Nogalski provided his opinions via evidence deposition. RX1. Dr. Nogalski testified he examined Petitioner at Respondent's request on June 20, 2018. RX1, p. 6. Dr. Nogalski obtained a history from Petitioner that she sustained a pull in her shoulder while throwing trash in a dumpster. RX1, p. 7. Dr. Nogalski specifically questioned Petitioner if she heard a pop which she did not recall. *Id.*

Dr. Nogalski testified he reviewed the MRI of February 13, 2018 which he believed evidenced degenerative findings. RX1, p. 9-10. Dr. Nogalski explained that an "acute rotator cuff tear is a profound change in their function that they really notice; it's not something that goes unnoticed. Chronic changes like this are things that people compensate for and just put up with

for a long time." RX1, p. 11. Dr. Nogalski testified Petitioner's work injury neither caused nor aggravated her shoulder condition. RX1, p. 12. When questioned as to the basis of his opinion, Dr. Nogalski testified as follows:

> Those records supported that while there may have been some symptom of a shoulder problem back in August, there was no support for an acute injury, nor were there any medical documentations provided by the most proximate providers, such as Dr. Kupferer, which supported an acute injury. Objective findings in this matter, specifically the MRI, support longstanding problems within the shoulder, so much so that I do not believe it is medically possible that things like fatty atrophy and the changes in the shoulder observed could reasonably have occurred over, say, a six-month time span around the time between August events, or claimed August events, and the imaging study. RX1, p. 13.

I afford greater weight to the opinions of Dr. Nogalski over those of Dr. Davis. "An expert opinion is only as valid as the reasons for the opinion." *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC. Dr. Davis' sole basis for his opinion is Petitioner said so. I submit this is correlation and not causation. In contrast to Dr. Davis, Dr. Nogalski explained in detail why Petitioner's shoulder condition was degenerative in nature and that an acute injury resulting in a "massive" rotator cuff tear would result in profound changes in Petitioner's ability to function. Dr. Davis agreed that a traumatic injury would result in Petitioner having difficulties in performing her job duties. Petitioner, though, continued to perform her job duties without difficulties. Certainly, Petitioner felt some type of transient symptom on August 15, 2017 but such neither caused nor aggravated her current shoulder condition.

As the Court noted in *County of Cook v. Industrial Commission*:

> Every employee whose disease or preexisting condition disables him while at work is not automatically entitled to a recovery under the Workmen's Compensation Act... 'In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. . .' 68 Ill. 2d 24, 31-32, 368 N.E.2d 1292 (1977).

For the above-stated reasons, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FARMER, JAN D
Employee/Petitioner

Case# **18WC006678**

MURPHYSBORO CUSD #186
Employer/Respondent

21IWCC0125

On 3/18/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4075 FISHER KERKHOVER COFFEY ET AL
JASON E COFFEY
600 STATE ST
CHESTER, IL 62233

2795 HENNESSY & ROACH PC
AMANDA J B RICHERT
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jan D. Farmer
Employee/Petitioner

v.

Murphysboro CUSD #186
Employer/Respondent

Case # 18 WC 06678

Consolidated cases: _____

21IWCC0125

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 16, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On August 15, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $490.07.

On the date of accident, Petitioner was 60 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $326.71 per week for 43 2/7 weeks, commencing January 15, 2018, through November 14, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $294.04 per week for 62.5 weeks because the injury sustained caused the 12 1/2% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator

March 14, 2020
Date

MAR 18 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on August 15, 2017. According to the Application, Petitioner was "Lifting/Throwing Trash Into Dumpster" and sustained an injury to her "Right Arm/Shoulder & Left Hip" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related accident on August 15, 2017, but Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in May, 2017, and worked as a custodian. At trial, Petitioner testified that on August 15, 2017 (the first day of school), Petitioner was collecting and disposing of trash in a dumpster. Because it was the first day of school, the trash was "excessively heavy" and as Petitioner was in the process of throwing a bag of trash into the dumpster, she injured her right shoulder. Petitioner stated the bags of trash were placed in barrels which were on rollers. Petitioner removed the bags from the barrel and threw the bags into the dumpster. Petitioner explained the bags of trash were heavy because it was the first day of school and there was a substantial amount of paper in the bags.

Petitioner reported the accident in a timely manner to Respondent and a First Report of Injury was completed on August 25, 2017. The Report noted Petitioner was lifting trash into a dumpster and strained her right upper arm/shoulder and left hip (Petitioner's Exhibit 1). At trial, Petitioner testified the left hip symptoms were extremely mild and she was not seeking any compensation for same.

Petitioner was able to complete her shift of work on August 15, 2017. Because of her right shoulder symptoms, Petitioner did not go to work the following day. Petitioner applied ice and took over-the-counter medication to treat her right shoulder injury. Petitioner thought she had just "pulled something" and the symptoms would get better on their own.

Petitioner did not seek any medical treatment immediately following the accident. Petitioner's right shoulder symptoms persisted and Petitioner testified that in November, 2017, she tried to make an appointment with Dr. Dale Blaise, whom she thought was her family physician. However, Petitioner had not been seen by Dr. Blaise (or any other physician) since 2005. Because it had been such a long time since she had last seen Dr. Blaise, she was informed that she would be considered a new patient and Dr. Blaise was not accepting new patients.

Petitioner continued to perform her job duties for Respondent which included disposing of the trash. Petitioner testified she continued to fulfill her work obligations for Respondent and thought her right shoulder symptoms would get better on their own. Petitioner stated she never dealt with "workmen's comp" before.

Petitioner was evaluated by Dr. Thomas Kupferer, a family medicine physician, on January 15, 2018. At that time, Petitioner advised Dr. Kupferer she heard her right arm while throwing trash into a bin on the first day of school in 2017. Petitioner had continued to use her right arm at work

in her job as a custodian. Dr. Kupferer opined Petitioner had right rotator cuff tendinitis and recommended application of heat and over-the-counter medications as needed (Petitioner's Exhibit 2).

Dr. Kupferer saw Petitioner on January 19, 2018, and Petitioner continued to have right shoulder symptoms. He ordered an x-ray and MRI scan of Petitioner's right shoulder. The x-ray was obtained on January 22, 2018. According to the radiologist, it revealed fairly advanced degenerative changes of the right acromioclavicular joint (Petitioner's Exhibit 2).

Dr. Kupferer first saw Petitioner on February 5, 2018. At that time, Petitioner advised him that her right shoulder pain had not improved, but she thought she had just pulled a muscle and it would eventually get better. Dr. Kupferer noted the MRI had not been performed because Petitioner's insurance would not cover it because it was a workers' compensation claim (Petitioner's Exhibit 2).

The MRI was performed on February 13, 2018. According to the radiologist, the MRI revealed a full thickness tear of the supraspinatus tendon with intrasubstance migration through the posterior rotator cuff throughout the supraspinatus and infraspinatus tendons which resulted in a "near complete massive tear of the rotator cuff" with mild bursal distention. The MRI also revealed moderate to severe degenerative disease of the acromioclavicular joint and moderate degenerative change most likely representing a tear of the superior to posterior labrum (Petitioner's Exhibit 2).

Dr. Kupferer referred Petitioner to Dr. John Davis, an orthopedic surgeon, who initially evaluated Petitioner on February 19, 2018. At that time, Petitioner advised Dr. Davis that on August 15, 2017, she was throwing heavy trash into a dumpster and injured her right arm. Dr. Davis reviewed the MRI scan and opined it revealed a traumatic rotator cuff tear and long head of the biceps tendinopathy. He recommended Petitioner undergo right shoulder arthroscopic rotator cuff repair, subacromial decompression and biceps tenotomy (Petitioner's Exhibit 3; Deposition Exhibit 1).

Dr. Davis performed arthroscopic surgery on Petitioner's right shoulder on February 27, 2018. The procedure consisted of arthroscopic traumatic rotator cuff repair, subacromial decompression and biceps tenotomy. Further, Dr. Davis performed debridement of degenerative superior labral tearing and of subacromial and subdeltoid bursitis and adhesions (Petitioner's Exhibit 3; Deposition Exhibit 1).

Following surgery, Dr. Davis continued to treat Petitioner and ordered physical therapy and work hardening. Petitioner made slow, but steady, progress and Dr. Davis authorized Petitioner to return to work without restrictions on November 15, 2018. He subsequently opined Petitioner was at MMI on December 13, 2018 (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Michael Nogalski, an orthopedic surgeon, on June 20, 2018. In connection with his examination of Petitioner, Dr. Nogalski reviewed medical records and the MRI scan provided to him by Respondent. Dr. Nogalski

agreed with the diagnosis made by Dr. Davis and opined the surgery performed by Dr. Davis was medically reasonable and necessary (Respondent's Exhibit 1; Deposition Exhibit 2).

In regard to causality, Dr. Nogalski opined Petitioner's right shoulder condition was not causally related to the accident of August 15, 2017. Dr. Nogalski based this opinion on his review of the MRI, the description of the accident and the fact Petitioner did not seek medical treatment for such a long time following the accident. In regard to the MRI, Dr. Nogalski opined it revealed "fatty atrophy" of the supraspinatus and diffuse changes in the rotator cuff which were extensive and long standing. In regard to the accident, Dr. Nogalski opined Petitioner throwing trash was not consistent with an acute trauma which would cause a tendon tear or aggravation unless there were correlating MRI findings. Finally, Dr. Nogalski opined that if Petitioner had sustained an acute injury, she would have experienced significant dysfunction and would have sought medical treatment shortly afterward (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Davis was deposed on October 22, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Davis' testimony in regard to his diagnosis and treatment of Petitioner's right shoulder condition was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Davis testified Petitioner informed him that she injured her right arm on August 15, 2017, while throwing trash in a dumpster and had persistent pain in her arm since then. In regard to causality, Dr. Davis testified the accident of August 15, 2017, was a traumatic work injury which led to her shoulder condition that ultimately required surgery. Dr. Davis also testified that if Petitioner had degeneration or a pre-existing issue in her right shoulder, if she was not having problems prior to the accident, but had them afterward, her shoulder condition and subsequent treatment was related to her work injury (Petitioner's Exhibit 3; pp 7, 13-14).

On cross-examination, Dr. Davis was interrogated about the fact Petitioner did not take time off work following the accident. He agreed Petitioner would have had difficulties continuing to perform her job duties, but did not necessarily expect her to take time off work. Dr. Davis stated a lot of people work in pain and there can be a delayed onset of pain with a rotator cuff injury. Dr. Davis stated that the fact Petitioner waited five months prior to seeking medical treatment for her right shoulder injury did not change his opinion as to causality (Petitioner's Exhibit 3; pp 21-23).

Dr. Nogalski was deposed on February 4, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Nogalski's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Nogalski testified the MRI scan revealed diffuse changes which he stated were chronic and did not occur over a period of five months. Further, he stated that if Petitioner had sustained an acute tear of the rotator cuff, he would expect to see no fatty atorphy and not the generalized tendonopathic changes on the top of the shoulder. Dr. Nogalski also stated that if Petitioner had sustained an acute rotator cuff tear, it would have caused a profound change in function and individuals usually seek medical treatment within a day or two (Respondent's Exhibit 1; pp 9-11).

On cross-examination, Dr. Nogalski reaffirmed his opinion regarding causality. He again noted the presence of fatty atrophy which he stated it takes many months to develop. Based on this, Dr. Nogalski testified Petitioner had significant rotator cuff issues prior to August, 2017 (Respondent's Exhibit 1; p 21).

At trial, Petitioner testified she returned to work for Respondent in November, 2018, after Dr. Davis released her for full duty. Petitioner subsequently quit her job for Respondent in January, 2019; however, she stated her resignation had nothing to do with her work injury. Petitioner testified she continues to experience pain and soreness as well as an occasional burning sensation in her right shoulder. Petitioner also stated she tends to be guarded when doing any lifting.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of August 15, 2017.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained an injury to her right arm/shoulder while throwing trash into a dumpster.

Petitioner's testimony that the bags of trash she was throwing into the dumpster were excessively heavy was unrebutted.

Petitioner did not attempt to seek medical treatment until November, 2017, from Dr. Blaise, but could not do so because she had not seen him since 2005, and was no longer considered a patient.

Petitioner was later seen by Dr. Kupferer on January 15, 2018, five months after the accident. This was the first time Petitioner had been seen by a physician for any reason at all since 2005, approximately 13 years.

The Arbitrator notes that Petitioner has chosen not to seek medical attention on any regular basis.

Petitioner's primary treating physician, Dr. Davis, opined Petitioner's right shoulder condition was related to the accident of August 15, 2017. The fact Petitioner did not seek any medical treatment for her right shoulder condition until five months afterward did not cause him to change his opinion in regard to causality.

Respondent's Section 12 examiner, Dr. Nogalski, opined Petitioner's right shoulder condition was not related to the accident of August 15, 2017. This opinion was based, to a large extent, on Dr. Nogalski's interpretation of the MRI in which he noted diffuse changes and fatty atrophy. However, these findings were not noted by either Dr. Davis or the radiologist who

performed/read the MRI. Based upon the preceding, the Arbitrator finds the opinion of Dr. Davis to be more persuasive than that of Dr. Nogalski in regard to causality.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that all of the medical treatment provided to Petitioner was reasonable and necessary.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 43 2/7 weeks, commencing January 15, 2018, through November 14, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner was temporarily totally disabled during the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner had sustained permanent partial disability to the extent of 12 1/2% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a custodian, a job which required lifting, at the time she sustained the accident. Petitioner was able to return to work to that job, but resigned for reasons unrelated to her work injury. The Arbitrator gives this factor moderate weight.

Petitioner was 60 years old at the time she sustained the accident. Petitioner will have to live with the effects of the entry for the remainder of her natural life. The Arbitrator gives this factor minimal weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner sustained a right shoulder injury which required arthroscopic rotator cuff repair, subacromial decompression and biceps tenotomy as well as debridement of the labrum and subdeltoid. Petitioner still has complaints consistent with the injury she sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vanessa Diaz,

Petitioner,

vs.

No. 17 WC 35923

21IWCC0126

Harvey Police Department,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of penalties under §19(k) and §19(l), and attorney's fees under §16, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.[1]

Findings of Fact:

On November 5, 2017, Petitioner, a 24-year-old probationary police officer, sustained injuries to her head, neck, and right knee when her patrol car was rear-ended by another vehicle. She was initially seen in the emergency room of Ingalls Hospital and released. Over the next 15 days, she was treated with pain medication, physical therapy, and rest. On November 20, 2017, Petitioner was released to return to work without restrictions, and has not received further treatment since then.

[1] Respondent also raised, "Nature and Extent," as an issue in its Petition for Review. However, Respondent subsequently waived that issue in its Statement of Exceptions.

On December 4, 2018, Petitioner filed a Petition for Penalties, Fees and Costs. She attached to it copies of her attorney's letters to Respondent dating back to December 2017, which demanded payment for medical expenses and temporary total disability. The petition alleged Respondent had failed, neglected, and refused to pay Petitioner those benefits without good cause, and that Respondent's failure or refusal to pay was vexatious, dilatory, punitive, retaliatory, and objectively unreasonable. At trial, Petitioner offered her medical bills into evidence and testified that, to her knowledge, they still had not been paid.

On March 13, 2019, Respondent filed its Reply to Petitioner's Petition for Penalties, Fees and Costs.[2] In it, Respondent asserted that its failure to pay benefits to Petitioner was not vexatious or unreasonable, but rather, was due to its lack of funds. In support of its claim, Respondent attached to its Reply an April 2018 order from a federal case in which three bank accounts of the City of Harvey were ordered to be depleted to $0.00 to satisfy a previous judgment. Respondent also attached a copy of a February 20, 2018 Independent Auditors' Report which analyzed the City of Harvey's aggregate remaining fund information for the year ending April 30, 2017. That report stated the City of Harvey had a $55 million deficit in its General Fund, which raised significant liquidity risks regarding the City's ability to meet its financial obligations.

Conclusions of Law:

§19(l) Penalties

Penalties under §19(l) are in the nature of a late fee and are mandatory when payment is late and the employer cannot show an adequate justification for the delay. *McMahan v. Industrial Commission*, 183 Ill.2d 499 (1998). The Arbitrator found that §19(l) penalties in the amount of $10,000.00 are warranted in this case because Respondent failed to provide good and just cause for its failure to pay Petitioner benefits under §8(a). The Commission agrees.

Commission Rule 9110.70(d) states that, "when an employer denies liability for payment of the cost of all or a part of an employee's medical care…the employer shall promptly notify the employee with a written explanation of the basis for the denial of liability or further responsibility." In this case, Petitioner's counsel first requested payment of the bill from Beverly Medical Center in a letter to Respondent dated December 28, 2017. Petitioner sent Respondent several subsequent letters in which she demanded payment of her medical bills. Respondent should have responded to Petitioner's letters but did not – for a period of 441 days.

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[2] Although Respondent's Reply, marked, "Respondent's Group Ex1," was in the Commission's file but not in the transcript, the Commission considers that exhibit to have been admitted in evidence, given Respondent's contingent offer of that exhibit when Petitioner offered her Penalties Petition into evidence. Petitioner's counsel acknowledged on the record she had no objection to the Respondent's Reply (Respondent's Group Ex1) being admitted into evidence, and the Arbitrator subsequently ruled the exhibits, "Admitted." The Commission's conclusion that Respondent's Group Ex1 was admitted in evidence is further supported by the fact that the Arbitrator considered and commented regarding Respondent's exhibit in the Arbitration decision.

21IWCC0126

While the Commission has considered Respondent's last minute explanation of its alleged inability to pay set forth in its Reply to Petitioner's Petition for Penalties, filed on the eve of trial, that was too little, too late. The documents Respondent attached to its Reply to the Penalties Petition – a federal court order and an audit report – are insufficient proof of its inability to pay Petitioner her medical benefits. At arbitration, Respondent failed to present any conclusive evidence to support its claimed inability to pay. For these reasons, the Commission affirms the Arbitrator's decision awarding Petitioner $10,000.00 penalties under §19(l) of the Act.

19(k) penalties and §16 attorney's fees

The Arbitrator awarded Petitioner penalties under §19(k) in the amount of $1,753.45, and attorney's fees under §16 in the amount of $1,753.45, finding that Respondent acted in "bad faith." The Commission views the evidence differently than the Arbitrator.

Awards of penalties under §19(k), and attorney's fees under §16, require a higher standard of proof than an award under §19(l); they require more than just proof of unreasonable delay. The Commission has discretion to impose §19(k) penalties where there is not only a delay in payment, but the delay was in bad faith. *McMahan v. Industrial Comm'n,* 183 Ill. 2d 499. In this case, the Commission, in its discretion, declines to award Petitioner penalties under §19(k) and attorney's fees under §16. Accordingly, the Commission reverses the Arbitrator's award of penalties under §19(k) and attorney's fees under §16.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 1, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical bills is affirmed, and Respondent shall pay to Petitioner medical bills totaling $3,506.90, pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability is affirmed, and Respondent shall pay to Petitioner permanent partial disability benefits of $487.92 per week for a total of 7.5 weeks as provided by §8(d)2 of the Act, because the injuries sustained caused the 1.5% loss of person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties under §19(l) is affirmed, and Respondent shall pay Petitioner $10,000.00 as provided by §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the awards of penalties under §19(k), and attorney's fees under §16, are hereby reversed.

21IWCC0126

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 16 2021
o-01/21/2021
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DIAZ, VANESSA
Employee/Petitioner

Case# **17WC035923**

HARVEY POLICE DEPARTMENT
Employer/Respondent

21IWCC0126

On 5/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0307 ELFENBAUM EVERS & AMARILIO
RACHAEL SINNEN
900 W JACKSON BLVD SUITE 3E
CHICAGO, IL 60607

1295 SMITH AMUNDSEN LLC
ALEXIS MAIMONIS
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

21IWCC0126

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vanessa Diaz
Employee/Petitioner

v.

Harvey Police Department
Employer/Respondent

Case # 17 WC 35923

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **March 14, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **11/05/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**42,286.40**; the average weekly wage was $**813.20**.

On the date of accident, Petitioner was 24 years of age, ***single*** with **one** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner's medical bills totaling $3,506.90 ($328.39 Bud's Ambulance; $2,320.98 Ingalls; $857.53 Beverly) per fee schedule directly to Petitioner as provided in Section 8(a) of the Act.

Petitioner is awarded permanent partial disability benefits of $487.92 per week for a total of 7.5 weeks, because the injuries sustained caused the 0% loss of use of Petitioner's right leg and 1.5% loss of use of Petitioner's whole person, as provided in Section 8(e) and Section 8(d)2 of the Act.

Respondent shall pay to Petitioner directly a total of $14,104.14 in fees, costs and penalties ($10,000.00 under Section 19(l), $1,753.45 under Section 19(k), and $2,350.69 under Section 16).

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

05-01-19
Date

MAY 1 - 2019

State of Illinois)
)
County of Cook)

21IWCC0126

BEFORE THE
ILLINOIS WORKERS' COMPENSATION COMMISSION

Vanessa Diaz)
Petitioner,)
)
v.) IWCC No. 17 WC 35923
)
Harvey Police Department)
Respondent.)

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

At the time of her November 5, 2017 accident, Petitioner was a police officer for Respondent for 11 months. Petitioner was working full duty and was not under any medical care. It was her first job out of the police academy. Other than the instant case, Petitioner has not had any prior workers' compensation claims.

Petitioner's Job Duties as a Police Officer

Petitioner responds to 911 calls which can vary in severity. Petitioner detains individuals by force, breaks up altercations, and physically restrains intoxicated individuals or those under the influence of narcotics. Petitioner also need to physically handle individuals with physiological defects. At times, Petitioner needs to run after persons of interest and bend down to detain individuals. In addition, Petitioner is required to drive her patrol vehicle and must wear a police vest weighing approximately 20-25 lbs. Along with the vest, Petitioner carries other equipment such as handcuffs, a radio, a baton, pepper spray, knives, and her holster and gun. She estimated that her job requires her to lift, push and pull approximately 200 pounds at any point.

Petitioner is 5 feet, 3 inches tall and weighs 142 pounds.

Petitioner's Work Accident

On November 5, 2017, Petitioner was seated in the driver seat of her patrol vehicle writing a citation. She was not wearing her seatbelt. Another vehicle rear-ended her patrol vehicle causing Petitioner to whiplash back and forth, hitting her head on the steering wheel. Sargent Barbee witnessed the accident. Petitioner had to be removed out of the patrol vehicle by ambulance.

EMS arrived on the scene and documented Petitioner's complains of head and right knee pain. Px 3, p. 3. She was immediately taken to the emergency department of Ingalls Memorial Hospital.

Petitioner reported that she was writing a ticket in her police vehicle when another vehicle hit the rear of her back. Petitioner reported hitting her head against the steering wheel and complained of head, neck and right knee pain. Px 4, p. 12. Tenderness to the posterior head and a swelling hematoma to the right forehead was noted. Px 4, p. 13. Tenderness to the right knee and cervical spine was also recorded. Px 4, p. 13. Her diagnosis included cervical strain. Px 4, p. 24. Petitioner was discharged home with prescriptions for pain medication and was told to follow up with her primary physician or specialist. Px 4, pp. 27; 35. Petitioner was instructed to return to work per primary physician. Px 4, p. 28.

While at the emergency room that same day, Petitioner and her supervisor Sargent Barbee completed and both signed a First Report of Injury detailing how Petitioner was at a traffic stop inside her patrol vehicle with her emergency lights activated when another vehicle collided into her patrol vehicle causing "major damage" to the patrol vehicle as well as injuries to Petitioner. Px 1, p. 1. On cross examination, Petitioner was presented with an Investigation Form completed by Sargent Barbee that says Petitioner injured her torso and head. Px 1, p. 4. Petitioner confirmed that she did not review the Investigation Form or complete it with Sargent Barbee.

While Petitioner remained off work for her work injury, she continued to receive regular pay pursuant to the Public Employee Disability Act (PEDA).

Petitioner's Medical Treatment

On November 9, 2017, Petitioner presented to Beverly Medical Center (a/k/a AMCI). She reported primary complaints of headaches, neck, low back, right shoulder and left shoulder pain. Petitioner reported that she was on duty in a squad police vehicle when another vehicle collided into her. At impact, Petitioner reported whiplash and striking her head on the interior of the vehicle. Petitioner explained that her work duties required lifting up to 200 lbs, pushing and pulling up to 200 lbs, frequent bending and frequent driving. Px 5, p. 6. Physical examination of the cervical spine noted tenderness and "hypertonicity in the suboccipitals and scalenes bilaterally." Jackson's test and Cervical Distraction test were both positive. For the lumbar spine, Kemp's test was positive and tenderness was noted on the erector spine bilaterally. Right shoulder examination noted tenderness of the supraspinatus, pain with abduction at end range of motion and positive impingement sign. Left shoulder examination documented positive impingement sign, positive Yergason's test, tenderness of the supraspinatus and pain with abduction at end range of motion. Her diagnosis included concussion, cervical sprain, lumbar sprain, and bilateral shoulder sprains. Px 5, p. 7. It was noted that her diagnoses were causally related to the work injury. Px 5, p. 8. Physical therapy was recommended, Petitioner continued her prescription pain medication and Petitioner was placed off work pending a follow up appointment with Dr. Foreman. Px 5, p. 8.

Petitioner began physical therapy on November 13, 2017 and continued until November 17, 2017. Px 5, pp. 9 -16.

Petitioner testified that Sergeant Armstrong from Internal Affairs reported to her residence on November 19, 2017 and told Petitioner that she needed to return to work. Petitioner returned to Beverly Medical Center the next day on November 20, 2017 and saw Dr. Foreman. Petitioner reported intermittent headaches and intermittent neck, low back and bilateral shoulder pain and

stiffness. However, in light of Sergeant Armstrong's remarks, Petitioner stated that she wanted to return to regular work duties. At her request, Petitioner was released from care with instructions to take over the counter Ibuprofen or Tylenol for headaches and recurrent pain, to continue home exercises, and to return to work full duty on November 21, 2017. Px 5, p. 19. Petitioner reported back to work.

Petitioner filed her Application for Adjustment of Claim on December 7, 2017, which was sent to Respondent on December 11, 2017. Px 6, pp. 31-32. Respondent terminated Petitioner December 27, 2017.

Petitioner's Current Condition

Petitioner testified that she now works as a part time police officer for Phoenix Police Department, in Phoenix, Illinois. Petitioner has not returned to a medical provider for her work-related injuries since her release from Dr. Foreman on November 21, 2017. She also no longer takes prescription pain medication. Petitioner explained at trial that her current job duties are similar to those when she worked for Respondent. Petitioner explained how some work tasks have become more difficult since her November 5, 2017 accident. Petitioner reported a decrease in strength that complicates her ability to physically restrain individuals. She reports soreness, stiffness and pain in her shoulders and neck when wearing her police gear that includes a 20-25lb vest as well as handcuffs, a radio, a baton, pepper spray, knives, and her holster and gun. Petitioner also reported having an increase in headaches since her work accident, approximately one every two weeks. Petitioner combats her complaints of pain with at home remedies and over the counter pain medication. Petitioner takes 600 mg of Ibuprofen once a week and uses heating pads about twice a week. Petitioner also uses an electronic massager once a week and pays for professional massages once a month. Petitioner confirmed that she did not use these pain relief measures prior to her work accident.

Petitioner's Requests to Respondent for Payment of Medical Bills

Petitioner testified that her medical bills remain unpaid and have been sent to collections. She also testified that no one from her employer every contacted her regarding payment of her medical bills or her workers' compensation case in general. As a result of the unpaid bills, Petitioner's counsel sent written correspondences to the Harvey Police Department and/or the Office of Comptroller for the City of Harvey on December 28, 2017; January 29, 2017; March 5, 2018; April 2, 2018; and June 12, 2018 demanding payment of Petitioner's medical bills. Px 6, pp. 16-26. Petitioner's counsel received no response.

On August 9, 2018, Petitioner's counsel sent Respondent a written correspondence advising that she appeared before Arbitrator Carlson at the Illinois Workers' Compensation Commission in Chicago, Illinois that same day on her Request for Hearing but no one appeared on behalf of Respondent. See Px 6, pp. 13-14. Again, Petitioner's counsel received no response.

On September 14, 2018, billing records from Ingalls Memorial Hospital state that "this employer Harvey Police Dept, has been un-responsive to collection attempts for payment." Px 4, p. 43.

Upon learning that SmithAmundsen, LLC may be representing Harvey Police Department on other legal matters, Petitioner's counsel emailed Alexis Maimonis on November 29, 2018. Px 6, p. 11. Ms. Maimonis replied that she would be handling the claim. Px 6, p. 11. Petitioner's counsel sent Ms. Maimonis the medical records and bills via email on November 29, 2018. Px 6, p. 10. Soon after, Respondent's counsel filed her appearance with the Illinois Workers' Compensation Commission. Px 6, p. 9. The instant petition for penalties was filed on December 4, 2018. Px 6, p. 1. Respondent filed its Reply to Petitioner's Petition for Penalties, Fees and Costs on March 13, 2019, the day before hearing. Rx 1.

According to its Reply, Respondent does not have any funding to pay its Workers' Compensation claims. Rx 1, p. 1, no. 1. A new third-party administrator was retained in December 2018. Rx 1, p. 1, no. 4. Around February 13, 2019, Respondent's attorney forwarded Petitioner's medical records and bills to a third-party administrator for "evaluation for payment." Rx 1, p. 2, no. 5.

Respondent did not call any witnesses at trial.

CONCLUSIONS OF LAW

The only issues in dispute are the nature and extent of Petitioner's injuries and whether penalties should be imposed upon Respondent. Respondent stipulated to accident, notice and liability of medical bills. The Arbitrator incorporates by reference the preceding findings of fact, and concludes:

With regard to issue "L", the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. 820 ILCS 305/8.1b.

Regarding the first factor, Section 8.1b(i), no impairment rating was performed by the treating physicians, nor did Respondents obtain an AMA Impairment rating. However, the absence of such a rating does not preclude a determination of permanent partial disability by the Commission. See, e.g., Smart v. Central Grocers, 2014 Ill. Wrk. Comp. LEXIS 352. As a result, the Arbitrator gives this factor no weight.

Regarding the other factors, the Arbitrator gives great weight to Section 8.b(ii), the occupation of the injured employee. While Petitioner was able to return to her job without restrictions, Petitioner's work is extremely physical. Petitioner must be able to run, bend and physically restrain individuals much larger than she is all while wearing a 25-pound vest and carrying police gear. She explained that since her work injury she has some difficulty performing her work duties due

to pain in her neck and shoulders.

The Arbitrator gives significant weight to Section 8.1b(iii), Petitioner's age, since she is only 25 years old with decades in front of her in the work force. With regard to Section 8.1(b)(iv), Petitioner's future earning capacity was not affected as she was released without restrictions and is working full duty. As a result, the Arbitrator gives this factor less weight.

Finally, with regard to Section 8.1b(v), the Arbitrator gives some weight to this section as Petitioner still experiences symptoms at the present time to her shoulders, neck and head. Further, the medical records corroborate Petitioner's testimony regarding her complaints of pain. Petitioner's treatment involved pain medications, the need to be placed off work, and physical therapy. Her final visit on November 20, 2017 with Dr. Foreman noted that Petitioner continued to have intermittent headaches and intermittent neck, low back and bilateral shoulder pain and stiffness. See Px 5, p. 19.

To date, Petitioner must rely on over the counter medication and at home remedies to treat her pain. This includes the use of a hand-held massager, heating pads and taking up to 600 mg of ibuprofen a week. While Petitioner has not returned for medical care related to her work accident, she continues to struggle with strength, stiffness and soreness in her shoulders and neck while wearing her police vest and gear as well as when she must use physical force to restrain individuals.

In view of this evidence, the Arbitrator finds a 0% loss of use of Petitioner's right leg and a 1.5% loss of use of Petitioner's whole person, as provided in Section 8(e) of the Act.

With regard to issue "M", whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Act and applicable case law clearly set the method in which penalties should be calculated as well as the standard in which this Commission must apply.

Section 19(l) Penalties

With regards to Section 19(l), the Act reads,

> In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

820 ILCS 305/19(l)

Case law dictates that penalties authorized by Section 19(l) serve as a late fee and apply whenever the employer or its carrier simply fails or neglects to make payment or unreasonably delays payment "without good and just cause." McMahan v. Industrial Comm'n, 702 N.E.2d 545 at 553 (1998). **If the payment is late, for whatever reason, and the employer or its carrier cannot**

show an adequate justification for the delay, an award of Section 19(l) penalties is mandatory. *Id* (emphasis added).

The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. Board of Education of the City of Chicago v. Industrial Comm'n, 442 N.E.2d 861 at 865 (1982). The employer has the burden of justifying the delay. *Id.* The employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id.*

The Arbitrator finds that Respondent's nonpayment of medical bills creates a rebuttable presumption of unreasonable delay. The Arbitrator further finds that Respondent failed to provide a good and just cause for its failure to pay benefits under Section 8(a).

At trial Respondent stipulated to accident, notice, causation, and liability for bills. The only issues contested where the nature and extent of Petitioner's injuries as well as penalties. At the hearing, Petitioner provided evidence that her medical bills are unpaid and in collections. This is uncontested. Petitioner provided sufficient evidence that requests for payment of medical bills were made as early as December 28, 2017.

Respondent contends that its financial hardships are a reasonable basis for its nonpayment of bills. However, no actual evidence was submitted that Respondent was unable to pay nor did Respondent ever acknowledge any of Petitioner's multiple requests for payment that were sent over the course of a year. The Arbitrator disagrees with Respondent that it didn't timely pay Petitioner's medical bills *because of* financial hardships. Rather, the Arbitrator finds that Respondent ignored Petitioner's requests and its obligation until Petitioner brought the matter to hearing before this Commission.

As the Arbitrator finds that Respondent was unable to show an adequate justification for its delay, an award of Section 19(l) penalties is mandatory. The Arbitrator fines Respondent $30.00 a day starting December 28, 2017. As of the date of trial, March 14, 2019, 441 days had passed. $30.00 per day multiplied by 441 days equals $13,230.00. However, Section 19(l) caps penalties at $10,000.00. Therefore, the Arbitrator imposes penalties of $10,000.00 under Section 19(l) against Respondent, to be paid directly to Petitioner.

Section 19(k) Penalties

The Act reads,

> In cases where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. When determining whether this subsection (k) shall apply, the Commission shall consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j).

820 ILCS 305/19(k).

While Section 19(l) penalties apply when Respondent delays payment "without good and just cause," Section 19(k) penalties require a lack of good faith. The Commission has the discretion to impose Section 19(k) penalties where there is not only a delay in payment but the delay was in bad faith. McMahan, 702 N.E.2d at 552 citing Smith v. Industrial Comm'n, 525 N.E.2d 81 (1988). Good faith must be assessed objectively, thus the question is whether an employer's denial of benefits was reasonable. *Id.* The employer bears the burden of demonstrating that its denial of benefits was reasonable. Residential Carpentry, Inc. v. Workers' Compensation Comm'n, 910 N.E.2d 109 at 117 (2009).

Here, Respondent's complete silence to Petitioner's numerous written requests for payment demonstrates that the delay was made in bad faith and warrants Section 19(k) penalties.

Respondent not only consistently evaded Petitioner's requests for payment but it also ignored attempts for payment made by Petitioner's medical providers. *See* Px 4, p. 43 (where Ingalls' billing department writes that Respondent is not responding to its payment requests). The first time Respondent notified Petitioner in writing of its financial stress as a basis for non-payment was its Reply to Petitioner's Petition for Penalties, which was filed the day before trial (even though Respondent's counsel has been in possession of the medical records and bills since November 29, 2018 and Petitioner's Petition for Penalties was filed December 4, 2018). See Px 6, pp. 1 and 10; Rx 1.

It is obvious that Respondent's silence to Petitioner's numerous requests for payment was not due to a lack of funding but was an effort to ignore its legal obligation. Its failure to even respond shows a lack of deference for the Rules Governing Practice and a clear disregard for the Illinois Workers' Compensation Commission. See 50 Illinois Administrative Code, Chapter II, Section 7110.70.

Because Respondent's behavior was in bad faith, penalties under Section 19(k) are warranted. Per fee schedule, Respondent is liable for $3,506.90 in outstanding medical bills ($328.39 Bud's Ambulance; $2,320.98 Ingalls; $857.53 Beverly). 50% of $3,506.90, is $1,753.45. As a result,

the Arbitrator fines Respondent $1,753.45 in penalties under Section 19(k), to be paid to Petitioner directly.

Section 16 Fees

Section 16 reads,

> Whenever the Commission shall find that the employer . . . or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act, or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

820 ILCS 305/16

Both Sections 16 and 19(k) are similar in that they require an unreasonable or vexatious delay in payment. Vulcan Materials Co. v. Industrial Comm'n, 842 N.E.2d 204 (2005). Here, Respondent's nonresponse to Petitioner's requests for payment of bills was unreasonable and/or vexatious.

Nonetheless, Respondent relies on various Commission decisions in its request to deny penalties, all of which are not controlling and quite distinguishable from the case at hand. In Williams-Grant, the arbitrator denied penalties finding that the State had no intent to harass since the petitioner previously received benefits and stray medical bills were already in line for payment. 2013 Ill. Wrk Comp. LEXIS 1153. Here, medical bills are unpaid and there is no evidence that Respondent attempted to pay them. In Askew, written correspondences from the City of East St. Louis acknowledged that TTD was due and cited to a lack of funds for the basis of non-payment. As a result, the arbitrator denied penalties as witnesses for the city explained that they were waiting for funding to be released by an outside entity. 2013 Ill. Wrk. Comp. LEXIS 1052. Here, no such evidence exists. In Frieman, the Commission affirmed the arbitrator's denial of penalties writing that the State a good faith basis to contest the compensability of the claim." 2012 Ill. Wrk. Comp. LEXIS 221. Here, Respondent stipulated to accident, notice, causation and even liability of medical bills.

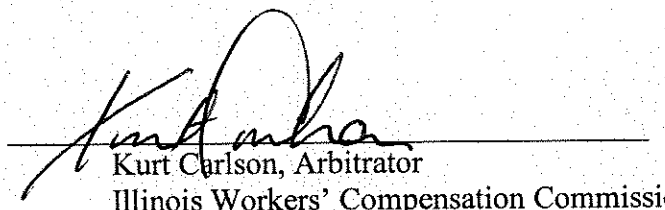
Further, the Arbitrator notes that government agencies are not immune to penalties. In fact, this Commission has found such agencies including the City of Harvey to be subject to penalties before. *See* Sansone v. City of Harvey, 2013 Ill. Wrk. Comp. LEXIS 480, 13 IWCC 373; McCabe v. Huntley Fire Protection District, 2015 Ill. Wrk. Comp. LEXIS 1680, 15 IWCC 820; Fischer v. Village of McCook Police Department, 2015 Ill. Wrk. Comp. LEXIS 417, 15 IWCC 416; Pickering v. State of Illinois, 2011 Ill. Wrk. Comp. LEXIS 711, 08 WC 41998 (where the Commission considered the State's lack of funding and *still* awarded penalties for unpaid medical bills).

Since Respondent's delay was unreasonable and vexatious, the Arbitrator will assess attorney's fees and costs under Section 16, which are 20% of the total penalties under Section 19(1) and

Section 19(k). The Arbitrator awards $10,000.00 under Section 19(l) and $1,753.45 under Section 19(k), which totals $11,753.45. 20% of $11,751.44 is $2,350.69. As a result, the Arbitrator imposes $2,350.69 in attorney's fees and costs under Section 16 against Respondent, to be paid directly to Petitioner.

As a whole, the Arbitrator fines Respondent a total of $14,104.14 in fees, costs and penalties ($10,000.00 under Section 19(l), $1,753.45 under Section 19(k), and $2,350.69 under Section 16) to be paid directly to Petitioner.

IT IS SO ORDERED BY:



Kurt Carlson, Arbitrator
Illinois Workers' Compensation Commission

05/01/2019

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aretha L. Wilkins-Simmons,

Petitioner,

vs. No. 14 WC 024866

State of Illinois—Elgin Mental Health Center,

21IWCC0127

Respondent.

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein, and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 19, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0127

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

Marc Parker

DATED:
o-3/4/21 MAR 16 2021
MP/dak
68

Deborah L. Simpson

Barbara N. Flores

21IWCC0127

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILKINS-SIMONS, ARETHA L
Employee/Petitioner

Case# **14WC024866**

ST OF IL/ELGIN MENTAL HEALTH
Employer/Respondent

On 6/19/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5317 CASTANEDA LAW OFFICE
JOHN J CASTANEDA
514 W STATE ST SUITE 210
GENEVA, IL 60134

5604 ASSISTANT ATTORNEY GENERAL
DAVID CHRISTENSEN
00 W RANDOLPH ST 13TH FL
HICAGO, IL 60601

745 DEPT OF HUMAN SERVICES
JREAU OF RISK MANAGEMENT
) BOX 19208
RINGFIELD, IL 62794-9108

2 STATE EMPLOYEES RETIREMENT
1 S VETERANS PARKWAY
BOX 19255
NGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 19 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

21IWCC0127

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Aretha L. Wilkins-Simons
Employee/Petitioner

v.

State of IL/Elgin Mental Health
Employer/Respondent

Case # **14** WC **24866**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 28, 2018.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. **X** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. **X** Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. **X** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. **X** What temporary benefits are in dispute?
☐ TPD ☐ Maintenance **X** TTD
L. **X** What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **June 22, 2014,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is,*** causally related to a work accident.

In the year preceding the injury, Petitioner earned **$78,000.00**; the average weekly wage was **$1,500.00**

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

To date, Respondent has paid **$0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

Respondent shall be given a credit of **$0** for TTD and TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0.**

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Medical Benefits

Respondent shall pay the sum of **$35,459.42** for medical bills in accordance with the fee schedule, §8 and §8.2 of the Act, with credit to be given for any payments made directly by respondent, or pursuant to §8 j.

Temporary Total and Temporary Partial Disability

Respondent shall pay temporary total disability benefits from June 24, 2014 to November 17, 2014 and December 20, 2014 to November 27, 2015, which is **70 weeks** at the rate of **$1,000.00 per week.**

Permanent Disability

Petitioner is entitled to 15.2 weeks, at **$721.66** per week, as petitioner's permanent disability has resulted in **20% loss of use of the right thumb under §8 (e) 1 of the Act.**

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Christine MOng

Signature of Arbitrator

June 18, 2019

Date

IC.ArbDec p. 2

JUN 19 2019

 21 IWCC0127

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aretha L. Wilkins-Simmons	)
Petitioner,	)
vs.	) No. 14 WC 24866
State of IL./Elgin Mental Health Ctr.	)
Respondent.	)
	)

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Wheaton on August 29, 2018. The parties agree that on June 22, 2014, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer and that petitioner gave timely notice of the claimed accident. The parties agree petitioner earned $78,000.00 in the year predating the accident and that her average weekly wage, calculated pursuant to §10, was $1,500.00.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment with respondent.
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for medical bills.
4. Whether petitioner is entitled to temporary total disability.
5. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

Petitioner was employed by respondent for 19 years. She began her employment as a Mental Health Tech I. On June 22, 2014, she was employed as a Security Therapy Aid. She worked from 3:00 P.M. to 11 P.M.; with a one-hour break.

Petitioner listed her duties on Respondent's Exhibit 5. She performed a "face check" on 40 patients every 30 minutes by walking around with a clipboard and checking whether the patient was awake or sleeping. "Precautions" were done every 15 minutes on patients that had caused problems that day.

She sometimes pushed wheel chairs. She rotated with other staff members so that she performed the job of removing garbage and opening doors three days a week. She would pass out food trays every other day. She sometimes had to bath patients, do laundry, change patients' clothes and change diapers. She sometimes had to restrain patients who were acting out. She also sometimes used the computer.

On June 22, 2014, as petitioner was passing trays of food, she noticed severe pain in her right hand at the base of her right thumb. She finished he shift and worked the next day. Her thumb was swollen. She therefore completed paperwork (Respondent's Exhibit 1) and was sent to Delnor Express Care for treatment.

She did not return to work after June 24, 2014. On June 28, 2014 she went Advocate ER. She then began treatment with Dr. Joshua Alpert

She underwent surgery to her thumb on June 5, 2015 by Dr. Pinnello. She has not returned to see Dr. Pinnello since she was released from his care.

Her right hand and thumb swells. She has tingling and severe pain in cold weather. She is right-hand dominant.

She did not return to work while receiving treatment. She did not receive any benefits while off work.

Although petitioner confirmed she had a smart phone and home computer, she did not play video games; mostly just watched television.

Delnor Express Care Records (PX.1)

Petitioner was seen by Dr. James Keen on June 24, 2014 with complaints of right wrist pain for two days. She reported her wrist began to hurt when she was handling the dinner trays. No trauma was reported. She reported the pain comes and goes. X-rays showed a small rounded well circumscribed osseous fragment projecting near the styloid process and some degenerative changes involving the distal interphalangeal joints of the 2nd, and 3rd digits with some osteophytic spurring noted. Diagnosis was thenar muscle strain.

Advocate Sherman Hospital June 28, 2014 Records (PX.2)

Petitioner reported to the emergency room with right wrist pain and swelling after injury of June 22, 2014 as she was passing trays and it started hurting. She advised the ibuprofen was not helping and that she had an appointment with Dr. Alpert on June 30, 2014. She was given Norco and diagnosed with DeQuervain's Disease. She was advised to keep appointment with Dr. Alpert.

Midwest Bone and Joint Institute (PX.3)

Petitioner was first seen on June 30, 2014 by Dr. Joshua Alpert with right wrist complaints as a referral by her husband, who had been Dr. Alpert's patient. Her history remained the same; that is, she was passing trays at work on June 22, 2014 when her right wrist began to hurt. The diagnosis was right wrist pain.

She returned on July 21, 2014. Dr. Alpert stated it was clearly work related as she was employed as a CNA and did a lot of lifting. She only went to one physical therapy treatment as workers' compensation denied her claim. An MRI was ordered. She was kept completely off work.

She returned on August 18, 2014 after doing some physical therapy. Her condition had improved.

The August 20, 2014 MRI of the right hand showed some degenerative arthritis with no acute abnormalities.

She returned to Dr. Alpert on September 8, 2014. The thumb was injected. Dr. Alpert diagnosis was right wrist exacerbation of CMC joint arthritis from a work-related injury on June 22, 2014. He described the injury as an over-use type injury. He kept her completely off work.

She was seen again by Dr. Alpert on September 29, 2014 and reported her pain was back. She was referred to a hand specialist within the practice, Dr. Fister.

She was first seen by Dr. Fister on October 1, 2014. Dr. Fister noted petitioner's problem started in June while passing trays at work. She denied having problems before this incident. She is right-hand dominant and has no problems with her left hand. Dr. Fister administered an injection.

Petitioner returned to Dr. Fister on October 1, 2014. She reported only temporary relief from therapy and pain management cream as the pain had returned. Dr. Fister injected the base of the right thumb at the carpal metacarpal joint. She returned on October 15, 2014 and reported the injection did not help. Dr. Fister was at a loss as to what to do for petitioner and referred her to a hand specialist.

ATI Physical Therapy Records (PX.4)

Petitioner received physical therapy from July 8, 2014 to August 21, 2014; July 21, 2015 to September 3, 2015 and September 17, 2015; when a fabrication was done for a custom, hand based thumb Spica splint.

The September 22, 2015 to November 1, 2015 was for treatment unrelated plantar fasciitis.

Castle Orthopaedics & Sports Medicine Records (PX.5)

Petitioner was first seen by Dr. John Pinnello on November 14, 2014. Dr. Pinnello diagnosis was CMC arthritis and probably and underlying arthritis pattern and may have had an acute aggravation with the work-related issue. Petitioner advised she had pain with lifting heavy items and writing too long. She was released to return to work in a CMC Collum brace and to avoid heavy lifting.

She returned on December 12, 2014. Dr. Pinnello discussed casting or removable brace, as well as CMC arthroplasty although Dr. Pinnello thought petitioner was too young.

Petitioner returned on December 19, 2014 requesting surgery as she reported she could not work with a cast or splint.

She was seen on April 28, 2015 and May 22, 2015 for surgery scheduling. On June 1, 2015, she underwent right CMC arthroplasty with interposition graft of the FCR tendon due to right CMC arthritis by Dr. Pinnello. She was seen in follow up on June 8, 2015, June 15, 2015,

On June 22, 2015, Dr. Pinnello reviewed the list of work activities petitioner performed over 19 years while working for respondent (RX.5) noting petitioner performed repetitive as well as strenuous activities and concluded these cumulative minor traumas could have resulted in thumb developing arthritis over time. He also noted petitioner related a specific incident of passing trays on June 22 2014 that also occurred at work. He, therefore, concluded petitioner's right thumb carpometacarpal arthritis was related to her long-term use of her hands at work as well as aggravated by the alleged injury on June 22, 2014.

Petitioner followed up on July 10, 2015. On July 17, 2015, Dr. Pinnello reported petitioner was to start physical therapy the following week. She was seen on August 14, 2015 and was making good progress. On September 14, 2015, Dr. Pinnello estimated petitioner could probably return to work the following month.

On October 26, 2015, Dr. Pinnello released her to return to work with a five to ten-pound restriction. On November 27, 2015, petitioner was released to return to work without restrictions and had reached MMI.

Medical Bills (PX.6)

Petitioner claims medical bills of:
$6084.74 ATI (07/08/2014 – 08/28/2014)
$342.71 ATI (09/17/2015)
$5,489.20 ATI (09/22/2015-10/16/2015)
$9,763.31 ATI (07/21/2015- 09/17/2015)

$111.62 Advocate Sherman Hospital (06/28/2014)
$10,929.00 Castle Orthopaedics (11/14/2014 – 11/27/2015)
$2,101.09 Northwestern Medicine (03/24/2016)
$2,895.30 Metro Health Solutions (07/21/2014)
$5,332.74 Midwest Bone and Join Institute (06/30/2014-10/15/2014)

Petitioner's June 23, 2014 Notice of Injury (RX.1)

Petitioner reported pain in right wrist after "just passing trays and [right wrist] was swollen and it hurt really bad; petitioner could [not] turn knob to open door.

Petitioner's 2014 Attendance Record (RX.2)

Dr. John J. Fernandez Report of Petitioner's July 14, 2015 Exam (RX.3)

Dr. Fernandez examined petitioner on July 14, 2015, reviewed medical records and petitioner's list of work activities and concluded petitioner's work activities did not cause basilar joint arthritis or the need for the surgery. Dr. Fernandez opined the degenerative arthritis of this type is multifactorial in nature and most commonly seen in this age group; particularly in females.

Although Dr. Fernandez did not believe petitioner's condition was caused by a work injury, and thus her treatment was not necessitated by a work injury, he did find the treatment to date to be reasonable.

Position Description of Mental Health Technician II (RX.4)

Respondent's description indicates petitioner's job duties as a Mental Health Technician II that corresponds to the job duties petitioner enumerated in her list of job duties introduced as Respondent's Exhibit 5.

Petitioner's List of Duties Performed with Hands for 19 Years (RX.5)

Petitioner listed 20 duties she performed with her hands over her 19 years of employment with respondent. She testified she did not perform these jobs every day.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

The evidence show petitioner had no prior problems or symptoms involving her thumbs, wrists or hands before June 22, 2014. Petitioner provided a detailed list of 20 activities she performed with her hands; specifically, her right hand. On June 22, 2014, she was performing one of these tasks, which was to pass out food trays, when the pain and swelling began at the base of her right thumb.

Dr. Alpert believed petitioner's right hand condition was the result of her work activity as a CNA, as petitioner did heavy lifting. Dr. Pinnello reviewed the tasks petitioner performed for respondent and concluded the tasks were both repetitive and strenuous enough to cause the cumulative trauma of arthritis over time; in addition, noting the specific incident of passing trays

on June 22, 2014. Dr. Fernandez, who examined petitioner at respondent's request, and reviewed the work activities list petitioner provided (RX.5), did not believe petitioner's work activities caused petitioner's joint arthritis.

According to the holding in *City of Springfield v. Illinois Workers' Compensation Commission*, 388, Ill App. 3d 397, 327 Ill. Dec. 333, 901 N.E. 1066 (2009) the fact that petitioner's work activities varied, does not negate the repetitive nature of the work activity.

The Arbitrator, having weighed the conflicting evidence, in reliance on the holding in *City of Springfield*, finds petitioner proved she sustained an injury to her right thumb in a repetitive accident that arose out of and in the course of her employment with respondent.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

There was no evidence petitioner had any problems with her right thumb or hand prior to June 22, 2014. She was employed by respondent for 19 years, during which she performed repetitive work for respondent. Petitioner did not participate in any activities outside of her employment that contribute to petitioner's right thumb and hand condition. Petitioner's treating physician, Dr. Pinnello, determined petitioner's repetitive and strenuous work activities caused the cumulative minor trauma, that was aggravated by the specific incident on June 22, 2014.

Based upon the foregoing, the Arbitrator finds petitioner's right thumb carpometacarpal arthritis was caused by the cumulative trauma and specific incident that occurred on June 22, 2014.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

Although Dr. Fernandez did not believe suffered a work injury, Dr. Fernandez believed the treatment to date was reasonable and appropriate. The Arbitrator, having determined petitioner sustained accidental injury to her right thumb on June 22, 2014, awards the following bills to be paid in accordance with the fee schooled and pursuant to §8 and §8.2 of the Act, with credit to be given for any payments made directly by respondent or pursuant to §8j:

$6,084.74 ATI (07/08/2014 – 08/28/2014)
$342.71 ATI (09/17/2015)
$9,763.31 ATI (07/21/2015- 09/17/2015)
$111.62 Advocate Sherman Hospital (06/28/2014)
$10,929.00 Castle Orthopaedics (11/14/2014 – 11/27/2015)
$2,895.30 Metro Health Solutions (07/21/2014)
$5,332.74 Midwest Bone and Join Institute (06/30/2014-10/15/2014)

K. With respect to the Arbitrator's decision with regard to temporary total and temporary partial disability, the Arbitrator makes the following conclusions of law:

According to the medical records, petitioner was released to return to work with no use of the right hand on June 24, 2014. She was released to return to full-duty work by Dr. Pinnello on November 17, 2014. Petitioner returned to Dr. Pinnello on December 19, 2014 and advised she could not work with the cast or splint and was kept off work. On November 27, 2015, petitioner was released to return to work without restrictions.

Based upon the foregoing, the Arbitrator finds petitioner was disabled from June 24, 2014 to November 17, 2014 and from December 20, 2014 to November 27, 2015, and awards temporary total disability for this period, which is 70 weeks at $1,000.00 per week.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, the Arbitrator makes the following conclusions of law:

Petitioner sustained right CMC arthritis, which necessitated CMC arthroplasty and interposition graft of the FCR tendon as a result of the repetitive work accident of June 22, 2014.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner is employed as a security therapy aid, which requires use of her hands. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 49 years of age. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was capable of returning to her usual employment with respondent without a loss of earning capacity as of November 27, 2015. The Arbitrator, therefore, gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes petitioner's injury necessitated a right CMC arthroplasty with interposition graft of the FCR tendon. She required physical therapy. At the time petitioner was released by Dr. Pinnello on November 27, 2015, petitioner's thumb strength had improved. She had no pain and minimal swelling. She was released to return to work without restrictions and no longer needed to wear her brace. Petitioner has not returned to a doctor since her released on November 27, 2015. Therefore, the Arbitrator gives some weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% loss of use of her right thumb under §8 (e) 1 and awards 15.2 weeks of permanent partial disability at the rate of $721.66 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Laura Maldonado,

Petitioner,

vs. No. 15 WC 3609

Flossmoor School District #161,

21IWCC0128

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, permanent partial disability, penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On November 24, 2014, Petitioner, a 39 year old school secretary, slipped and fell while walking to her car in her school's parking lot, fracturing her left ankle. At that time, she had been heading to a mandatory meeting at the School District's offsite office. Two days later, Petitioner underwent surgery to her left ankle. She subsequently underwent two additional ankle surgeries, on April 27, 2015 and March 25, 2016, before returning to her prior position.

The Arbitrator ordered Respondent to pay Petitioner, *inter alia,* 29-3/7 weeks of temporary total disability benefits, for the periods: November 11, 2014[1] through April 27, 2015, and March 24, 2016 through April 4, 2016. However, the record shows that at arbitration,

[1] On page 2 of his decision, the Arbitrator mistakenly listed both the date of Petitioner's injury and date on which TTD was to begin, as November 11, 2014. The correct date of accident is November 24, 2014, as reflected elsewhere in the Arbitrator's decision and in the record on review.

21IWCC0128

Petitioner sought temporary total disability benefits only for the period November 24, 2014 through June 1, 2015. Petitioner claimed this on the Request for Hearing sheet (Arbitrator's Exhibit #1), and affirmed that period verbally, at the start of the hearing (transcript, page 5).

The Appellate Court has held that Commission Rule 7030.40 (now, Commission Rule 9030.40) is binding upon the parties as to the claims made therein. *Walker Brothers v. Indus. Comm'n,* 345 Ill. App. 3d 1084 (4th Dist., 2004). Because of Petitioner's claim on the Request for Hearing sheet, temporary total disability benefits from March 24, 2016 through April 4, 2016 should not have been awarded. Accordingly, the Commission finds Petitioner entitled to TTD benefits only for the period November 25, 2014 (the day after her work accident) through June 1, 2015. The Commission affirms all other parts of the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified. Respondent shall pay Petitioner the sum of $400.00 per week commencing November 25, 2014 through June 1, 2015, totaling 27 weeks, that being the period of temporary total incapacity from work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2021
o-02/18/2021
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALDONADO, LAURA
Employee/Petitioner

Case# **15WC003609**

FLOSSMORE SCHOOL DIST #161
Employer/Respondent

21IWCC0128

On 5/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.32% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5551 MENDOZA LAW PC
GEORGE SPATARO
120 S STATE ST SUITE 400
CHICAGO, IL 60603

0863 ANCEL GLINK
DOUGLAS J SULLIVAN
140 S DEARBORN ST SUITE 600
CHICAGO, IL 60603

21IWCC0128

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Laura Maldonado
Employee/Petitioner

v.

Flossmoor School Dist. #161
Employer/Respondent

Case # **15** WC **003609**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago/Wheaton**, on **9/28,10/4,12/21/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **11-24-14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**31,200.00**; the average weekly wage was $**600.00**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS AS FOLLOWS:

1. From November 11, 2014 (date of injury) Petitioner was off work and had two (2) surgeries, November 26, 2014 and April 27, 2015, and thereafter she returned to work with restrictions on June 8, 2015; 27 57ths weeks @ $400 per week $11,085.72
2. From March 24, 2016 (third surgery on March 25, 2016) through April 4, 2016 return to work; 1 5/7ths weeks @ $400 per week.....$ 685.72

Total TTD due to Petitioner..... $11,771.44

MEDICAL

Petitioner's Exhibit 27 includes the medical bills received by Petitioner from seven (7) providers. These bills total $99,694.66. Respondent shall pay Petitioner's unpaid medical pursuant to fee schedule and subject to credit for any group paid medical.

PERMANENT PARTIAL DISABILITY

The Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 50% loss of use of her left foot, 83.5 weeks, and 35% loss of use of her left leg, 75.25 weeks, under section 8(e) of the Act.

PENALTIES AND FEES

Penalties and fees are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 24, 2019
Date

MAY 29 2019

FINDINGS OF FACTS

Laura Maldonado ("Petitioner") was 39 years old on November 24, 2014 (Arb. Exhibit 1). On said date she was employed by Flossmoor School District #161 ("Respondent") as a secretary at Serena Hills School. She began her employment with Respondent in 2003 as a custodian, then as a safety aid, before becoming a secretary in 2006-2007 (Trans. #2, pgs. 15-16). Petitioner testified that she usually drove to work and, beginning in 2003, she would park anywhere. (Trans. #2, pg. 17) Petitioner is paid hourly (Trans. #2, Pg. 56), works 40 hours per week (Trans. #2, Pg.154), and is required to punch a time card when arriving to begin work and again at the end of her work day. She is paid for hours on her time card and is not paid for time not punched in. (Trans. #2, pg. 161) Her regular work schedule is from 7:30 a.m. to 4:00 p.m., Monday through Friday (Trans. #1, pg. 85; Trans. #2, pg. 41 pg. 116, pg.154). When she became a secretary, her principal was Lynn Westerlund. (Trans #2, pg. 17)

Between 2003 and 2011-2012, no parking spaces in the respondent's north lot were marked or designated in any way. (Trans. #2, pg. 17) Petitioner testified that, sometime in the summer of 2012, permanent metal posts and signs were erected in the north parking lot immediately adjacent to the front entrance of the school building at certain parking spaces (Trans. #2, pg. 27; Trans. #3, pg. 7; Petitioner's Ex. 1-5, 10-12, 15-17). The new signs at these spaces read "Handicap", "Principal", "Secretary" (x2), "Nurse", and "Counsellor". Petitioner testified that, after the signs were erected, Principal Westerlund held a staff meeting in the school's library. Petitioner and the other secretary, Virginia Garcia, were told by Westerlund to park in the north lot and to use the spaces marked "Secretary." (Trans. #2, pgs. 18-28) Additionally, the access road to the front of the school building (used to enter the north parking lot) was marked with a permanent sign at its entrance reading "Buses and Employees Only – Do

Not Enter" (Trans. #2, pg. 45). Petitioner testified that she was usually one of the first school employees to arrive (Trans #2, pgs. 47-28). She would park in one of the two (2) parking spaces marked "Secretary" (Trans. #2, pg. 41). When she would arrive to begin her workday, there were normally not a lot of cars in the north lot and at least one of the "Secretary" spots was open (Trans. #2, pg. 47). Petitioner testified that teachers park in the unmarked spaces. (Trans. #2, pg. 47)

On November 24, 2014, Petitioner drove to work, entered the north parking lot and parked in the space marked "Secretary," next to the space marked "Principal" (Trans. #2, pgs. 45-48; pg. 59). When she exited her car, it was snowy, rainy and windy, everything was wet. (Trans #2, pg. 60) She carefully walked to the front of the school building, entered and punched her time card at 7:39 a.m. (Trans. #2, pg. 42). This day was not a regular school day; it was a "parent-teacher conference" day. The conferences usually start around 1:00 p.m. (Trans. #2, pg. 51). Petitioner went to work at her usual time to prepare for the parent-teacher conferences (Trans. #2, pg. 55). Also, on this day Petitioner was required to attend a meeting at 10:00 a.m. at the District offices at Normandy Villa, approximately five minutes from Serena Hills School (Trans. #2, pgs. 52-53). She testified that it had been the plan for her principal to pick her up in the morning and they would go straight to this meeting location together – but, her principal called her in the morning and told her that she would not be able to pick her up. So, the petitioner went to her school building. Petitioner worked at Serena Hills School until it was time to leave to go to the meeting at the District office building (Trans. #2, pg. 59). She intended to attend the meeting and thereafter return to her school to finish the work day. The other secretary was on vacation (Trans. #2, pg. 148).

Petitioner put on her coat and exited her school building carrying her purse, a note pad, and her car keys; she wore flat-bottomed shoes (Trans. #2, pgs. 61-63). To get to her car she crossed the lane in front of the school building where buses would stop to drop off and pick up students, then onto a sidewalk to a point adjacent to the principal's space, and then across the principal's space toward her car (Trans. #2, pgs. 64-66). It was wet snow, slushy, wet with ice (Trans. #2, pgs. 62-63). She pushed the button on her car key to unlock her car and when she was about three steps from her car she slipped and fell (Trans. #2, pgs. 67-72). She slipped on the parking lot where there was ice and a little snow on the ground in spite of watching where she walked. After she fell, she was unable to get up on her own (Trans. #2, pg. 72). As she was on the ground where she fell, she noticed "black ice" that she did not see while walking to her car (Trans. #2, pg. 158).

While on the ground she made telephone calls to say she could not get up on her own and would not attend the meeting at the District office building (Trans. #2, pg. 73). Soon thereafter, a Serena Hills School custodian, Deondra Cocroft, and principal Shari Demitrowicz came to her. She was helped up and into her car, out of the snow, until an ambulance arrived (Trans. #2, pg. 74); (Trans. #1, pgs. 17-21; pgs. 43-45).

Petitioner's medical care for the injuries she suffered at work on November 24, 2014 began that day when the Chicago Heights Fire Department ambulance took her to the emergency facility at St. James Hospital in Chicago Heights, Illinois. Her medical records and bills are admitted in evidence as Petitioner's Exhibits Numbers 24, 25, 26, 27, 32, 33, 34, and 35. At St. James Hospital, she was diagnosed with a left displaced bimalleolar facture and dislocation of the ankle joint, with ossific fragments floating in and near the joint. They casted her leg and foot, told her she needed surgery, and discharged her. She then called her primary caregiver Dr.

Tallamaraju the next day at Hammond Clinic in Munster, Indiana. She was referred by Dr. Tallamaraju to see Dr. Rosenblum, an orthopedic surgeon, who confirmed the need for surgery. On November 26, 2014, Dr. Rosenblum performed surgery on Petitioner's leg and ankle at St. Margaret's Hospital in Hammond, Indiana. A plate was inserted and secured with screws. A long screw was also inserted into her leg bone, and loose fragments were removed. After surgery, she followed up with Dr. Rosenblum and complained of extreme pain, even with pain medication. CT-scans were performed in February and April of 2015 that revealed debris floating in the joint, spurring, and loosening of the plate.

On April 27, 2015 Dr. Rosenblum performed a second surgery to take out the long screw and clean up the spurs and loose bodies. After the second surgery, she ambulated with a CAM-boot and crutches, and attempted to work with restrictions, beginning on June 8, 2015. However, her pain and instability with ambulation and did not subside and she was only allowed to weigh-bear minimally. More CT-scans were done on January 22, 2016, and thereafter on March 25, 2018 a third surgery was performed on her leg and ankle by Dr. Rosenblum, to address the causes of her continued pain and disability. After the third surgery, she followed up with Dr. Rosenblum and on April 4, 2016, she was returned to work. After April 4, 2016, she continued to see Dr. Rosenblum and participate in therapy. She continues to suffer daily pain and disability at and around her injured leg and ankle, and continues to take medicine for pain, as well as doing exercises and stretches in the morning and throughout the day,

Principal Demitrowicz completed a Supervisor's Investigation Report of Petitioner's November 24, 2014 fall (Petitioner's Exhibit 28, dated December 3, 2014). Respondent's claim representative "Sedgwick" denied Petitioner's claim for Workers Compensation Benefits (Petitioner's Exhibit 29). Respondent did not pay TTD to Petitioner (Trans. #2, pgs. 87-88).

Respondent did not pay Petitioner's medical expenses through workers compensation (Trans. #2, pg. 87).

CONCLUSIONS OF LAW

A. PETITIONER'S INJURY WAS IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT.

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties, and while claimant is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co v. I.C.*, 129 Ill. 2d 52 (1989). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Orsin v. I.C.*, 117 Ill. 2d 38 (1987). In the case at bar, Petitioner's injury was received (1) on Respondent's premises, (2) while Petitioner was walking to her car to go to a mandatory meeting at Respondent's District offices located three to five minutes away by car from the school where Petitioner works, and (3) at 10:00 a.m. during Petitioner's workday. Here, it is undisputable that Petitioner's injuries were received/sustained in the course of her employment with Respondent. These undisputed facts are susceptible to but a single inference, and therefore the question is one of law. *Baumgardener v. IWCC*, 409 Ill. App. 3d 274 (2011).

B. PETITIONER'S INJURY AROSE OUT OF HER EMPLOYMENT WITH RESPONDENT.

To obtain compensation under the Act, Petitioner must show by a preponderance of the evidence that she suffered a disabling injury that not only was received in the course of her employment with Respondent, but that also arose out of her employment with Respondent. 820 ILCS 305/2 (West 2006). An injury "arises out of" Petitioner's employment if it originates from a risk connected with, or incidental to, the employment, so as to create a causal connection

between the employment and the accidental injury. *Baggett v. I.C.*, 201 Ill. 2d 187 (2002). Typically, an injury arises out of one's employment, if at the time of occurrence, the employee was performing acts she was instructed to perform by the employer, or acts which the employee might reasonably be expected to perform incident her assigned duties. *Brais v. I.W.C.C.*, 2014 Ill. App. 3d 120820 WC, No. 3-12-0820 WC; *Homerding v. I.C.*, 327 Ill. App. 3d 1050 (2002); *Caterpillar Tractor Co. v. I.C.* 129 Ill. 2d 52 (1989); *Potenza v. I.W.C.C.*, 378 Ill. App. 3d 113 (2007); *Ill. Inst. Of Tech v. I.C.*, 314 Ill. App. 3d 149 (2000).

For an injury caused by a fall to arise out of the employment, Petitioner must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment with Respondent. *Builder's Square, Inc., v. I.C.,* 339 Ill. App. 3d 1006 (2003). In cases in which a Petitioner fell on Respondent's premises, a snowy, icy, wet parking lot during the workday, while performing acts of her employment, the courts have consistently found that the fall arose out of the employment. *Archer Daniels Midland Co. v. I.C.* 91 Ill. 2d 210 (1982); Mores-Harvey v. I.C., 345 Ill. App. 3d 1034 (2004). A risk is incidental to employment where it belongs to or is connected with what an employee has to do in fulfilling her duties. *Caterpillar Tractor Co. v. I.C.,* 129 Ill. 2d 52 (1989). In *Dukich v. IWCC*, 2017 Ill. App. 2d 160351 WC, No. 2-16-0351WC, where Petitioner fell on wet pavement at the employer's premises while walking to her car on her way to lunch, the Commission noted that (1) at the time of the fall Petitioner was not carrying anything other than her own purse and umbrella, (2) was not hurrying to complete an assigned task but was going to lunch, (3) the walkway where she fell was not defective, (4) there was no accumulation of ice or snow that caused her fall and (5) the walkway where she fell was open to the public. The Commission found that her fall did not result from an employment related risk or from a neutral risk to which she was at increased

exposure as a result of her employment. However, it is notable that Commissioner DeVriendt dissented. He noted that she consistently reported that she slipped on wet asphalt and that it was raining when she fell. Moreover, he found it significant that she had an employer designated parking space and had to walk from the school's entrance to get from the school building to her parked car on a regular basis and concluded that she was exposed to a greater risk than the general public. Commissioner DeVriendt relied on *Mores-Harvey v. I.C.* Id.

In this case, Petitioner fell on Respondent's snowy, icy and wet premises while going to her car during her workday, to go to a mandatory meeting. She was not going to lunch. While there was testimony from Respondent that Petitioner was to report directly to the district offices for the meeting at 10:00 am, and there was no reason for her to report to her school building first; Petitioner testified credibly that she reported to her school building to help prepare for parent-teacher conferences later in the day after the meeting at the district offices and that she planned to return to her school building after the meeting. Regarding the lengthy testimony by the parties concerning where Petitioner parked, which lot, which space(s), how they were marked and designated, etc., those details are not determinative.

Based on the current case law cited above and the facts in this case, the Arbitrator finds that Petitioner's fall, and resulting injuries and conditions, arose out of and in the course of her employment with Respondent and are, therefore, compensable.

C. RESPONDENT SHALL PAY PETITIONER'S UNPAID MEDICAL PURSUANT TO FEE SCHEDULE AND SUBJECT TO CREDIT FOR ANY GROUP PAID MEDICAL.

Petitioner's Exhibit 27 includes the medical bills received by Petitioner from seven (7) providers. These bills total $99,694.66. Respondent shall pay Petitioner's unpaid medical pursuant to fee schedule and subject to credit for any group paid medical.

D. RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS AS FOLLOWS:

Petitioner was off work and unable to perform the duties of her employment with Respondent during the following periods of time:

1. From November 11, 2014 (date of injury) Petitioner was off work and had two (2) surgeries, November 26, 2014 and April 27, 2015, and thereafter she returned to work with restrictions on June 8, 2015;

   194 days @ $400 per week $11,085.72

2. From March 24, 2016 (third surgery on March 25, 2016) through April 4, 2016 return to work;

   12 days @ $400 per week.....$ 685.72

3. Total TTD due to Petitioner..... $11,771.44

E. PETITIONER'S INJURIES TO HER LEFT FOOT AND LEFT LEG ARE COMPENSABLE UNDER SECTION 8(e) OF THE ACT.

A review of Petitioner's medical records reveals that on November 24, 2014, Petitioner's injuries were (i) dislocation of the ankle joint; (ii) displaced bimalleolar fracture of the ankle; (iii) spiral oblique fracture of the left fibula; and (iv) transverse avulsion fracture of the medial malleolus. On November 26, 2014, she had the first of three (3) surgeries, where her surgeon performed open reduction-internal fixation of the malleolar fracture using six (6) screws and a plate and using wire and a threaded screw to repair and secure the transverse avulsion fracture of the medial malleolus. After her pain and range of motion did not improve, diagnostic tests revealed loose bodies in the ankle joint, post-surgery changes with the plate and screws, spurring with impingement, and heterogeneous bone density. She then had a second surgery on April 27, 2015 to address these issues, and to remove the long screw from her fibula. Again, after the second surgery her pain and range of motion did not improve. More diagnostic tests were done that revealed significant synovitis, overgrowth of soft tissue, a loose screw on the medial malleolus, and more floaters in the ankle joint. On March 25, 2016, she had a third surgery by arthroscopy. Loose bodies were removed, synovectomy was performed, microfracture was done, and her talas dome was remodeled. After the third surgery she continued to follow up. Her last visit with her caregivers was on July 5, 2018 where she was diagnosed with ongoing acute left ankle pain. She has (1) ongoing therapy and home exercises, (2) use of a leg/ankle brace and crutches as needed, (3) allowance of extra time to go places where walking is required, and (4) periodic rest periods as needed to reduce pain.

The Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 50% loss of use of her left foot and 35% loss of use of her left leg under section 8(e) of the Act.

F. **RESPONDENT'S ACTIONS WERE IN NO WAY DILATORY, VEXATIOUS OR IN BAD FAITH.**

Respondent had a legitimate good-faith dispute regarding the facts of this case as well as the law. Therefore, penalties and fees are not warranted and are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jovan R. Garcia,

Petitioner,

21IWCC0129

vs. NO: 19 WC 9078

City of Chicago, Dept. of Streets & Sanitation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

21IWCC0129

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2021

d: 2/23/21
TJT/jds
51

Thomas J. Tyrrell

Stephen J. Mathis

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

GARCIA, JOVAN R
Employee/Petitioner

Case# **19WC009078**

21IWCC0129

CITY OF CHICAGO DEPT OF STREETS & SANITATION
Employer/Respondent

On 12/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0009 ANESI OZMON RODIN NOVAK KOHEN
JENNIFER J C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

0010 CITY OF CHICAGO DEPT OF LAW
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

J. Garcia v. City of Chicago, etc., 19 WC 09078

21IWCC0129

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jovan R. Garcia
Employee/Petitioner

v.

City of Chicago Dept. of Streets & Sanitation
Employer/Respondent

Case # **19** WC **09078**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **June 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0129

FINDINGS

On the date of accident, **3/15/2019**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$45,074.64**; the average weekly wage was **$866.82**.

On the date of accident, Petitioner was **38** years of age, ***single*** with 3 dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $13,052.61, as provided in Sections 8(a) and 8.2 of the Act and as is set forth below.

Respondent shall approve and pay for the prospective medical treatment recommended by Dr. Poepping as is set forth below.

Respondent shall pay Petitioner temporary total disability benefits of $577.88/week for 12 weeks, commencing March 16, 2019 through June 7, 2019, as provided in section 8(b) of the Act.

Respondent shall pay to Petitioner penalties of $0, as provided in Section 16 of the Act; $0 as provided in Section 19(k) of the Act; and $0, as provided in Section 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 2, 2019

Date

ICArbDec19(b)

DEC 2 - 2019

FINDINGS OF FACT

Petitioner is employed by Respondent as a General Laborer in the Department of Streets and Sanitation. He has been so employed since October 2018. His job duties as a general laborer consisted of working on a garbage truck and "throwing trash."

On the morning of March 15, 2019, Petitioner was struck in the right arm by a passing SUV as he walked in Respondent's yard lot in order to clock in.

Petitioner testified thet at the start of his workday, he is required to clock in at 6:00 a.m. at a building located on the north side of Respondent's yard lot (the "yard lot"). The yard lot is located at 4808 West Wilson Avenue. Garbage trucks are parked on the yard lot, which is not open to the public. Additionally, Water Department vehicles and personal vehicles of Respondent's management and the office staff are allowed to park in the yard lot. Laborers are not allowed to park in the yard lot. They can park in a close by City lot (the "authorized parking lot"), or on the street. Laborers can get from the authorized lot to the yard lot where the timeclock is by walking or riding in a shuttle van. Laborers are not allowed to bring their personal vehicles into the yard lot. Petitioner testified that his supervisor, Mickey Mantilla, told laborers they could not park in the yard lot. There was a sign at the entrance of the yard lot that stated: "No Unauthorized Vehicles." Petitioner testified that City employees do sometimes drive their personal vehicles into the yard lot, even though they are not supposed to do so.

Petitioner testified that it is about a five to ten minute walk from the authorized parking lot to the building where he has to clock in. At the south entrance of the yard lot, there are very tall gates to walk through. The gates are generally open. If you are walking, once you enter the yard lot, you have to walk up a hill and through the yard lot that is lined with garbage trucks, in order to reach the building.

Petitioner testified that on the date of accident, March 15, 2019, it was very dark outside when he was arriving for work and there was very low visibility in the yard lot. The main lighting came from lamps on the building, and if there was lighting on the fence line, it was blocked by the trucks that were parked near it. On cross-examination, Petitioner said that some of the garbage trucks had their headlights on, but he wasn't certain how many. On that day, he met up with a co-worker, Mike Malkowski, in the authorized parking lot and they walked to work together and through the gates and into the yard lot. Petitioner stated the transportation offered by the City to the yard lot wasn't available at the time he was walking in on that day. Petitioner stated he was probably entering the yard lot at 5:50 a.m. or 5:55 a.m., and that he was wearing a required yellow City of Chicago jacket with retroreflective markings on it.

Petitioner and Malkowski were walking up the hill to clock in and talking when he noticed a vehicle go by. They moved out of the way and continued walking. Petitioner was looking down a bit to watch for potholes in the yard lot, when another vehicle approached from the opposite direction and struck him on the right shoulder. Petitioner testified he heard a loud sound and went backwards a little bit and felt shocked. Petitioner briefly saw the vehicle as it approached, and after it struck him, he turned around and saw the vehicle as it drove away very fast toward the exit. Malkowski was standing next to Petitioner when he was struck. On cross-examination, Petitioner stated there was traffic coming in and out of the yard lot the morning of the incident.

After the incident, Petitioner immediately went into the building to report it to his supervisor, Mickey Mantilla. He was taken to the office of the District supervisor, Tony LaPash, where he again explained what happened when the vehicle struck him. Petitioner completed an incident report. The police were called after the trucks had left the lot, and the Chicago Police Department officer arrived approximately two hours after the incident. The officer took statements and completed an Illinois Traffic Crash Report. (PX 5) The report states Petitioner was walking north across the yard lot when he was struck from an unknown vehicle at a high rate of speed hitting him with the passenger's side mirror and states that Petitioner was complaining of pain to the right shoulder. (PX 5)

On cross-examination and re-direct, Petitioner testified that the vehicle that struck him was a large black SUV, although he wasn't certain of the exact make or model. He said that he did not get a clear look at the vehicle as it approached him, but did turn around to look at it after he was struck and the vehicle drove away. Petitioner confirmed this was consistent with what he reported to the police offer that arrived at the scene, and the crash report that was completed.

Petitioner testified that prior to March 15, 2019, he had never injured his right shoulder or undergone medical treatment for his right shoulder or arm.

After the incident reports were completed on the date of accident, Petitioner was driven by a supervisor to Concentra medical clinic.

Michael Malkowski testified at Petitioner's request. Malkowski works For Respondent as general laborer with Petitioner and is also a military policeman active in military service. Malkowski testified that the laborers need to punch in by 6:00 a.m., and that they can either park on the street or in a City lot that is provided and located about two blocks away from the yard lot. You have the option to either walk from your parking spot to the yard lot, or to take a shuttle. The shuttle van is pretty small, so often they walk. Malkowski testified that supervisors directed the laborers to park "over there" since the very first day of work, and that the supervisors did not care whether employees took the van or walked, as long as they clocked in by 6:00 a.m. He

stated that laborers are not allowed to park their personal vehicles in the yard lot, and only administrative personnel and supervisors are permitted to do so.

Malkowski testified that the entrance of the yard lot is gated and the gates are always open. You enter through the south side of the yard lot and it is a distance of approximately 1,000 feet from the gates to the north side of the yard lot and the building where the laborers clock in for their shift. As you enter the yard lot, there is a slight slope and a black asphalt surface. The yard lot is full of approximately 40 garbage trucks.

Malkowski testified that on the accident date, March 15, 2019, he was walking side by side with Petitioner from their parked vehicles to the yard lot. They entered the gated yard at approximately 5:50 a.m. It was very dark outside. Laborers are required to wear reflective gear, and on March 15, 2019, he and Petitioner were both wearing reflective jackets, and Petitioner was also wearing reflective bottoms. Malkowski stated the yard was very dark and there were a few lights that were burnt out. When he reported for work the Monday following the incident, he noticed a couple of lights at the entrance of the yard had been replaced with white light LEDs.

Petitioner and Malkowski were walking parallel to the trucks toward the building where they were to clock in when Malkowski heard a loud sound that sounded like a bottle shattering. He stated he involuntarily blinked his eyes when he heard the sound and then Petitioner told him he had been hit by a car. Malkowski stated he recalled a really large SUV approaching them prior to hearing the sound, and it seemed like it was going fast, although he did not think it would actually hit them. After hearing the noise, Malkowski yelled and tried to get the license plate, but was unable to get a clear visual.

After the incident, Petitioner looked shocked. Together, they went into the office building where they swiped in and reported the incident involving a vehicle striking Petitioner to Mickey Mantilla. Malkowski testified he shared what he observed regarding the vehicle, but was not asked to complete any written incident report.

Miguel Mantilla testified at the request of Respondent. Mantilla is the Assistant Division Superintendent for the City of Chicago Streets and Sanitation Department and he works at the 4808 West Wilson facility. Mr. Mantilla testified that the yard lot is about a 100 yard property with only one entrance and exit, with gates that are always open. Mantilla stated that only supervisors and the "E-Man" are allowed to park personal vehicles in the yard lot. You have to be authorized to park in or enter the yard lot. Mantilla recalled that at 5:55 a.m. on March 15, 2019, Malkowski reported that Petitioner was struck in the shoulder by the mirror of a Ford Explorer as they were walking toward the building to swipe in. Mantilla brought the incident to the attention of the District Superintendent, Tony LaPash. Mantilla stated that they "waited for a bit" because it was dark outside, and also because the medical clinic was not open yet, and then he and Petitioner drove around to

try and find the vehicle in question, but did not locate it. Mantilla stated that upon inspecting the lot they did not locate a mirror on the ground.

On cross-examination, Mantilla testified that the main purpose of the yard lot is to house garbage trucks and that, on the morning of the incident, the yard lot was "packed" with trucks. Mantilla also confirmed that general laborers are not permitted to park their personal vehicles in the yard lot, and that there is a designated lot for them to park a few blocks away. Mantilla stated that after the workers park in the authorized lot, they have the option to either walk to the yard lot or take a shuttle. Once at the entrance of the yard lot, they have to travel the distance of the size of a football field to get to the building to check in for their shift.

With regard to the incident itself, Mantilla testified that he was not outside at the time Petitioner was struck and he did not witness the event. He recalled that Malkowski came in at 5:55 a.m. and reported the incident to him, and he did not recall whether or not he directly spoke with Petitioner. Mantilla stated that Petitioner went into the office and completed a report with Mr. LaPash, and that he was not present for the entirety of their meeting. Mantilla recalled that the Chicago Police Department was called to the scene, but he did not remember the time they arrived and he did not speak to the officer.

Mantilla testified the drivers head to the garbage trucks at 6:00 a.m., and the laborers get on the trucks at approximately 6:10 a.m., with the garbage trucks driving out of the yard lot between 6:10 a.m. and 6:30 a.m. Mantilla said there are 42 to 44 garbage trucks on site, and 37 of them were driven off on the morning of March 15, 2019. It was after these 37 garbage trucks had driven through the yard lot that he went out to investigate the area where Petitioner's incident occurred and to look for any debris. Mantilla testified there are two video cameras stationed on the building in the yard lot and that the police officers had been attempting to obtain that video footage, but he was uncertain if the video was every released to them.

Neither Party presented any video evidence of the accident.

Anthony LaPash, Division Superintendent with the City of Chicago Department of Streets and Sanitation in the Mayfair grid testified at Respondent's request. LaPash recalled that on March 15, 2019, Petitioner reported that he was struck by a vehicle. It was initially Mr. Mantilla that informed LaPash about the incident, and then LaPash spoke directly with Petitioner and completed a report. LaPash testified that Mantilla checked the yard lot for glass debris from a mirror and also drove around to look for the vehicle involved. He did not observe any vehicles that matched the description of the one that allegedly struck Petitioner. LaPash also testified that only he, his staff and some other supervisors are allowed to park in the yard lot. He stated "it is a very small lot for a City lot, very small." LaPash testified that other employees, including laborers, have a designated lot to park in a few blocks away from the yard, and that they have to get themselves to the yard lot to check in by either walking or taking a van. Either option is permissible.

On cross-examination, Mr. LaPash testified that he was not outside on the morning of March 15, 2019 and did not witness the accident. He stated he sat down with Petitioner and completed a report, during which time Petitioner relayed to him that he was struck in the shoulder by the mirror of a vehicle in the yard lot as he was walking to clock in. LaPash confirmed that he personally did not go out to investigate the scene, and that approximately 37 garbage trucks would have been driving out of the yard lot the morning of March 15, 2019 at approximately 6:07 a.m. He further testified that when Mantilla investigated the yard for any debris or glass, it was after these 37 garbage trucks had driven through the area in question. LaPash testified that the Chicago Police Department came to the scene, completed a crash report, and that they had been requesting video footage from the morning of the incident.

The medical records reflect that Petitioner presented to Concentra on the date of accident, March 15, 2019, with right shoulder pain "which started when he was hit by SUV while walking in to punch in on time clock at 5:55 a.m. today." (PX 1) Petitioner complained of right shoulder pain, popping, and limited range of motion, as well as right-sided neck soreness and stiffness. Petitioner denied any prior problems to the Concentra physician, and stated he reported the incident to his supervisor right away. Physical examination revealed erythema (redness of the skin) at the anterior and superior shoulder, tenderness in multiple areas of the shoulder, crepitus with pain, limited shoulder extension, and tenderness in right cervical paraspinal and trapezius muscle and right-sided muscle spasms. Petitioner was placed on restricted duty from work. (PX 1)

Petitioner had two additional visits at Concentra on March 19, 2019 and March 26, 2019, during which he reported ongoing right shoulder pain. Exacerbating factors included arm elevation, overhead use and above shoulder level. Physical examination revealed right shoulder tenderness, limited range of motion, positive Rotator Cuff tests, including painful arc test, positive Neer test, and positive empty can test. It was noted that Petitioner was not working, since no light duty work was available with his employer. Physical therapy and medication were recommended. At the visit of March 26, 2019, Petitioner advised the Concentra physician that he was seeking a transfer of care to an orthopedic specialist, Dr. Thomas Poepping, and he was given a referral for the same. (PX 1)

Petitioner next came under the care of Dr. Poepping at G&T Orthopedics on March 22, 2019. (PX 2) Petitioner relayed a consistent history of injury, stating he was injured while walking into work in the parking lot on March 15, 2019, when a vehicle struck him in the right shoulder with the driver's side mirror. He reported right shoulder pain, and there were multiple positive findings noted on physical examination. Dr. Poepping elected to start with physical therapy, although an injection was considered. Meanwhile, he restricted Petitioner to work with no use of the right arm, no overhead work, and no lifting or carrying more than 10 pounds. (PX 2)

An initial evaluation was completed at ATI Physical Therapy on March 27, 2019. Petitioner again reported a consistent history of injury, stating he was struck in the shoulder by a vehicle while walking into work, and he reported right shoulder pain. A plan of care was established, and progress notes from ATI through May 23, 2019 demonstrate Petitioner had ongoing right shoulder pain, although it was less frequent. (PX 3)

In follow-up on April 12, 2019, Petitioner reported persistent right shoulder pain and Dr. Poepping ordered a right shoulder MRI. He continued therapy and work restrictions. The MRI was completed on April 16, 2019 and revealed posterosuperior labral tearing, and a small amount of long head biceps tenosynovial fluid in absence of glenohumeral joint effusion that could be correlated with mild tenosynovitis. (PX 2)

On April 26, 2019, Petitioner returned to Dr. Poepping and the MRI results were discussed. Dr. Poepping felt the MRI demonstrated evidence of a SLAP tear, and he administered a lidocaine injection into the right shoulder. Dr. Poepping noted Petitioner was doing well with therapy and recommended continuing it, but noted surgery would be considered if Petitioner failed to improve. Petitioner returned to Dr. Poepping on May 24, 2019, at which time he reported some relief from the injection and ongoing therapy, although he noted ongoing anterior shoulder pain. Dr. Poepping's impression was a right shoulder superior labrum anterior and posterior tear, and he recommended additional therapy. Petitioner would be considered a surgical candidate if the pain persists. (PX 2)

Petitioner testified that as of the May 24, 2019 visit, he was still having pain in the right shoulder, although it had improved somewhat with the injection and therapy. He was scheduled to return to Dr. Poepping on June 21, 2019. Petitioner also confirmed that he remained on work restrictions per Dr. Poepping, and that he had not worked at all since the accident of March 15, 2019 because no modified work had been offered by his employer. Petitioner has not received any compensation since his accident and he does not believe his medical bills had been paid. Petitioner has not received any explanation from Respondent as to why they were disputing his claim.

Petitioner testified that he is right handed, and his current right shoulder condition causes daily difficulty with lifting and playing with his kids, and he reiterated that these right arm and shoulder symptoms began after the incident at work on March 15, 2019. He has suffered no subsequent injuries. Petitioner stated he wished to undergo ongoing medical treatment as recommended by Dr. Poepping.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law that follow.

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980), including that there is some causal relationship between his employment and the injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

Being cognizant of his responsibility to observe Petitioner when testifying, judge his credibility and determine how much weight to afford his testimony, the Arbitrator finds Petitioner's testimony to be credible.

REGARDING ISSUE (C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AN IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT?, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on March 15, 2019 when he was struck by an SUV mirror while walking from the entrance of the yard lot to the building where he was required to clock in. This finding is based on the credible testimony of Petitioner and Mr. Malkowski, the testimony of Respondent's witnesses and the documentary evidence.

First, an accident did occur. Petitioner was struck by an SUV (mirror to right shoulder/arm) as he was walking in Respondent's yard lot.

Second, the accident occurred in the course of Petitioner's employment. The phrase in the course of refers to the time, place and circumstances of the accident. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." Johnson v. Illinois Workers' Compensation Comm'n, 2011 IL App. (2d) 100418WC Here, Petitioner was in Respondent's yard lot walking with co-workers to the building where he was required to check in, only minutes before the start of his shift.

The injury arose out of Petitioner's employment by Respondent. "Typically, an injury arises out of one's employment, if, at the time of the occurrence, the employee was performing acts as he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the

employee might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." Johnson v. Illinois Workers' Compensation Comm'n, 2011 IL App. (2d) 100418WC Petitioner's employment exposed him to an increased risk of injury in that the yard lot was dark, crowded with garbage trucks and had access limited to authorized vehicles. Hammel v. Industrial Commission, 253 Ill.App. 3d 900 (1994)

REGARDING ISSUE (F) WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner's current condition of ill-being regarding his right shoulder, to wit: right shoulder superior labrum anterior and posterior tear, as diagnosed by Dr. Poepping, is causally related to the injury. This finding is based on Petitioner's testimony and the medical records.

REGARDING ISSUE (J) WHETHER THE MEDICAL SERVICES WERE REASONABLE AND NECESSARY, AND WHETHER RESPONDENT HAS PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS:

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary to cure or relieve Petitioner of the effects of his right shoulder injury. Further, Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

PX 4 was Petitioner's Bills exhibit. **The Arbitrator orders Respondent to pay the said claimed bills: $1,465.00 to G&T Orthopaedics (Dr. Poepping); $18,485.66 ($8,922.54/Fee Schedule) to ATI Physical Therapy; $715.07 to Concentra Medical Clinic; and $1,950.00 to American Diagnostic LLC., in accordance with §§8(a) and 8.2 of the Act.**

REGARDING ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner is entitled to receive ongoing medical care with Dr. Poepping in relation to his right shoulder condition, including possible surgical intervention. This finding is based upon the Arbitrator's findings above on the issue of accident and causation and Petitioner's testimony and the medical records. The Arbitrator orders Respondent to authorize and pay for the reasonable and necessary medical treatment recommended by Dr. Poepping, to wit: follow up regarding physical therapy post the May 24, 2019 visit, with Petitioner remaining a surgical candidate depending on his progress with therapy, along with all related services.

REGARDING ISSUE (L), IS PETITIONER ENTITLED TO ANY TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner is entitled to receive TTD benefits from March 16, 2019 through June 7, 2019, based upon Petitioner's testimony and the medical records. **Therefore, Respondent shall pay Petitioner TTD benefits of $577.88/week for 12 weeks.**

REGARDING ISSUE (M), SHOULD PENALTIES AND FEES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR FINDS:

The Arbitrator declines to impose penalties and fees upon Respondent.

First, as to §19(k) penalties and §16 fees, Respondent's disputes herein are not frivolous, unreasonable or vexatious. As Petitioner had not yet clocked in and we do not know the identity of the driver of the SUV that hit Petitioner, there is an arguable dispute as to the compensability of the injury.

Second, as to §19(l) penalties, while Respondent offered no evidence of its compliance with Rule 9110.70, the Penalty Petition was filed on June 6, 2019 (PX 6) (the day before trial) and Petitioner did not submit evidence of any prior written demand for payment of benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eleazar DeLaTorre,

Petitioner,

vs.

21IWCC0130

NO: 15 WC 34314

A & A Drywall & Taping,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 8, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0130

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $74,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2021

d: 2/9/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DeLaTORRE, ELEAZAR
Employee/Petitioner

Case# **15WC034314**
15WC034315

A & A DRYWALL & TAPING
Employer/Respondent

21IWCC0130

On 9/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0000 RAYMOND M SIMARD PC
874 GREEN BAY RD
SUITE 130
WINNETKA, IL 60093

0445 EVANS & DIXON LLC
PAUL A KRAUTER
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

21IWCC0130

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [X] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISON
NATURE AND EXTENT ONLY

Eleazar DeLaTorre

Employee/Petitioner

v.

A & A Drywall & Taping

Employer/Respondent

Case # **15** WC **34314**

Consolidated cases: **15 WC 34315**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **July 16, 2020**. By stipulation, the parties agree:

On the date of accident, **February 9, 2015**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned **$67,513.16**, and the average weekly wage was **$1,298.33**.

At the time of injury, Petitioner was **33** years of age, married, with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$77,641.33** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$77,641.33**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$735.37**/week for a further period of **100.20** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the permanent loss of use of the right foot of Petitioner to the extent of 60% thereof.**

Respondent shall pay Petitioner compensation that has accrued from **September 26, 2017** through **July 16, 2020**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner temporary total disability benefits of $865.55/week for 89 5/7 weeks for the following periods: commencing 02/10/2015 through 08/10/2015; commencing 09/09/2015 through 03/20/2016; and, commencing 01/17/2017 through 9/25/2017

Respondent shall be given a credit of $77,641.33 for TTD benefits paid under Section 8 of the Act.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

09/04/2020
Date

CONSOLIDATED
STATEMENT OF FACTS
15WC 34314 and 15WC 34315

After careful consideration of all the testimony, exhibits, medical records and reports, the Arbitrator hereby makes the following Findings of Fact, Conclusions of Law and Order.

On February 9, 2015 Petitioner, a union drywaller, slipped on ice and twisted his right ankle as he fell. He was taken by ambulance to Presence Resurrection Hospital. (PX1) The initial x-rays showed a complete disruption of the right ankle mortise and at least a bi-malleolar fracture. On February 10, Dr. Gregory Fahrenbach, an orthopedic surgeon, performed surgery consisting of an open reduction with internal fixation of a tri-malleolar fracture dislocation and an open reduction with internal fixation of a complete disruption of the syndesmotic joint. Dr. Fahrenbach implanted a total of two metal plates and nine screws during the course of surgery.

Dr. Gregory Fahrenbach (PX2)

Petitioner followed up with Dr. Fahrenbach who prescribed physical therapy followed by work hardening. On June 1, 2015, Dr. Fahrenbach noted the prominence of the screws on the lateral side of the ankle. Petitioner complained of pain in the medial ankle. On June 30, 2015, Petitioner complained of pain in the medial and lateral ankle. Dr. Fahrenbach advised Petitioner to continue work hardening and prescribed hardware removal. On August 7, 2015, Dr. Fahrenbach restricted Petitioner to light duty and again advised Petitioner that the hardware will require removal. Petitioner returned to light duty work on August 11, 2015 with restrictions of ground level work and no lifting over 40 pounds. Petitioner returned to Dr. Fahrenbach on September 4,

2015 complaining of increased pain and swelling and a decreased range of motion in the right ankle. Dr. Fahrenbach continued Petitioner on light duty.

Second Accident

On September 8, 2015 Petitioner sustained an eversion sprain of the right ankle while working. The emergency room physician noted complaints of pain over the lateral ankle, tingling in the L5/S1 distribution and minimal swelling in the ankle. The x-rays revealed no acute fractures. Petitioner was discharged and advised to follow up with Dr. Fahrenbach. (PX1) Petitioner began to lose time from work.

Dr. Fahrenbach – continued

Petitioner returned to Dr. Fahrenbach on September 11, 2015 complaining of pain laterally and the inability to bear weight. Dr. Fahrenbach scheduled Petitioner for surgery. (PX2) On October 8, 2015, Dr. Fahrenbach removed all of the hardware from the right ankle. Petitioner was again weaned off a walking boot while he attended physical therapy. On January 19, 2016, Dr. Fahrenbach ordered work hardening, which Petitioner attended until March 16, 2016 when he was discharged from work hardening by Athletico. (PX2) Using a job description provided by the claim's adjuster, the physical therapist, Grady, found that Petitioner met 45.83% (11/24) of his job demands. (PX2) Petitioner asked for a trial release to return to work. (PX2) On March 14, 2016, Dr. Fahrenbach released Petitioner to return to work without restrictions. Petitioner returned to work on March 20, 2016.

Petitioner returned to Dr. Fahrenbach on April 11, 2016 complaining of pain, instability and weakness in his right ankle. Dr. Fahrenbach prescribed Ibuprofen 600 and a home exercise program. On May 26, 2016, Petitioner voiced the same complaints to Dr. Fahrenbach who advised Petitioner to continue working full duty and to perform a home exercise program. He placed Petitioner at maximum medical improvement.

Midwest Orthopedics at Rush (PX3 and 4)

Petitioner testified that he sought a second opinion for his continued right ankle pain from Dr. George Holmes, a foot and ankle specialist, at Midwest Orthopedics at Rush on July 11, 2016. Petitioner complained of pain in his right ankle, which worsened with weightbearing and squatting. After examination and x-rays, Dr. Holmes ordered an MRI study and an EMG/NCV of the right ankle. (PX3) The EMG/ NCV performed on August 16, 2016 showed minimal right distal tibial nerve entrapment. The MRI study of December 14, 2016 showed an area of avascular necrosis measuring 3.0 x 3.0 x 1.9cm in the lateral tibial plafond of the right ankle, severe inframalleolar posterior tibial tendinosis and a low-grade strain of the distal soleus muscle. (PX3) Dr. Holmes referred Petitioner to Dr. Kamran Hamid for surgery. On January 17, 2017, Dr. Hamid excised the avascular bone and filled the defect with Pro-Stim and Pro-Dense. Dr. Hamid also excised extensive scar tissue and soft tissue impingement from the anterior ankle. Petitioner attended physical therapy, which was followed by work hardening.

On August 9, 2017, Dr. Hamid noted no further improvement. Petitioner complained that the work conditioning was aggravating his pain and swelling. Petitioner also complained of trouble walking on uneven surfaces. Dr. Hamid advised Petitioner to wear an ankle brace and to return to work after completion of work hardening. Petitioner was discharged from work hardening on

August 24, 2017. (PX3) On September 20, 2017, Dr. Hamid had Petitioner fitted for a custom lace-up ankle brace. Dr. Hamid placed Petitioner at MMI and referred him to Dr. Adam Young, for evaluation for complex regional pain syndrome.

On November 29, 2017, Dr. Daniel Bunzol, a physiatrist, examined Petitioner on a referral from Dr. Hamid. (PX4) Petitioner complained of difficulty weightbearing because of the pain. Dorsiflexion, plantar flexion and inversion of the right foot also caused pain. Dr. Bunzol found impaired sensation in the right foot and tenderness at multiple locations. (PX4 at p.8) Dr. Bunzol ordered an updated EMG to determine if there was a neurologic cause for the pain. The EMG/NCV performed December 19, 2017 showed no obvious nerve lesion. (PX4 at p.27)

Petitioner returned to Dr. Hamid on May 9, 2018 complaining of an exacerbation of his right ankle pain and swelling. Petitioner related two separate areas of pain: one deep seated related to the avascular necrosis which worsens throughout the day and, a second pain, more superficial and hypersensitive, which was significantly worse. Dr. Hamid prescribed a Medrol dosepak and lidocaine cream. He again referred Petitioner to a pain specialist.

Dr. Howard Konowitz (PX5)

On June 28, 2018, Dr. Howard Konowitz, a pain specialist, performed a section 12 examination of Petitioner at the request of Respondent. (PX5) After examination and an exhaustive review of the treating records Dr. Konowitz determined that a diagnostic ultrasound was needed prior to the determination of causation and the initiation of treatment. (PX5 at p.22) After review of the diagnostic ultrasound Dr. Konowitz diagnosed Petitioner as having an active inflammatory disease of the talus and subtalar joint, significant tarsal tunnel syndrome and significant superficial peroneal and sural nerve entrapment. (PX5 at p.25) Dr. Konowitz related his diagnosis to the

surgery and post-operative scarring. He recommended that Petitioner undergo tibial, superficial peroneal, and sural nerve hydrodissection with ultrasound. Petitioner elected to treat with Dr. Konowitz. He prescribed various pain medications. On April 16, 2019, Dr. Konowitz administered a right saphenous nerve block and a right sural nerve block. (PX5 at p.42) In follow-up on May 7, 2019 Petitioner rated his foot/ankle pain at 4 – 8 with burning, throbbing and tingling. Dr. Konowitz prescribed shoe inserts and increased the dosage of Topamax. Petitioner reported worsening symptoms with increased swelling. On July 15, 2019, Dr. Konowitz injected Depo-Medrol, Xylocaine and Marcaine into the area around the saphenous nerve and tibial nerve. (PX5 at p.67-68) On July 23, 2019 Petitioner reported a 50% improvement in his pain from the injection. Dr. Konowitz prescribed Tramadol and a home exercise program. He placed Petitioner at MMI. (PX5 at p.74) Petitioner saw Dr. Konowitz for the last time on October 29, 2019. Petitioner rated his pain at 4. He had decreased sensation on the dorsum of his foot. Dr. Konowitz prescribed Tramadol and Naproxen 500 and released Petitioner to return to work without restrictions.

Dr. Alan C. League (RX1)

Dr. League, a Board-certified orthopedic surgeon, examined Petitioner pursuant to section 12 of the Act at the request of Respondent on February 25, 2020. Dr. League reviewed the treating records and obtained a history. Petitioner reported that he worked in construction but that he no longer did drywalling. He has constant pain and swelling of the right ankle even when he not working. He described the pain as sharp, throbbing, aching and burning, which is severe at times.

On physical examination, Petitioner had decreased sensation over all distributions of the tibial nerves, saphenous nerves, sural nerve, and the deep and superficial peroneal nerves onto the right foot and ankle. Petitioner had 0 degrees of dorsiflexion on the right side and 15 degrees on

the uninjured left side. Plantarflexion was 20 degrees right and 50 degrees left. Circumferential measurements showed that the right calf was 2.3 cm smaller than the left calf and that there was swelling of the right ankle and foot. Weightbearing x-rays of the ankles showed anterior right ankle osteophytes. The cartilage interval on the AP view was 3 mm on the right, 4 mm on the left. The interval on the lateral view was 3.5 mm on the left and 1.5 – 2 mm on the right.

Dr. League provided an impairment rating using Table 16-2 (p. 506 AMA 6th ed.) based upon the cartilage interval and the avascular necrosis. He also used Table 16-7 (p.517) for a grade 2 modifier. Dr. League concluded that Petitioner had a lower extremity impairment of 16% or whole person impairment of 6%. (Table 16-10, p.530)

Additional Testimony of Petitioner

Petitioner testified that he is a member of the same union but works as a framer. (p.19) He stands all day and he has "lots of pain." (p.23) His pain is worse when he goes up or down a ladder. He rated his current pain as an 8. (p.25) At arbitration Petitioner was wearing a lace-up brace which he fastened with a shoelace through three eyelets on each side and a three-inch Velcro strap at the top. (p.27) His custom-made brace was ordered by Dr. Hamid. Petitioner has not seen Dr. Hamid since May 9, 2018 and Dr. Konowitz since October 29, 2019. (p.31) He takes Tramadol and Naproxen at night.

Testimony of Carolina DeLaTorre

Carolina testified that she is the wife of Petitioner. She notices that Petitioner walks with a limp and that he does not do much after work. He sleeps more than before the accident. (p.35) She also notices that his right foot twitches during the night and that he has really bad muscle

cramps in the right calf and thigh. She has trouble buying shoes for Petitioner because he has no arch in his right foot. (p.36) She also notices that he now runs with his legs open pushing the right leg to the side in a wobble motion. (p.38)

Consolidated Findings of Fact and Conclusions of Law
Case No. 15WC 34314

The Nature and Extent of the Injury

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth above. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence all of the elements of his or her claim *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1(b)3(d); 820 ILCS 305/1.1(e)

Petitioner testified in open hearing before the Arbitrator who had opportunity to view his demeanor under direct examination and under cross-examination. The Arbitrator evaluated the testimony of the Petitioner in consideration of all the evidence in the record. The Arbitrator finds that Petitioner was a credible witness. The Arbitrator notes that Petitioner's testimony was corroborated by and consistent with the medical records and objective findings. The Arbitrator further finds that Petitioner's wife was straight forward and credible.

With regard to subsection (i) of section 8.1b (b), the Arbitrator notes that the record contains an impairment rating of 16% of the right lower extremity as determined by Dr. League, pursuant to the most current edition of the AMA Guide to the Evaluation of Permanent Impairment. (RX1) The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Act, but instead is a factor to be considered in making such a disability evaluation.

Dr. League used Table 16-2 (p.506) based on his diagnosis of posttraumatic arthritis as seen on the weightbearing x-rays. The doctor also used Table 16-7 (p.517) for a grade 2 modifier for the physical exam. Table 16-7 refers to Dr. League's moderate findings of pain and loss of sensation upon palpation of the foot and ankle. The impairment rating did not consider the losses in the range of motion, notably the complete loss of dorsiflexion of the right ankle and the 60% loss of plantarflexion. (20 degrees right, 50 degrees left) For these reasons, the Arbitrator assigns less weight to this factor.

With regard to subsection (ii) of section 8.1b (b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a drywaller at the time of the accident and that he was released to return to work without restrictions. The Arbitrator notes that Petitioner now works as a framer. He stands all day at work. Because of the heavy physical demands of his construction job, the Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of section 8.1b (b), the Arbitrator notes that Petitioner was 33 years old at the time of the accident. Petitioner has a work life expectancy of 34 years. The Arbitrator assigns great weight to this factor.

With regard to subsection (iv) of section 8.1b (b), Petitioner's future earning capacity, the Arbitrator notes that no evidence was submitted on this factor. The Arbitrator gives little weight to this factor.

With regard to subsection (v) of section 8.1b (b), evidence of disability corroborated by the treating medical records, the subjective complaints of constant pain which is worse at the end of the day, increased pain on ladders, difficulty squatting, limping, the inability to run normally, and nighttime twitching and cramping are all consistent with the injuries sustained and the extensive treatment described in the medical records. Petitioner has three related yet distinct sources for his credible subjective complaints. Petitioner sustained a tri-malleolar fracture and a complete syndesmotic disruption which were reduced with 2 plates and 9 screws. He later developed avascular necrosis in his distal tibia. The three surgical procedures resulted in extensive scar tissue which has encased the saphenous, sural and tibial nerves of his right foot and ankle. Petitioner has lost 64% of the range of motion (55 degrees left, 20 degrees right) of his right foot and ankle. In addition, Petitioner has residual swelling and a loss of sensation over the foot. He takes Tramadol and Naproxen after work. Based on the above, the Arbitrator assigns the greatest weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner has sustained a 60% loss of use of the right foot pursuant to section 8 (e) of the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner failed to establish that a causal connection exists between the accident of September 8, 2015 and the subsequent condition of ill-being of Petitioner.

Petitioner sustained a minor right ankle sprain on September 8, 2015. At the time of the accident he was performing light duty and he was still under active medical care from his earlier accident of February 9, 2015. The hardware removal surgery performed on October 8, 2015 was recommended by Dr. Fahrenbach two months prior to the second accident. Petitioner offered no medical opinion establishing that the accident of September 8, 2015 resulted in any structural change in the right ankle, altered the course of treatment, or contributed to the Petitioner's current condition of ill-being.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eleazar DeLaTorre,

Petitioner,

21IWCC0131

vs.

NO: 15 WC 34315

A & A Drywall & Taping,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 8, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0131

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $74,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2021

d: 2/9/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DeLaTORRE, ELEAZAR
Employee/Petitioner

Case# **15WC034315**

15WC034314

A & A DRYWALL & TAPING
Employer/Respondent

21IWCC0131

On 9/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0000 RAYMOND M SIMARD PC
874 GREEN BAY RD
SUITE 130
WINNETKA, IL 60093

0445 EVANS & DIXON LLC
PAUL A KRAUTER
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

21IWCC0131

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eleazar DeLaTorre
Employee/Petitioner

v.

A & A Drywall & Taping
Employer/Respondent

Case # **15** WC **34315**

Consolidated cases: **15 WC 34314**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **July 16, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0131

FINDINGS

On **September 8, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$67,513.16**; the average weekly wage was **$1,298.33**.

On the date of accident, Petitioner was **33** years of age, ***married,*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

All claims for compensation and medical benefits are denied.

The Arbitrator finds that the subsequent condition of ill-being of Petitioner is causally related to his earlier accident of February 9, 2015, as adjudicated in claim number: 15 WC 34314

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

09/04/2020
Date

SEP 8 - 2020

CONSOLIDATED
STATEMENT OF FACTS
15WC 34314 and 15WC 34315

After careful consideration of all the testimony, exhibits, medical records and reports, the Arbitrator hereby makes the following Findings of Fact, Conclusions of Law and Order.

On February 9, 2015 Petitioner, a union drywaller, slipped on ice and twisted his right ankle as he fell. He was taken by ambulance to Presence Resurrection Hospital. (PX1) The initial x-rays showed a complete disruption of the right ankle mortise and at least a bi-malleolar fracture. On February 10, Dr. Gregory Fahrenbach, an orthopedic surgeon, performed surgery consisting of an open reduction with internal fixation of a tri-malleolar fracture dislocation and an open reduction with internal fixation of a complete disruption of the syndesmotic joint. Dr. Fahrenbach implanted a total of two metal plates and nine screws during the course of surgery.

Dr. Gregory Fahrenbach (PX2)

Petitioner followed up with Dr. Fahrenbach who prescribed physical therapy followed by work hardening. On June 1, 2015, Dr. Fahrenbach noted the prominence of the screws on the lateral side of the ankle. Petitioner complained of pain in the medial ankle. On June 30, 2015, Petitioner complained of pain in the medial and lateral ankle. Dr. Fahrenbach advised Petitioner to continue work hardening and prescribed hardware removal. On August 7, 2015, Dr. Fahrenbach restricted Petitioner to light duty and again advised Petitioner that the hardware will require removal. Petitioner returned to light duty work on August 11, 2015 with restrictions of ground level work and no lifting over 40 pounds. Petitioner returned to Dr. Fahrenbach on September 4,

2015 complaining of increased pain and swelling and a decreased range of motion in the right ankle. Dr. Fahrenbach continued Petitioner on light duty.

Second Accident

On September 8, 2015 Petitioner sustained an eversion sprain of the right ankle while working. The emergency room physician noted complaints of pain over the lateral ankle, tingling in the L5/S1 distribution and minimal swelling in the ankle. The x-rays revealed no acute fractures. Petitioner was discharged and advised to follow up with Dr. Fahrenbach. (PX1) Petitioner began to lose time from work.

Dr. Fahrenbach – continued

Petitioner returned to Dr. Fahrenbach on September 11, 2015 complaining of pain laterally and the inability to bear weight. Dr. Fahrenbach scheduled Petitioner for surgery. (PX2) On October 8, 2015, Dr. Fahrenbach removed all of the hardware from the right ankle. Petitioner was again weaned off a walking boot while he attended physical therapy. On January 19, 2016, Dr. Fahrenbach ordered work hardening, which Petitioner attended until March 16, 2016 when he was discharged from work hardening by Athletico. (PX2) Using a job description provided by the claim's adjuster, the physical therapist, Grady, found that Petitioner met 45.83% (11/24) of his job demands. (PX2) Petitioner asked for a trial release to return to work. (PX2) On March 14, 2016, Dr. Fahrenbach released Petitioner to return to work without restrictions. Petitioner returned to work on March 20, 2016.

Petitioner returned to Dr. Fahrenbach on April 11, 2016 complaining of pain, instability and weakness in his right ankle. Dr. Fahrenbach prescribed Ibuprofen 600 and a home exercise program. On May 26, 2016, Petitioner voiced the same complaints to Dr. Fahrenbach who advised Petitioner to continue working full duty and to perform a home exercise program. He placed Petitioner at maximum medical improvement.

Midwest Orthopedics at Rush (PX3 and 4)

Petitioner testified that he sought a second opinion for his continued right ankle pain from Dr. George Holmes, a foot and ankle specialist, at Midwest Orthopedics at Rush on July 11, 2016. Petitioner complained of pain in his right ankle, which worsened with weightbearing and squatting. After examination and x-rays, Dr. Holmes ordered an MRI study and an EMG/NCV of the right ankle. (PX3) The EMG/ NCV performed on August 16, 2016 showed minimal right distal tibial nerve entrapment. The MRI study of December 14, 2016 showed an area of avascular necrosis measuring 3.0 x 3.0 x 1.9cm in the lateral tibial plafond of the right ankle, severe inframalleolar posterior tibial tendinosis and a low-grade strain of the distal soleus muscle. (PX3) Dr. Holmes referred Petitioner to Dr. Kamran Hamid for surgery. On January 17, 2017, Dr. Hamid excised the avascular bone and filled the defect with Pro-Stim and Pro-Dense. Dr. Hamid also excised extensive scar tissue and soft tissue impingement from the anterior ankle. Petitioner attended physical therapy, which was followed by work hardening.

On August 9, 2017, Dr. Hamid noted no further improvement. Petitioner complained that the work conditioning was aggravating his pain and swelling. Petitioner also complained of trouble walking on uneven surfaces. Dr. Hamid advised Petitioner to wear an ankle brace and to return to work after completion of work hardening. Petitioner was discharged from work hardening on

August 24, 2017. (PX3) On September 20, 2017, Dr. Hamid had Petitioner fitted for a custom lace-up ankle brace. Dr. Hamid placed Petitioner at MMI and referred him to Dr. Adam Young, for evaluation for complex regional pain syndrome.

On November 29, 2017, Dr. Daniel Bunzol, a physiatrist, examined Petitioner on a referral from Dr. Hamid. (PX4) Petitioner complained of difficulty weightbearing because of the pain. Dorsiflexion, plantar flexion and inversion of the right foot also caused pain. Dr. Bunzol found impaired sensation in the right foot and tenderness at multiple locations. (PX4 at p.8) Dr. Bunzol ordered an updated EMG to determine if there was a neurologic cause for the pain. The EMG/NCV performed December 19, 2017 showed no obvious nerve lesion. (PX4 at p.27)

Petitioner returned to Dr. Hamid on May 9, 2018 complaining of an exacerbation of his right ankle pain and swelling. Petitioner related two separate areas of pain: one deep seated related to the avascular necrosis which worsens throughout the day and, a second pain, more superficial and hypersensitive, which was significantly worse. Dr. Hamid prescribed a Medrol dosepak and lidocaine cream. He again referred Petitioner to a pain specialist.

Dr. Howard Konowitz (PX5)

On June 28, 2018, Dr. Howard Konowitz, a pain specialist, performed a section 12 examination of Petitioner at the request of Respondent. (PX5) After examination and an exhaustive review of the treating records Dr. Konowitz determined that a diagnostic ultrasound was needed prior to the determination of causation and the initiation of treatment. (PX5 at p.22) After review of the diagnostic ultrasound Dr. Konowitz diagnosed Petitioner as having an active inflammatory disease of the talus and subtalar joint, significant tarsal tunnel syndrome and significant superficial peroneal and sural nerve entrapment. (PX5 at p.25) Dr. Konowitz related his diagnosis to the

surgery and post-operative scarring. He recommended that Petitioner undergo tibial, superficial peroneal, and sural nerve hydrodissection with ultrasound. Petitioner elected to treat with Dr. Konowitz. He prescribed various pain medications. On April 16, 2019, Dr. Konowitz administered a right saphenous nerve block and a right sural nerve block. (PX5 at p.42) In follow-up on May 7, 2019 Petitioner rated his foot/ankle pain at 4 – 8 with burning, throbbing and tingling. Dr. Konowitz prescribed shoe inserts and increased the dosage of Topamax. Petitioner reported worsening symptoms with increased swelling. On July 15, 2019, Dr. Konowitz injected Depo-Medrol, Xylocaine and Marcaine into the area around the saphenous nerve and tibial nerve. (PX5 at p.67-68) On July 23, 2019 Petitioner reported a 50% improvement in his pain from the injection. Dr. Konowitz prescribed Tramadol and a home exercise program. He placed Petitioner at MMI. (PX5 at p.74) Petitioner saw Dr. Konowitz for the last time on October 29, 2019. Petitioner rated his pain at 4. He had decreased sensation on the dorsum of his foot. Dr. Konowitz prescribed Tramadol and Naproxen 500 and released Petitioner to return to work without restrictions.

Dr. Alan C. League (RX1)

Dr. League, a Board-certified orthopedic surgeon, examined Petitioner pursuant to section 12 of the Act at the request of Respondent on February 25, 2020. Dr. League reviewed the treating records and obtained a history. Petitioner reported that he worked in construction but that he no longer did drywalling. He has constant pain and swelling of the right ankle even when he not working. He described the pain as sharp, throbbing, aching and burning, which is severe at times.

On physical examination, Petitioner had decreased sensation over all distributions of the tibial nerves, saphenous nerves, sural nerve, and the deep and superficial peroneal nerves onto the right foot and ankle. Petitioner had 0 degrees of dorsiflexion on the right side and 15 degrees on

the uninjured left side. Plantarflexion was 20 degrees right and 50 degrees left. Circumferential measurements showed that the right calf was 2.3 cm smaller than the left calf and that there was swelling of the right ankle and foot. Weightbearing x-rays of the ankles showed anterior right ankle osteophytes. The cartilage interval on the AP view was 3 mm on the right, 4 mm on the left. The interval on the lateral view was 3.5 mm on the left and 1.5 – 2 mm on the right.

Dr. League provided an impairment rating using Table 16-2 (p. 506 AMA 6th ed.) based upon the cartilage interval and the avascular necrosis. He also used Table 16-7 (p.517) for a grade 2 modifier. Dr. League concluded that Petitioner had a lower extremity impairment of 16% or whole person impairment of 6%. (Table 16-10, p.530)

Additional Testimony of Petitioner

Petitioner testified that he is a member of the same union but works as a framer. (p.19) He stands all day and he has "lots of pain." (p.23) His pain is worse when he goes up or down a ladder. He rated his current pain as an 8. (p.25) At arbitration Petitioner was wearing a lace-up brace which he fastened with a shoelace through three eyelets on each side and a three-inch Velcro strap at the top. (p.27) His custom-made brace was ordered by Dr. Hamid. Petitioner has not seen Dr. Hamid since May 9, 2018 and Dr. Konowitz since October 29, 2019. (p.31) He takes Tramadol and Naproxen at night.

Testimony of Carolina DeLaTorre

Carolina testified that she is the wife of Petitioner. She notices that Petitioner walks with a limp and that he does not do much after work. He sleeps more than before the accident. (p.35) She also notices that his right foot twitches during the night and that he has really bad muscle

cramps in the right calf and thigh. She has trouble buying shoes for Petitioner because he has no arch in his right foot. (p.36) She also notices that he now runs with his legs open pushing the right leg to the side in a wobble motion. (p.38)

Consolidated Findings of Fact and Conclusions of Law
Case No. 15WC 34314

The Nature and Extent of the Injury

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth above. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980); *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1(b)3(d); 820 ILCS 305/1.1(e)

Petitioner testified in open hearing before the Arbitrator who had opportunity to view his demeanor under direct examination and under cross-examination. The Arbitrator evaluated the testimony of the Petitioner in consideration of all the evidence in the record. The Arbitrator finds that Petitioner was a credible witness. The Arbitrator notes that Petitioner's testimony was corroborated by and consistent with the medical records and objective findings. The Arbitrator further finds that Petitioner's wife was straight forward and credible.

With regard to subsection (i) of section 8.1b (b), the Arbitrator notes that the record contains an impairment rating of 16% of the right lower extremity as determined by Dr. League, pursuant to the most current edition of the AMA Guide to the Evaluation of Permanent Impairment. (RX1) The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Act, but instead is a factor to be considered in making such a disability evaluation.

Dr. League used Table 16-2 (p.506) based on his diagnosis of posttraumatic arthritis as seen on the weightbearing x-rays. The doctor also used Table 16-7 (p.517) for a grade 2 modifier for the physical exam. Table 16-7 refers to Dr. League's moderate findings of pain and loss of sensation upon palpation of the foot and ankle. The impairment rating did not consider the losses in the range of motion, notably the complete loss of dorsiflexion of the right ankle and the 60% loss of plantarflexion. (20 degrees right, 50 degrees left) For these reasons, the Arbitrator assigns less weight to this factor.

With regard to subsection (ii) of section 8.1b (b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a drywaller at the time of the accident and that he was released to return to work without restrictions. The Arbitrator notes that Petitioner now works as a framer. He stands all day at work. Because of the heavy physical demands of his construction job, the Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of section 8.1b (b), the Arbitrator notes that Petitioner was 33 years old at the time of the accident. Petitioner has a work life expectancy of 34 years. The Arbitrator assigns great weight to this factor.

With regard to subsection (iv) of section 8.1b (b), Petitioner's future earning capacity, the Arbitrator notes that no evidence was submitted on this factor. The Arbitrator gives little weight to this factor.

With regard to subsection (v) of section 8.1b (b), evidence of disability corroborated by the treating medical records, the subjective complaints of constant pain which is worse at the end of the day, increased pain on ladders, difficulty squatting, limping, the inability to run normally, and nighttime twitching and cramping are all consistent with the injuries sustained and the extensive treatment described in the medical records. Petitioner has three related yet distinct sources for his credible subjective complaints. Petitioner sustained a tri-malleolar fracture and a complete syndesmotic disruption which were reduced with 2 plates and 9 screws. He later developed avascular necrosis in his distal tibia. The three surgical procedures resulted in extensive scar tissue which has encased the saphenous, sural and tibial nerves of his right foot and ankle. Petitioner has lost 64% of the range of motion (55 degrees left, 20 degrees right) of his right foot and ankle. In addition, Petitioner has residual swelling and a loss of sensation over the foot. He takes Tramadol and Naproxen after work. Based on the above, the Arbitrator assigns the greatest weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner has sustained a 60% loss of use of the right foot pursuant to section 8 (e) of the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner failed to establish that a causal connection exists between the accident of September 8, 2015 and the subsequent condition of ill-being of Petitioner.

Petitioner sustained a minor right ankle sprain on September 8, 2015. At the time of the accident he was performing light duty and he was still under active medical care from his earlier accident of February 9, 2015. The hardware removal surgery performed on October 8, 2015 was recommended by Dr. Fahrenbach two months prior to the second accident. Petitioner offered no medical opinion establishing that the accident of September 8, 2015 resulted in any structural change in the right ankle, altered the course of treatment, or contributed to the Petitioner's current condition of ill-being.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victor Roa,
Petitioner,

vs.

No. 17 WC 013992
(cons. 17 WC 013993, not appealed)

City of Chicago,
Respondent.

21IWCC0132

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of medical expenses, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. Findings of Fact and Procedural Background

The Commission writes additionally with respect to the issue of medical expenses. The facts of the case are otherwise straightforward and addressed in the Arbitrator's decision. Petitioner, a 71-year-old construction laborer, injured his right knee on May 5, 2017. Petitioner's treating physician and Respondent's Section 12 examiner agreed that Petitioner required a total right knee replacement and that his medical treatment had been reasonable and necessary. Petitioner's treating physician opined that Petitioner's need for the knee replacement was work-related while Respondent's Section 12 examiner concluded that it was not. Petitioner underwent the right knee replacement surgery on July 5, 2017 and returned to work full duty on November 20, 2017.

At the arbitration hearing, Petitioner claimed that he was entitled to $111,127.01 in unpaid medical expenses, $992.61 representing the amount paid by Blue Cross/Blue Shield on his behalf, and $212.84 in out-of-pocket expenses. On the request for hearing form, Respondent disputed the medical bills on the basis of causal connection only. Respondent also claimed, and Petitioner disputed, that it was entitled to §8(j) credit in the amount of $2,617.72 for medical bills paid by a

group health insurance company. In support of his claim for payment of these expenses, Petitioner submitted Petitioner's Exhibit 7 consisting of a listing of three medical providers and the amounts due, followed by the actual bills provided in response to subpoenas, the amounts paid by Blue Cross/Blue Shield, and Petitioner's out-of-pocket expenses. Respondent did not object to the bills exhibit, and they were admitted.

The Arbitrator found that Petitioner's right knee replacement was causally related to his work accident but denied Petitioner's request for medical expenses in total. In so doing, the Arbitrator concluded that Petitioner failed to prove that there were any unpaid balances, that the Blue Cross/Blue Shield payments he claimed were made, or that he was entitled to out-of-pocket expenses. Although he declined to find Respondent liable for any outstanding medical bills, the Arbitrator concluded that Respondent was entitled to the §8(j) credit it requested for payments made by a group health plan to LaGrange Hospital (if any) and to Hinsdale Orthopaedics. The Arbitrator did not address Petitioner's claim for his outstanding bill from ATI Physical Therapy.

II. Conclusions of Law

The Commission views the evidence differently than the Arbitrator. With regard to the LaGrange Hospital bill, the Arbitrator found that Petitioner had failed to prove that this bill remained unpaid, finding the bill "outdated" for its failure to reflect any payments had been made. The LaGrange Hospital charges, based on the dates incurred and the descriptions, were clearly related to Petitioner's total knee replacement and some post-operative physical therapy performed at the hospital. Respondent did not object to the admission of the bill or its reasonableness. The Commission finds that the amount listed on the bill, $55,438.33, should be paid to Petitioner, pursuant to §§8(a) and 8.2.

The Arbitrator did not specifically address the ATI Physical Therapy bills. These bills were submitted by Petitioner at the arbitration hearing and reflect that payments were made by City of Chicago/Committee of Finance/Medrisk for physical therapy services rendered from May 31, 2017 through July 3, 2017 with a balance due of $575.93. The subsequent, post-operative therapy bills list "Medrisk" as the insurance plan to be billed and reflect no payments were made, leaving $34,607.68 as the balance due. This bill was also admitted without objection. Moreover, there is no evidence to suggest that the services rendered were not reasonable or necessary to alleviate Petitioner from the effects of his injury at work. Thus, the Commission finds that any remaining outstanding balances of the ATI bills should be paid directly to Petitioner, pursuant to §§8(a) and 8.2.

After reviewing the charges and payments of Hinsdale Orthopaedics, the Arbitrator found that there was no unpaid balance owed. These billing statements reflect some payments made by Blue Cross/Blue Shield and by the Committee on Finance. However, the bills also clearly shows an unpaid insurance balance of $21,081.00. The Commission finds that the outstanding balance of $21,081.00 should be paid to Petitioner pursuant to §§8(a) and 8.2.

The Arbitrator further found no documentary support for Petitioner's allegation that Blue Cross/Blue Shield had paid any of the bills. However, Petitioner's Exhibit 7 reflects a claim for payments totaling $992.84 made by group health insurer, Blue Cross/Blue Shield, and the billing statements from Hinsdale Orthopaedics document Blue Cross/Blue Shield's total payments of

$1,032.30. The Commission finds that this amount should be paid to Petitioner directly pursuant to §§8(a) and 8.2.

With regard to out-of-pocket expenses, Petitioner listed a total of $214.82[1] on the cover sheet in Petitioner's Exhibit 7. The Arbitrator rejected this claim, as he found there was no documentary support. However, Petitioner's Exhibit 7 also contains billing statements from Hinsdale Orthopaedics in which there are notations indicating that Petitioner paid $215.04 toward that bill. The Commission finds the charges reasonable and necessary and orders Respondent to reimburse Petitioner $215.04 for out-of-pocket expenses to Hinsdale Orthopaedics.

Finally, the Arbitrator concluded that Respondent would be entitled to credit pursuant to §8(j) of the Act for various medical payments made by group health insurers. The Commission disagrees. Section 8(j) establishes three requirements which must be proved before credit can be awarded: (1) group insurance must have paid medical benefits; (2) the employer must have paid into the group policy; and (3) the group policy must preclude medical payments for injuries sustained in work-related accidents. 820 ILCS 305/§8(j). The Respondent's claim for a §8j credit was disputed by Petitioner. Respondent offered no evidence to support it claims. Therefore, the Commission finds that it is not entitled to the awarded §8(j) credit.

Thus, based on the record as a whole and pursuant to §§8(a) and 8.2, the Commission finds that Respondent is liable to pay for all medical services reasonably required to cure or relieve Petitioner from the effects of his injury. Therefore, Respondent is ordered to pay Petitioner the outstanding medical bills for LaGrange Hospital, Hinsdale Orthopaedics, and ATI Physical Therapy, the payments made by Blue Cross/Blue Shield, and the amount of his out-of-pocket expenses.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, according to the fee schedule, the outstanding medical bills, if any, of LaGrange Hospital, ATI Physical Therapy, and Hinsdale Orthopaedics to Petitioner, as provided in §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the $1,032.30 paid by group health insurer, Blue Cross/Blue Shield, on Petitioner's behalf to Hinsdale Orthopaedics.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner $215.04 in reimbursement of his out-of-pocket expenses related to medical treatment of his work-related injury.

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[1] In his Commission Statement of Exceptions, Petitioner claims that the correct amount of out-of-pocket expenses was $214.82. According to the Commission's calculations, the total was actually $215.04.

21IWCC0132

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive no §8(j) credit for medical bills paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2021

o-2/18/21
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROA, VICTOR
Employee/Petitioner

Case# **17WC013992**

17WC013993

CITY OF CHICAGO
Employer/Respondent

21IWCC0132

On 4/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2512 THE ROMAKER LAW FIRM
PATRICK SEROWKA
211 W WCKER DR SUITE 1450
CHICAGO, IL 60606

0010 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0132

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§ 8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Victor Roa
Employee/Petitioner

Case # **17 WC 13992**
Consolidated Case # **17 WC 13993**

v.

City of Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth** Arbitrator of the Commission, in the city of **Chicago**, on **6/21/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☒ Is Respondent due any credit?

FINDINGS

On **5/5/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of the accident was given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident of **May 5, 2017**.

In the year preceding the injury, Petitioner earned **$83,268.38**; the average weekly wage was **$1,601.32**.

On the date of accident, Petitioner was **71** years of age, ***married*** with **0** dependent children.

Petitioner **has** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Petitioner failed to prove that there were any unpaid balances for the reasonable and necessary medical care and treatment he received. Therefore, Petitioner's claim for unpaid medical charges and expenses of $112,332.46 is denied.

Respondent shall pay Petitioner TTD at a rate of $1067.55/week for the period of **May 9, 2017 through November 19, 2017, 27 & 5/7** weeks, totaling $29,586.39, reduced by a credit of $26,208.68 for TTD, non-occupational indemnity disability and other benefits paid, for a net **$3,377.70** unpaid TTD.

Respondent shall pay Petitioner $775.18/week for injuries which caused a permanent partial disability of **20% loss of the right leg, 43 weeks**, after applying a 30% loss of the right leg credit from an award in 12 WC 30694/15 IWCC 0434 to Petitioner's 50% loss of a right leg from his accident on May 5, 2017.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 17, 2019
Date

APR 22 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ASHLEY BRIDGES,

Petitioner,

21IWCC0133

vs.

NO. 18 WC 10060, 19 WC 09771

STATE OF ILLINOIS/
VIENNA CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Permanent Disability

The Commission views the evidence of disability differently with respect to the Section 8.1b(b) factor (iv).

(iv) the employee's future earning capacity

No evidence was presented to support a finding that Petitioner's injuries have or would detrimentally affect her future earning capacity. The Arbitrator engaged in speculation in concluding that negative repercussions would manifest in the near future. At the time of hearing Petitioner has returned to full-duty and has not sustained a loss of earnings. The Commission finds that less weight should have been given to this factor. This factor weighs heavily in favor of decreased permanent disability.

21IWCC0133

Having weighed the evidence and analyzed the Section 8.1b(b) factor (iv), the Commission finds that Petitioner sustained a 20% loss of the use of the left great toe, and 30% loss of the use of the left foot under Section 8(d)2 of the Act.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $418.31 per week for 50.1 weeks, because the injuries sustained caused 30% loss of the use of the left foot, and the sum of $418.31 for 7.6 weeks because the injuries sustained caused the loss of use of 20% of the left great toe.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $174,987.36 (Petitioner's Exhibit 1) for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Pursuant to Section 19(f)(l) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: MAR 18 2021

Stephen J. Mathis

SM/msb
o-1/19/21
44

Thomas J. Tyrrell

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRIDGES, ASHLEY
Employee/Petitioner

Case# **18WC010060**
19WC009771

STATE OF ILLINOIS/VIENNA CORR CTR
Employer/Respondent

21IWCC0133

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

AUG - 3 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

21IWCC0133

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ASHLEY BRIDGES
Employee/Petitioner

v.

STATE OF ILLINOIS/VIENNA CORR. CTR.
Employer/Respondent

Case # 18 WC 10060

Consolidated cases: **19 WC 09771**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 12, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury? **(19 WC 09771 ankle only)**
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? **(19 WC 09771 ankle only)**
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury? **(both claims)**
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **March 19, 2017, and February 13, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year(s) preceding the injuries, Petitioner earned **$36,254.02**; the average weekly wage was **$697.19**.

On the date(s) of accident, Petitioner was **30-32** years of age, ***single*** with **3** dependent child(ren).

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$all paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$all paid**.

Respondent is entitled to a credit of **$any benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in §§ 8(a) and 8.2 of the Act.

Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$418.31**/week for **71.75** weeks, because the injuries sustained caused the **35%** loss of the **left foot (58.45 weeks)** and the **35%** loss of the **left great toe (13.30 weeks)**, as provided in § 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carl Lee
Signature of Arbitrator

7/30/20
Date

AUG 3 - 2020

Findings of Fact

This matter was presented for Arbitration on June 12, 2020, regarding Petitioner's claims for injury to her left foot and left big toe on February 13, 2019, bearing claim number 19 WC 9771, and her left foot and ankle on March 19, 2017, bearing claim number 18 WC 10060. With respect to claim 19 WC 9771, Respondent disputed causal connection, reasonableness and necessity of treatment to left ankle, as well as nature and extent of her injuries. With respect to 18 WC 10060, Respondent disputed nature and extent only.

On March 19, 2017, (18 WC 10060) Petitioner was employed at Respondent's Choate Mental Health Center in Anna, Illinois, as a Mental Health Technician II. (T.10) She had been employed there almost six (6) years. *Id.* On the day of the accident, Petitioner was participating in "active treatment," which is where the staff takes a group of developmentally disabled individuals to participate in some sort of activity. (T.11) The choice that day was basketball. *Id.* Petitioner was injured when she attempted to keep the basketball from going out of bounds and came down on her left foot wrong. (T.11-12) Petitioner stated that it "made this terrible popping sound and I couldn't get up, I couldn't sustain my weight." (T.11-12) Following the accident, she immediately went to Union County Hospital's emergency room, where the consistent history of the injury by "playing ball game, injured left foot" was taken. (T.12; PX3, 3/19/17) Petitioner's exam was positive for pain upon movement and pain with tenderness on the lateral side of the foot. *Id.* X-rays were taken and the impression was a non-displaced comminuted fracture of the base of the fifth metatarsal. *Id.* Petitioner was discharged with crutches and a boot. *Id.*

Two days later, Petitioner was seen at the Orthopedic Institute of Southern Illinois, where she was examined by Jeremy Palmer, physician's assistant to Dr. JT Davis. (PX4, 3/21/17) Mr. Palmer's assessment was closed non-displaced fracture of the fifth metatarsal bone of the left foot. *Id.* He placed her in a boot with instructions to remain non-weight bearing and ordered a repeat x-ray in four weeks to assess the healing. *Id.* With respect to work, he recommended sedentary duty only with no walking, standing, or lifting. *Id.*

Petitioner returned on April 17, 2017, and was seen by Dr. Davis. (PX4, 417/17) His exam showed minimal swelling with focal tenderness over the base of the small toe metatarsal. New x-rays showed delayed healing of the fifth metatarsal fracture. *Id.* He recommended a bone stimulator

to see if healing could be expedited and allowed Petitioner to continue working with non-weight bearing sedentary work. *Id.*

Follow-up visits and x-rays showed delayed healing of the left base of the metatarsal fracture, and Dr. Davis again tried to arrange a bone stimulator. (PX4) He believed, if Petitioner did not improve, she would need an MRI scan, as she was having some tenderness over the peroneal tendons. (PX4, 7/3/17) He prescribed physical therapy, which was done at Elite Physical Therapy in Anna from May 31, 2017, to September 1, 2017. (PX4, PX5)

On August 7, 2017, Petitioner saw Dr. Davis with continued discomfort over the peroneal tendon area. (PX4, 8/7/17) He again recommended an MRI scan. *Id.* This was finally done on September 7, 2017, at Memorial Hospital of Carbondale. (PX6) It showed ongoing visualization of her fracture line through the fifth metatarsal, some mild tibial tendinitis, and mild inflammation within the peroneal tendons. *Id.* Petitioner finally received the bone growth stimulator, which added to her healing process. (PX4, 10/16/17)

Follow-up visits with Dr. Davis' office showed some improvement; but because she did not return to baseline, Dr. Davis referred her to his partner, Dr. Wood, who Petitioner saw January 4, 2018. (PX4, 11/13/17; 1/4/18) He took the same history of the injury, and noted that Petitioner had tried every manner of conservative treatment, including bracing, physical therapy, ice, medication and a bone growth stimulator. (PX4) Dr. Wood took additional x-rays, which showed normal anatomy without evidence of residual fracture deformity. (PX4, 1/4/18) He also reviewed the MRI, which he believed showed a bone edema within the base of the fifth metatarsal, but was otherwise remarkable. *Id.*

Dr. Wood's assessment was that Petitioner was suffering from a nerve stretch injury of the superficial peroneal nerve. *Id.* He recommended topical nerve cream, Neurontin, and mentioned the possibility of a corticosteroid injection around the peroneal nerve. *Id.* Petitioner was seen again on February 5, 2018, and was still having symptoms, partially because she was not able to secure the neurogenic cream for the dorsum of her foot as "apparently work comp has denied it thus far." (PX4, 2/5/28) Dr. Wood remained most suspicious of a nerve stretch injury. *Id.* Dr. Wood also prescribed additional work hardening/physical therapy at his own facility from March 1, 2018, to March 14, 2018. *Id.*

Petitioner sought a second opinion with Dr. George Paletta on March 21, 2018. (PX7, 3/21/18) He took the history of the injury and noted that Petitioner was still having symptoms of swelling over the lateral ankle, and pain with tingling in the lateral lower leg. *Id.* As stated throughout Petitioner's history, there was no prior history of left ankle or foot problems. *Id.*

Dr. Paletta's examination showed tenderness to palpation at the anterior talofibular ligament and mild tenderness at the calcaneal fibular ligament. (PX7, 3/21/18) She was not tender in other areas of her foot or ankle. *Id.* There was minimal soft tissue swelling posterior to the lateral malleolus. *Id.* He believed that her fracture had healed and was a non-factor in her overall pain symptoms, which appeared to be related to the lateral ligament complex on the lateral side of the ankle. *Id.* He recommended a new MRI scan of her ankle and foot, and allowed Petitioner to continue working with restrictions of no pushing or pulling of more than 20 pounds, no standing or walking for more than 30 minutes in an hour, and no lifting of more than 20 pounds. *Id.*

The MRI was done at MRI Partners of Chesterfield on 3/21/18 and it showed an abnormality of the peroneus brevis, malpositioned at the level of the lateral malleolar pulley. (PX8) There was no evidence of a tear. *Id.* Dr. Paletta referred Petitioner to his partner, Dr. Bagwe, a foot and ankle specialist. (PX7, 3/23/18)

Dr. Bagwe saw Petitioner on March 30, 2018, and noted she had pain along the peroneal tendons in the lateral side of her left foot. *Id.* Examination showed a positive Mulder sign with tenderness along the peroneal tendons, and other tests were negative. *Id.* Dr. Bagwe reviewed plain films of the ankle and the MRI report, and after so doing, his diagnosis was left foot 4-5 Morton's neuroma, peroneal tendonitis, and possible peroneal tendon subluxation. *Id.* He injected the left foot under ultrasound guidance and restricted her work by limiting her lifting, carrying and pushing to no greater than 15 pounds and no direct care with special needs patients. *Id.*

Petitioner returned on April 11, 2018, and advised that the injection gave only temporary relief. (PX9, 4/11/18) Dr. Bagwe then recommended surgery. *Id.* This was done on May 14, 2018. (PX10) Intraoperative objective findings showed a left 4-5 Morton's neuroma, ankle synovitis, and a 2 centimeter tear in the peroneus brevis tendon. *Id.* These were repaired and Petitioner continued to follow up with Dr. Bagwe. *Id.* He recommended physical therapy at Advanced

Training and Rehab, which Petitioner did from July 9, 2018, to November 12, 2018. (PX9, 7/2/18; PX11)

Following surgery, Petitioner was released to work, sedentary duty only, and subsequently with restrictions of no carrying more than 10 pounds wearing a removable boot. (PX9) On August 20th, she reported back to Dr. Bagwe that she was making steady improvement, with minimal discomfort on flat surfaces but problems with uneven surfaces and stairs. (PX9, 8/20/18) Dr. Bagwe recommended transitioning out of the boot an air cast ankle brace. *Id.* On November 5, 2018, and November 19, 2018, Petitioner reported that she was doing well but still had some aching around the ankle and the first MTP joint, because she was favoring the lateral side of her foot. (PX9, 11/5/18; PX18 at p. 17-18) Dr. Bagwe returned Petitioner to work without limitation. *Id.*

During the time between her first and second accidents, Petitioner tried to see Dr. Bagwe for treatment but could not get an appointment. (T.17, 30)

The parties stipulated Petitioner sustained another injury on February 13, 2019, (19 WC 09771) when, while trying to steady a combative individual with Huntington's disease, he began stomping on her left foot. (AX2) Following the accident, she went to urgent care, both on February 13th and 14th. (PX12) She was given x-rays, which were read as negative, ibuprofen, an Ace wrap, and a walking boot. *Id.*

Following the incident, Petitioner tried to call Dr. Bagwe for an appointment; however, was told he would not see her without a referral from Tristar, Respondent's third party administrator. (T.17, 30) Because she could not get in to see Dr. Bagwe, she was referred to Dr. Matthew Bradley. (T.17-18) Dr. Bradley saw Petitioner on February 21, 2018, and took the history of both injuries, and noted Petitioner was placed in a cam boot, had swelling in the left great toe, limited range of flexion and extension, and took x-rays. . (PX13. 2/21/18) These showed an intra-articular fracture of the base of the distal phalanx of the great toe with two (2) to three (3) mm of displacement and an otherwise normal foot. *Id.* Dr. Bradley also performed a diagnostic ultrasound, which showed a small amount of fluid about the IP join of the great toe. *Id.* Dr. Bradley advised Petitioner to wear the cam boot and take non-steroidal anti-inflammatories for swelling and work light duty. *Id.*

Petitioner followed up with Dr. Bradley's office on March 18, 2019, and continued to have pain in her toe and now lateral aspect of her foot. (PX13, 3/18/18) An MRI was recommended. *Id.* This was done on April 2, 2019, and it showed no internal derangement in the left ankle or hind foot. (PX14) She followed up with Dr. Bradley on April 15, 2019, to discuss the results of the MRI and Dr. Bradley noted that while the MRI showed no derangement in the left ankle or hind foot, Petitioner was still tender to palpation and had limited amount of dorsiflexion. (PX13, 4/15/18)

Follow up visits of May 15, 2019, and July 3, 2019, showed that Petitioner was not responding to conservative treatment. (PX13) Dr. Bradley had tried bracing, medication, topical creams, and physical therapy; however Petitioner still had unremitting symptoms along the lateral aspect of her foot. *Id.* An ultrasound done on July 3, 2019, showed that Petitioner's left ankle had a wavy, thickened anterior talofibular ligament without an obvious complete tear. (PX13, 7/3/19)

Because everything else had failed, Dr. Bradley recommended surgery. *Id.* This was done on July 26, 2019. (PX15) During surgery Dr. Bradley was rewarded with intraoperative objective findings of fibers off the tip of the fibula, which were fairly incompetent. *Id.* The intraoperative anterior drawer type test showed significant anterior translation of the foot with a very definitive clunk. *Id.* There was also a significant amount of scar tissue and chronic inflammatory adhesions. *Id.* Dr. Bradley dissected and debrided these down so the tendons could be evaluated. *Id.* These were normal. *Id.* In short, Dr. Bradley's post-operative diagnosis was left ankle instability with an anterior talofibular ligament tear, fibrosis and adhesions to the left peroneal tendons. *Id.* Following surgery Petitioner was placed in a cam boot, given modified activities and medication, and eventually told to increase activities. *Id.* On the last visit of February 3, 2020, he stated:

> Mrs. Bridges returns to the clinic today for a follow-up of her left ankle status post ATFL repair. She has been at work full-time without restrictions. She notes only some mild discomfort in the lateral aspect of her ankle when she runs. When she has this discomfort from running, she notes she wears her lace up ankle brace and it resolves fairly quickly. (PX13, 2/3/2020)

On that day, Dr. Bradley placed Petitioner at maximum medical improvement and discharged her from his care. *Id.*

At Arbitration Petitioner testified that after surgery she came back to work on a light duty basis for a short period of time. (T.21) She finished up her physical therapy and then returned to

work full-duty with restrictions of no overtime. *Id.* She was restricted from working after hours to regain strength, but was now working back full-duty. *Id.* When asked if the surgery helped, she testified, "The surgery was very helpful. It was absolutely helpful, yes." (T.20)

Respondent had Petitioner examined by Dr. Gary Schmidt, the first time on May 30, 2018. (RX3) He took the history of the injury, reviewed the medical records and diagnostic studies, and noted that Petitioner had undergone repair for peroneal tendon and nerve resection on May 21, 2018. *Id.* He also noted that Petitioner had no preexisting conditions or injuries. *Id.* Petitioner's behavior was appropriate, she gave a concise history, and was very accurate. *Id.* Because he had no operative report and wasn't sure what nerve was resected, he was unable to form any opinions regarding the need for surgical intervention, what was done, or the nature of the surgery itself. *Id.* He stated that Petitioner was not at maximum medical improvement. *Id.*

Dr. Schmidt was given additional records and authored a supplemental report on August 20, 2018. At that time he had the operative report and noted that Dr. Bagwe reported the 2 cm tear in her peroneus brevis at the musculotendinous junction. *Id.* Based on his examination and the operative report, Dr. Schmidt's diagnosis was a peroneus brevis tear with ankle synovitis, and he stated there was a causal relationship between Petitioner's accident, the diagnosis, and the need for surgery. (PX16)

Dr. Schmidt examined Petitioner a third time on November 15, 2019. (RX4) He took the history of the second injury, reviewed all the medical records, noted that the MRI was reported to be normal, and that while the initial ultrasound of her ankle was suggestive of intact ligaments and the peroneal tendon gliding normally, a subsequent ultrasound suggested that the ligaments were torn. *Id.* He noted that surgery was performed in July and that Petitioner was in physical therapy at the time of his examination and was improving. *Id.* His diagnosis that Petitioner was recovering from a ligament reconstruction and peroneal tendon debridement. *Id.* In his report, Dr. Schmidt stated that it was difficult to ascertain a direct causative relationship between Petitioner's current symptoms and the findings reported in the accident, stating:

> Dr. Bradley is known to me and is a skilled examiner, and a negative drawer with a normal MRI and a normal ultrasound, as well as a negative stress test on more than one occasion, would certainly not lead one to believe that there was ligament damage leading to the instability feelings in the ankle itself. It is true that a subsequent ultrasound showed

> changes in the ligament itself and his findings at surgery were that there was a partial detachment of the ligament which would lead to the question that there may indeed be a second injury. I would not deny the findings he had in surgery, although the initial findings are overwhelmingly that the ligaments themselves were normal. *Id.*

Deposition of Dr. Bradley

Dr. Bradley testified by way of deposition April 9, 2020. (PX18) He first saw Petitioner on February 21, 2019, when he took a consistent history of her injury and complaints. (*Id.* at p.9) He related that her symptoms were pain in the left foot, specifically the left great toe, which started on February 13, 2019, when her foot and toe were stomped on by a patient. *Id.* Dr. Bradley testified that Petitioner's greatest concern was the pain in her great toe and did not specifically mention pain in her ankle at the first visit. (*Id.* at p. 11) He had ankle x-rays and an ultrasound done the same day, which showed she had an intraarticular fracture in the great toe, displaced two (2) or three (3) millimeters. (*Id.* at p. 11-12) He recommended Petitioner continue with the cam boot, refrain from any kind of heavy lifting or impact-type activities, continue taking anti-inflammatories, and to follow up in three weeks. (*Id.* at p. 13-14)

Dr. Bradley testified that Petitioner had seen his nurse practitioner, on March 18, 2019, and had ongoing pain. *Id.* Petitioner had continued swelling, but was able to flex and extend the joint in the great toe. (*Id.* at p.15) Petitioner now had recurrent pain in the lateral side of her foot, so an MRI scan was ordered. *Id.* The MRI was normal with no acute-appearing injury. (*Id.* at 15-16) On the next visit of April 15, 2019, Petitioner was still having pain in her great toe; but Dr. Bradley stated the greatest amount of pain was over her lateral ankle, and she was having the pain while prolonged walking and twisting-type activity. (*Id.* at p.16) Dr. Bradley testified that this was familiar with people with great toe fractures or injuries, walking on the outside aspect of their foot, causing to supinate or invert the foot to protect the toe. (*Id.* at p.17) He opined that this was the case with Petitioner. (*Id.*) As she transitioned out of her boot to regular footwear, she did indeed walk on the outside of her ankle, and this caused the pain in the front and outside aspect of her ankle. (*Id.* at p.17-18) Dr. Bradley stated that he gave Petitioner lidocaine patches to place over the painful areas, did an intra-articular injection, and continued Petitioner on light duty with limited standing. (*Id.*)

Since Petitioner had continued ankle instability, surgical intervention was discussed. (*Id.* at p. 22-23) The x-rays showed that the great toe was healing well, but the ultrasound showed that the anterior talofibular ligament (ATFL), located right in the area of Petitioner's pain, was wavy and thickened, indicative of an injury. (*Id.* at p. 23-24) Dr. Bradley believed this was significant finding because it identified an anatomic reason for her pain and instability; torn ligaments do not heal through conservative care, and surgical intervention was reasonable. *(Id.* at p. 25)

During surgery, Dr. Bradley stated that he repaired the ATFL and debrided some fibrosis off the peroneal tendons. *Id.* The ATFL was nearly completely torn, and only a couple fibers remained on the fibula. (*Id.* at p.26) He stated this verified his suspicions from clinical findings, verified the instability Petitioner experienced, and was consistent with her symptoms of anterolateral ankle pain. (*Id.* at p. 26-27) He next opined that Petitioner's chronic walking on the outside of her ankle after her toe fracture, led to chronic spraining and straining of the ATFL, which led to instability and rolling inducing a tear. (*Id.* at 27-28) He believed that it all went back to the fact she walked on the outside of her foot due to the fracture to her great toe during her work accident. *Id.* He stated:

> Prior to fracturing her great toe, she had a surgery by Dr. Bagwe for a neuroma and a peroneal injury, but she had seemed to recover from that. She had no complaints of instability. She was able to do all of her activities of daily living, all of her work requirements. She didn't report any instability prior to this.
>
> This has all come about subsequent to her great toe fracture. I don't have any other mechanisms that would really relate and correlate to an ATFL tear subsequent to that, so that's really the only injury. I don't see – I couldn't see how I could say that she would have gotten an ATFL tear had she not fractured her great toe. (*Id.* at p. 28-29)

Dr. Bradley placed Petitioner at maximum medical improvement on February 3, 2020. (*Id.* at p. 29) He testified that Petitioner had good stability, and she was returning to normal activities. *Id.* Petitioner's post-operative care was without complication, included physical therapy and progressed as expected. *Id.* Dr. Bradley testified that he believed that the fracture suffered on February 13, 2019, contributed to the development of Petitioner's ankle instability and subsequent need for surgery. (*Id.* at p. 30)

On cross-examination, Dr. Bradley testified that the 2017 and 2019 accidents were not related to each other, noting that Dr. Bagwe was dealing with the peroneus brevis, a tendon, and he was dealing with a ligament. (*Id.* at p. 39, 40) Dr. Bradley then clarified the difference between the two, one going between a bone and muscle that moves the foot and one going between bones for stability. (*Id.* at p. 40-41) He again testified that Petitioner's development of ankle instability was not uncommon, and even though her great toe was not painful anymore, people tend to be reluctant to walk on a body part that was injured. (*Id.* at p. 45) Additionally he opined, her not putting pressure on the great toe could have caused the pain to subside. *Id.* He stated that Petitioner's symptoms were aggravated by walking and twisting. (*Id.* at p.46) Dr. Bradley was asked his opinion as regards causation, he stated:

> I think it was her gait and her activities in the recovery period that led to this that were a direct result of her fracture…she suffered an injury to her great toe with a fracture. That's pretty much unarguable…What happened subsequent to that that she developed instability and she developed this tear—there's not a great explanation, but what we don't have is we don't have any explanation other than the way that she was walking on it and repetitive microtrauma…We only have one possibility…so there's no other explanation for it other than my explanation. (*Id.* at p.47-48)

Dr. Bradley explained microtrauma, stating that ligaments do not have good blood supply or the ability to heal, so repetitively traumatizing a ligament subsequently leads to a tear, as in Petitioner's situation. (*Id.* at p. 49-50) Dr. Bradley expounded on his restrictions for Petitioner in detail, and stated that even though she had restrictions, her level of activity was sufficient to cause her further injuries. (*Id.* at p. 51-53) He testified that at the May visit Petitioner had pain exactly where Dr. Bradley would have expected it for her injury. (*Id.* at p. 55)

Dr. Bradley explained that ATFL tears have a tendency to show up as a false negative on an MRI. (*Id.* at p. 56) Additionally he stated that MRI's of the foot and ankle are difficult to interpret, so even if there was an injury in April, the MRI could have missed it. (*Id.* at p. 57

When asked why no further imaging studies were ordered prior to surgery, he stated that ankle instability was really about the physical examination and the symptomatic findings, and if he would have waited and the Petitioner's ankle completely gave out, her injuries could be more severe. (*Id.* at p. 71-72) He then testified that ultimately at the time of surgery, the ATFL was in

fact torn, and waiting would not have changed that. (*Id.* at p. 72) At the final visit of February 3, 2020, Dr. Bradley stated Petitioner had mild discomfort when running; she continued to wear her lace-up ankle brace when she had pain, which helped; and she was back to work full duty without restrictions. (*Id.* at p. 72-73) He recommended that Petitioner continued to wear the brace for a year after surgery when participating in activities that could cause reinjures. (*Id.* at p.73) He felt Petitioner would continue to have improved symptoms, and other than over-the-counter pain medications as needed, she did not require medication. (*Id.* at p. 74)

Deposition of Dr. Schmidt

Dr. Schmidt also testified by way of deposition. (RX5) He believed Petitioner's diagnosis was that she was recovering from Brostrom-Gould ligament reconstruction, a peroneal tendon debridement and a fracture of the great toe. (*Id.* at p. 9) He noted that he was in agreement with Dr. Bradley's diagnosis in regards to the great toe. *Id.* Dr. Schmidt was also in agreement with Dr. Bagwe and his diagnosis and surgical repairs done on Petitioner in regards to the accident of 2017. (*Id.* at p.10) He noted that Petitioner was done treating and at maximum medical improvement prior to the accident on February 13, 2019, and did not feel the two accidents were related. (*Id.* at p.10-11) He stated they involved different injuries, the peroneal tendons had healed from the 2017 accident and then referred to Dr. Bradley's indication of her ligament tear from the 2019 accident, which he noted was in the same locale, but a separate type of injury. (*Id.* at p.11)

Dr. Schmidt believed that the wavy, thickened anterior talofibular ligament showed on the ultrasound, must be due to Petitioner rolling her ankle while exiting her car. (*Id.* at p. 17-18) Dr. Schmidt noted that since Dr. Bradley did not find scarring around the injury during surgery, the tear would have to be of an acute nature as Dr. Bradley opined. (*Id.* at p. 20) Dr. Schmidt believed that Petitioner recovered as expected but still required some physical therapy to reach maximum medical improvement. (*Id.* at p.21)

On cross-examination, he testified that he agreed with Dr. Bagwe's treatment and the mechanism of the injury that caused the need for treatment resulting from the first accident. (*Id.* at p. 22)

With regard to the second accident, when asked if he agreed with the care and treatment given Petitioner by Dr. Bradley, he stated, "She seems to have done pretty well." (*Id.* at p. 23) He

further stated that if a patient has a torn ligament, repairing it is appropriate. *Id.* Dr. Schmidt testified that he would not deny Dr. Bradley's findings during surgery. (*Id.* at p. 25)

Petitioner testified she is back to full duty, and did have improvement from both surgeries. (T.21) She felt that Dr. Bradley helped her instability. (T.44) Petitioner stated that before her injuries, she ran three miles per day, hiked with her children and enjoyed many outside activities. (T.21-22) She is a single mother of three young children and she would take advantage of free outdoor activities, but since the accidents, she is less able to participate. (T.22) Petitioner takes anti-inflammatory medication before outings and wears her brace to prevent further injury, especially when involved in activities where the ground may be unstable, wet, or while mowing. (T.22, 39) She is sure to take medication as a preventative measure for pain, when planning to work overtime, go swimming or being active with her children, and almost every night. (T.42)

Petitioner also uses ice nightly, in particular after working or mowing. (T.23) She wears compression socks in the evenings as well, to control the swelling. *Id.* She also noted that stairs can be difficult; however, at work they are vital in assisting other employees or patients quickly, and she has to use the handrail to pull herself up the stairs at times. (T.22-23)

Petitioner stated that not only is she limited in the type of shoe she is able to wear, she has to invest in certain shoes with more cushion in them. *Id.* She testified that although her arch had fallen quite a bit since the accident, she focuses on supporting the left side of her left foot where it was broken. (T.39) Petitioner stated that she has increased sensitivity in her foot when there is a weather change, but both surgeries "absolutely" helped. (T.41, 44)

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury? (19 WC 9771 left ankle only)

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 442 N.E.2d 908 (1982). Petitioner suffered an injury on February 13, 2019, which immediately produced symptoms for which she promptly received medical treatment. (T.16) Dr. Bradley's records and testimony reflect that because of her great toe

being broken, Petitioner sustained further injury to her left ankle. (PX18 at p.33) In addition to noting the credible consistency of Petitioner's complaints, Dr. Bradley further noted that Petitioner's imaging demonstrated objective findings of ATFL injuries consistent with Petitioner's accident mechanism and symptoms. (*Id.* at p. 63) Based upon the foregoing facts and medical evidence, Dr. Bradley concluded that Petitioner's current condition of ill-being with regard to the left ankle was causally related to her initial work accident of February 2019. (*Id.* at p. 80)

The issue is whether the initial accident was a causative factor in the condition of ill-being produced in the left ankle. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury" is compensable. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2d Dist. 2005); *Nat'l Freight Indus. v. Illinois Workers' Comp. Comm'n*, 993 N.E.2d 473, 481, 373 Ill.Dec. 167, 175 (5th Dist. 2013). In *Mendota Twp. High Sch. v. Indus. Comm'n,* had it not been for the original basketball injury, in all probability claimant's back problems would not have reached the stage they did in such a short period of time. *Mendota Twp. High Sch. v. Indus. Comm'n*, 243 Ill. App. 3d 834, 837–38, 612 N.E.2d 77, 79 (1993) The Arbitrator finds that the manifest weight of the evidence demonstrates that Petitioner's second left ankle injury occurred as a result of her altered gait from her toe injury. It is thus a natural consequence stemming from the work injury. The Arbitrator sees absolutely no basis for a dispute of causal connection and finds that Petitioner met his burden of proof on this issue.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? (19 WC 09771 ankle only)

Respondents stipulates to all causally related medical bills for the left great toe, but disputes all medical treatment for the left ankle. The Arbitrator finds Dr. Bradley's testimony concerning the reasonableness and necessity of medical treatment to Petitioner's left ankle, credible and persuasive. The Arbitrator notes that Dr. Bradley is well-qualified and versed in the identification and treatment in orthopedics. The Arbitrator also places substantial weight on the fact that Petitioner had failed all conservative options to manage her left ankle symptoms, and the fact that he had a largely favorable surgical outcome.

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Given the evidence, the Arbitrator finds that the care and treatment given to Petitioner's left ankle was reasonable and necessary to cure Petitioner of the effects of his work-related great toe injury.

Issue (L): What is the nature and extent of the injury? (both claims)

Pursuant to § 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner continues to serve as a Mental Health Technician II and while she is able work full duty, she still experiences symptom and requires conservative pain management. (T.10, 21, 42) The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 30 years of age at the time of her injury. She is a younger individual and must live and work with her disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: While there is no direct evidence of reduced earning capacity contained in the record; based on the severity of Petitioner's injuries, the requisite treatment and the resulting disability, it is reasonable to conclude that such repercussions will manifest in the near future. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of her accident in 2017, Petitioner sustained a left 4-5 Morton's neuroma, ankle synovitis, and a 2 centimeter tear in the peroneus brevis tendon. Petitioner attempted to manage her condition conservatively, by way of medication, injections, physical therapy and topical creams, but ultimately required surgery.

With respect her accident in 2019, Petitioner sustained an intra-articular fracture of the base of the distal phalanx of the great toe with two (2) to three (3) mm of displacement. Petitioner again attempted to manage her condition conservatively, by way of bracing, medication, topical creams, and physical therapy. Petitioner's chronic walking on the outside of her ankle as a natural result of her toe fracture, however led to chronic spraining and straining of the ATFL. This, in turn, led to instability, rolling, and a tear in the ATFL. Petitioner ultimately underwent surgery to repair the ATFL and debride fibrosis from the peroneal tendons.

Although Petitioner did have improvement due to her surgeries and care, she is not the same. She stated that before her injuries, she ran three miles per day, hiked with her children, and enjoyed many outside activities. (T.21-22) She is a single mother of three young children, and since the accidents, she is less able to participate in extracurricular activities. (T.22) Petitioner takes anti-inflammatory medication before outings and wears her brace to prevent further injury, especially when involved in activities where the ground may be unstable or wet such as lawn mowing. (T.22, 39) She is sure to take medication as a preventative measure for pain almost every night or when planning to work overtime, go swimming or being active with her children. (T.42) Petitioner also uses ice nightly, in particular after working or mowing. (T.23) She wears compression socks in the evenings to control the swelling. *Id.* She also has difficulty using stairs at work, which she must do to assist other employees or patients quickly, and at times uses the handrail to pull herself up the stairs. (T.22-23) Petitioner is limited in the type of footwear she can select and invested in shoes with more cushion in them that shield her injured foot. *Id.* She also reported increased sensitivity in her foot when there is a weather change. (T.41)

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 35% loss of Petitioner's left great toe and serious and permanent injuries to her left ankle that resulted in the 35% loss of her left foot.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALMA CHACON,

Petitioner,

vs. NO: 13 WC 42428

LABOR NETWORK,

Respondent.

21IWCC0134

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, credits and chain of referrals, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator solely to correct a scrivener's error and the temporary total disability (TTD) calculation. The scrivener's error is on page 16, in the first line in the second full paragraph of the Arbitrator's Decision. The Commission strikes "2019" and replaces it with "2016" so the sentence reads as follows, "The Arbitrator finds that Dr. Wingate's June 29, 2016, fusion surgery and Dr. Erickson's February 22, 2017, revision surgery were both reasonable and necessary to diagnose, relieve, or cure the effects of the claimant's injury."

The Arbitrator awarded 137 weeks of TTD, for the period commencing July 15, 2015, through February 28, 2018. The Commission agrees with the dates, however, calculates the time period as 137-1/7 weeks.

21IWCC0134

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on November 4, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $304.96 per week for a period of 137-1/7 weeks, commencing July 15, 2015, through February 28, 2018, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's unpaid medical bills, contained in Petitioner's exhibits nine and ten, (PX9, PX10) as they relate to Petitioner's lumbar spine condition only, pursuant to the fee schedule and §8(a) and §8.2 of the Act. Respondent shall receive a credit for any medical bills which Respondent had previously paid. Respondent is not liable for any medical expenses involving Petitioner's cervical spine, as set forth in the Conclusions of Law in the Arbitrator's Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that as stated in the Conclusions of Law in the Arbitrator's Decision, Petitioner did not exceed the limits of "Chain of Referral."

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
KAD/bsd
O012621
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CHACON, ALMA
Employee/Petitioner

Case# **13WC042428**

LABOR NETWORK
Employer/Respondent

21IWCC0134

On 11/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5015 ESR LAW GROUP LLC
EDWARD S RUEDA
33 N LASALLE ST SUITE 330
CHICAGO, IL 60602

5001 GAIDO & FINTZEN
JASON P ALLEN
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

21IWCC0134

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alma Chacon
Employee/Petitioner
v.
Labor Network
Employer/Respondent

Case # **13** WC **42428**
Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **01/17/2019 and July 18, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Chain of Referrals**

FINDINGS

On the date of accident, **12/16/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**3,354.00**; the average weekly wage was $**304.26**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent is found to be liable and is ordered to pay Petitioner's unpaid medical bills, contained in Petitioner's PX9 and 10, as they related to Petitioner's lumbar spine condition only, pursuant to the fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any medical bills which Respondent had previously paid. Respondent is not liable for any medical expenses involving Petitioner's cervical spine, as set forth in the attached Conclusions of Law;

Petitioner is awarded TTD from July 15, 2015 through February 28, 2018, representing 137 weeks, as set forth in the attached Conclusions of Law;

As stated in the Conclusions of Law, Petitioner did not exceed the limits of "Chain of Referral".

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

10/31/2019
Date

ICArbDec19(b)

NOV - 4 2019

Procedural Background

On October 16, 2015, Arbitrator Hagerty previously issued a decision in this matter. At that time, the disputed issues were, in part, causal connection, whether Respondent was liable for unpaid medical bills, whether Petitioner was entitled to prospective medical treatment and whether Petitioner exceeded the limits of the "chain of referral". (PX11)

Arbitrator Hagerty found causal connection between and that Respondent was liable for unpaid medical bills and that Petitioner was entitled to prospective medical treatment, consisting of a L4-L5 and L5-S1 lumbar micro lumbar discectomy as proposed by Dr. Geoffrey Dixon, and that Petitioner did not exceed the limits of the "chain of referral". (PX11)

At that trial, Respondent relying upon the opinions of their Section 12 examiner, Dr. Levin, claimed no causal connection, Petitioner only sustained a back contusion, Petitioner was at MMI and additional medical treatment was unnecessary and not reasonable. Arbitrator Hagerty found that Dr. Dixon's causation opinion and recommendation for prospective surgery were supported by clinical and diagnostic evidence which included two MRI's which showed a 3-4 mm L4-5 broad based disc herniation with impaction and a 5-6 mm L5-S1 left sided disc herniation with impaction levels and an EMG showing left L5 and S1 acute radiculopathy with deinervation. (PX11).

Arbitrator Hagerty took found that Petitioner was consistent in the pattern of lumbar spine complaints radiating down her left leg and that all diagnostics showed pathologies and radicular pain consistent with Petitioner's complaints. Arbitrator Hagerty further found Dr. Levin discredited on the question of causation for not acknowledging the existence of substantial objective evidence of a lumbar spine injury and correlating radiculopathy contained in two MRIs and an EMG. Arbitrator Hagerty also noted that the MRI ordered by Dr. Levin was not included in any of his reports nor was it offered into evidence. (PX1).

Arbitrator Hagerty awarded prospective medical care recommended by Petitioner's treating neurosurgeon, Dr. Dixon, consisting of L4-5 and L5-S1 microlumbar discectomy. Arbitrator Hagerty determined that Petitioner was not at MMI and,

therefore, entitled to TTD benefits. Arbitrator Hagerty also found that Petitioner did not violate the "chain of referrals". Respondent was ordered to pay medical expenses to various medical providers including Diversey Medical Center, ION Orthopedics, Dr. Dixon, Sky Point Medical Center, and New life. The decision was affirmed and adopted by the Commission on October 27, 2016 and confirmed by the Circuit Court on June 2, 2017. (PX 11 and PX 14).

This matter proceeded to trial for the second time, pursuant to sections 19(b) and 8(a) of the Act, on January 17, 2019 and July 18, 2019. The issues in dispute involve whether Petitioner's current condition of ill-being is was causally related to her work accident, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and/or maintenance and whether Petitioner violated the "chain of physician". (Arb. Ex. #1).

Respondent claims that Petitioner's current condition of ill-being is related to the fusion surgery she underwent, rather than the two-level microlumbar discectomy previously recommended by Dr. Dixon, which was not reasonable or necessary and constituted an intervening act braking the chain of causation. On June 29, 2016, Petitioner underwent a lumbar decompression with segmental reconstruction of the L4-5 and L5-S1 (TLIF).

Findings of Fact

During the period of time this case was on review before the Commission and the Circuit Court, Petitioner's treating physician, Dr. Dixon, left the clinic and Petitioner's treatment was directed to Dr. Wingate, of Illinois Orthopedic Network. Petitioner had previously treated with Dr. Murtaza, of Illinois Orthopedic Network, who had originally referred Petitioner to Dr. Dixon of Chicago Neurological Surgery. (PX 3).

Petitioner saw Dr. Wingate on November 24, 2015. In is initial report, Dr. Wingate indicates that he spent 2 ½ hours preparing, examining and authoring his report. (PX 8). Dr. Wingate's report includes the following entries:

> **Diagnostics**: (Regarding a 6/9/2014 lumbar MRI) I have had an opportunity to review this study directly and discuss it with the patient as well as having had the opportunity to review the transcribed report, and that will be discussed within the body of my report as well. (*Id.* 11/24/2015 Rpt. p.2)
> **The 6/09/2014 Lumbar MRI**:

1. The 06/09/2014 MRI scan that I had an opportunity to review today clearly demonstrates annular tearing with disk herniation at the L5-Sl segment. The L5-Sl disk is a tall black disk.
2. There is evidence of a grade 1 degenerative spondylolisthesis at L4-5, not discussed within the body of the report nor discussed by Dr. Levin nor discussed in medical records by Drs. Murtaza and Dixon. A grade I degenerative spondylolisthesis is present with facet hypertrophy, annular tearing, and plate Modic signal changes and central disk herniation is apparent. (*Id.* P. 2)
3. There is a combination of moderate spinal canal stenosis centrally and, to my interpretation, a moderately significant neural foraminal stenosis bilaterally at the L5-S1 segment. (*Id.*)
4. There is more remarkable neural foraminal stenosis on the left than on the right. My description of the left neural foraminal stenos is in this study is moderately severe. (*Id.*)
5. Both of these segments represent tall dark disks with Modic signal changes. (*Id.*)
6. The annular tearing and herniation are clearly present as well as both central and lateral recess canal stenosing lesions. (*Id.*)

The 7/9/2014 EMG:

1. The EMG/nerve conduction study with abnormal findings. (*Id.* p. 3).
2. left L5 and SI spinal radiculopathy as demonstrated by abnormal EMG findings in the left L5 and SI enervated muscles. (*Id.* p. 3).
3. Reinnervation potentials are present, and there is no evidence of a peripheral neuropathy to suggest any involvement of the patient's diabetes. (*Id.* p. 3).

Dr. Wingate also reviewed Petitioner's medical treatment which included, in part, the following:

1. 2/20/2014, Dr. Murtaza performed a lumbar epidural steroid injection transforaminally using an approach at L4-5 and L5-S1 on the left under fluoroscopy with contrast. Temporary reduction in pain. (*Id.* p. 3).
2. 5/15/2014, Dr. Murtaza performed transforaminal injections along the left side of the spine and he sent the patient for neurosurgical evaluation with Dr. Geoffrey Dixon, MD. Again, temporary reduction in pain. (*Id.* p. 3).
3. At the bottom of page 1 from his 06/01/2015 report, Dr. Dixon states, "in my opinion, given the obvious inconsistencies and inappropriate omissions in his documentation and interpretation, I believe that Dr. Levin's report can be disregarded in full." He goes on to recommend the microdiskectomy that he had been supporting after more than 1 year of clinical evaluations. (*Id.* p. 3 ¶ 3).

Dr. Wingate's Physical Examination:

1. My examination today, 11/24/2015, demonstrates a patient who is unable to rise from a seated position. When assisted to an upright position, she can lean heavily on the cane in her right hand. (*Id.* p. 5).
2. She is unable to bend forward to the mid leg, ankle, or foot. In this position, she has tremendous escalation of her back pain. She also has an extensor lag. (*Id.*).

3. She has to push up on the cane to rise up to an upright position. Any attempt to backward extend, even 10 degrees, greatly exacerbates her back and left leg symptoms. (*Id.*).
4. She is unable in a seated position to lean forward into a position where she can place a sock on her left foot; she has sharply decreased internal rotation of the left hip joint, making this maneuver impossible. (Id.).
5. With standing, she is unable to single-limb toe raise on the left. (*Id.* p. 6).
6. She is not able even with weightbearing and hands on the exam table to perform a single isolated toe raise on the left side. She can perform this maneuver multiple times on the right side with good coordinated musculature function. (*Id.*).

Dr. Wingate's 11/24/2015 Opinions and Recommended treatment plan:

1. It does represent my professional opinion to a reasonable degree of medical certainty that the herniated disks in her lumbar spine are clinically and causally related to the work-described injury.
2. In my professional opinion, this patient is nowhere near maximum medical improvement.
3. I also find that there is a significant diskogenic component to the severity of her back pain in the fact that she cannot flex forward, and the fact that she cannot sustain anterior common loading of the lower lumbar spine is significant and pertinent.
4. Treatment plan: I personally do not agree with microscopic lumbar discectomy in this case because: (*Id.* p. 7).
    a. The patient already has findings of degenerative spondylolisthesis at L4-5. Decompression would be likely unpinch the left-sided nerve roots in her left low back, but could ultimately result in increased instability that would exacerbate the discogenic part of her pain. *Id.*
    b. The fact that epidurals into the canal, both translaminarly and transforaminally, had such an impact would suggest inflamed radiculopathic nerve roots can be calmed by steroids. *Id.*
    c. At this point, 23 months into the course of her injury, a workup for discogenic pain is well indicated. *Id.*

On April 18, 2016, Petitioner followed up with Dr. Wingate complaining of low back pain level of 10/10 and left leg pain level of 9-10/10. Dr. Wingate noted that Petitioner has herniated disks, with loss of anterior column height, posterior central herniations, left greater than the right, neural foraminal stenosis and loss of lordosis at the L4-5 and L5-S1 segments. In his records, Dr. Wingate stated that he recommended lumbar decompression with segmental reconstruction of both the L4-L5 and L5-S1 segments based upon Petitioner's clinical radiographic and electromyographic findings and that Petitioner had been through more than 2-1/2 years of left leg radicular pain,

numbness, tingling and weakness, which, he said, was unacceptable because of her diabetes and continued severe neurologic compression seen on her radiographic studies. (PX 3. 4/18/2016 Rpt.).

On June 29, 2016, Dr. Wingate performed surgery at Michigan Surgical Hospital. (PX 5). The June 29, 2016 Surgical Report indicates that Petitioner was admitted with severe bilateral leg pain and sever left leg pain, disk degeneration on top of centrally and left sided herniated disk including both L4-5 and L5-S1 motion segments and moderately severe neuroforaminal stenosis involving the right exiting nerve roots at L4, L5 and S1. The Surgical Report further states that Petitioner presents for decompression and fusion, with complaints of both severe axial low back pain, and severe leg pain symptoms as well as neurogenic claudicatory type symptoms. The Surgical Report also indicates that, during the procedural, Petitioner was rolled prone and position baseline neuromonitoring was established with both upper and lower extremities being monitored for somatosensory and EMG responses. At the time of baseline neuromonitoring, left lower extremity potentials were quite a bit lower than the right lower extremity which was consistent with her clinical history. (PX 5).

On July 15, 2016, Petitioner followed up with Dr. Wingate whose report states that Petitioner's left leg pain had disappeared but she was experiencing weakness in the left leg. The examination showed excellent motor strength and both ankle and EHL dorsiflexors were faring well. Petitioner reported some discomfort in the right sciatic notch but no pain down either leg. (PX 5).

On August 17, 2016, Petitioner returned to Dr. Wingate. At that time, Dr. Wingate noted that some of Petitioner's symptoms had progressed. Dr. Wingate indicated that Petitioner was describing dystrophic type symptoms involving the right lower extremity. An x-ray showed no evidence for pedicle screw encroachment medially. Dr. Wingate proscribed a TENs unit and he ordered a CT scan. (PX 5).

Petitioner returned to Dr. Wingate on September 13, 2016. In his records, Dr. Wingate noted that Petitioner was experiencing sympathetically-mediated pain syndrome involving her right lower extremity, the nonpainful side prior to surgery. Dr. Wingate indicated that he reviewed the transcribed report and the images themselves which showed some bone graft and debris scattered around the right posterolateral margin of the

L5-S1 cage and also some debris in the canal around the right L4and L5 lateral recess nerve roots related to the L4-5 interbody fusion. Dr. Wingate noted that there was contact of pedicle screw fixation with nerve root. Dr. Wingate ordered an EMG study, MRI and CT scan. (PX 5).

The CT scan showed mild levoconvex curvature of the lumbar spine with mild encroachment upon the L5-S1 spinal canal due to central/left paracentral disc osteophyte complex and moderate L3-4 spinal canal narrowing due to disc bulge and the prominence of the dorsal epidural fat. (PX 3). The MRI, taken on July 30, 2016, was compared to the MRI taken on April 9, 2016. The impression of the MRI was: (1) Congenital central in the lower lumbar spine due to congenitally short pedicles creating a baseline degree of central canal narrowing; (2) At the L5-S1 surgical level there is a residual signal that spans the central to left lateral recess zones, but it is unclear whether this represents residual disc protrusion or scar tissue and the right subarticular stenosis resolved. There is residual left subarticular narrowing improved from the previous study. The overall degree of central canal narrowing has improved; (3) At the L4-5 surgical level, the previously demonstrated central disc protrusion is no longer seen and the central canal stenosis has resolved. (PX3).

The EMG, taken October 21, 2016, at Suburban Pain Care, showed a borderline abnormal study of the right lower extremity suggestive of a right L5-S1 radiculitis. The report further states a frank radiculopathy could not be determined due to incomplete needle exam during the EMG portion of the study because the patient refused a lumbar paraspinal exam. (PX 3).

On November 21, 2016, Petitioner followed up with Dr. Wingate, at Lakeshore Medical Center. Petitioner testified that Dr. Wingate moved to Lakeshore Medical Center. Dr. Wingate reviewed the CT scan and noted that it showed good positioning of the pedicel screws but suggested some bone graft out of the back of the right cage around the L4 neuroforamen. Dr. Wingate also reviewed the MRI. Dr. Wingate found significant residual right L4-5 foraminal narrowing. Dr. Wingate diagnosed possible right L4-5 lateral recess mild foraminal narrowing due to an extruded bone graft. Dr. Wingate recommended revision laminectomies to explore foraminotomies around the nerve roots. (PX 8).

On January 4, 2017, Petitioner returned to Lakeshore Medical Center to follow up with Dr. Wingate. Petitioner was treated with Dr. Erickson. (PX 8). Petitioner testified that her treatment was switched to Dr. Erickson because Dr. Wingate left the Lakeshore Surgery Center. (T. 1/17/19 at pg. 12). Dr. Erickson's records state that Petitioner complained of bilateral sciatica radiating to all of her toes with right sided predominance. Dr. Erickson indicated that he reviewed the postoperative films and he noted lateral recess stenosis at L5-S1 and L4-5. Dr. Erickson also noted that the EMG, dated October 21, 2016, was consistent with radiculopathy affecting the L5-S1 nerve roots on the right side. (PX 8).

Dr. Erickson performed surgery on February 22, 2017. The post-surgical diagnosis was lateral recess stenosis due to bony overgrowth at L4-5 and L5-S1 on the right side beneath posterior instrumentation fusion instrumentation. During the surgery, Dr. Erickson removed the instrumentation from L4 through S1 and performed a total facetectomy and osteotomy of the L4-5 and L5-S1 joint complexes on the right side. (PX 8).

On March 20, 2017, Petitioner followed up with Dr. Erickson who noted that Petitioner responded well to the procedure and her leg pain diminished greatly and she had less back pain. Dr. Erickson recommended physical therapy. (PX 8). Petitioner returned to Dr. Ericson on June 1, 2017, reporting pain radiating into the right leg. Dr. Erickson ordered an MRI. (PX 8).

On July 10, 2017, Petitioner followed up with Dr. Erickson who reviewed Petitioner's MRI of June 26, 2017. Dr. Erickson indicated that the lateral recesses was satisfactory although there was some fibrosis in the lateral recesses which was expected. Dr. Erickson also noted that he found heavy calcification within the lateral recess after the surgery performed by Dr. Wingate. Petitioner reported that 80% relief of her back pain. Dr. Erickson noted that Petitioner had diminished light touch sensation over the ankles and feet which was consistent with peripheral neuropathy. In his records, Dr. Erickson indicted that Petitioner may have peripheral neuropathy with contribution from diabetes. (PX 8).

On July 13, 2017, Petitioner returned to Dr. Erickson reporting severe pain and swelling in her toes. Dr. Erickson noted that Petitioner's back pain overall was improved

following the revision surgery. Dr. Ericson indicted that Petitioner had some intrinsic changes within her nerves consistent with peripheral neuropathy. Dr. Erickson recommend Petitioner treat with her primary care physician to manager her peripheral neuropathy which was likely a diabetic peripheral neuropathy. Dr. Erickson provisionally discharges Petitioner from care. Dr. Erickson continued to keep Petitioner off work. (PX 8).

On February 28, 2018, Petitioner returned to Dr. Erickson. Petitioner reported that she frequently uses a walker because of severe low back pain and the feeling of cramping in her low back. Dr. Erickson noted that Petitioner has multiple medical problems which may be also related to her disability. Petitioner has diabetics, peripheral neuropathy, hypertension obesity and anxiety. Dr. Erickson also noted that Petitioner's overall chronic state is significantly related to her injury of December 16, 2013. Dr. Erickson indicated that Petitioner was not a surgical candidate and he provisionally discharged her from care. Dr. Erickson's notes contain a reference a no lifting more than 10 pounds restriction, but he authored a work status form indicating that Petitioner is unable to work. (PX 8). Petitioner has not returned to Dr. Erickson.

Petitioner testified that she treated at New Life Medical Center from March 9, 2014 through September 11, 2017. (T. 1/17/19 pg. 12).

Testimony of Section 12 Examiner, Dr. Jesse Butler.

Dr. Butler testified that he is an orthopedic surgeon. Dr. Butler evaluated Petitioner's medical treatment. Dr. Butler testified that he agreed with the recommendations of Dr. Dixon for a two-level decompression on the left side, which was the symptomatic side. Dr. Butler opined that the spinal fusion surgery was neither reasonable or necessary. Dr. Butler testified that he disagreed with the diagnosis of spondylolisthesis by Dr. Wingate. Dr. Butler testified that spondylolisthesis did not exist on the imaging he reviewed. Dr. Butler also testified that Petitioner had no instability. Dr. Butler opined that Petitioner had significant neuropathic symptoms on the left leg, combined with the physical exam, Petitioner's response to conservative treatment and the imaging studies, the nerve decompression surgery was the appropriate. (RX 1).

Dr. Butler opined that the EMG and CTs performed in 2016 were medical necessary because Petitioner had severe postoperative neuropathic pain affecting the right

leg. Dr. Butler also opined that the CT scans were reasonable because after an instrumented fusion it is difficult to see at the operative level if there are any complications because of the artifact from the hardware. (RX 1)

Dr. Butler opined that the revision decompression surgery, performed by Dr. Erickson, was medically necessity for the residual nerve compression documented on the CAT scan after the operative procedure. However, Dr. Butler opined that Petitioner did not require the removal of the surgical hardware or revision fusion because the hardware was well-positioned, and all Petitioner needed was her nerves decompressed. (RX 1).

Dr. Butler testified that Petitioner's peripheral neuropathy is not Petitioner's primary issue. Dr. Butler further testified that Petitioner's dystrophic pain comes from the damaged nerves on the right side from the surgery. Dr. Butler also testified that Petitioner's significant activity limitations are primarily the result of complications from the surgery performed. Dr. Butler opined that Petitioner reached maximum medical improvement. (RX 1).

Dr. Butler was asked his opinion as to the anticipated condition of Petitioner has she undergone the decompression surgery rather than the fusion surgery. Dr. Butler answered, "Well it's hard to know what the ultimate outcome may have been. I mean certainly there are positive outcomes and negative outcomes from nerve decompression surgery. The advantage of the nerve decompression is that you're basically just treating what's symptomatic. She only had left leg pain, and by going in and decompression the nerves on that side alone, you could have addressed that without introducing the risk of complications affecting the right side." (RX 1).

Testimony of Lisa Helma, a licensed and certified rehabilitation counselor.

Lisa Helma testified that she is a licensed and certified rehabilitation counselor who works at Vocamotive. Ms. Helma testified that she interviewed Petitioner on September 21, 2018. Ms. Helma testified that Petitioner is 41 years old individual who is unable to speak or write English and does not possess a driver's license. Petitioner had 6 years of education in Mexico. Ms. Helma indicated that Dr. Erickson's suggested that Petitioner was not capable for lifting anything more than 10 pounds. Ms. Helma testified that did not have any transferable skills and she would be at a unskilled sedentary occupation, which only comprises of 1 percent of the labor market. Ms. Helma opined

that Petitioner lost access to her usual and customary line of occupation and that she also loss access to any stable labor market. Ms. Helma further opined that Petitioner is disability was total. (PX 16).

Petitioner did not proffer testimony regarding performing a job search after being released from Dr. Ericson on February 28, 2018.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With respect to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. See *Sisbro*, 207 Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

The Arbitrator has carefully reviewed and considered all medical evidence along with the testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that her current lumbar spine condition of ill-being is causally related to her work accident of December 16, 2013.

The issue of whether Petitioner's lumbar disk herniations were related to her work accident of December 16, 2013 was previously decided. The Arbitrator found that Petitioner's

lumbar spine condition was causally related to the accident. The Arbitrator further awarded TTD benefits from December 16, 2013 through July 14, 2015, prospective medical treatment consisting of lumbar spinal microlumbar discectomy at L4-5 and L5-S1. The findings of the Arbitrator become the Law of the Case.

Respondent claim that Petitioner underwent a more intrusive surgery than a microlumbar discectomy at L4-5 and L5-S1, awarded by the Arbitrator, and that Petitioner's current condition of ill-being is the result of the more fusion surgery and by proceeding with a different surgery constitutes an intervening cause which breaks the chain of causation.

The Arbitrator finds that proceeding with the fusion surgery, not two-level microlumbar discectomy surgery previously awarded by the Arbitrator, in this case, does not constitute an intervening cause that completely breaks the causal chain. Employers are relieved of liability only if an intervening cause completely breaks the causal chain between the original work-related injury and the ensuring condition of ill-being. *Global Products v. IWCC*, 392 Ill.App.3d 408, 411 (2009). That the subsequent employment may have aggravated the condition is irrelevant. See *Par Electric v. IWCC*, 2018 IL App (3d) 170656WC, p.12 (2019).

Petitioner testified that she started treating with Dr. Wingate, who recommended the fusion surgery, only after Dr. Dixon left the clinic. The Arbitrator issued her decision on October 16, 2015, the Commission affirmed the Arbitrator's decision on October 27, 2016 and the Circuit Court confirmed the Commission's decision on June 2, 2017. (PX 11). Petitioner underwent the fusion surgery on June 26, 2016.

The Arbitrator notes the first trial was not litigated on the issue of which type of surgery should Petitioner undergo. (*i.e.* two-level microdiscectomy vs. fusion). In the first trial, despite the existence of an MRI evaluation showing significant disk herniations at L4-5 and L5-S1 with significant compression of the nerves which was confirmed by the EMG, Respondent's claimed Petitioner's condition was not causally related to her work injury and that she only sustained a low back contusion and she was at MMI and additional medical treatment was not necessary or reasonable. The Arbitrator found Dr. Levin discredited on the question of causation and awarded prospective medical treatment consisting of a two-level microlumbar discectomy recommended by Dr. Dixon. (PX 11). While Respondent contested the Arbitrator's decision at the Commission and Circuit Court level, Dr. Dixon left the clinic and Petitioner's treatment was switched to

Dr. Wingate who, after examining Petitioner and reviewing the testing, elected to procced with a fusion surgery.

The Arbitrator notes that the surgery performed by Dr. Wingate involved the same L4-5 and L5-S1 segments, as those identified by Dr. Dixon in his surgical recommendation. The Arbitrator further notes that Dr. Dixon advised Petitioner that despite proceeding with the microlumbar discectomy, she could still develop instability in her spine and still may need a fusion surgery. In his letter recommending surgery Dr. Dixon wrote "I have discussed the risks, benefits and rational for the surgery including but not limited to neurologic injury resulting in pain, numbness, weakness or all three, bleeding requiring transfusion, infection requiring additional surgery or CFS *leakage or instability requiring additional surgery or possible fusion.". Emphasis added.* (PX 3). In his reports dated August 8, 2014, August 29, 2014 and June 1, 2015, Dr. Dixon reaffirmed that instability requiring additional surgery and the possibility of needing a future fusion surgery was a risk associated with proceeding with the microlumbar discectomy. (PX 3).

The Arbitrator finds that the risks associated with the two level microlumbar discectomy included spinal instability and the possibility of fusion surgery. The Arbitrator further finds that the fusion surgery was an associated risk of the two-level microlumbar discectomy recommended by Dr. Dixon and, as such, there was a foreseeable risk that had Petitioner undergone the two-level microlumbar discectomy she may still have to undergo the fusion surgery. Because the fusion surgery was a foreseeable risk associated of the two-level microlumbar discectomy, the fact that Petitioner underwent the fusion surgery, rather than the two-level micolumbar discectomy does not, in of itself, completely break the causal chain. Employers are relieved of liability only if an intervening cause completely breaks the causal chain between the original work-related injury and the ensuring condition of ill-being. *Global Products v. IWCC*, 392 Ill.App.3d 408, 411 (2009).

The Arbitrator notes that Petitioner's ability to proceed with the original surgical recommendation was delayed by Respondent's vigorous defense at the Commission and Circuit Court levels. During this period, Dr. Dixon left the clinic and Petitioner was directed to Dr. Wingate. The Arbitrator finds it reasonable for Petitioner to treat with a

different doctor after Dr. Dixon left the clinic and that Petitioner's condition could deteriorated between the time Dr. Dixon recommended surgery and presenting to Dr. Wingate and that a different doctor could recommend a different medical approach to address Petitioner's medical condition. Petitioner presented to Dr. Wingate one year and three months after Dr. Dixon recommended surgery.

On November 24, 2015, Petitioner first presented to Dr. Wingate who indicated, in his records, that he performed the fusion because Petitioner had findings of degenerative spondylolisthesis at L4-5 which the decompression surgery which would likely result in increased instability and exacerbate Petitioner's discogenic pain. In his records, Dr. Wingate noted that the epidurals into the canal, both translaminary and transforeminally had an impact which suggested inflamed radiculopathic nerve roots could be calmed by steroids. (PX 3). Dr. Wingate also noted presence of spondylolisthesis during Petitioner's examination, in his report, Dr. Wingate wrote:

> "I also find that there is a significant diskogenic component to the severity of her back pain in the fact that she cannot flex forward, and the fact that she cannot sustain anterior common loading of the lower lumbar spine is significant and pertinent." (PX 3. p. 6 ¶6)

Dr. Wingate further explains why he decided to not to proceed with the microdiscectomy. In his report, Dr. Wingate wrote:

> "I personally do not agree with microscopic lumbar discectomy in this case. The patient already has findings of degenerative spondylolisthesis at L4-5. Decompression would be likely to unpinch the left-sided nerve roots in her left low back, but could ultimately result in increased instability that would exacerbate the discogenic part of her pain." (*Id.* p. 7).

Respondent retained Dr. Butler who performed a records review. Dr. Butler issued a report dated July 13, 2018. In his report, Dr. Butler agreed with the opinions of Dr. Dixon regarding the need for surgery and type of surgery. The Arbitrator notes that Dr. Butler did not offer an opinion regarding the likelihood of Petitioner developing instability or needing a fusion surgery had she undergone the two level microlumbar discectomy. The Arbitrator further notes that Dr. Butler was unable or proffer an opinion regarding the anticipated outcome had Petitioner underwent the decompression

surgery. To that question, Dr. Butler testified. "Well it's hard to know what the ultimate outcome may have been. I mean certainly there are positive outcomes and negative outcomes from nerve decompression surgery…). (RX 1).

The Arbitrator also finds that *but for* Petitioner's work-related injury and Respondent's delays, it is likely that Petitioner's care would not have been transferred to a different doctor. Petitioner should not be held liable for the differing opinions of two similarly qualified physicians. *International Harvester Co. v. Industrial Commission*, 46 Ill.2d 238, (1970) (So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable). The risk that Petitioner's condition could change or that some intervening cause could exacerbate Petitioner's condition is within the foreseeable scope of risk created by the Respondent's "legal delay" in Petitioner's treatment.

With respect to issues "J"; Whether the medical services provided were reasonable, the Arbitrator concludes the following:

Respondent claims that they are not liable to pay for Petitioner's fusion surgery or the revision surgery. The Arbitrator notes that Respondent is not claiming that the extent of their liability is limited to the cost of the two-level microlumbar discectomy previously awarded. Rather, Respondent claims that they are absolved of all liability for all medical costs, including those previously awarded. The Arbitrator notes that Respondent did not elicit opinions regarding the cost of the two-level decompression surgery from Dr. Butler. Respondent claims they are absolved of all liability for medical costs because the surgeries performed by Drs. Windgate and Erickson were unreasonable and unnecessary.

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill.App.3d 463, 470 (4th Dist. 2011).

The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that Petitioner's medical treatment for her lumbar spine were reasonable and necessary to diagnose, relieve or cure the effects of the Petitioner's injury.

Dr. Wingate recommended fusion surgery, in part, based upon Petitioner's clinical radiographic and electromyographic findings, Petitioner undergoing more than 2-1/2 years of left leg radicular pain, numbness, tingling and weakness, which, he believed, was unacceptable given Petitioner's diabetes and severe neurologic compression seen on the radiographic studies. (PX 3. 4/18/2016 Rpt.). Dr. Wingate reviewed the June 9, 2014 MRI. Upon reviewing the MRI, Dr. Wingate wrote in his records:

> "There is evidence of a grade 1 degenerative spondylolisthesis at L4-5, not discussed within the body of the report nor discussed by Dr. Levin nor discussed in medical records by Drs. Murtaza and Dixon. A grade I degenerative spondylolisthesis is present with facet hypertrophy, annular tearing, and plate Modic signal changes and central disk herniation is apparent." (PX3. p. 2).

Dr. Wingate's interpretation was supported by an earlier interpretation of the same MRI by Dr. Rizwan Arayan M.D who, on July 9, 2014, wrote in his report:

> "She underwent an updated lumbar spine MRI on 6/9/14 which revealed diffuse lumbar spondylosis and disc bulging at L4-LS with moderated spinal and mild bilateral neural foraminal stenosis." (PX 3)

The Arbitrator also notes that Dr. Butler, who performed the Section 12 examination, acknowledged the presence of spondylosis in Petitioner's January 4, 2017 CT scan. In his report, Dr. Butler wrote:

> "On January 4, 2017, CT of the lumbar spine showed extensive post fusion changes with instrumentation at L4, LS and Sl. Mild lumbar spondylosis." (RX 1).

Dr. Wingate further noted the presence of spondylolisthesis during Petitioner's examination, in his report, Dr. Wingate wrote:

> "I also find that there is a significant diskogenic component to the severity of her back pain in the fact that she cannot flex forward, and the fact that she cannot sustain anterior common loading of the lower lumbar spine is significant and pertinent." (PX 3. p. 6 ¶6)

And that:

> "At this point, 23 months into the course of her injury, a workup for discogenic pain is well indicated." (*Id.* p. 7).

In support of his decision to proceed with the fusion surgery, Dr. Wingate wrote:

> "I personally do not agree with microscopic lumbar discectomy in this case. The patient already has findings of degenerative spondylolisthesis at L4-5. Decompression would be likely to unpinch the left-sided nerve roots in her left low back, but could ultimately result in increased instability that would exacerbate the discogenic part of her pain." (*Id.* p. 7).

The medical record shows that Dr. Erickson's involvement in this case came as a result of Petitioner's continuing complaints of bilateral lower extremity pain. (PX 8). Dr. Erickson noted that, on November 21, 2016, Dr. Wingate found that Petitioner's bilateral lumbar lower extremity pain was due to "post-op L4 to S1 TLIF, possible right L4 and L5 lateral recess mild foraminal narrowing due to extruded bone graft." (PX 8). In his report, Dr. Wingate wrote, "This is certainly a case where I would recommend revision laminectomies to explore foraminotomies around those nerve roots." (*Id.* p. 2). Dr. Erickson characterizes the issue as whether the bone graft was migrating or growing in the lateral recess on the right side at L4-L5. (PX 8. 1/4/2017 Rpt.). Revision surgery was performed on February 22, 2017, and the postoperative report identified "lateral recess stenosis due to bony over growth at L4-L5 and L5 and S1 on the right side beneath posterior instrument fusion instrumentation, the reason for the revision fusion. (*Id.* 2/22/2017 Rpt.).

The Arbitrator finds that Dr. Wingate's June 29, 2019 fusion surgery and Dr. Erickson's February 22, 2017 revision surgery were both reasonable and necessary to diagnose, relieve, or cure the effects of the claimant's injury. Petitioner should not be held liable for the differing opinions of two similarly qualified physicians. *International Harvester Co. v. Industrial Commission*, 46 Ill.2d 238, (1970) (So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable).

The Arbitrator finds the opinions of Dr. Wingate and Dr. Erickson more persuasive then the opinions of Dr. Butler. The Arbitrator notes that Dr. Butler did not exam Petitioner but only reviewed her records. Dr. Butler's involvement in this case was limited to a January 8, 2019 deposition and a July 23, 2018 records review which was performed approximately 5 ½ years after Petitioner's work injury, 2 years after Dr. Wingate's surgery, and more than a year after Dr. Erickson's revision surgery.

Dr. Butler opined that Dr. Wingate's sacrum transforaminal lumbar interbody fusion was neither reasonable nor necessary. (RX 1). Dr. Butler supports his position with three sub-opinions: (1) there was no indication to proceed with the spinal fusion based on the radiographic abnormalities outlined on three preoperative MRI scans of the lumbar spine; (2) there was no evidence of spinal instability on the imaging studies that reviewed and (3) the two-level decompression surgery, as recommended by Dr. Dixon, was the appropriate procedure because it addressed the left side which was the symptomatic side. (*Id.*).

Dr. Wingate's recommended fusion surgery was based upon (1) a "discogenic" component to Petitioner's condition (2) diagnostics and (3) his physical examination and (4) 2 ½ years persistent signs and symptoms. (PX3 11/24/2015 and 4/18/2016 Rpts.). Dr. Wingate identifies a spondylosis at L4-5. The finding of spondylosis was also made by Dr. Rizwan Arayan, who wrote in his July 9, 2014 report, that:

> "She underwent an updated lumbar spine MRI on 6/9/14 which revealed diffuse lumbar spondylosis and disc bulging at L4-LS with moderated spinal and mild bilateral neural foraminal stenosis." (PX 3)

Dr. Butler also acknowledged the existence of spondylosis, in his report Dr. Butler wrote:

> "On January 4, 2017, CT of the lumbar spine showed extensive post fusion changes with instrumentation at L4, LS and Sl. Mild lumbar spondylosis." (RX 1)

The Arbitrator notes that Dr. Wingate's decision to proceed with the fusion surgery was supported by the findings made during his examination particularly those showing that Petitioner had significant pain with loading maneuvers which point to a discogenic source and not just a nerve root compressive pathology. (PX. 3).

The issue regarding the type of surgery is a situation of a difference of opinions between two similarly qualified physicians regarding an interpretation of radiograph images. The Arbitrator finds the opinions of Dr. Wingate and Dr. Erickson, who had the opportunity to assess the physical aspects of Petitioner's condition and incorporate them into a full clinical picture, to be more persuasive than the opinions of Dr. Butler.

The Arbitrator notes that Dr. Butler's opinions appear to be based primarily upon his interpretation of radiographs and he does not adequality address Dr. Wingate exam

findings or whether Petitioner's underlying medical condition favors one type of surgery over another.

Petitioner submitted a schedule of his medical expenses at hearing along with copies of his medical expenses. (PX9 and 10) Accordingly, the Arbitrator orders Respondent to pay the medical expenses, as they related to Petitioner's lumbar spine condition only, as set forth in Petitioner's Exhibits 9 and 10, pursuant to the fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any medical bills which Respondent had previously paid. Respondent is not liable for any medical expenses involving Petitioner's cervical spine.

In support of the Arbitrator's decision relating to "L," whether Petitioner is entitled to TTD benefits or maintenance benefits, Arbitrator finds as follows:

Petitioner claims that she is due TTD benefits from July 15, 2015 through January 17, 2019 and due maintenance benefits from February 22, 2018 through the date of trial. (Arb. Ex. #1). On February 28, 2018, Petitioner was released from care by Dr. Erickson. At that time, Dr. Erickson indicated that Petitioner is not a surgical candidate and he provisionally discharged her from care. Dr. Erickson's notes contain a reference of no lifting more than 10 pounds, but he also authored a work status form indicating that Petitioner is unable to work. (PX 8). Petitioner did not participate in a job search after being released from medical care.

Lisa Helma testified that Petitioner is 41 years old individual who is unable to speak or write English and does not possess a driver's license. Ms. Helma testified that Petitioner did not have any transferable skills and she fell into the unskilled sedentary occupation category, which only comprises of 1 percent of the labor market. Ms. Helma opined that Petitioner lost access to her usual and customary line of occupation and that she also loss access to any stable labor market. Ms. Helma further opined that Petitioner is disability was total. (PX 16).

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, *i.e.*, until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will*

County v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (emphasis added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The Arbitrator finds that Petitioner's condition stabilized, and she reached maximum medical improvement on February 28, 2018, when she was discharged from care by Dr. Erickson when he indicated that Petitioner was not a surgical candidate. As such, the Arbitrator finds that Petitioner is entitled to TTD benefits from July 15, 2015 through February 28, 2018.

Petitioner claims to be entitled to maintenance benefits from February 22, 2018 through July 18, 2019. Petitioner did not participate in a self-directed job search. As such, the Arbitrator finds that Petitioner is not entitled to maintenance benefits pursuant to *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill2d 107. 561 N.E.2d 623, 149 Ill.Dec. 253 (1990).

In support of the Arbitrator's decision relating to "O," whether Petitioner exceeded the "chain of referrals" the Arbitrator finds as follows:

At hearing Petitioner testified her treatment with Dr. Jeffrey Wingate began at Illinois Orthopedic Network on 11/24/2015 when Dr. Geoffrey Dixon left the clinic. (TX. p. 9. 1/17/2019). Petitioner further testified when Dr. Wingate left Illinois Orthopedic Network and moved to Lakeshore Surgery Center she followed him to Lakeshore. (TX. p. 12. 1/17/2019). Thereafter, Dr. Wingate left Lakeshore and Petitioner testified she switched to Dr. Robert Erickson at Lakeshore Surgery Center (T. pp. 12. 1/17/2019). Regarding Petitioner's treatment at New Life Medical had been previously determined by Arbitrator Hegarty to be within the chain of referrals. (PX 11). Under the law-of-the-case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles that question for all subsequent stages of the action. *See Ming Auto Body v. The Industrial Comm'n*, 387 Ill. App.3d 244, 899 N.E.2d 365, 326 Ill.Dec. 148 (First Dist. 2008). Petitioner's medical records show that Petitioner was sent back to New Life Medical on 04/17/2017 by Dr. Erickson (PX p. 17). Based on Petitioner's testimony at

hearing and review of the record related to "chain of referrals", Arbitrator finds Petitioner has remained within her allowable two physician lines of referral.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
X Vacate med. exp. & TPD awards	☐ PTD/Fatal denied
X Reverse Prospective med award	☒ None of the above
☐ Modify Choose direction	

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY LEWIS,

Petitioner,

vs. NO: 18 WC 12691

USF HOLLAND,

Respondent.

21IWCC0135

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical expenses, and temporary partial disability (TPD), and being advised of the facts and law, reverses the Decision of the Arbitrator as to causal connection. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner, a 62-year-old line haul driver, testified he has been employed by Respondent, a trucking company, for 25 years and he described his employment tasks. (T. 8-9) He drives for multiple days at a time. When he arrives at the terminal, no one is there, and he punches in, gets his truck and fuels it. Next, he would locate his fully loaded trailer, and hook onto that trailer. (T. 9) He would back up to the trailer, hook up air lines and dolly down the dollies to make sure the tractor was hooked to the trailer. (T. 10) He would make sure everything was working, the steel

was there and make sure it was ready. He testified that these tasks were part of his job over the past 25 years. (T.10)

Prior Work Injury

Petitioner sustained a work-related injury to his cervical spine on November 29, 2015 and filed claims 16 WC 35775 and 17 WC 06688. Petitioner underwent an anterior cervical discectomy and fusion at C3-4 on September 22, 2016, performed by Dr. Broderick. Petitioner returned for follow-up on February 7, 2017, reporting neck and shoulder pain are unchanged despite PT. The medical records indicate, "Neck pain is R sided. c/o numbness/tingling R ulnar nerve distribution. Not taking any pain medications." Petitioner was referred to Dr. Whitehurst to review MRI findings of the right shoulder, referred to Dr. Enke for CESI, and to follow-up in one month for x-rays. (PX14)

Petitioner saw Dr. Whitehurst on February 22, 2017, reporting right shoulder pain due to a work injury radiating into neck and down arms and fingers. Pain level at rest was 8/10 and 10/10 with activity. A review of the right shoulder MRI taken 1/20/2017, revealed status post rotator cuff repair without evidence of re-tear. Dr. Whitehurst noted it is possible that his current symptoms are a combination of some residual impingement or cervical spine mediated pain. He further noted Petitioner continues to have ongoing treatment for the cervical spine by Dr. Broderick. On that date, Petitioner received a subacromial cortisone injection. (PX14)

Petitioner returned for follow-up with Dr. Broderick on April 18, 2017 complaining of cervical and right shoulder pain. His pain level at rest was reported as 7/10 and 10/10 with activity. He exhibits full ROM of the cervical spine, it was reported. (PX14) An EMG, performed on 4/12/17, was reviewed and it was reported it showed no evidence of right cervical radiculopathy. Petitioner was referred for a CESI to see if it would provide relief. (PX14)

Petitioner was examined by Dr. Graf at Respondent's request on May 12, 2017. (RX1, T. 7, 24) Dr. Graf recommended a CT scan (no contrast) of the cervical spine be performed to ensure solid fusion. Dr. Graf reviewed the June 16, 2017, CT scan and prepared an IME Addendum Report dated September 18, 2017. Dr. Graf indicated he had previously examined Petitioner and stated that due to subjective pain complaints post-surgery, he recommended the CT scan to ensure a solid fusion. He had noted if the CT demonstrated solid fusion then Petitioner was at MMI. On review of the CT scan, he indicated the fusion appeared solid. He further noted then that given the solid fusion, Petitioner was at MMI and there was no objective reason Petitioner could not return to full duty. He opined Petitioner did not require additional treatment for the neck. (RX1, T. 24)

Petitioner returned to Dr. Broderick on June 20, 2017, for a follow-up visit post CT scan of the cervical spine taken on June 16, 2017. The main complaint, it was noted, was "RUE numbness and tingling, muscle spasms". He reported a pain level of 6/10 at rest and 7/10 walking around, using arms. Dr. Broderick reviewed the CT images and report noting post-operative changes at C3/4 with metal artifact. He noted it showed no evidence of screw fracture, "but 1

inferior screw has partially backed out, mpoor (*sic*) evidence of bone fusion bridging the interspace." Dr. Broderick stated, "will order a bone stimulator for therapy for 6 weeks and follow up with repeat CT scan at that time. If no fusion maturation, may need to perform revision surgery". (PX14)

Dr. Broderick ordered a bone stimulator on June 29, 2017. Petitioner contacted the doctor's office regarding the status of the bone stimulator in July 5, 2017, and again on September 22, 2017. (PX 14)

Petitioner did not return to work at this time.

On October 17, 2017, Petitioner received the bone stimulator and Dr. Broderick's office instructed Petitioner on proper use. Petitioner underwent a CT scan of the cervical spine on December 4, 2017. (PX3) Clinical indication was "neck pain, status post ACDF". The impression was: "No significant change from prior study with technical limitations causing difficulty in properly assessing the arthrodesis status of the C3-C4 fusion site." (PX3).

On December 5, 2017, Petitioner retuned to Dr. Broderick for follow-up. Petitioner reported his pain level at 5/10 without activity and 6/10 with activity. He reported numbness and tingling in the right upper extremity-right hand. On exam, his range of motion of the cervical spine was limited by mild pain. His motor strength was 5/5 in all muscle groups, his reflexes were 2+ and symmetric and sensation was grossly intact. Dr. Broderick indicated, "Pt is requesting release to work unrestricted and feels he can return to his normal joba (*sic*) t(*sic*) this time, release given, continue cervical bone stim and f.u. with flex/ex xrays in 2 months." (PX14)

A December 14, 2017, addendum authored by Dr. Broderick noted the CT scan showed postop changes at the C3-4 level and he believed there was evidence of increased bone density along the lateral margins of the cage bilaterally when comparing this CT scan to the prior CT scan and it is indicative of increased fusion mass. Dr. Broderick did not indicate Petitioner reached MMI. (PX14)

Petitioner testified that he received the bone stimulator in September of 2017. (T. 12) He testified he returned to work in December 2017, and he did not use the bone stimulator after he returned to work. (T. 12) Petitioner testified he was not receiving any treatment with Dr. Broderick at that time. Petitioner testified when he first returned to work in December 2017, he was feeling fine and was back to normal. (T. 14) When asked if he had ongoing pain in his neck or symptoms down either of his arms, he answered "no". (T. 14)

Petitioner and Respondent settled claims 16 WC 35776 and 17 WC 06688, for injuries to the cervical spine and right shoulder for 32.5% loss of use of a person as a whole. (RX3) The settlement contracts were approved by the Arbitrator on December 13, 2017.

Work-Related Accident January 6, 2018

Petitioner testified that on Saturday, January 6, 2018, he arrived at work, and it was "real cold" that morning. (T. 15) The dolly or landing gear was frozen with ice and snow so he had to crank the dolly down "real hard" in order to drop the trailer. When he finally got it down, he felt a lot of pain in his neck and shoulder and it started burning. (T. 14-16)

Petitioner returned to his truck and contacted Central Dispatch on his cell phone and advised what happened. Petitioner testified dispatch asked if he needed to call 911. Petitioner testified he initially said "no", but he was in pain, so he told them "yes". (T. 17) Petitioner testified he was directed to go to Physicians Immediate Care. (T. 17-18) Petitioner testified he was seen there that same day. (T. 18)

The medical records introduced into evidence show Petitioner sought medical treatment at Physician's Immediate Care on January 11, 2018. He reported neck pain radiating into his shoulders and shooting down his arms on both sides after using a crank on his truck that was frozen. He was diagnosed with radiculopathy of the cervical region, prescribed medications and released to return to work full duty. He was to follow up in one week. (PX1)

Petitioner returned to Physicians Immediate Care on February 1, 2018, and an MRI of the neck and right shoulder was recommended, as well as a course of physical therapy. Petitioner underwent a cervical MRI at Progressive Radiology on February 5, 2018, which showed the C3-4 anterior fixation hardware and disc prostheses with prominent associated artifacts, at C5-6 it was noted the broad-based left paracentral disc herniation appears slightly increased since April 26, 2016, indenting the spinal cord. It further showed multiple levels of degenerative disc disease similar to prior imaging. No spinal cord signal abnormality was seen. (PX4)

Petitioner returned to Dr. Broderick on February 20, 2018 and reported an onset of neck pain and bilateral symptoms down both upper extremities while cranking a dolly at work. Dr. Broderick examined Petitioner, reviewed the February 5, 2018 cervical MRI scan and recommended physical therapy with traction. He advised Petitioner he may need a C5-6 discectomy and fusion versus arthroplasty. (PX14)

Petitioner followed up with Dr. Broderick, on March 20, 2018, after physical therapy. He reported pain is getting worse and radiates down his right arm. He reported muscle spasms in the RUE and numbness and tingling BUE. He reported constant pain on the bottom of his right foot. Petitioner advised he is still using his spinal cord stimulator once a day for four hours per day. (PX14) Dr. Broderick recommended Petitioner undergo epidural steroid injections and referred Petitioner to Dr. Enke. Dr. Enke administered an epidural injection at C7-T1 on April 24, 2018. (PX14) Petitioner testified that the injection provided no relief. (T. 16-17) Petitioner followed up with Dr. Broderick on May 8, 2018, after the injection. Dr. Broderick did not specify in his record what level had been injected. (PX14) At that time, Petitioner still complained of neck pain that radiates down both arms (right is worse than left) and advised the injection provided no relief. Dr.

Broderick noted Petitioner is still using his spine stimulator, 4 hours daily. (PX14) Again, he recommended a C5/6 ACDF and advised him of the risk of future problems at C4/5. (PX14)

Petitioner testified that during this time he had been working with restrictions for Respondent. Petitioner stated that he had been basically performing clerical work in the office, participating in a transitional work duty program which was for employees who were getting ready to return to work. Petitioner was working in the office on restricted duty, but he was not earning his regular wages. Petitioner was earning $330.00 per week, $8.25 per hour, and he was receiving TPD benefits for 2/3rds of the lost wages. (T.24-26)

Petitioner was examined by Dr. Graf at the request of Respondent on May 16, 2018. Dr. Graf recommended Petitioner undergo another MRI scan with contrast to get a better picture of Petitioner's cervical pathology. (RX1) The new MRI scan performed July 18, 2018, revealed disc bulging at C5-6 that was unchanged from the prior, pre-January imaging studies.

Petitioner returned to Dr. Broderick on July 26, 2018. Petitioner reported pain in his neck radiating to the right upper extremity to the fingers, occasional left. He denied numbness and tingling. (PX14) The records indicate Dr. Broderick reviewed the MRI. No date was given for the MRI that was reviewed. Dr. Broderick stated the patient has degenerative spondylosis at C4-5 and C5-6 with associated foraminal stenosis, right greater than left, and it is causing nerve root impingement. He noted this correlates clinically with his cervical radiculopathy involving the right C5-6 regions. (PX14) Dr. Broderick again recommended C4-5, C5-6 artificial disc replacement, possible C4-5, C5-6 anterior cervical discectomy and fusion. The records indicate Petitioner wants to proceed with surgery. He was not working at this time because of cervical complaints. (PX5) Petitioner was taking Ibuprofen and aspirin.

Dr. Graf issued an addendum report dated November 3, 2018, after reviewing the better quality MRI scan of the cervical spine. He stated this demonstrates disc bulging at C5-6, unchanged as compared to his prior MRI from 4/26/2016. He also reviewed a Utilization Review report non-certifying the proposed surgery. The UR also stated there was no focal disc herniation at C4-6. (RX1, Ex.5) Dr. Graf stated Petitioner's subjective complaints do not correlate with the MRI studies. (RX1)

Dr. Graf issued another addendum report dated September 6, 2019. (RX2) He reviewed additional medical records from Dr. Broderick's office for dates of service January 15, 2019, April 9, 2019, May 7, 2019, and June 11, 2019, and noted complaints of cervical pain radiating down the right arm, cervical spasms and tingling down the right arm. (RX2) He reviewed 4 MRI scans dated April 26, 2016, January 20, 2017, February 4, 2018, and July 18, 2018. He stated that at level C5-6, the two MRI's following the second claimed injury in question appear unchanged when compared to the two MRI's prior to the claimed injury in question. This is not a new disc herniation at C5/6. He further stated, "This opinion is supported by the independent radiologists' reading demonstrating similar findings prior to the claimed second injury in question." (RX2)

Dr. Broderick testified on behalf of Petitioner. He agreed he was familiar with Petitioner for a number of years. He began treating Petitioner in 2016, for a prior work injury for which he performed an anterior cervical discectomy and fusion at the C3-4 level. (PX12, T. 6-7). Dr. Broderick testified on direct examination that he eventually released him at maximum medical improvement for that injury. (PX12, T. 7)

Dr. Broderick testified Petitioner again presented in February 20, 2018. He noted at that time Petitioner reported a new injury sustained while working "to his neck, causing pain in his neck and radiating down his arm". (PX12, T. 7) Prior to returning to Dr. Broderick, Petitioner had presented to an urgent care/immediate care facility. Dr. Broderick did not recall if Petitioner had undergone the MRI scan before his visit or if it was immediately. After Dr. Broderick reviewed his record, he stated Petitioner underwent an MRI scan of the cervical spine on February 5, 2018, at Progressive Radiology. He had reviewed the report and films. He noted Petitioner had the expected post-operative changes at C3-4 level. Dr. Broderick further noted the MRI showed Petitioner had progression of the degenerative condition at C5-6 that, in his opinion, was causing nerve root compression on both neural foramina. (PX12, T. 7-9)

Dr. Broderick testified his clinical examination showed diminished range of motion of his neck flexion, extension, and rotational movements, left and right. He noted some weakness in Petitioner's grip strength bilaterally. He found absent biceps reflex and diminished triceps reflex on the left. He noted a positive Lhermitte's sign and a Spurling's sign on the right and negative Tinel's and Phalen's test. (PX12, T. 9-10) Dr. Broderick noted the Petitioner had had a prior surgery that included a fusion, cervicalgia, and he diagnosed cervical disc disorder with myelopathy. (PX12, T. 12) He recommended physical therapy, light duty work, and return in one month. Petitioner asked if surgery would help him with this presentation. Dr. Broderick discussed surgical options and advised that because Petitioner had a previous fusion at C3-4 level, that if he performed a fusion at C5-6, that could potentially lead to problems at C4-5. So he discussed artificial disc replacement surgery, an alternative to fusion surgery in such situations. (PX12, T. 13)

Dr. Broderick testified he proposed performing surgery at levels C4-5 and C5-6 because of degenerative changes at C4-5 and C5-6. It was his opinion that the C5-6 level was causing clinical symptoms at this time. Only fusing C5-6 would isolate the C4-5 segment and would leave Petitioner with potentially "big problems" and potentially require more surgery. (PX12, T. 14-15)

Dr. Broderick testified Petitioner returned for follow-up on March 20, 2018 and continued to complain of pain. The pain was worse and was radiating down his right arm. (PX12, T. 15) He complained of muscle spasms in his right arm and numbness and tingling in both arms. The pain was constant and in his foot. He rated his pain as a 7 out of 10. Dr. Broderick referred Petitioner to Dr. Enke for an epidural steroid injection which was performed on April 24, 2018. Petitioner returned on May 5, 2018 and advised Dr. Broderick he really didn't find that the injection helped much with his neck and the radiating pain in the arm. (PX12, T. 17)

Dr. Broderick testified Petitioner returned on July 26, 2018, and his findings on clinical evaluation were consistent with earlier findings and his diagnosis remained the same. Dr. Broderick stated, "[m]y belief is that he has a cervical myeloradiculopathy and that he had evidence of some very mild spinal cord issues but more prominently a cervical radicular, nerve root syndrome." (PX12, T. 18) When asked if the findings on the MRI that he reviewed from February 5, 2018, correlate with his clinical examination findings and subjective complaints, he responded, "Yes, they do." (PX12, T. 18) Dr. Broderick testified he disagreed with the radiologist's opinion on the MRI that the left-sided protrusion was more prominent. He believed there was evidence of foraminal stenosis on both sides, noting the symptoms were predominately right sided, but the patient also had some symptoms in his left upper extremity just not as predominant. Dr. Broderick agreed the treatment he recommended is to address the foraminal stenosis that he found. (PX12, T. 19)

On cross examination, Dr. Broderick was asked where in his records it indicated Petitioner had reached MMI after his prior surgery. Dr. Broderick testified, "I am not sure that I specifically stated that." (PX12, T. 30) Dr. Broderick testified he released Petitioner to return to work so in his opinion it is an indication he was at MMI. (PX12, T. 30) Dr. Broderick was asked on cross-examination if "MMI" and "return to work" are essentially the same, to which he responded, "No." (PX12, T. 30) Dr. Broderick testified that on December 5, 2017, the patient was requesting unrestricted work release and he felt that he could, so the work release was given to him. (PX12, T. 31). Dr. Broderick agreed that, on that date, there was no MMI determination as far as the medical record is concerned. (PX12, T. 31)

Dr. Broderick testified on cross-examination that the bone stimulator had been recommended on June 20, 2017, after a review of CT scan images showed "poor evidence of bone fusion bridging the interspace at the C3-4 level." (PX12, T. 32) Petitioner received the bone stimulator in October 2017. (PX12, T. 32) Dr. Broderick testified that when he treats a patient with a bone stimulator, he likes to get CT imaging four to six months after the treatment begins to assess the effect of the treatment. (T. 34) On November 30, 2017, a follow-up CT scan was ordered by Dr. Broderick although he did not see Petitioner on that date. (PX12, T. 33).

Dr. Broderick testified on cross-examination that when Petitioner returned on December 5, 2017, he was complaining of right upper extremity symptoms. (PX12, T. 34) When asked if he was "symptomatic" at that point, Dr. Broderick testified, "What do you mean by 'symptomatic'? Dr. Broderick agreed Petitioner had pain complaints at that time. (PX12, T. 34)

Dr. Broderick testified he personally compared Petitioner's MRI's performed in April 2016 and February 2018. It was his custom and practice to review all imaging and compare all imaging to previous studies that are available. (PX12, T. 36) He did not agree when a patient has complaints predominantly on one side, that you would see the pathology primarily on that side in the imaging studies. (PX12, T. 36)

Dr. Broderick compared treatment recommendations and diagnoses for dates of services July 26, 2018, and January 15, 2019. He testified that on both dates, Petitioner reported pain levels as 7/10. In July 2018, Petitioner denied radiating numbness and tingling. In January, Petitioner complained of right upper extremity numbness and tingling. This, Dr. Broderick testified, was about the only thing he saw as significantly different in those two notes. (PX12, T. 37) He agreed that apart from the difference in the right upper extremity tingling complaints, his diagnosis and treatment recommendations were the same. (PX12, T. 37)

On redirect examination, Dr. Broderick was asked to review the December 5, 2017, note and the February 20, 2018, note. He agreed the December 5, 2017, visit was a post-operative visit regarding the September 2016, fusion. (PX12, T. 38) He further agreed he recommended a two-month follow-up visit at that time. (PX12, T. 39) Dr. Broderick stated the purpose of the two month follow-up is, "Because I wanted to – I follow my patients who are having – that are under active treatment, so his bone stimulation treatment at this point was not necessarily terminated, and so I recommended follow-up just to continue with that purpose." (PX12, T. 39) Dr. Broderick stated he did not comment on the Spurling sign because in his custom and practice if it is not positive, he does not go about and record a negative. (PX12, T. 40) Dr. Broderick testified there were no abnormal findings with his biceps or triceps reflex. He testified that there were changes in his complaints between December and February, namely, bilateral upper extremity numbness and tingling. He found that Petitioner's grip strength was decreased on the right and left in February 2018, as well as a reflex change. He found the Lhermitte and Spurling signs were both positive on the February exam. Dr. Broderick testified that there was a change in the MRI findings between January 20, 2017, MRI and the February 5, 2018, MRI, however he did not testify as to what the changes were. (PX12, T. 41)

Dr. Broderick testified that within a reasonable degree of medical certainty the clinical symptoms and clinical findings are causally related to the accident of January 6, 2018. (PX12, T. 29)

Dr. Graf testified that he examined Petitioner at the request of Respondent pursuant to Section 12 of the Illinois Workers' Compensation Act. He examined Petitioner on two occasions, May 12, 2017 and May 16, 2018. (RX1) During that latter exam, he noted Petitioner claimed an injury on January 6, 2018, cranking down the landing gear while dropping a trailer. As he was cranking down the landing gear, it was hard, and he began to experience pain in the neck, right shoulder and right arm. (RX2, T. 8) Dr. Graf noted Petitioner contacted his supervisor and informed him of the injury. Petitioner parked the truck and went home. The following Monday he called in to Respondent and was offered to go to the emergency room and Petitioner refused. (RX1, T. 9) He noted Petitioner ultimately went to Physicians Immediate Care and was given medication, prescribed therapy and was referred for an MRI scan. Dr. Graf noted Petitioner was told he had a herniated disc and was sent back to his treating physician Dr. Broderick. (RX1, T. 8-9) Dr. Graf noted Petitioner had been sent for additional therapy and an ESI with no improvement. Petitioner had returned to Dr. Broderick and cervical surgery was recommended at adjacent levels of the prior fusion. (RX1, T.9)

Dr. Graf noted Petitioner underwent a prior anterior cervical decompression and fusion at C3-4, and Petitioner advised him he had been released back to work December 5, 2017, and then claimed this injury a few weeks later. (RX1, T. 9) Dr. Graf testified he questioned Petitioner regarding his pain for which Petitioner stated he had no pain before the claimed injury, but following the claimed injury, he had pain in the back of the neck into the right side, the upper shoulder. (PX1, T. 9-10) Dr. Graf testified Petitioner reported the pain radiated down the arm from the right shoulder in the ulnar aspect side of the hand with the little finger to the right forearm and the ulnar three digits, the outer three digits toward the little finger. (RX1, T. 9) He rated his initial pain as 8/10, and 7/10 at the time of the evaluation. (RX 1, T. 9-10)

Dr. Graf's examination revealed normal gait, normal tandem gait and a well-healed right sided cervical incision. The range of motion findings were basically normal. Petitioner's forward flexion was slightly limited, his extension and lateral rotation were "pretty normal". (RX1, T. 10-11) He noted no pain to palpation of the neck and a positive Spurling's sign on the right, negative on the left. (RX1, T. 11) He noted motor strength was 5 out of 5 and full. He noted reflexes were equal and symmetric. There was normal sensation throughout the bilateral upper extremities. Examination of the shoulder revealed decreased passive range of motion with pain bilaterally on the right with range of motion which near completely reproduced his upper extremity and shoulder pain while abducting. Thoracic, lumbar, sacral, all motor strength was 5 out of 5 and equal. Dr. Graf testified Petitioner exhibited equal reflexes, normal neurological examination, and found it "essentially normal". (RX1, T. 11) He had Petitioner fill out a pain questionnaire and the score was 120, indicating his self-rated disability as severe. (RX 1, T. 12)

Dr. Graf testified he reviewed Petitioner's medical records and noted that all the medical records, including the past medical records, were significant. (RX1, T. 12) Dr. Graf testified he personally reviewed the February 5, 2018, MRI scan. It showed the prior C3-4 surgery, minimal disc degeneration at C4-5, and a broad-based disc herniation with stenosis at C5-6. He stated it was difficult as the film was overall poor quality. He stated it was hard to tell on the poor-quality scan. (RX 1, T.12-13)

Dr. Graf testified his diagnosis was essentially neck pain with vague right upper extremity radiating pain and these were similar symptoms to his prior evaluation in 2017. (RX1, T. 13) Dr. Graf questioned causation to the January 2018 incident stating Mr. Lewis had a claimed injury with a new onset a few weeks following his previous release to return to work from a similar cervical injury. (RX1, T. 13) Dr. Graf testified Petitioner's symptoms were not stemming from the same levels of the cervical spine as his prior surgery, namely C3-4. He stated this time Petitioner had upper extremity and shoulder radiating pain, but it was more C7-T1 nerve root distribution which would really be from a much lower cervical level. As to further care, he had recommended an MRI of higher quality, in his opinion related to the alleged 1/6/18 work injury. At that time, he felt Petitioner capable of returning to work at a sedentary work level. (RX1, T.14-15)

Dr. Graf prepared an IME addendum, dated October 2, 2018. (RX1, T. 15) He reviewed additional records including a utilization review report (UR), dated September 4, 2018. He had reviewed the UR, regarding non-certification for surgery, and he stated, Given the MRI scan that we had, which was the poor-quality scan, that the surgery recommended was not reasonable, but I did again recommend a higher-quality MRI." (RX1, T. 16)

Dr. Graf prepared a second IME addendum, dated November 3, 2018. He had reviewed the MRI of the cervical spine dated July 18, 2018 and compared it to the previous studies. He testified the MRI demonstrated post-operative changes at C3-4 from the cervical decompression and fusion and there was no evidence of stenosis or nerve root encroachment at that level. He testified that at C4-5, there was no evidence of stenosis in the foramen where the nerve passes out of the spinal canal and it was widely patent or open. (RX1, T. 18) He stated at C5-6, there was a "central disc, slash osteophyte with a bulge. No evidence of foraminal stenosis, nerve root compression, or spinal cord compression." (RX 1, T. 18) He noted there was no disc herniation, stenosis or nerve root encroachment at C6-7 or C7-T1. (RX1, Ex.4) Dr. Graf compared the MRI scan of July 18, 2018, to the MRI scan from April 26, 2016, and noted it was unchanged. (RX 1, T.17-18, RX1, Ex.4)

Dr. Graf testified that the results of the MRI scan did not correlate with Petitioner's symptoms as presented in May 2018. He testified that the bottom 2 levels, C6-7 and C7-T1, could partially correlate with Petitioner's symptoms, however, there was no stenosis, disc herniation, or otherwise at those levels. (RX1, T. 18) He stated Mr. Lewis had subjective complaints of pain from the right shoulder down the outside ulnar aspect of the forearm which would not correlate with C4-5 or C5-6. That was more of a C7 or T1 nerve root distribution. (RX 1, T.18-19) Dr. Graf agreed he did not find any pathology at C6-7, C7-T1. (RX1, T. 19)

Dr. Graf testified the proposed adjacent two-level decompression and fusion versus disc replacement surgery was not medically reasonable regardless of causation. He stated it did not match up with the clinical distribution of symptoms. Further, he did not see any evidence of myelopathy on physical exam or any myomalacia, which is the radiographic finding of cord compression and edema within the cord, on his imaging studies. (RX 1, T.19).

Dr. Graf testified he could not objectively substantiate a causal relationship between Petitioner's current symptoms and the work incident of January 6, 2018. (RX1, T. 20) He testified he found Petitioner at MMI and noted there was no objective reason why Petitioner could not return to his full duty level job. No further care or treatment was necessary or reasonable. (RX 1, T.19-21)

Petitioner was examined by Dr. Sweet for a second opinion on March 11, 2019. (PX9) Dr. Sweet noted Petitioner is a 63-year old gentleman who on January 6, 2018, was cranking a dolly to lower a trailer which was frozen and had sudden onset of neck pain radiating into the right shoulder and arm. (PX9) Petitioner had been unable to work until November 2018. He went back to work for four days and when he was pulling a chain to lower a door at a terminal, he re-injured himself and has been off work since then. (PX9) Petitioner reported his pain as 7/10 on a daily

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basis. He reported his pain as involving the neck, trapezius, shoulder, periscapular area, arm, forearm with numbness and tingling in the middle digits on the right side. (PX9) On exam, a positive Spurling's test was noted on right lateral rotation and extension, diminished sensation slightly on the index, long and ring fingers. Petitioner exhibited normal station and gait. The dynamic and statis neurologic exam for motor, sensation and deep tendon reflexes in the upper and lower extremities are within normal limits. There was no pain with ROM of the shoulders, elbows or wrists. He had negative Lhermitte's, negative Hoffman's, and negative inverted radial reflex. Peripheral pulses were 2+ and intact. Dr. Sweet reviewed a cervical MRI, however, there is no indication which MRI he reviewed. His impression was C6 radiculopathy from a disc bulge and foraminal stenosis on the right at C5-6. Dr. Sweet agreed with Dr. Broderick that Petitioner needs an anterior cervical discectomy and fusion to treat his pain. He indicated that based on history he believed there was a causal relationship to the January 2018 injury and further exacerbated by the November 2018 work injury. (PX 9)

Petitioner filed claim 18 WC 37273, for injuries resulting from a November 2018 work accident. The Arbitrator found Petitioner's current condition was not related to the November 2018 accident. Respondent filed a Petition for Review and the Arbitrator's Decision was affirmed and adopted.

After a careful review of the totality of the evidence, the Commission finds that Petitioner has failed to prove his current condition of ill-being is causally related to the accident of January 6, 2018.

The Commission finds Petitioner's testimony that he was asymptomatic before the January 2018 accident unpersuasive. Petitioner testified that in December 2017, after he returned to work and before his second accident, he was "normal" and not experiencing pain. Dr. Broderick's contemporaneous medical records dispute Petitioner's testimony. The medical records dated 12/5/2017 show he rated his pain level as 5/10 at rest and 6/10 with activity. They further show he complained of numbness and tingling in the right upper extremity-right hand and his range of motion in the cervical spine was limited by mild pain in rotation. Dr. Broderick's records clearly indicate it was Petitioner who requested a release to return to work at this visit. Petitioner was advised to continue with the bone stimulator and to follow-up in two months. The record does not indicate Petitioner was discharged from care or had achieved MMI on this date. It is clear, therefore, he was still under active treatment for his prior cervical fusion, continuing to experience symptoms in his cervical spine and right upper extremity, and continuing to receive ongoing care.

Petitioner's testimony that he was not using his bone stimulator after he returned to work is likewise not credible. The records of 12/5/2017, state he was to *continue* using his bone stimulator. Also, Petitioner contacted Dr. Broderick's office on 2/2018 and asked if he should *continue* to use the bone stimulator. Dr. Broderick's office notes indicate Petitioner was advised to continue using it. The Commission relies on this contemporaneous medical record and finds it reliable to show Petitioner was continuing active medical treatment and continued to be symptomatic for symptoms related to his previous cervical fusion.

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Finally, Petitioner testified he went to Physician's Immediate Care on the date of the accident. However, the records introduced into evidence show he sought medical treatment on January 11, 2018, five days later. (PX 1) The Commission finds Petitioner's testimony unsupported by the medical records introduced into evidence and thus finds his testimony not credible.

The Commission finds the causation opinions of Drs. Broderick and Sweet unpersuasive. Dr. Broderick performed a C3-4 cervical fusion in September 2016 and participated in Petitioner's post-operative recovery. Dr. Broderick's medical records describing care in 2017, specifically, March 7, April 18, June 2, June 20, and December 5, 2017, show Petitioner continued to complain of cervical pain and numbness and tingling in the right upper extremity. Dr. Broderick noted his concern as to whether Petitioner was having sufficient healing bone growth density from the prior surgery when Petitioner returned for follow-up on June 20, 2017. Dr. Broderick prescribed external bone stimulator therapy for 6 weeks on that date and advised him to follow up with a CT scan. He further stated if no fusion maturation, Petitioner will need revision surgery. Petitioner returned to Dr. Broderick in December 2017 and Dr. Broderick notably does not discharge Petitioner from his care at that time. Moreover, Petitioner requested to be released to return to work and Dr. Broderick complied. Petitioner was to return in two months (February 2018) for a follow-up to include x-rays, and Petitioner was instructed to continue using the bone stimulator. At that time Dr. Broderick records did not indicate Petitioner had reached MMI, and at deposition, Dr. Broderick could not state he had placed Petitioner at MMI from the prior injury. (PX 12, T. 31) Dr. Broderick's testimony of Petitioner being at MMI in December 2017 is not supported by his own records.

Dr. Broderick's causation opinion is further undermined by his deposition testimony regarding the change between Petitioner's pre-accident and post-accident MRI scans and symptoms. Dr. Broderick was asked if there was a change in the findings between the January 20, 2017 MRI and the February 5, 2018 MRI scan. Dr. Broderick answered there was a change. However, Dr. Broderick never describes the specific change. Dr. Broderick also testified about Petitioner's change in symptoms after the accident. He responded Petitioner had bilateral numbness and tingling post-accident. However, Dr. Broderick never testified to the change in symptoms after February 20, 2018. His testimony was limited to the specific time frame from December 5, 2017, to February 20, 2018, consistent with a temporary exacerbation. Absent this testimony, his opinion is incomplete and without foundation. Thus, the Commission declines to adopt his opinion on causation.

The Commission notes Dr. Broderick examined Petitioner for the first-time post-accident February 20, 2018. He reviewed the February 2018 MRI that Dr. Graf described as a poor-quality MRI. At that visit and based on that MRI scan, Dr. Broderick recommended further invasive surgery. It must be noted that Dr. Broderick was contemplating revision surgery in June 2017 and Petitioner was still under active care for his pre-accident cervical fusion. The Commission finds the surgical recommendation, which was based on a poor-quality MRI scan, undermines his opinion on the need for surgery.

Dr. Sweet's opinions are similarly unpersuasive. Dr. Sweet saw Petitioner for one visit, March 11, 2019 for a second opinion. At that visit, Petitioner reported his pain was in the neck, trapezius shoulder, periscapular area, arm forearm with numbness and tingling in the middle digits on the right side only. Dr. Sweet reviewed an MRI however, he does not state which MRI he reviewed. Further, Dr. Sweet opined the November 2018 work accident exacerbated Petitioner's condition. The Arbitrator, and affirmed by the Commission, found Petitioner failed to prove a causal relationship between his condition and the November accident. The Commission declines to adopt Dr. Sweet's opinions in this case as well.

The Commission relies on the well-reasoned opinion of Dr. Graf who compared quality diagnostic tests pre- and post-accident. Dr. Graf reviewed the February 2018 MRI and, finding it poor quality, recommended Petitioner undergo a new MRI scan rather than opine based on a poor-quality image, in direct contradiction to Dr. Broderick's reaction. Dr. Graf noted Dr. Broderick's opinions were based on the non-diagnostic quality February 5, 2018 MRI scan, and he opined relying on the July 2018, better quality MRI.

Further, Dr. Graf testified Petitioner's subjective complaints of pain in May 2018 from the right shoulder down the outside ulnar aspect of the forearm, would not correlate with C4-5 or C5-6 distributions; he stated that was more C6 or T1 nerve root distribution. The opinions of Dr. Graf are more persuasive as they more closely correlate with the medical records and diagnostics results recorded before and after January 2018. Even assuming Petitioner's pain was emanating from the bulging disc at C5-6, notably, neither Dr. Broderick nor Dr. Sweet recognized it as changed from the 2017 diagnostic studies. Dr. Graf had the opportunity to view the pre and post injury MRI's and opined there was no change at the C5-6 level. While Dr. Graf opined Petitioner was at MMI in September 2017, the diagnostics indicated, per Dr. Graf, that there had been no changes from the 2017 imaging to 2018 imaging, indicating Petitioner's current condition of ill-being is not related to the January 6, 2018 incident.

The Commission finds Petitioner failed to prove his current condition of ill-being is related to the January 6, 2018 accident. The evidence supports the finding that Petitioner had sustained a temporary aggravation and had returned to his December 2017 baseline by the time he returned to Dr. Broderick February 20, 2018.

The Commission finds the opinions of Dr. Graf more persuasive and reliable than those of Drs. Broderick and Sweet, and further finds since Petitioner failed to prove his current condition of ill-being is causally related to the accident of January 6, 2018, reverses and vacates the award of prospective medical care and the TPD award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 12, 2019, is hereby reversed on the issue of causation. Further, the Commission, finding no causal connection, vacates the award of medical expenses, the award of prospective medical care and the TPD award.

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IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 2 2021
o-1/26/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

DISSENT

I respectfully dissent. I believe that the Arbitrator's well-reasoned decision is amply supported by the evidence, and that Petitioner proved by a preponderance of the credible evidence that his current condition of ill-being and need for surgery are causally related to the accident on 1/6/18, that Petitioner is entitled to continuing TPD benefits, and that Petitioner is entitled to ongoing treatment as prescribed by Dr. Broderick, including but not limited to surgical intervention and attendant care.

While Petitioner had previously suffered a work related injury involving his cervical spine, undergoing a fusion at C3-4 on 9/16/16, the record shows he returned to full duty work in December 2017 after Respondent's §12 examining physician (both then and now), Dr. Graf, had found (in his report dated 9/8/17) that Mr. Lewis had reached maximum medical improvement -- an opinion that would appear to be at odds with Dr. Graf's more recent opinion. Indeed, in that prior IME report, Dr. Graf had even noted that the CT scan had demonstrated a solid fusion.

Petitioner subsequently re-injured and/or aggravated his neck while trying to turn a frozen crank by hand on 1/6/18, the date of accident in the current claim. Thereafter, Petitioner provided consistent histories to his providers of new and ongoing symptoms, and both Drs. Broderick and Dr. Sweet interpreted the cervical MRI performed on 2/5/18 as evidencing a bulging/herniated disk at C5-6, as opposed to the C3-4 level the subject of the prior surgery. Furthermore, Dr. Broderick persuasively opined that Petitioner's condition of ill-being and need for additional cervical surgery were causally related to the work injury of 1/6/18 – an opinion that is more than adequately supported by the medical records taken as a whole. Thus, I believe the Arbitrator's reliance on the opinions of Drs. Broderick and Sweet was entirely justified under the circumstances, as was her finding that the subsequent accident on 11/17/18 (18 WC 37273) did not change or alter the course of the recommended treatment, and therefore did not represent an intervening accident sufficient to break the causal chain.

As a result, I dissent from the majority opinion and would have affirmed and adopted the Arbitrator's decision in its entirety.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

LEWIS, LEROY
Employee/Petitioner

Case# **18WC012691**

18WC037273

USF HOLLAND
Employer/Respondent

21IWCC0135

On 11/12/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK & JONES ATTY AT LAW
TRACY JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(A)

Leroy Lewis
Employee/Petitioner

v.

USF Holland
Employer/Respondent

Case # **18** WC **12691**

Consolidated cases: **18 WC 37273**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **Waukegan**, on **10/21/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **1/6/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**87548.76**; the average weekly wage was $**1683.63**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**72,935.55** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**All sums paid** under Section 8(j) of the Act. ARB EX 1.

ORDER

The Arbitrator finds that Petitioner's current condition of ill-being and need for surgery are causally related to the work injury of 1/6/18 only.

Arbitrator orders Respondent to approve and pay for ongoing treatment as ordered by Dr. Broderick, including but not limited to surgical intervention and the attendant care, pursuant to Sections 8 and 8.2 of the Act.

Arbitrator orders Respondent to continue to pay TPD benefits through the date Petitioner is taken off work or the Respondent is no longer able to accommodate restrictions set forth by Dr. Broderick. Respondent shall receive credit for amounts paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn M. Doherty

Signature of Arbitrator

11/11/19
Date

NOV 12 2019

FINDINGS OF FACT

These two consolidated matters were presented for trial pursuant to Sections 19(b)/8(a) of the Act. In 18 WC 12691, Petitioner alleges an accident date of 1/6/18. ARB EX 1. In case 18 WC 37273, Petitioner alleges an accident date of 11/17/18. ARB EX 2. The main issues in dispute in each case are accident and causal connection for ongoing medical treatment, namely the proposed cervical surgery. Each decision is addressed under separate cover.

Petitioner, a 62 year old truck driver, testified that he has been an employee of Respondent as a line haul truck driver for 25 years. Petitioner testified that he reports for work to the terminal, gets into a truck and locates a trailer to hook to. He then drives to remote locations delivering loads and picking up loads in multiple states.

It is undisputed that Petitioner had a prior work-related injury while working at Respondent on 11/29/15. Petitioner ultimately underwent a C3-4 cervical diskectomy and fusion by Dr. Broderick on 9/22/16. Postoperatively he was noted to have slow healing of the bone and ongoing symptoms. A CT scan done 6/16/17 indicated, because of hardware, it could not be determined if the fusion hardware had been incorporated or not. PX 14 p. 0428. Dr. Broderick suspected poor evidence of bone fusion on the CT and ordered the use of a bone stimulator on 6/20/17. PX 14 p. 383. Respondent obtained an IME with Dr. Carl Graf on 9/18/17 to address the Petitioner's condition at that time. PX 11. Dr. Graf personally reviewed the CT scan and opined the fusion was solid and there appeared to be "bony fusion." He went on to state that, in his opinion, Petition had a "solid fusion" and had reached "maximum medical improvement." PX 11. He opined that Petitioner did not require any additional treatment, including the bone stimulator. He further opined Petitioner could return to work as a truck driver without any restrictions. PX 11. He specifically stated, "there is no objective reason why Mr. Lewis cannot return to his full duty work, without restrictions." PX 11.

Despite Dr. Graf's opinion, Petitioner obtained the bone stimulator on October 17, 2017 and used it for two months. A repeat CT scan was done 12/5/17. PX 14 p 427. Dr. Broderick examined Petitioner and noted improvement in symptoms. He noted only mild pain in rotation and full 5/5 muscle strength. PX 14 p. 363. Dr. Broderick released Petitioner to return to work full duty and advised him to follow up in 2 months for a checkup in February 2018. PX 14 p 364. Petitioner was no longer using the bone stimulator. Petitioner received a settlement for his prior workers' compensation injury in 2015. RX 3, RX 4.

Petitioner then returned to work full duty 12/11/17 for Respondent as agreed to by Dr. Broderick. He testified that he was doing well with only mild symptoms in his neck and down his arm and that he was able to do his job duties.

Petitioner testified that while at work on January 6, 2018, he was using two hands to turn a crank while attaching the trailer to his truck. Petitioner the crank was frozen with ice and snow. Normally the cranks can be turned with only one hand, but because of the ice, Petitioner had to grab the handle with both hands in front of his chest with his hands in fists, the thumbs touching one another. He then had to use a rowing type motion where he moved both hands up and outward from his chest and cranked it around in a circle bringing his hands back to his chest. Petitioner testified that while forcing the frozen crank forward, he had increasing pain in his neck and down both arms to his fingers. He finished the task and got in his truck where he called Central Dispatch and reported the injury.

Petitioner was told by central dispatch to go to Physicians Immediate Care. Petitioner reported the pain in his neck and both upper extremities after pushing the crank. He was told to follow up in one week. Petitioner returned on 2/1/18 and an MRI of his neck and right shoulder was recommended along with physical therapy.

The MRI of 2/5/18 without contrast showed a broad based left paracentral disc herniation which appeared slightly increased from 4/26/16 [MRI] indenting the spinal cord on this exam. No spinal cord signal abnormality is seen. PX 4. Petitioner returned to Dr. Broderick on 2/20/18 and explained the onset of pain and the reported neck pain down both arms to his hands. Dr. Broderick noted that the MRI showed C5-6 radiculopathy but that no change was reported at the prior surgery level of C3-4. Dr. Broderick noted that he believed there was evidence of foraminal stenosis on both sides disagreeing with the radiologist determination of left side protrusion only. PX 12. Dr. Broderick recommended physical therapy with traction. Petitioner returned to Dr. Broderick for an epidural injection at C7-T1. Petitioner reported no relief.

On May 8, 2018 Petitioner returned to Dr. Broderick and reported no relief from the injection. Dr. Broderick indicated that Petitioner would need either another fusion or an artificial disk replacement at C5-6. Petitioner was working on restricted duty performing clerical work for Respondent under a restricted duty program. Respondent paid Petitioner $330 per week or 8.25 per hour to come to work. Petitioner testified that he was also receiving TPD payments to make up the lost wage. He testified that he continued to receive the TPD payments at the time of trial. As of his last visit to Dr. Broderick in July 2018, Dr. Broderick was still recommending a fusion surgery and Petitioner was still taking ibuprofen. Petitioner continued to work his light duty job for Respondent.

Dr. Broderick interpreted a subsequent MRI dated July 18, 2018 and stated that it revealed "... degenerative spondylosis at C4-5 and C5-6 with associated foraminal stenosis right greater than left. This is causing nerve root impingement that correlates clinically with his cervical radiculopathy involving the right C5 and C6 regions." PX 5.

Petitioner testified that Respondent subsequently told him that Dr. Graf indicated Petitioner should be performing regular duty. Petitioner testified that he returned to regular duty for 4 days around 11/17/18. However, on 11/17/18, Petitioner was dropping freight at a terminal and attempted to help another driver pull down a terminal door. Petitioner testified that he used a device to pull the door down, and while reaching up with the device to grab the door and pull it down, he felt pain again. Petitioner testified that he called Central Dispatch and reported the incident. Petitioner then drove back to Rockford and went immediately to Physician's Immediate Care complaining of pain in his neck and upper back.

Petitioner testified that he was sent back to work with a 10 pound restriction and returned to office work. Dr Broderick's treatment recommendations stayed the same.

Respondent sent Petitioner to Dr. Sweet on March 19, 2018. Petitioner complained of neck pain and pain down both arms. Upon review of the MRI, Dr. Sweet recommended a cervical fusion at C5-6 under a diagnosis of C6 radiculopathy. PX 9. Dr. Sweet noted that he reviewed his "cervical MRI" although no date is given. He interpreted the MRI as showing "left sided foraminal stenosis at C4-5 and a disc bulge with severe foraminal stenosis on the right at C5-6 with compression of the exiting C6 nerve root." He

agreed with Dr. Broderick on the diagnosis of C6 radiculopathy from a disc bulge and foraminal stenosis on the right at C5-6 and the recommended treatment in the form of a diskectomy and fusion. PX 9.

Petitioner testified that he has been seen by Dr. Broderick since March 2019 and that his treatment recommendations are the same. He complains of pain from mid level of the back of his head down both sides of his neck and into both arms. He has numbness and tingling of both hands and intermittent spasms in both arms. Petitioner testified that he has seen Dr. Broderick monthly since the January 2018 accident.

Dr. Graf performed one Section 12 exam on May 16, 2018 in connection with the accident of January 2018. Dr. Graf testified via evidence deposition taken on 2/4/19. RX 1. He testified that Petitioner reported the accident on 1/6/18 while cranking down the landing gear. Petitioner reported pain in the neck, right shoulder and right arm. Dr. Graf noted Petitioner's prior C3-4 fusion surgery and that Petitioner had returned to work on 12/5/17. Petitioner reported that he had no pain at the time he returned to work and before the accident of 1/6/18. P. 9.

Dr. Graf reviewed the MRI from 2/5/18 and testified that it revealed the prior surgery at C3-4, minimal disc degeneration at L4-5 and a broad based disc herniation with stenosis at C5-6. He determined that Petitioner had "neck pain with vague upper extremity radiating pain. Similar symptom to the prior evaluation when I had evaluated him back in 2017." P. 13. Dr. Graf did not opine as to causal connection at that time but stated that he "questioned" causal connection due to the short period of time between Petitioner's return to work in December 2017 and the accident date of January 2018. P. 13-14,22. He determined that Petitioner's shoulder and upper extremity pain was not coming from C3-4, the prior fusion site, but rather from C7-T1. He recommended a higher quality MRI be performed. T. 14. He placed Petitioner at sedentary work level.

Dr. Graf authored an addendum report dated 10/2/18. In it he indicated that he reviewed a utilization review report dated 9/4/18 and reiterated his belief in the need for a higher quality MRI to determine the need for additional surgery. P. 16. Dr. Graf authored a third report dated 11/3/18 after he reviewed the MRI scan of July 2018. After comparing that scan to the prior MRI scans, he opined that it demonstrated post operative changes at C3-4 no evidence of stenosis at C4-5, and a central disc/osteophyte with a bulge at C5-6 with no evidence of stenosis, nerve root compression or spinal cord compression. He further noted that there were no abnormal findings at C6-7 or C7-T1 which could partially correlate with Petitioner's purported symptoms of pain from the right shoulder down the outside ulnar aspect of the forearm. He determined that the July 2018 MRI was unchanged from the prior MRI of 4/26/16. P. 18-19.

Dr. Graf testified that the recommended surgery was not medically reasonable "regardless of causation" because the surgery does not "match up with his clinical distribution of symptoms. And further I didn't see any evidence of myelopathy on physical exam. P. 19. When asked his opinion on whether Petitioner's current symptoms were causally related to the work incident of January 6, 2018, he replied, "I could not objectively substantiate such. I further at that point listed him at maximum medical improvement and also noted that there was no objective reason why he could not return to his full duty level job." P. 20. He opined that Petitioner did not need any further treatment.

On cross, he agreed that he was not aware of another claimed accident in November 2018 and had not opinions regard the need for treatment subsequent to that accident. P. 21. He further agreed that he had

returned Petitioner to full duty work in May 2017 and stated no need for any further treatment at that time. P. 24. He acknowledged that the MRI of 2/5/18 revealed a broad based disc herniation with bilateral stenosis at C5-6 but again noted the poor MRI quality and the need for a new MRI. P. 30. He reviewed the subsequent July 2018 MRI films but not the radiologist report or Dr. Broderick's interpretation of the July 2018 MRI. P. 32. He does not agree that Petitioner had a C5-6 radiculopathy but testified that if he did, an adjacent level surgery, either fusion or disc replacement, could be reasonable treatment. P. 32-34.

On redirect he again testified that on his exam of Petitioner on May 16, 2018, he did not have any clinical findings to correlate to a C5-6 radiculopathy and his subjective complaints were the wrong nerve root distribution. P. 35. He interpreted the July 2018 MRI as showing left side foraminal narrowing but Petitioner' claimed right side symptoms. P. 35.

Dr. Broderick disagreed with the radiologist and Dr. Graf who noted that the herniated disk was more prominent on the left side. Dr. Broderick testified "I believe that there is evidence that there was foraminal stenosis on both sides, and the symptoms were predominantly right sided, but the patient also did have some symptoms in his left upper extremity, just not as predominant." Id. at 19. Dr. Broderick testified the MRI showed the "expected postoperative changes at the C3-4 level...progression of the degenerative condition with a new disc herniation or bulge at C5-6, that in [his] opinion it was causing nerve root compression on both neural foramen." PX 12 p. 8-9. Dr. Broderick testified "in my opinion the patient's MRI findings showed foraminal stenosis, which means narrowing of the branch point, where the nerve branches out of the spine, traveling down the arm, so when you have foraminal stenosis, then the nerve root gets compressed or pinched." Id. at 18.

He noted on physical exam that there was a positive Lhermitte's sign, positive Spurling's sign on the right, diminished sensation, diminished reflexes, and subjective complaints consistent with a cervical radiculopathy and myelopathy. Id. at 9-11. Dr. Broderick opined Petitioner's diagnosis included the prior fusion, cervicalgia, and cervical disc disorder with myelopathy. Id. at 12. He further opined that Petitioner's February 5, 2018 MRI findings correlated with this clinical exam findings and subjective complaints. PX 12, p. 18. Dr. Broderick opined additional treatment was medically necessary and recommended surgery including either an anterior cervical diskectomy and fusion from C4 to C6 or a cervical artificial disk replacement at the same levels. Id. at 14-15, 27. According to Dr. Broderick, the rational for the surgery was because the radicular symptoms "are by far and away the dominant problem here. In [his] clinical recommendations, in [his] clinical findings, they are all consistent with a severe radiculopathy. The patient has a very mild myelopathic finding, but...they both go hand-in-hand. In treating the radiculopathy, you will also automatically treat the myelopathic issues." Id. at 28. Dr. Broderick opined that Petitioner's condition and need for another cervical surgery was caused by the work injury of 1/6/18. Id. at 29. Dr. Broderick further testified that there was a difference in the MRI report from January 2017, prior to this accident in January 2018, and the MRI of February 5, 2018, which correlate with Petitioner's presentation of symptoms in February 2018 and the need for the prescribed surgery. PX 12, p. 41-42.

Given the extent of the surgery being proposed and the conflicting opinions between Dr. Broderick and Dr. Graf, Dr. Broderick recommended that Petitioner seek a second opinion with another orthopedic spine surgeon. PX12 p. 23-24. The doctors at Physician's Immediate Care also referred Petitioner to a second opinion. PX 8.

Dr. Sweet, after reviewing the MRI's ultimately agreed with Dr. Broderick that surgery was indicated and that the condition and need for surgery were causally related to the work injury of 1/6/18. PX 9. Dr. Sweet examined him on 3/11/19. Dr. Sweet noted symptoms in the neck, trapezius, shoulder, periscapular area, arm, forearm with numbness and tingling in the middle digits on the right side. He noted physical examination found positive Spurlings with right lateral rotation and extension, diminished sensation on the index, and long and ring fingers. He reviewed the MRI's and x-rays. Dr. Sweet indicated the MRI showed prior C3-4 fusion, left sided foraminal stenosis at C4-5 and a disc bulge with foraminal stenosis on the right at C5-6 with compression of the exiting C6 nerve root. PX 9 p. 262. He diagnosed C6 radiculopathy from a disc bulge and foraminal stenosis on the right at C5-6. He agreed with Dr. Broderick's recommendation for an anterior cervical diskectomy and fusion. He further stated that "based on the patient's history that this was elicited by his work injury on January of 2018 and further exacerbated by the work injury in November of 2018." PX 9 p. 262.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law apply in both consolidated matters as stated below.

B. Did an accident occur that arose out of and in the course of Petitioner's employment?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Petitioner did sustain an injury that arose out of and in the course of his employment. The Respondent disputed accident at trial. However, they presented no evidence to refute that the injury occurred. Petitioner testified credibly that he felt pain on 1/6/18 when he was trying to turn a frozen crank by hand. He felt pain in his neck going into his arms. He reported it immediately by contacting Central Dispatch, whom Petitioner referred to as his "supervisor". Additionally, the contemporaneous medical records contain a very clear and detailed history of the work injury. The records of Physicians Immediate Care, Dr. Broderick, and Dr. Sweet all contain identical histories. Furthermore, Dr. Graf, Respondent's section 12 physician does not deny that something happened on 1/6/18. Instead he implies it is suspicious that he alleged an injury within a month of being sent back to work full duty by Dr. Graf himself. The Arbitrator finds this statement unpersuasive based on the record as a whole. Accordingly, the Arbitrator finds Petitioner sustained an accident arising out of and in the course of his employment by Respondent on 1/6/18 in case 18 WC 12691.

In case 18 WC 37273, the Arbitrator further finds that Petitioner sustained an accident arising out of and in the course of his employment by Respondent on 11/17/18. Petitioner testified that he had returned to work for 4 days during which he was on a run assisting another driver in pulling down a terminal door. In doing so, he felt immediate symptom increase and reported those symptoms to dispatch. Petitioner again sought medical care and treated thereafter. Nothing in the record disputes this occurrence nor detracts from the Arbitrator's finding of accident on 11/17/18.

F. Is the Petitioner's current condition of ill-being causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Petitioner's current condition of ill-being and need for additional treatment including surgery is causally related to the work injury of 1/6/18. The Arbitrator further finds that although Petitioner sustained a work related accident on 11/17/18 during his brief return to work, that accident resulted in a flare up of Petitioner's symptoms with a return to baseline thereafter. His symptoms and treatment recommendations did not change following the accident of 11/17/18. Specifically, the Arbitrator finds that Petitioner's condition of ill-being and the need for surgery are causally related solely to the accident of 1/6/18 causing injury to Petitioner's cervical spine.

In so finding, the Arbitrator further finds that the opinions of Dr. Broderick and Dr. Sweet are more credible than Dr. Graf's opinions on the issue of causation and the need for more treatment. The Arbitrator is aware that Petitioner had an undisputed prior work injury for which he underwent a cervical fusion at C3-4 on 9/16/16. Dr. Graf saw the Petitioner, in connection with that case, for an IME on 9/18/17. PX 11. Dr. Graf opined that the Petitioner's cervical fusion at C3-4 was solid, had healed without complication, and there was no residual compression, stenosis, disc bulge or herniation. He further opined that Petitioner had a completely normal objective examination. Dr. Graf was determined that Petitioner had fully healed, that no further treatment was necessary and that there was no "objective reason why Petition could not return to work full duty" as a truck driver. PX 11. In reliance on that opinion that he was medically cleared to return to work, Petitioner in fact returned to work. The Arbitrator is not dissuaded by the short interval between Petitioner's return to work in December 2017 and the accident on 1/6/18. Rather, the Arbitrator notes that Petitioner had returned to full duty work with only a routine follow up scheduled with Dr. Broderick in February 2018. It was during this return to full duty work that Petitioner sustained another work related accident which resulted in increased neck pain and new radicular symptoms down both arms as testified to by Dr. Broderick and verified by Dr. Sweet.

The Arbitrator notes that the MRI of 2/5/18 showed a bulging/herniated disk at C5-6 as interpreted by Drs. Broderick and Sweet. The Arbitrator places greater weight on the opinions of Dr. Broderick, treating surgeon, and Dr. Sweet regarding the diagnosis of foraminal stenosis on both sides with symptoms more prominent on the right side than on the left side. Petitioner's numerous clinical exams by Dr. Broderick as well as Dr. Sweet correlated with this reading of the MRI. Dr. Broderick opined Petitioner's diagnosis included the prior fusion, cervicalgia, and cervical disc disorder with myelopathy. Dr. Broderick opined additional treatment was medically necessary and recommended surgery including either an anterior cervical diskectomy and fusion from C4 to C6 or a cervical artificial disk replacement at the same levels. According to Dr. Broderick, the rational for the surgery was because the radicular symptoms "are by far and away the dominant problem here. In [his] clinical recommendations, in [his] clinical findings, they are all consistent with a severe radiculopathy. The patient has a very mild myelopathic finding, but…they both go hand-in-hand. In treating the radiculopathy, you will also automatically treat the myelopathic issues." Broderick opined that Petitioner's condition and need for another cervical surgery was caused by the work injury of 1/6/18. The Arbitrator agrees and further finds that Petitioner shall receive the surgery

recommended by Dr. Broderick and Respondent shall authorize and pay for the specific type of surgery as currently recommended by Dr. Broderick and the attendant care pursuant to Sections 8 and 8.2 of the Act.

Again, the finding of causal connection and the need for prospective surgery are made in connection with the accident of 1/6/18 only. The Arbitrator finds no causal connection between Petitioner's condition for which surgery is awarded and the accident of 11/17/18 in case 18 WC 37273. Further, the Arbitrator notes that although it is clear Petitioner had a second injury at work, it did not change or alter the recommended course of treatment. Surgery had already been recommended and continued to be recommended. Therefore, the Arbitrator further finds that the 11/17/18 was not an intervening accident sufficient to sever the causal connection between Petitioner's condition and the accident of 1/6/18.

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Respondent is liable for all related medical bills outlined in Petitioner's exhibit 13. Arbitrator notes that the parties agreed that the dispute regarding medical bills was based solely on liability for the accident and causal connection. Having found the treatment rendered to be causally related to the work injury of 1/6/18, the Arbitrator further orders Respondent to pay the medical bills incurred pursuant to Sections 8 and 8.2 of the Act in case 18 WC 12691. Respondent shall receive credit for amounts already paid and a credit under Section 8(j) for any sum paid by the group health carrier, if any. No award of medical expenses is made in case 18 WC 37273.

L. What temporary benefits are in dispute?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

Having awarded Petitioner ongoing medical treatment, the Arbitrator finds that the restrictions in place by Dr. Broderick and Physicians Immediate Care are reasonable and that Petitioner is entitled to ongoing TPD benefits. ARB EX 1. Respondent shall continue to pay the TPD benefits while Petitioner is working modified duty. Respondent shall receive credit for amounts paid. ARB EX 1. No award of TPD is made in case 18 WC 37273.

TTD was not in dispute based on a reading of ARB EX 1. No award of prospective TTD is made in case 18 WC 12691.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY LEWIS,

Petitioner,

vs. NO: 18 WC 37273

USF HOLLAND,

Respondent.

21IWCC0136

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses-including prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 17, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
o-1/26/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

LEWIS, LEROY
Employee/Petitioner

Case# **18WC037273**
18WC012691

USF HOLLAND
Employer/Respondent

21IWCC0136

On 11/12/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK AND JONES ATTY AT LAW
TRACY JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0136

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(A)

Leroy Lewis
Employee/Petitioner

v.

USF Holland
Employer/Respondent

Case # **18 WC 37273**

Consolidated cases: **18 WC 12691**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **Waukegan**, on **10/21/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **11/17/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**87548.76**; the average weekly wage was $**1683.63**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

ORDER

The Arbitrator finds that Petitioner's current condition of ill-being and need for surgery are not causally related to the work injury of 11/17/18. SEE DECISION

No award of benefits is made.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn M. Doherty

Signature of Arbitrator

11/11/19
Date

NOV 12 2019

FINDINGS OF FACT

These two consolidated matters were presented for trial pursuant to Sections 19(b)/8(a) of the Act. In 18 WC 12691, Petitioner alleges an accident date of 1/6/18. ARB EX 1. In case 18 WC 37273, Petitioner alleges an accident date of 11/17/18. ARB EX 2. The main issues in dispute in each case are accident and causal connection for ongoing medical treatment, namely the proposed cervical surgery. Each decision is addressed under separate cover.

Petitioner, a 62 year old truck driver, testified that he has been an employee of Respondent as a line haul truck driver for 25 years. Petitioner testified that he reports for work to the terminal, gets into a truck and locates a trailer to hook to. He then drives to remote locations delivering loads and picking up loads in multiple states.

It is undisputed that Petitioner had a prior work-related injury while working at Respondent on 11/29/15. Petitioner ultimately underwent a C3-4 cervical diskectomy and fusion by Dr. Broderick on 9/22/16. Postoperatively he was noted to have slow healing of the bone and ongoing symptoms. A CT scan done 6/16/17 indicated, because of hardware, it could not be determined if the fusion hardware had been incorporated or not. PX 14 p. 0428. Dr. Broderick suspected poor evidence of bone fusion on the CT and ordered the use of a bone stimulator on 6/20/17. PX 14 p. 383. Respondent obtained an IME with Dr. Carl Graf on 9/18/17 to address the Petitioner's condition at that time. PX 11. Dr. Graf personally reviewed the CT scan and opined the fusion was solid and there appeared to be "bony fusion." He went on to state that, in his opinion, Petition had a "solid fusion" and had reached "maximum medical improvement." PX 11. He opined that Petitioner did not require any additional treatment, including the bone stimulator. He further opined Petitioner could return to work as a truck driver without any restrictions. PX 11. He specifically stated, "there is no objective reason why Mr. Lewis cannot return to his full duty work, without restrictions." PX 11.

Despite Dr. Graf's opinion, Petitioner obtained the bone stimulator on October 17, 2017 and used it for two months. A repeat CT scan was done 12/5/17. PX 14 p 427. Dr. Broderick examined Petitioner and noted improvement in symptoms. He noted only mild pain in rotation and full 5/5 muscle strength. PX 14 p. 363. Dr. Broderick released Petitioner to return to work full duty and advised him to follow up in 2 months for a checkup in February 2018. PX 14 p 364. Petitioner was no longer using the bone stimulator. Petitioner received a settlement for his prior workers' compensation injury in 2015. RX 3, RX 4.

Petitioner then returned to work full duty 12/11/17 for Respondent as agreed to by Dr. Broderick. He testified that he was doing well with only mild symptoms in his neck and down his arm and that he was able to do his job duties.

Petitioner testified that while at work on January 6, 2018, he was using two hands to turn a crank while attaching the trailer to his truck. Petitioner the crank was frozen with ice and snow. Normally the cranks can be turned with only one hand, but because of the ice, Petitioner had to grab the handle with both hands in front of his chest with his hands in fists, the thumbs touching one another. He then had to use a rowing type motion where he moved both hands up and outward from his chest and cranked it around in a circle bringing his hands back to his chest. Petitioner testified that while forcing the frozen crank forward, he had increasing pain in his neck and down both arms to his fingers. He finished the task and got in his truck where he called Central Dispatch and reported the injury.

Petitioner was told by central dispatch to go to Physicians Immediate Care. Petitioner reported the pain in his neck and both upper extremities after pushing the crank. He was told to follow up in one week. Petitioner returned on 2/1/18 and an MRI of his neck and right shoulder was recommended along with physical therapy.

The MRI of 2/5/18 without contrast showed a broad based left paracentral disc herniation which appeared slightly increased from 4/26/16 [MRI] indenting the spinal cord on this exam. No spinal cord signal abnormality is seen. PX 4. Petitioner returned to Dr. Broderick on 2/20/18 and explained the onset of pain and the reported neck pain down both arms to his hands. Dr. Broderick noted that the MRI showed C5-6 radiculopathy but that no change was reported at the prior surgery level of C3-4. Dr. Broderick noted that he believed there was evidence of foraminal stenosis on both sides disagreeing with the radiologist determination of left side protrusion only. PX 12. Dr. Broderick recommended physical therapy with traction. Petitioner returned to Dr. Broderick for an epidural injection at C7-T1. Petitioner reported no relief.

On May 8, 2018 Petitioner returned to Dr. Broderick and reported no relief from the injection. Dr. Broderick indicated that Petitioner would need either another fusion or an artificial disk replacement at C5-6. Petitioner was working on restricted duty performing clerical work for Respondent under a restricted duty program. Respondent paid Petitioner $330 per week or 8.25 per hour to come to work. Petitioner testified that he was also receiving TPD payments to make up the lost wage. He testified that he continued to receive the TPD payments at the time of trial. As of his last visit to Dr. Broderick in July 2018, Dr. Broderick was still recommending a fusion surgery and Petitioner was still taking ibuprofen. Petitioner continued to work his light duty job for Respondent.

Dr. Broderick interpreted a subsequent MRI dated July 18, 2018 and stated that it revealed "... degenerative spondylosis at C4-5 and C5-6 with associated foraminal stenosis right greater than left. This is causing nerve root impingement that correlates clinically with his cervical radiculopathy involving the right C5 and C6 regions." PX 5.

Petitioner testified that Respondent subsequently told him that Dr. Graf indicated Petitioner should be performing regular duty. Petitioner testified that he returned to regular duty for 4 days around 11/17/18. However, on 11/17/18, Petitioner was dropping freight at a terminal and attempted to help another driver pull down a terminal door. Petitioner testified that he used a device to pull the door down, and while reaching up with the device to grab the door and pull it down, he felt pain again. Petitioner testified that he called Central Dispatch and reported the incident. Petitioner then drove back to Rockford and went immediately to Physician's Immediate Care complaining of pain in his neck and upper back.

Petitioner testified that he was sent back to work with a 10 pound restriction and returned to office work. Dr Broderick's treatment recommendations stayed the same.

Respondent sent Petitioner to Dr. Sweet on March 19, 2018. Petitioner complained of neck pain and pain down both arms. Upon review of the MRI, Dr. Sweet recommended a cervical fusion at C5-6 under a diagnosis of C6 radiculopathy. PX 9. Dr. Sweet noted that he reviewed his "cervical MRI" although no date is given. He interpreted the MRI as showing "left sided foraminal stenosis at C4-5 and a disc bulge with severe foraminal stenosis on the right at C5-6 with compression of the exiting C6 nerve root." He

agreed with Dr. Broderick on the diagnosis of C6 radiculopathy from a disc bulge and foraminal stenosis on the right at C5-6 and the recommended treatment in the form of a diskectomy and fusion. PX 9.

Petitioner testified that he has been seen by Dr. Broderick since March 2019 and that his treatment recommendations are the same. He complains of pain from mid level of the back of his head down both sides of his neck and into both arms. He has numbness and tingling of both hands and intermittent spasms in both arms. Petitioner testified that he has seen Dr. Broderick monthly since the January 2018 accident.

Dr. Graf performed one Section 12 exam on May 16, 2018 in connection with the accident of January 2018. Dr. Graf testified via evidence deposition taken on 2/4/19. RX 1. He testified that Petitioner reported the accident on 1/6/18 while cranking down the landing gear. Petitioner reported pain in the neck, right shoulder and right arm. Dr. Graf noted Petitioner's prior C3-4 fusion surgery and that Petitioner had returned to work on 12/5/17. Petitioner reported that he had no pain at the time he returned to work and before the accident of 1/6/18. P. 9.

Dr. Graf reviewed the MRI from 2/5/18 and testified that it revealed the prior surgery at C3-4, minimal disc degeneration at L4-5 and a broad based disc herniation with stenosis at C5-6. He determined that Petitioner had "neck pain with vague upper extremity radiating pain. Similar symptom to the prior evaluation when I had evaluated him back in 2017." P. 13. Dr. Graf did not opine as to causal connection at that time but stated that he "questioned" causal connection due to the short period of time between Petitioner's return to work in December 2017 and the accident date of January 2018. P. 13-14,22. He determined that Petitioner's shoulder and upper extremity pain was not coming from C3-4, the prior fusion site, but rather from C7-T1. He recommended a higher quality MRI be performed. T. 14. He placed Petitioner at sedentary work level.

Dr. Graf authored an addendum report dated 10/2/18. In it he indicated that he reviewed a utilization review report dated 9/4/18 and reiterated his belief in the need for a higher quality MRI to determine the need for additional surgery. P. 16. Dr. Graf authored a third report dated 11/3/18 after he reviewed the MRI scan of July 2018. After comparing that scan to the prior MRI scans, he opined that it demonstrated post operative changes at C3-4 no evidence of stenosis at C4-5, and a central disc/osteophyte with a bulge at C5-6 with no evidence of stenosis, nerve root compression or spinal cord compression. He further noted that there were no abnormal findings at C6-7 or C7-T1 which could partially correlate with Petitioner's purported symptoms of pain from the right shoulder down the outside ulnar aspect of the forearm. He determined that the July 2018 MRI was unchanged from the prior MRI of 4/26/16. P. 18-19.

Dr. Graf testified that the recommended surgery was not medically reasonable "regardless of causation" because the surgery does not "match up with his clinical distribution of symptoms. And further I didn't see any evidence of myelopathy on physical exam. P. 19. When asked his opinion on whether Petitioner's current symptoms were causally related to the work incident of January 6, 2018, he replied, "I could not objectively substantiate such. I further at that point listed him at maximum medical improvement and also noted that there was no objective reason why he could not return to his full duty level job." P. 20. He opined that Petitioner did not need any further treatment.

On cross, he agreed that he was not aware of another claimed accident in November 2018 and had not opinions regard the need for treatment subsequent to that accident. P. 21. He further agreed that he had

returned Petitioner to full duty work in May 2017 and stated no need for any further treatment at that time. P. 24. He acknowledged that the MRI of 2/5/18 revealed a broad based disc herniation with bilateral stenosis at C5-6 but again noted the poor MRI quality and the need for a new MRI. P. 30. He reviewed the subsequent July 2018 MRI films but not the radiologist report or Dr. Broderick's interpretation of the July 2018 MRI. P. 32. He does not agree that Petitioner had a C5-6 radiculopathy but testified that if he did, an adjacent level surgery, either fusion or disc replacement, could be reasonable treatment. P. 32-34.

On redirect he again testified that on his exam of Petitioner on May 16, 2018, he did not have any clinical findings to correlate to a C5-6 radiculopathy and his subjective complaints were the wrong nerve root distribution. P. 35. He interpreted the July 2018 MRI as showing left side foraminal narrowing but Petitioner' claimed right side symptoms. P. 35.

Dr. Broderick disagreed with the radiologist and Dr. Graf who noted that the herniated disk was more prominent on the left side. Dr. Broderick testified "I believe that there is evidence that there was foraminal stenosis on both sides, and the symptoms were predominantly right sided, but the patient also did have some symptoms in his left upper extremity, just not as predominant." Id. at 19. Dr. Broderick testified the MRI showed the "expected postoperative changes at the C3-4 level...progression of the degenerative condition with a new disc herniation or bulge at C5-6, that in [his] opinion it was causing nerve root compression on both neural foramen." PX 12 p. 8-9. Dr. Broderick testified "in my opinion the patient's MRI findings showed foraminal stenosis, which means narrowing of the branch point, where the nerve branches out of the spine, traveling down the arm, so when you have foraminal stenosis, then the nerve root gets compressed or pinched." Id. at 18.

He noted on physical exam that there was a positive Lhermitte's sign, positive Spurling's sign on the right, diminished sensation, diminished reflexes, and subjective complaints consistent with a cervical radiculopathy and myelopathy. Id. at 9-11. Dr. Broderick opined Petitioner's diagnosis included the prior fusion, cervicalgia, and cervical disc disorder with myelopathy. Id. at 12. He further opined that Petitioner's February 5, 2018 MRI findings correlated with this clinical exam findings and subjective complaints. PX 12, p. 18. Dr. Broderick opined additional treatment was medically necessary and recommended surgery including either an anterior cervical diskectomy and fusion from C4 to C6 or a cervical artificial disk replacement at the same levels. Id. at 14-15, 27. According to Dr. Broderick, the rational for the surgery was because the radicular symptoms "are by far and away the dominant problem here. In [his] clinical recommendations, in [his] clinical findings, they are all consistent with a severe radiculopathy. The patient has a very mild myelopathic finding, but...they both go hand-in-hand. In treating the radiculopathy, you will also automatically treat the myelopathic issues." Id. at 28. Dr. Broderick opined that Petitioner's condition and need for another cervical surgery was caused by the work injury of 1/6/18. Id. at 29. Dr. Broderick further testified that there was a difference in the MRI report from January 2017, prior to this accident in January 2018, and the MRI of February 5, 2018, which correlate with Petitioner's presentation of symptoms in February 2018 and the need for the prescribed surgery. PX 12, p. 41-42.

Given the extent of the surgery being proposed and the conflicting opinions between Dr. Broderick and Dr. Graf, Dr. Broderick recommended that Petitioner seek a second opinion with another orthopedic spine surgeon. PX12 p. 23-24. The doctors at Physician's Immediate Care also referred Petitioner to a second opinion. PX 8.

Dr. Sweet, after reviewing the MRI's ultimately agreed with Dr. Broderick that surgery was indicated and that the condition and need for surgery were causally related to the work injury of 1/6/18. PX 9. Dr. Sweet examined him on 3/11/19. Dr. Sweet noted symptoms in the neck, trapezius, shoulder, periscapular area, arm, forearm with numbness and tingling in the middle digits on the right side. He noted physical examination found positive Spurlings with right lateral rotation and extension, diminished sensation on the index, and long and ring fingers. He reviewed the MRI's and x-rays. Dr. Sweet indicated the MRI showed prior C3-4 fusion, left sided foraminal stenosis at C4-5 and a disc bulge with foraminal stenosis on the right at C5-6 with compression of the exiting C6 nerve root. PX 9 p. 262. He diagnosed C6 radiculopathy from a disc bulge and foraminal stenosis on the right at C5-6. He agreed with Dr. Broderick's recommendation for an anterior cervical diskectomy and fusion. He further stated that "based on the patient's history that this was elicited by his work injury on January of 2018 and further exacerbated by the work injury in November of 2018." PX 9 p. 262.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law apply in both consolidated matters as stated below.

B. Did an accident occur that arose out of and in the course of Petitioner's employment?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Petitioner did sustain an injury that arose out of and in the course of his employment. The Respondent disputed accident at trial. However, they presented no evidence to refute that the injury occurred. Petitioner testified credibly that he felt pain on 1/6/18 when he was trying to turn a frozen crank by hand. He felt pain in his neck going into his arms. He reported it immediately by contacting Central Dispatch, whom Petitioner referred to as his "supervisor". Additionally, the contemporaneous medical records contain a very clear and detailed history of the work injury. The records of Physicians Immediate Care, Dr. Broderick, and Dr. Sweet all contain identical histories. Furthermore, Dr. Graf, Respondent's section 12 physician does not deny that something happened on 1/6/18. Instead he implies it is suspicious that he alleged an injury within a month of being sent back to work full duty by Dr. Graf himself. The Arbitrator finds this statement unpersuasive based on the record as a whole. Accordingly, the Arbitrator finds Petitioner sustained an accident arising out of and in the course of his employment by Respondent on 1/6/18 in case 18 WC 12691.

In case 18 WC 37273, the Arbitrator further finds that Petitioner sustained an accident arising out of and in the course of his employment by Respondent on 11/17/18. Petitioner testified that he had returned to work for 4 days during which he was on a run assisting another driver in pulling down a terminal door. In doing so, he felt immediate symptom increase and reported those symptoms to dispatch. Petitioner again sought medical care and treated thereafter. Nothing in the record disputes this occurrence nor detracts from the Arbitrator's finding of accident on 11/17/18.

F. Is the Petitioner's current condition of ill-being causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Petitioner's current condition of ill-being and need for additional treatment including surgery is causally related to the work injury of 1/6/18. The Arbitrator further finds that although Petitioner sustained a work related accident on 11/17/18 during his brief return to work, that accident resulted in a flare up of Petitioner's symptoms with a return to baseline thereafter. His symptoms and treatment recommendations did not change following the accident of 11/17/18. Specifically, the Arbitrator finds that Petitioner's condition of ill-being and the need for surgery are causally related solely to the accident of 1/6/18 causing injury to Petitioner's cervical spine.

In so finding, the Arbitrator further finds that the opinions of Dr. Broderick and Dr. Sweet are more credible than Dr. Graf's opinions on the issue of causation and the need for more treatment. The Arbitrator is aware that Petitioner had an undisputed prior work injury for which he underwent a cervical fusion at C3-4 on 9/16/16. Dr. Graf saw the Petitioner, in connection with that case, for an IME on 9/18/17. PX 11. Dr. Graf opined that the Petitioner's cervical fusion at C3-4 was solid, had healed without complication, and there was no residual compression, stenosis, disc bulge or herniation. He further opined that Petitioner had a completely normal objective examination. Dr. Graf was determined that Petitioner had fully healed, that no further treatment was necessary and that there was no "objective reason why Petition could not return to work full duty" as a truck driver. PX 11. In reliance on that opinion that he was medically cleared to return to work, Petitioner in fact returned to work. The Arbitrator is not dissuaded by the short interval between Petitioner's return to work in December 2017 and the accident on 1/6/18. Rather, the Arbitrator notes that Petitioner had returned to full duty work with only a routine follow up scheduled with Dr. Broderick in February 2018. It was during this return to full duty work that Petitioner sustained another work related accident which resulted in increased neck pain and new radicular symptoms down both arms as testified to by Dr. Broderick and verified by Dr. Sweet.

The Arbitrator notes that the MRI of 2/5/18 showed a bulging/herniated disk at C5-6 as interpreted by Drs. Broderick and Sweet. The Arbitrator places greater weight on the opinions of Dr. Broderick, treating surgeon, and Dr. Sweet regarding the diagnosis of foraminal stenosis on both sides with symptoms more prominent on the right side than on the left side. Petitioner's numerous clinical exams by Dr. Broderick as well as Dr. Sweet correlated with this reading of the MRI. Dr. Broderick opined Petitioner's diagnosis included the prior fusion, cervicalgia, and cervical disc disorder with myelopathy. Dr. Broderick opined additional treatment was medically necessary and recommended surgery including either an anterior cervical diskectomy and fusion from C4 to C6 or a cervical artificial disk replacement at the same levels. According to Dr. Broderick, the rational for the surgery was because the radicular symptoms "are by far and away the dominant problem here. In [his] clinical recommendations, in [his] clinical findings, they are all consistent with a severe radiculopathy. The patient has a very mild myelopathic finding, but...they both go hand-in-hand. In treating the radiculopathy, you will also automatically treat the myelopathic issues." Broderick opined that Petitioner's condition and need for another cervical surgery was caused by the work injury of 1/6/18. The Arbitrator agrees and further finds that Petitioner shall receive the surgery

recommended by Dr. Broderick and Respondent shall authorize and pay for the specific type of surgery as currently recommended by Dr. Broderick and the attendant care pursuant to Sections 8 and 8.2 of the Act.

Again, the finding of causal connection and the need for prospective surgery are made in connection with the accident of 1/6/18 only. The Arbitrator finds no causal connection between Petitioner's condition for which surgery is awarded and the accident of 11/17/18 in case 18 WC 37273. Further, the Arbitrator notes that although it is clear Petitioner had a second injury at work, it did not change or alter the recommended course of treatment. Surgery had already been recommended and continued to be recommended. Therefore, the Arbitrator further finds that the 11/17/18 was not an intervening accident sufficient to sever the causal connection between Petitioner's condition and the accident of 1/6/18.

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

The Arbitrator finds that Respondent is liable for all related medical bills outlined in Petitioner's exhibit 13. Arbitrator notes that the parties agreed that the dispute regarding medical bills was based solely on liability for the accident and causal connection. Having found the treatment rendered to be causally related to the work injury of 1/6/18, the Arbitrator further orders Respondent to pay the medical bills incurred pursuant to Sections 8 and 8.2 of the Act in case 18 WC 12691. Respondent shall receive credit for amounts already paid and a credit under Section 8(j) for any sum paid by the group health carrier, if any. No award of medical expenses is made in case 18 WC 37273.

L. What temporary benefits are in dispute?

The following conclusions apply to both consolidated matters 18 WC 12691 and 18 WC 37273 as stated herein.

Having awarded Petitioner ongoing medical treatment, the Arbitrator finds that the restrictions in place by Dr. Broderick and Physicians Immediate Care are reasonable and that Petitioner is entitled to ongoing TPD benefits. ARB EX 1. Respondent shall continue to pay the TPD benefits while Petitioner is working modified duty. Respondent shall receive credit for amounts paid. ARB EX 1. No award of TPD is made in case 18 WC 37273.

TTD was not in dispute based on a reading of ARB EX 1. No award of prospective TTD is made in case 18 WC 12691.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alec Laule,

Petitioner,

vs.

Village of Niles,

Respondent.

21IWCC0137

NO: 17 WC 3679

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator with respect to the issue of the award for disfigurement. The Arbitrator awarded two weeks of partial permanent disability benefits for the disfigurement of Petitioner's right arm and two weeks of benefits for the disfigurement of the left arm. On March 11, 2021, the parties appeared before Commissioner Barbara N. Flores by agreement for a viewing via videoconference of Petitioner's disfigurement and the evidence recorded at that time was shared with the panel. The Commission finds three points of disfigurement on the right elbow, one red and the size of a dime, with two smaller white marks, all indented. Regarding the left forearm, the Commission finds one point of disfigurement, white and the size of a quarter. Given the nature and extent of the demonstrated disfigurement, the Commission modifies the Decision of the Arbitrator and awards five weeks of benefits regarding the disfigurement of Petitioner's right elbow and five weeks of benefits regarding the disfigurement of Petitioner's left forearm.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

21IWCC0137

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,046.29 per week for a period of 10 weeks, for the reason that the injuries sustained resulted in disfigurement as provided in §8(c) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 15, 2020 is hereby affirmed and adopted as modified herein.

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
o: 3/18/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0137

LAULE, ALEC
Employee/Petitioner

Case# **17WC003679**

VILLAGE OF NILES
Employer/Respondent

On 6/15/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5669 ALEKSY BELCHER
JASON CARROLL
30 N LASALLE ST SUITE 750
CHICAGO, IL 60654

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alec Laule
Employee/Petitioner

v.

Village of Niles
Employer/Respondent

Case # **17 WC 3679**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **9/30/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **5/17/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**90,678.12**; the average weekly wage was $**1,743.81**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Petitioner received full pay while off work per collective bargaining agreement of the parties, and therefore TTD is moot.

Respondent is entitled to a credit of $**132.06** under §8(j) of the Act.

ORDER

Petitioner's claim for medical benefits in the amount of $145.99 paid by Blue Cross Blue Shield of Illinois to Illinois Bone & Joint Institute is denied as not being causally related to the instant accident.

Respondent is given a credit of $132.06 and shall hold Petitioner harmless from any claims by Rezin Orthopaedics and Sports Medicine, for which Respondent is receiving this credit, as provided in §8(j) of the Act, paid by Blue Cross Blue Shield of Illinois for medical treatment on May 23, 2016. No other medical bills were claimed.

Respondent shall pay Petitioner two weeks a permanent partial disability benefits for disfigurement of his right arm and two weeks of permanent partial disability benefits for disfigurement of his left arm.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 9, 2020
Date

JUN 15 2020

Alec Laule v. Village of Niles
17 WC 3679

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

FINDINGS OF FACT

Petitioner Alec Laule was employed by the Village of Niles from September 1992 until his retirement on September 15, 2018, as a patrol police officer. Petitioner testified that he was involved in a work-related accident at work on May 17, 2016.

On that date, Petitioner testified he was at the Niles police station when there was a call regarding three male subjects who had stolen back packs full of alcohol from the Jewel grocery store at Oakton and Milwaukee. While at the station, the car that had been described as the get-away car was spotted outside the police station at Milwaukee and Touhy. Petitioner testified that he participated in detaining the three subjects. One of the suspects tried to escape and Petitioner tackled the subject on Touhy Avenue. Petitioner testified that help to the ground injuring his right and left arms and his right knee

Petitioner testified that immediately after this incident, he noticed that he was bleeding from his arms and his right knee. Petitioner identified areas of his injuries on black and white photocopies of photographs (PX #5). The Photocopies of photographs demonstrated abrasions about both forearms and the right knee.

Petitioner was transported to Lutheran General Hospital ER by ambulance (PX #1). Petitioner was diagnosed with abrasions on his forearms and his right knee. The abrasion over the knee had a slightly deeper portion but was not amenable to suturing. Discharge orders kept off Petitioner work.

Petitioner testified he next sought treatment by Dr. Raymond Meyer at Rezin Orthopaedics May 23, 2016 (PX #2). Petitioner testified that Dr. Meyer had treated his son and was also a friend of Petitioner's from high school. Dr. Meyer focused his attention on the right knee as Petitioner reported the arm abrasions were not giving too much discomfort. Petitioner complained of pain in his anterior right knee, where the abrasion was more significant, and also medial knee pain. Dr. Meyer diagnosed a right

knee contusion and abrasion, as well as possible medial meniscal tear. He kept Petitioner off work until May 26, 2016. He provided Petitioner with prescriptions for Cleocin and EC-Naprosyn.

Petitioner followed up with Dr. Meyer on June 3, 2016. Petitioner reported overall improvement in his condition. His abrasions were healing. Petitioner was discharged from care at that time and allowed to return to work without restrictions. Dr. Meyer advised Petitioner to return if he had further complaints with his knee.

Petitioner was temporarily and totally disabled for 1 & 2/7 weeks, from May 18, 2016, through May 26, 2016, and received full pay benefits pursuant to his union contract.

Petitioner did not receive any other treatment for the injuries related to this accident.

Following his discharge by Dr. Rezin, Petitioner presented to Illinois Bone & Joint Institute for right elbow pain July 22, 2016 (PX #3). On that day, he treated with Dr. Taizoon Baxamusa. Petitioner gave a history that he had been dealing with right elbow pain for the past year. Petitioner did not give a history of being injured in a work-related accident on May 17, 2016. Petitioner testified that this was for a longstanding condition in his elbow that predated his work accident. Additional records from Hinsdale Orthopedics (RX #1) and from Athletico (RX #2) bear out that Petitioner's right elbow condition is not related to the instant work accident.

Petitioner testified that he returned to work for Respondent and worked as a patrol officer until he retired on September 15, 2018. Petitioner acknowledged that his retirement was not related to injuries claimed from his May 17, 2016 work accident.

At trial, Petitioner displayed the scars he claims resulted from his accident. The Arbitrator noted that the scar on Petitioner's left forearm is approximately the size of a dime. It was discolored from the surrounding non-injured skin. The scar was visible from at least six feet away. There is scar on Petitioner's right elbow area. It was somewhat larger that the scar on the opposite arm but was not as visible from the same distance. Finally, Petitioner has a slightly larger than dime-sized scar on his right kneecap. It was similar in appearance and size to the left arm scar.

Petitioner testified that he had used lotion on his scars up until about one year ago.

CONCLUSIONS OF LAW

F: Is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator finds that Petitioner proved by a preponderance of the evidence that his current condition of ill-being as it relates to the scars on his arms are causally related to his work accident of May 17, 2016. The contemporaneous medical records support a finding that these scars were a direct result of his accident. Further, the scars match up with the injuries as visualized in the four photographs admitted into evidence as Petitioner's Exhibit #5.

The Arbitrator notes that the scarring of Petitioner's right knee is at the patella, not below the knee. §8(c) of the Act provides for disfigurement benefits on the leg below the knee. Petitioner scarring on the right leg is not below the knee, and therefore is not compensable.

For these reasons, the Arbitrator concludes that Petitioner's current condition of ill-being as it relates to the scars on his forearms are causally related to his work accident of May 17, 2016.

J: Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent paid all appropriate charges except for the portion of the Rezin Orthopedics and Sports Medicine bill for date of service May 23, 2016, which was paid by Blue Cross Blue Shield of Illinois in the amount of $132.06.

Respondent shall be given a §8(j) credit of $132.06 for medical benefits that have been paid by Blue Cross Blue Shield, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

The claim for benefits provided in the amount of $145.99 for the July 22, 2016, date of service at Illinois Bone & Joint Institute, is not causally related to Petitioner's accident in this claim and therefore no §8(j) credit is given.

L: What is the nature and extent of the injury?

As a result of his accident, Petitioner sustained disfiguring injuries to both of arms and to his right lower extremity. These scars were clearly visible from a distance at the arbitration hearing. However, as noted above, Petitioner's right knee scarring is not compensable under §8(c) of the Act.

The Arbitrator noted that Petitioner also had evidence of other but unrelated disfigurement on his forearms. The compensable scars are neither large nor significantly discolored as compared to surrounding skin. Nonetheless, the scars are noticeable and are therefore compensable. Therefore, the Arbitrator finds that Petitioner is entitled to two weeks of benefits for the disfigurement on his right arm and two weeks of benefits for the disfigurement on his left arm.

Steven J. Fruth, Arbitrator

June 9, 2020
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carol Pugliani,
Petitioner,

vs.

Hobby Lobby Stores, Inc,
Respondent.

21IWCC0138

NO: 19 WC 7002

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, medical expenses, prospective medical treatment, and penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

There is no bond for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
o3/18/21
DLS/rm
046

Deborah L. Simpson
Deborah L. Simpson

Barbara N. Flores

Marc Parker
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0138

PUGLIANI, CAROL ANN Case# **19WC007002**
Employee/Petitioner

HOBBY LOBBY STORES INC
Employer/Respondent

On 8/19/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2988 CUDA LAW OFFICES LTD
ADRIANA PRESTON
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

5074 QUINTAIROS PRIETO WOOD & BOYER
SHIRLEY LYDIA SAN
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Carol Ann Pugliani
Employee/Petitioner

v.

Hobby Lobby Stores, Inc.
Employer/Respondent

Case # **19 WC 7002**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago** on **January 29, 2020** and **February 21, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **February 13, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$964.89**; the average weekly wage was **$396.95**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **1** dependent child.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under §8(j) of the Act.

ORDER

Because Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on February 13, 2019 and, further, failed to prove that her current condition of ill-being is causally related to the claimed accident Petitioner's application for benefits and prospective medical care is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

August 11, 2020
Date

AUG 19 2020

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues included: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** Is Petitioner entitled to prospective medical care?; ***L:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

FINDINGS OF FACT

Petitioner Carol Ann Pugliani testified that she was employed with Respondent Hobby Lobby Stores, Inc. in February 2019. She testified that she had been working for 3 weeks prior to the alleged work related injury on February 13, 2019. Art Swietlik, a co-manager for Respondent, testified for Respondent. He testified that Petitioner was hired on February 5, 2019 as a temporary worker to help set up the store in question.

Before beginning work for Respondent, Petitioner was employed by Martam Construction as a flagger until she was laid off in October 2018. Petitioner denied that she was working at her construction company job on February 13, 2019. Petitioner testified that she only worked half of her shift on February 14, but denied that this was because she worked her other position all night and didn't sleep. She worked half her shift on February 14 because of pain from her injuries.

Petitioner acknowledged that she had had a neck MRI in 2015 which showed some damage but no herniation or bulge. She testified that before working for Respondent she was not receiving medical care for her neck, was not receiving medication for her neck, and was not placed on any light duty work restrictions for her neck.

Petitioner testified that she was involved in building a new store, which she described as hard physical work. Her work required lifting and picking up boxes and loading carts. The boxes weighed anywhere from 10 to 40 pounds. On rebuttal, Petitioner admitted individual items weighed around 2 to 10 pounds. Petitioner testified she would handle 40 to 50 items per day. She also testified that her job duties involved building

displays and putting shelving units together. She would also pick up approximately 7 big metal shelves plus brackets in the back, put them in a cart, and then take them to the front to build the displays and shelving units. She would lift the shelves out of the cart, put them onto the display, and build the display. Each shelf was metal, approximately 4 feet wide, and weighed 10 to 20 pounds. She handled at least 40 shelves per day.

Petitioner testified that she started work at 6 AM. At about 10 AM she grabbed 7 or 8 carts and had to maneuver them between registers, lifting the carts. She lifted the carts only a few inches. As she lifted the carts she felt something pop in her neck, shoulder, and arm. Petitioner testified that it was "excruciating pain." Petitioner continued to work, finishing her shift. She iced her neck on the way home but could not sleep that night.

Petitioner denied that she had had a previous neck injury but acknowledged that she had had a neck MRI in 2015. She testified was "some damage" in her neck but no herniation or bulging and that there was nothing to do for it. She did not have any treatment for her neck at that time.

On cross-examination Petitioner testified that she had been seen at Demorest Consultants before February 2019 for colds, coughs, and headaches, and also neck and back pain for which she had been prescribed Norco. On further cross-examination Petitioner admitted that she had received injections in her lower back and had also been previously diagnosed with chronic neck and shoulder pain.

Petitioner testified that she first sought treatment with a chiropractor, Dr. David Shifman, DC on February 20, 2019 (PX #1). Petitioner testified that she told the chiropractor she was doing physical work and pushing carts when she felt something pop in her neck and shoulder. Dr. Shifman's notes recorded Petitioner's history of complaints of left side neck pain radiating down the left arm of 4 days duration. She reported that she woke up with it on Saturday morning and that she had "been doing a lot of lifting at work prior to this episode." Petitioner reported 8–9/10 pain.

On exam Dr. Shifman noted reduced cervical ranges of motion with 7–8/10 pain. Muscle strength and sensation were normal. Cervical compression and cervical distraction were positive with 8/10 pain. Petitioner testified that Dr. Shifman performed therapy, massage, cupping, and acupuncture. Dr. Shifman did not document a diagnosis but noted he did perform adjustments, CMT, electrostimulation, hot packs, ultrasound, and icepacks. Petitioner was taken off work until February 26.

Petitioner returned to Dr. Shifman on February 22 with continuing complaints of neck pain radiating down the left arm to the elbow. Clinical exam findings were

essentially the same. Dr. Shifman diagnosed neck pain and performed the same modalities as before. Petitioner also reported that she had an appointment with her MD the next day.

Petitioner testified that she next sought treatment from Dr. (Nicholas) Recchia at Demorest Consultants on February 23, 2019 (PX #2). Petitioner presented with complaints of low back pain and sciatica, however the reason for her visit was noted as "Follow-up & Refills." Petitioner's history was noteworthy for cervicalgia in 2017, sciatica in 2016, and "other chronic pain", as well as long-term (current) use of opiate analgesic. "There was a note of "past drug use." Petitioner also had a history of LESI (lumbar epidural steroid injection) in 2017 and the lumbar and cervical MRIs May 13, 2015 which noted degenerative disc disease. Petitioner's history of medication in included 800 mg of ibuprofen prescribed November 30, 2018 by Dr. Recchia and 325 mg Norco prescribed January 25, 2019 by Dr. Recchia.

Petitioner gave a history of a job stocking, arranging items, moving displays, and installing shelves on a job with Hobby Lobby (PX #2). Activities exacerbated chronic neck pain, severe left side left upper back\trapezius, and upper arm pain. Petitioner noted hydrocodone was not helping her pain. On exam Dr. Recchia noted marked spasm in the upper back, shoulder, and left neck. He diagnosed acute strain of the left upper back and shoulder muscles. Dr. Recchia prescribed a muscle relaxant and continued the hydrocodone prescription. He recommended hot bath/hours and massage therapy. There was no note regarding work status. An addendum on March 5, 2019 by Eliza Monarrez added "hurt herself at work moving 6-7 shopping carts."

A mammogram was also ordered on February 23.

Petitioner's Exhibit #2 also contained Dr. Recchia's consultation note dated January 25, 2019 at page 41. Petitioner presented for "Follow-up & Refills", with complaints of cervicalgia, sciatica, and low back pain. Dr. Ritchie noted Petitioner presented for follow-up for chronic opioid management of pain. It was noted that medication helped and allowed her to participate in activities of daily living. Active medications were noted as: Norco, tizanidine (muscle relaxant), triamcinolone topical, Symbicort, clonazepam (anticonvulsant), and ibuprofen.

Petitioner next sought medical care at the Emergency Room of Lutheran General Hospital on February 25, 2019 (PX #4). She testified that she was "in desperate need of medical care." She further testified that she reported to the doctors at the Emergency Room that she was doing physical work at Hobby Lobby and that she pulled something in her neck and shoulder. Petitioner said that the ER doctors did nothing and they did not prescribe her anything.

Petitioner was evaluated by Melanie Perez RN and Ryan Greene MD (PX # 4). Ms. Perez noted Petitioner's complaint of neck and shoulder pain since "last Saturday" and now left arm numbness. Dr. Greene noted that Petitioner was extremely anxious and tearful. She gave a history of chronic neck and back pain and being on daily Norco, baclofen, and ibuprofen. Petitioner complained of left superior trapezius neck pain/spasm that she "woke up with approximately 1 week ago." She complained of shooting pain down the left arm with some numbness. Dr. Greene noted no weakness in the arm. Petitioner had seen a chiropractor for massage, manipulation, and cupping with minimal relief. She reported medications were not helping.

On exam Dr. Greene noted pain complaints over the left superior trapezius muscle with range of motion of the head and pinpoint tenderness to palpation over the left superior trapezius, which appeared to be in spasm. The remainder of the examination was unremarkable. Dr. Greene noted Petitioner's history and physical were consistent with musculoskeletal spasm/strain of the left superior trapezius causing cervical radiculopathy. Dr. Greene noted this also could be from a cervical peripheral herniated disc. He did not believe an emergent MRI was necessary but noted Petitioner's anxiety was contributing to her symptoms. She was advised to stop taking baclofen and was prescribed a Medrol Dosepak diazepam. Petitioner was also given a neurosurgical referral. There was no note regarding Petitioner's work status.

Petitioner returned to Dr. Shifman that same day, February 25 (PX #2) complaining of neck and left arm pain. Petitioner's history of chiropractic care for a month was noted. Petitioner complained of 10/10 unbearable left-sided neck pain, left shoulder and arm pain, and tingling in the left three fingers. Dr. Shifman diagnosed cervical radiculopathy and ordered a cervical MRI with and without contrast.

Petitioner had a cervical MRI March 11, 2019 (PX #5). The referral noted "neck pain status post work injury 2/13/19." Multilevel moderate spondylotic changes were noted. A broad-based herniation at C3-4 caused mild foraminal/central canal stenosis. A disc bulge superimposed over a posterior herniation at C4-5 caused mild to moderate neural foraminal/central canal stenosis. A disc bulge superimposed over a broad-based herniation at C5-6 caused moderate foraminal in central canal stenosis.

Petitioner testified that she saw Dr. Kern Singh March 20, 2019 and reported that she injured herself at work. She testified that she reported excruciating pain from her neck, shoulder, arm, upper arm, lower arm and into her hands. Petitioner testified she was given physical therapy, 3 times a week for 4 to 6 weeks, and was prescribed Meloxicam. Dr. Singh of Midwest Orthopaedics at RUSH noted in his report to Petitioner's counsel that Petitioner was working as a temporary worker at Hobby Lobby

on February 13, 2019 (PX #6). She gave a history of working construction in the summer and temporary work during the winter. Petitioner reported she was pushing 7-8 shopping carts at once and felt a pull in her neck with immediate 10/10 neck and arm pain. She continued to work for a few days. She gave a history of mild chronic neck pain. Petitioner's current complaints were constant 10/10 pain in the neck and arm that traveled down the left lateral upper arm and lateral forearm. Dr. Singh noted Petitioner was off work.

On examination Petitioner's neck was tender to palpation. Upper extremity strength was normal, as were reflexes. She had negative Hoffman's, Spurling's, and Inverted Brachioradialis signs. Dr. Singh noted 5 negative Waddell findings. He noted the cervical MRI findings and diagnosed C4-5 and C5-6 herniated nucleus pulposus. Dr. Singh prescribed a Medrol Dosepak and physical therapy 3 times a week for 4 weeks. He also kept Petitioner off work.

Petitioner returned to Dr. Recchia on March 22, 2019. The doctor noted the findings of the March 11 cervical MRI. Petitioner reported that Dr. Singh informed her that she may need surgical spine intervention. Dr. Recchia did not note orthopedic or neurological exam findings. He diagnosed cervicalgia, neck pain, cervical spondylosis without myelopathy or radiculopathy, and cervical spondylosis without myelopathy. The doctor recommended continued medications and maintain a healthy lifestyle. He also recommended physical therapy as instructed.

Petitioner returned to Dr. Recchia on April 11, May 23, June 24, July 8, July 22, August 22, September 19, and October 18, 2019. Dr. Recchia's clinical notes were essentially the same on each of those visits. There were no notes of a clinical orthopedic or neurological examination. The diagnoses and care plans remained unchanged. Medications included Norco, Ventolin, Symbicort, ibuprofen, and triamcinolone topical.

Petitioner testified that she returned to Dr. Singh on October 28, 2019. The records of Midwest Orthopaedics at RUSH on October 28, 2019, noted she was examined by Christopher McGee PA-C (PX #6). Petitioner gave the same history of injury while working at Hobby Lobby and she was pushing 7-8 shopping carts and felt a pull in her neck with immediate 10/10 neck and arm pain. Petitioner presented with current complaints of 10/10 neck pain from her neck into her left biceps, triceps, shoulder, and wrist. Petitioner complained of subjective weakness in her upper extremity, however muscle strength was noted as normal. Reflexes were symmetrical. She had negative Hoffman's, Spurling's, and Inverted Brachioradialis signs.

PA McGee diagnosed C4-5 and C5-6 herniated nucleus pulposus and diffuse cervical spondylosis. Physical therapy 3 times a week for 4 weeks was again ordered.

Mobic was also ordered, and Petitioner was taken off work again. Dr. Singh countersigned PA McGee's clinical note.

Petitioner returned to Dr. Recchia on November 18 and December 13, 2019, as well as January 14 and February 13, 2020. Those clinical notes were not significantly different from any preceding clinical note.

Petitioner began physical therapy January 23, 2020 at Athletico on referral of Dr. Singh (PX #8). An initial evaluation petitioner gave a history of pushing carts at her job on February 13, 2019 and felt a sudden pain in her neck. She continued to work despite increasing pain. She attempted chiropractic care. She reported an MRI showed a herniated disc in the cervical region. She complained of 9/10 pain in the upper thoracic region which traveled down her left arm and with numbness and tingling in the left hand.

Cervical range of motion was diminished, as was left shoulder motion. Left shoulder strength was less than the right as well as at the elbow. Petitioner received physical therapy through February 7, 2020, after which she did not return without discharge. She was unable to pay for more therapy because it had not been authorized by Respondent.

Petitioner testified that she reported her injury to her manager/supervisor multiple times. She said that she told them she got hurt pushing the carts, picking them up, and felt like she injured her neck. Petitioner testified that she had a conversation with her manager Gary by cell phone in the beginning of March. She also spoke with Art, who was her boss. She said she wanted to come back to work but was told she could not return without a doctor's release. Petitioner testified that she had given Dr. Schifman's and Dr. Demorest's off work notes to Gary.

Petitioner testified that she did not have a prior injury to her cervical spine. She admitted that she had a prior MRI of her spine. She testified that she did not have herniations or bulging. She further testified that she did not receive any treatment or medication for her cervical spine prior to her claim work-related injury. Petitioner testified that she had never been placed any work restrictions for any body part.

Petitioner testified that her neck and shoulder have not improved. She testified that she had excruciating pain in her neck at the trial. She has been unable to work since February 22, 2019 through the present time and has been authorized off of work for that period by Drs. Singh, Shifman, and Recchia.

On cross-examination, Petitioner again testified that she did not have treatment for her cervical spine prior to the claimed work-related injury. She testified that she did

not take any medications for her cervical spine. Petitioner admitted that she had treated at Demorest Consultants prior to the claimed work-related injury. She clarified that it was her primary physician. On further cross-examination Petitioner admitted that she had been previously treated for cervical and lumbar pain at Demorest Consultants. She also testified that she was prescribed both Fentanyl and Norco during that time.

On further cross-examination Petitioner acknowledged that she was involved in a motor vehicle accident at the end of September 2017. However, she denied going to the emergency room for treatment for that accident. Petitioner testified that she was not diagnosed with chronic shoulder and neck pain for the past 8 years in 2011. She denied a second time that she was diagnosed with chronic neck pain for the past 8 years. She further denied that there was any plan to treat her cervical spine after she treated for her neck injuries.

Art Swietlik testified for Respondent. Mr. Swietlik testified when he hired Petitioner. He identified Respondent's Exhibit #12, Interview Checklist dated February 5, 2019, where he noted Petitioner stated that she was presently employed. Petitioner told him in the interview that she was a construction laborer and she would flag and direct traffic as well. Mr. Swietlik also testified that Petitioner told him that she worked numerous different shifts and she wanted a more stable job. It was a new store and employees were hired to put the store together.

Mr. Swietlik testified that shifts for setting up the store were 7 AM to 7 PM, Monday through Saturday, and sometimes Sunday, for all employees. Petitioner had testified that she completed paperwork on this date. Petitioner's timecard noted she was clocked in for 3.77 hours on February 5, 2019 (RX #6). Her timecard noted she only worked 3 shifts, February 8, February 11, and February 12, prior to the claimed work related injury.

Mr. Swietlik further testified that Petitioner came to do the "build" after the main assembly. Associates had already assembled all of the framing of the aisles which were called gondolas. He testified that Petitioner put together shelves, pegs, and merchandise. Petitioner placed the shelves and pegs on the wall and then put merchandise on them.

Mr. Swietlik testified that Petitioner did not help move shopping carts from the back of the store to the front of the store. He and other supervisors personally moved them. He clarified that the carts are smaller than traditional grocery carts. He further testified that he was able to push 7 to 8 carts at once without difficulty. Mr. Swietlik testified that one cannot lift 7 to 8 carts at once. He testified that if the carts were pushed together, the most that can be lifted are the back 2 wheels of the last two carts.

Mr. Swietlik testified that Petitioner worked her entire shift on February 13, 2019. Her timecard showed she worked from 7:56 AM, took a break for lunch, and clocked out for the day at 8:27 PM (RX #6). Mr. Swietlik testified that he spoke with Petitioner on the claimed date of loss and she did not report a work related injury to him on that date.

Mr. Swietlik testified that the next day, February 14, 2019, Petitioner did not work her entire shift. She clocked in at 7:00 AM and clocked out at 12:02 PM (RX #6). Mr. Swietlik testified that Petitioner came to him "in tears, a little hysterical" stating that she was "crashing" and that she had to go home. When he asked why, Petitioner told him that she worked her other job doing construction all night and came straight to work. She told him that she was tired and needed to leave.

Mr. Swietlik testified that it was his understanding on February 13 Petitioner left the Respondent, went to her overnight job doing construction, and came right back to the store without any sleep. He testified that Petitioner did not report a work related injury on February 14, 2019. He testified that Petitioner did not report any pain nor an injury regarding lifting or pushing anything while at work.

Mr. Swietlik testified that Petitioner returned to work on February 15, 2019 and did not report a work-related injury. Petitioner came to work the next day, February 16, and did not report a work-related injury. Petitioner returned to work on February 18, and did not report a work-related injury. Petitioner came to work on February 19, and did not report a work-related injury. Petitioner came to work on February 20, 2019, and did not report a work-related injury. Petitioner came to work on February 21, and did not report a work-related injury. During those 7 shifts that Petitioner worked after the alleged incident, she did not report any pain or bodily injury. Mr. Swietlik also testified that he was not aware that anything was wrong, or anything was bothering her.

Mr. Swietlik was present during a speakerphone conference between Gary Pennington, the store manager, and Petitioner after Petitioner's last day of work, February 21, 2019. There was also a video of the room where Mr. Pennington and Mr. Swietlik held the speakerphone, Mr. Pennington is currently retired. He testified that during the telephone conference (RX #11, refused). Petitioner mentioned that she had an injury but never mentioned if it was work related. Mr. Pennington asked Petitioner several times how she injured herself and where and when. Petitioner responded that she did not know when or how she was injured.

Mr. Swietlik identified Respondent's Exhibit #7, the work schedule on February 24 through March 2, 2019. The schedule notes that Petitioner was scheduled to work February 25, February 26, February 27, February 28, March 1, and March 2. Mr. Swietlik

testified that he continued to put Petitioner on the schedule as he had no reason to believe Petitioner was not going to or unable to come in. Petitioner did not show up or work any of her scheduled shifts over that period.

Mr. Swietlik testified he had received training on how to deal with work-related injuries and accidents. He identified Respondent's Exhibit #7, Employee Occupational Injury Packet. He did not complete an Employee Occupational Injury Packet regarding this claimed injury. He further testified if a work-related injury was reported, he would have completed Employee Occupational Injury Packet.

Mr. Swietlik completed a Hobby Lobby Loss Prevention Voluntary Statement (RX #9). He clarified that this is a statement if he witnessed something or wanted to discuss something that happened. He read the contents of his Statement, dated March 20, 2019, into the record. In his Statement Mr. Swietlik recounted his testimony regarding his conversation with petitioner on February 14, 2019. He also recounted his testimony regarding the speakerphone conference he overheard between Mr. Pennington and petitioner, on February 26, 2019. Mr. Pennington was a witness to this statement.

Mr. Swietlik testified that Mr. Pennington also completed a Hobby Lobby Loss Prevention Voluntary Statement (PX #10). He testified that he read the statement after Mr. Pennington completed it and that he was a witness to this document due to his signature on the bottom right hand side of the page. Mr. Pennington's Statement, dated March 22, 2019, recounted that Petitioner delivered a doctor's note on November 21, 2019 stating she was restricted to working 1/2 days. Mr. Pennington noted petitioner's statement that that she waited until the end of the day on February 21 because she was trying to work through her pain. He noted that Petitioner said that she had no idea of "what, when, how, & where it happened."

Mr. Pennington also recounted in his Statement, PX #10, that he had a telephone conference with petitioner witnessed by Mr. Swietlik. It was noted that Mr. Pennington asked Petitioner again how she was heard and when it happened and where did it happen. It was noted again that Petitioner responded that she did not know. Mr. Pennington also noted Petitioner's report that she had been on "pain medications and muscle relaxers for some time."

Mr. Pennington confirmed that Petitioner never notified him of any injury that she incurred while working at Hobby Lobby.

Respondent's Exhibits #9 and #10 were admitted into evidence.

Dr. Kern Singh gave his evidence deposition December 4, 2019 (PX #10). Dr. Singh is a board-certified orthopedic surgeon affiliated with Midwest Orthopaedics at RUSH. Dr. Singh relied on his records of Petitioner's care for his testimony.

Dr. Singh first saw Petitioner on March 20, 2019. She gave a history of it being a temporary worker at Hobby Lobby when she was pushing 7 to 8 shopping carts at once. She felt a pull in her neck and developed neck and arm pain. On examination Petitioner had tenderness to palpation in the back of the neck, but the remainder of the examination, particularly the neurological component, was normal. Dr. Singh reviewed Petitioner's March 11, 2019 cervical MRI which demonstrated degenerative changes at multiple levels from C2 to C6 and with disc herniations at C4-5 and C5-6.

Dr. Singh diagnosed C4-5 and C5-6 herniated nucleus pulposus. He recommended physical therapy and a Medrol Dosepak, and that Petitioner remain off work.

Dr. Singh then testified that he saw Petitioner again on October 28, 2019. At that time, she complained of continued neck pain and arm pain into her left biceps and triceps as well as the shoulder and the wrist on the left. He noted that Petitioner had been seen Dr. Recchia, pain management specialist. The findings on exam were unchanged, including negative Waddell signs. The diagnoses were the same, including diffuse cervical spondylosis. Dr. Singh added that the complaints of arm pain correlated with the MRI findings. Dr. Singh again recommended physical therapy and an anti-inflammatory, meloxicam or Mobic.

Dr. Singh opined that, based on Petitioner's history of neck pain and the degenerative findings on MRI, that Petitioner's reported work accident aggravated her underlying degenerative condition at C4-5 and C5-6. He found Petitioner's explanation of the mechanism of injury to be a plausible explanation of her injury. Dr. Singh further opined that Petitioner needs further physical therapy and anti-inflammatories for her symptomatic cervical disc herniations with radiculopathy.

Respondent's counsel objected to direct examination regarding specific recommendations for future care after completion of physical therapy, based on *Ghere,* which was sustained, and the response was disregarded.

On cross-examination Dr. Singh testified that the temporal onset of symptoms and the location of symptoms is more important to the clinician than the mechanism of an accident. He added that causation is more important to lawyers. Dr. Singh noted petitioner's report of immediate 10/10 pain as she pushed 7 to 8 carts. He did not rely on that mechanism of injury for his diagnosis of cervical radiculopathy with disc herniation.

Dr. Singh acknowledged that at the March 20, 2019 consultation Petitioner's physical examination was normal. The neurological examination was also normal. He reiterated that he took Petitioner off work for 4 weeks. Dr. Singh acknowledged that Petitioner was examined by a Physician Assistant Christopher McGee on October 28, 2019 added that he too saw Petitioner that day. He kept her off work another 4 weeks.

On redirect examination Dr. Singh confirmed that Petitioner's subjective complaints consistent with his clinical findings and diagnosis. On re-cross-examination Dr. Singh confirmed that he had not seen any radiology imaging from before the March 11, 2019 MRI. He confirmed that Petitioner's pre-existing nucleus pulposus were pre-existing and were aggravated by the work accident.

Various of Petitioner's medical records were admitted in evidence:

Respondent's Exhibit #3 was records from Gottlieb Memorial Hospital. On January 18, 2011 Petitioner presented with complaints of 9/10 and cervical pain with radiating pain and numbness in both shoulders down to the fingers. She gave a history of chronic shoulder pain for 8 years. On January 22, 2015, Petitioner presented to Gottlieb complaining of 10/10 back and neck pain (RX #3). Petitioner's past medical history noted that Petitioner was diagnosed with mechanical and motor problems with neck and trunk. Petitioner stated her back pain was chronic and that she "deals with this all the time." RN notes documented that "patient appears comfortable, smiling, and texting on her phone as she talks."

Respondent's Exhibit #1 was records from Demorest Consultants. Petitioner was seen for an initial evaluation on April 10, 2015. Petitioner complained of constant pain from the neck down. She stated that she had pain in her neck and shoulders, with tingling down both arms to her hands. MRIs of the cervical spine and lumbar spine were ordered.

Respondent's Exhibit #4 was records from Westlake Hospital on May 13, 2015, when Petitioner had her May 13, 2015 MRIs for the MRIs of the lumbar spine and cervical spine. The lumbar MRI demonstrated a mild wedging deformity of T11, which was likely related to old trauma and associated mild degenerative change of the T10-11 intervertebral disc. The cervical MRI demonstrated a small center and right of center posterior disk protrusions at C3-4 and C5-6 which in conjunction with small osteophytes resulted in mild degree of encroachment on the anterior aspect of the central vertebral canal and the right neural foramina and mild bulging of the C4-5 intervertebral disc but no evidence of central vertebral canal or neural foraminal stenosis.

On May 29, 2015, Petitioner returned to Demorest Consultants to review her MRIs (RX #1). Petitioner reported ongoing cervical pain, along with arm tingling and pain.

Petitioner reported that Norco helped. Petitioner was diagnosed with chronic cervical pain with structural changes and mechanical lower lumbar pain. Petitioner was given prescription refills. Petitioner filled multiple prescriptions for opioids monthly at Walgreens for her pain (RX #5).

Petitioner continued to treat at Demorest Consultants for her cervical pain, along with pain, tingling, and numbness into her arm and fingers (RX #1). On October 1, 2015, Petitioner reported that she drops things as well. Petitioner also continued to using Fentanyl and Norco prescribed by Demorest Consultants (RX #1 & RX #5). Petitioner returned with a flare-up June 3, 2016, complaining of severe cervical and lumbar pain with difficulty reaching up, carrying, lifting, climbing, and bending. She was diagnosed with chronic cervical and lumbar pain, with degenerative disc disease, along with cervical and lumbar radiculopathy. On April 7, 2017, Petitioner complained of cervical and lumbar pain. She was diagnosed with cervicalgia on this date.

Petitioner presented to Presence Resurrection Health (Presence Resurrection) on April 21, 2017 (RX #2). She reported 8/10 pain in the cervical spine and lumbar spine, but with pain was radiating down her left leg for a week. Petitioner was unsure of the cause of pain, but it guessed that it could be from a motor vehicle accident a few years earlier.

Petitioner continued to treat at both Presence Resurrection and Demorest Consultants in 2017 (RX #1 & RX 2). On June 19, 2017, Petitioner was diagnosed by Demorest Consultants with cervical and lumbar pain, and sciatica due to degenerative disc disease. On July 18, 2017, Petitioner told Demorest that her quality of life had improved due to her recent injections. She stated that Presence Health would address her cervical spine in the future. It was noted that Petitioner had been working for 2 months for a road construction crew.

On September 18, 2017, Petitioner presented at Demorest Consultants and complained of cervical and lumbar pain due to a recent motor vehicle accident a few days ago (RX #1). Petitioner reported that she had difficulty turning her head and cervical spine and when reaching upwards. She was diagnosed with cervicalgia, cervical pain, and lumbar pain. Petitioner was given light duty restrictions. Petitioner presented Presence Resurrection Emergency Room September 20, 2017 with neck pain, chest pain, and head pain, along with bruising on her chin where she hit the steering wheel in the car accident. Petitioner followed up to Demorest Consultants on September 25, 2017, complaining of a concussion, cervical, and lumbar pain, along with arm and leg weakness (RX #1).

On October 14, 2017, at Demorest Consultants, Petitioner reported ongoing headaches, cervical, and lumbar pain. She also said that she had difficulty raising her arms upward, lifting, carrying, and bending. Through the end of 2017 and beginning of 2018, Petitioner continued to treat for her cervical and lumbar spine. She also continued to obtain opioid prescription refills for her chronic pain (RX #1 & RX #5).

On February 22, 2018, Petitioner presented at Presence Resurrection for lumbar pain radiating down her legs and feet, as well as her cervical spine radiating down to her bilateral elbows and wrists (RX #2). On May 30, 2018, Petitioner returned to Demorest Consultants, complaining of cervicalgia, sciatica, and insomnia (RX #1). She was evaluated for chronic opioid use for chronic pain. Petitioner returned June 28, 2018 with cervical and lumbar pain due to degenerative disc disease, poor mechanics, and obesity. She was given another prescription for Norco and Tizanidine.

Petitioner treated for her cervicalgia, lumbar pain, sciatica, and weakness in arms and legs throughout 2018 at Demorest Consultants (RX #1). On November 30, 2018, Petitioner reported that she was more productive with opioid therapy than without. Petitioner reported that she was not exercising due to cervical and lumbar back pain. On January 25, 2019, Petitioner again returned to Demorest Consultants for chronic opioid pain management and prescription refills. Petitioner was advised to return in a month.

CONCLUSIONS OF LAW

C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on February 13, 2019. The Arbitrator's finding is based principally on finding Petitioner was not a credible witness.

Petitioner testified that she was employed by Respondent to help build and set up Respondent's new store in preparation for opening for business. She testified that while pushing shopping carts she had to lift the carts in order to maneuver them through Respondent's store. Petitioner stated that she felt a pop in her neck and developed 10/10 pain in her neck and left arm. Despite suffering from 10/10 pain Petitioner continued to work and completed her shift. It is incongruous that a person suffering from 10/10 pain (the worst pain ever experienced) would continue to work the job described by Petitioner: repetitively lifting and mounting steel shelving weighing up to 20 pounds and stocking

shelves from boxes weighing up to 40 pounds. It is equally incongruous that a person suffering the degree of excruciating pain, as claimed by Petitioner, would report for work at 7 AM on the day following their claimed injury.

In addition, Petitioner testified that she had been laid off from her flagger's job with Martam Construction in October 2018. However, in her job interview with respondent on February 5, 2019 she reported that she was employed as a construction flagger and truck driver. Moreover, Respondent's witness Art Swietlik, Petitioner's supervisor, testified that on February 14 Petitioner had an emotional breakdown and left work early, stating that she was "crashing" because she had worked the night before on her construction job and had come straight to work at Hobby Lobby.

When she presented to her chiropractor, Dr. Shifman, on February 20, 2019 Petitioner reported that first had neck and arm pain when she woke up 4 days before, which would be February 16. Dr. Shifman's clinical notes contradict Petitioner's testimony that she reported that her neck arm pain began from a work accident on February 13. When she presented to Lutheran General Hospital emergency department on February 25, 2019 Petitioner reported that her neck and arm pain began "last Saturday", which was February 23 or when she "woke up with approximately 1 week ago." These clinical notes also contradict Petitioner's testimony that she reported her neck and arm pain beginning February 13 due to a work accident. The Arbitrator finds that Petitioner's memory of the onset of her complaints was more likely fresher when she consulted her chiropractor and the care of the staff of Lutheran General Hospital's emergency department staff.

Respondent's witness and Petitioner's supervisor Art Swietlik testified credibly that Petitioner never reported a work related injury. He was witness to a telephone conversation between manager Gary Pennington and Petitioner, at which time petitioner stated she did not know how or when she injured herself. Both Mr. Swietlik and Mr. Pennington wrote Hobby Lobby Loss Prevention Voluntary Statements confirming the contents of the telephone conversation with Petitioner.

In addition, the evidence showed that Petitioner had a long term history of complaints and medical intervention with analgesic opioids for chronic neck pain which she minimized and diminished during her testimony at trial. A credible witness would have been more forthcoming about the extent of her medical history. Further, Petitioner testified at trial that just prior to her claimed accident she was not under active medical care for neck pain. Dr. Recchia's clinical notes on January 25, 2019 (PX #2 & RX #1) demonstrate the untruth of Petitioner's denial.

Credible evidence rebuts Petitioner's claim that she was injured in an accident February 13, 2019 that arose out of and in the course of her employment by Respondent Hobby Lobby. Petitioner's claim that she suffered excruciating 10/10 pain immediately after her claimed accident is not credible, particularly in light of the fact that she continued to work the remainder of her shift, clocking out at 8:27 PM.

Healthcare providers, Dr. Shifman and emergency department staff at Lutheran General Hospital, documented Petitioner's report that her symptoms began after February 13, 2019. Respondent's witness Art Swietlik testified that Petitioner never told him she had been injured at work. Moreover, he confirmed that in a telephone conversation between Petitioner and Gary Pennington he overheard Petitioner state she did not know the how or when of her claimed injury. This testimony was corroborated by Mr. Swietlik's and Mr. Pennington's written statements (RX #9 & RX #10).

E: Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner proved that she gave timely notice of the claimed accident to Respondent.

Petitioner claims that she was injured in an accident that arose out of and in the course of her employment by Respondent on February 13, 2019. Petitioner filed her Application for Adjustment of Claim on March 7, 2019, within the 45 day mandate under §6(c) of the Act. The Application for Adjustment of Claim sets forth the date and place of the accident on its face. Inasmuch as the Application is a written document, all elements of required notice are satisfied.

Respondent's counsel acknowledged that the application for adjustment of claim was filed within 45 days of the claimed work related injury. Respondent's dispute of notice is frivolous and without factual basis.

F: Is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator has found that Petitioner failed to prove that she sustained an accidental injury arising out of and in the course of her employment by Respondent on February 13, 2019. However, given that, the Arbitrator finds that Petitioner failed to prove that her current condition of ill-being was causally related to the claimed accident.

As noted above, in her encounters with her chiropractor, Dr. Shifman, and the emergency department staff at Lutheran General Hospital, Petitioner gave a history of onset of her complaints of neck and arm pain beginning on dates subsequent to February 13, 2019. Further, she did not attribute her symptoms to a work-related accident. It is

noteworthy that in the later encounters with medical care providers Petitioner gave February 13 as the date of onset of her symptoms. Nonetheless, Petitioner's later reports of attributing her symptoms to the claimed date of accident of February 13, 2019 do not rehabilitate her damaged credibility.

Petitioner presented the evidence of orthopedic surgeon Dr. Kern Singh, who opined that the mechanism described by Petitioner caused an aggravation of a pre-existing degenerative condition in petitioner's cervical spine. Cervical MRIs from May 2015 and March 2019 demonstrated cervical spine abnormalities.

However, Dr. Singh had not reviewed any medical records of petitioner, including the May 2015 MRI, during his assessments of Petitioner's clinical condition. Dr. Singh was unaware of the extent of degeneration evident in Petitioner's cervical spine in the 2015 MRI. In addition, Dr. Singh was unaware of Petitioner's history of medical care and intervention prior to his first encounter with her on March 20, 2019, particularly Petitioner's last encounter before her claimed accident with Dr. Recchia on January 25, 2019.

This lack of anything approaching a full and complete medical history undermines the reliability and persuasiveness of Dr. Kern's causation opinion. Moreover, Dr. Kern's opinion that the claimed accident aggravated petitioner's pre-existing degenerative cervical spine lacked specificity. He did not specify whether Petitioner's subjective symptoms, of which he knew nothing, were aggravated or exacerbated or whether the degenerative components of Petitioner's cervical spine were further compromised or exacerbated, which he could not assess without review of the 2015 MRI. In sum, the Arbitrator rejects the causation opinion of Dr. Singh.

Due to Petitioner's lack of credibility and the unreliable and unpersuasive causation opinion of Dr. Kern Singh, the Arbitrator reiterates his finding that Petitioner failed to prove that her current condition of ill being is causally related to the claimed accident on February 13, 2019.

J: Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator has found that Petitioner failed to prove that she sustained a compensable accidental injury that was causally related to her work for Respondent. Therefore, this issue is moot.

K: Is Petitioner entitled to any prospective medical care?

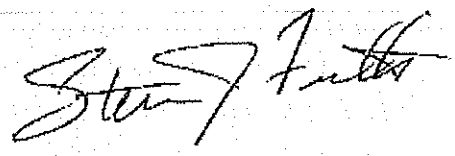
The Arbitrator has found that Petitioner failed to prove that she sustained a compensable accidental injury that was causally related to her work for Respondent. Therefore, this issue is moot.

L: What temporary benefits are in dispute? TTD

The Arbitrator has found that Petitioner failed to prove that she sustained a compensable accidental injury that was causally related to her work for Respondent. Therefore, this issue is moot.

M: Should penalties be imposed upon Respondent?

The Arbitrator had found that Respondent asserted a frivolous defense on the issue of timely notice in violation of §19(k) of the Act. However, Petitioner presented no evidence that a Petition for Penalties and Attorney's Fees was filed. Further, the Arbitrator has found that Petitioner failed to prove that she sustained a compensable accidental injury that was causally related to her work for Respondent. Therefore, this issue is moot.



Steven J. Fruth, Arbitrator

August 11, 2020

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kerwin Henderson, Sr.,

Petitioner,

vs. NO: 11 WC 15795

Illinois State University,

Respondent.

21IWCC0139

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary disability and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
o-01/19/2021
SM/sk
44

Stephen Mathis

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HENDERSON, KERWIN
Employee/Petitioner

Case# **11WC015795**

06WC034533
08WC011818
08WC032625
11WC015796

STATE OF IL/ILLINOIS STATE UNIVERSITY
Employer/Respondent

21IWCC0139

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0000 ASSISTANT ATTORNEY GENERAL
LOUIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305 / 14

MAR 11 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kerwin Henderson
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **11** WC **15795**

Consolidated cases: **06 WC 34533, 08 WC 11818, 08 WC 32625, 11 WC 15796**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the cities of **Peoria**, on **12/12/2019 and Bloomington**, on **2/28/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

21IWCC0139

On **8/19/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$33,383.70**; the average weekly wage was **$641.99**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **4** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for any benefits it has paid toward TTD, TPD, maintenance, and other related benefits.

Respondent is entitled to a credit for any expenses paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $427.99/week for 167 weeks, commencing 9/29/10 through 12/16/13, as provided in Section 8(b) of the Act.

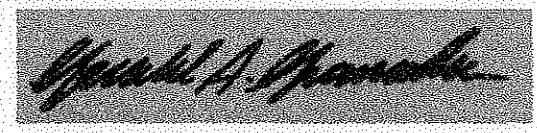
Respondent shall pay any outstanding, related, reasonable and necessary medical expenses, subject to the Medical Fee Schedule, as set forth in Petitioner's medical bill exhibits. Respondent shall receive a credit for any medical expenses it has already paid and shall hold Petitioner harmless under Section 8(j) of the Workers' Compensation Act for any amounts paid and/or adjusted by insurance.

Respondent shall pay Petitioner permanent partial disability benefits of $385.19/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $385.19/week for 37.95 weeks, because the injuries sustained caused the 15% loss of the right arm, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator Gerald Granada

3/10/20
Date

MAR 11 2020

FINDINGS OF FACT

Petitioner Kerwin Henderson alleges to have been injured while working for Respondent, the State of Illinois / Illinois State University on the following dates: May 31, 2006 (06 WC 34533); June 14, 2006 (08 WC 32625); February 15, 2008 (08 WC 11818); August 19, 2010 (11 WC 15795); and September 10, 2010 (11 WC 15796). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Although all these claims were heard together, this decision is on Petitioner's August 19, 2010 claim, in which the issues in dispute are as follows: 1) accident; 2) medical expenses; 3) TTD and maintenance; and 4) nature and extent.

On August 19, 2010, Petitioner was working for Respondent as a building service worker. On that date, Petitioner was cleaning the inside of an elevator, which included wiping fingerprints off the interior metal elevator walls. The elevator had a rail almost halfway down separating the top from the bottom. Because Petitioner had issues with his back, he would clean the bottom sections of the elevator walls by getting down on one knee and scooting around the elevator. As he was cleaning the bottom section of the elevator, he went to stand up, felt a twinge in his back. Petitioner then grabbed the rail to pull himself up and felt a sharp pain in his right shoulder. Petitioner testified that he experienced back pain after feeling the shoulder pain. Petitioner reported this incident to his supervisor. (RX. 4)

On August 23, 2010 Petitioner saw Dr. Lawrence Li for his right shoulder. (PX. 35) Dr. Li had previously treated Petitioner for a prior right arm injury that involved surgery. (See 08 WC 11818) Dr. Li ordered an MRI of the right shoulder, which was performed August 25, 2010. (PX. 26) Dr. Li diagnosed Petitioner with a rotator cuff tear. Dr. Li explained that Petitioner's previous rotator cuff supraspinatus tendon repair was intact and that Petitioner now has a tear of the infraspinatus tendon. (PX. 35) He recommended lifting restrictions, which included no overhead work and limited use of right arm. Petitioner was also prescribed Darvocet for pain control. (PX. 36) Petitioner underwent physical therapy at Orthopedic & Sports Medicine Center from August 31, 2010 through January 20, 2011. (Px. 41) On September 29, 2010 Dr. Li performed surgery on Petitioner involving a right shoulder arthroscopy with repair of the subscapularis tendon, biceps tenodesis and debridement of a type superior labral tear. (PX. 35) Petitioner was taken off work completely following the surgery.

Following his September 29, 2010 right shoulder surgery, Petitioner began experiencing increased numbness and tingling in his right arm. On December 3, 2010, Petitioner underwent an EMG, which indicated right ulnar nerve entrapment. (PX. 40, pp. 68-69; PX. 33; Rx. 10). Upon review of the EMG, Dr. Li opined that the Petitioner's ulnar nerve condition was most likely due to him having his elbow in a sling to protect his shoulder rotator cuff repair. (PX. 35) On January 25, 2011, Dr. Li performed a right cubital tunnel release and anterior transposition of Petitioner's ulnar nerve. (PX. 35) Following this surgery, Dr. Li recommended work hardening, but later noted that Petitioner could not undergo the work hardening because of his high blood pressure and the risk of Petitioner having a stroke.

Petitioner testified that he was able to return to restricted work with Respondent following his August 19, 2010 accident, but sustained another accident to his left arm on September 10, 2010 – which is the subject of companion case 11 WC 15796. Petitioner was paid TTD from September 29, 2010 - the date of his right shoulder surgery - through December 15, 2013. (Arb. Exh. 4A)

On December 16, 2013, Dr. George Paletta examined Petitioner at Respondent's request. Dr. Paletta does not refute the causal relationship between Petitioner's August 19, 2010 incident and Petitioner's shoulder injury and

21IWCC0139

eventual surgery. Dr. Paletta does dispute the casual relationship between Petitioner's accident and his cubital tunnel syndrome. Dr. Paletta found Petitioner's medical treatment to be reasonable and necessary, and placed Petitioner at maximum medical improvement for his right shoulder as of December 16, 2013, the date of his independent medical examination. (RX6, Deposition of Dr. Paletta and IME, generally).

Petitioner currently complains that he still has occasional right shoulder pain as high as 5/10 and has difficulty getting up from a seated position due to his back pain. His right arm is much better since the surgery, but he testified that he now has muscle loss in his right arm.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the documentary evidence submitted at the time of trial. The Arbitrator finds credible the Petitioner's description of injuring his back and right shoulder while cleaning the interior of an elevator August 19, 2010. At that time, Petitioner's job required him to be in an awkward and uncomfortable position on one knee for a period of time and scooting around as he cleaned the bottom portion of the elevator. This awkward position of being on one knee and scooting around on one knee also required Petitioner to use the elevator railing to hold onto and to lift himself up off the floor with his right arm. All of these factors created an increased risk of injury for Petitioner that was distinct to his job as a building service worker. As such, the Arbitrator concludes that the Petitioner sustained an accident while working for Respondent on August 19, 2010.

2. Based on the Arbitrator's conclusions regarding the issue of accident, the Arbitrator further finds that the Petitioner's medical treatment for his right shoulder and right arm stemming from the August 19, 2010 accident has been reasonable and necessary. Subject to the Fee Schedule, Respondent shall pay any outstanding medical expenses related to treatment for Petitioner's right shoulder and right arm as set forth in Petitioner's medical bill exhibits. Respondent shall receive a credit for any related medical expenses it has already paid.

3. Regarding the issues of TTD and maintenance, the Arbitrator finds that the Petitioner was temporarily totally disabled from September 29, 2010 - the date of his right shoulder surgery - through December 16, 2013. Petitioner reached MMI as of December 16, 2013 as per the IME with Dr. Paletta. Petitioner's claim for TTD or maintenance beyond December 16, 2013 for this claim is denied. Respondent shall pay Petitioner TTD benefits for this time period representing 167 weeks and shall receive a credit for any TTD it has already paid. The Arbitrator acknowledges the Petitioner testified to being off work beyond December 16, 2013, but the evidence shows that the Petitioner's inability to return to work beyond the aforementioned MMI date is most likely due to his subsequent accident on September 10, 2010 - which is the subject of companion case 11 WC 15796.

4. With regard to the issue of nature and extent, the Arbitrator concludes that based on the Petitioner's medical evidence and his unrebutted testimony regarding his medical treatment, complaints and physical limitations following his work accident, the Petitioner's injuries stemming from his August 19, 2010 accident have resulted in a 12.5% loss of the man as a whole pursuant to Section 8(d)(2) of the Act and 15% loss of use of the right arm pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kerwin Henderson, Sr.,

Petitioner,

vs. NO: 11 WC 15796

Illinois State University,

Respondent.

21IWCC0140

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary disability and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

21IWCC0140

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 22 2021
o-01/19/2021
SM/sk
44

Stephen J. Mathis
Stephen Mathis

Thomas J. Tyrrell
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HENDERSON, KERWIN
Employee/Petitioner

Case# **11WC015796**

06WC034533
08WC011818
08WC032625
11WC015795

STATE OF IL/ILLINOIS STATE UIVERSITY
Employer/Respondent

21IWCC0140

On 3/11/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
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NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305 / 14

MAR 11 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kerwin Henderson
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **11** WC **15796**

Consolidated cases: **06 WC 34533, 08 WC 11818, 08 WC 32625, 11 WC 15795**

21IWCC0140

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the cities of **Peoria**, on **12/12/2019 and Bloomington**, on **2/28/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On **9/10/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**33,429.82**; the average weekly wage was $**642.88**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **4** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for any benefits it has paid toward TTD, TPD, maintenance, and other related benefits.

Respondent is entitled to a credit for any expenses paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $428.58/week for 205 weeks, commencing 9/11/10 through 9/28/10 and 12/16/13 through 11/1/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $428.58/week for 121-2/7 weeks, commencing 11/2/17 through 2/28/20, as provided in Section 8(a) of the Act.

Respondent shall pay any outstanding, related, reasonable and necessary medical expenses, subject to the Medical Fee Schedule, as set forth in Petitioner's medical bill exhibits. Respondent shall receive a credit for any medical expenses it has already paid and shall hold Petitioner harmless under Section 8(j) of the Workers' Compensation Act for any amounts paid and/or adjusted by insurance.

Respondent shall pay Petitioner permanent and total disability benefits of $**428.58**/week for life, commencing **2/28/20**, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Gerald Granada

3/10/20
Date

MAR 11 2020

FINDINGS OF FACT

Petitioner Kerwin Henderson alleges to have been injured while working for Respondent, the State of Illinois / Illinois State University on the following dates: May 31, 2006 (06 WC 34533); June 14, 2006 (08 WC 32625); February 15, 2008 (08 WC 11818); August 19, 2010 (11 WC 15795); and September 10, 2010 (11 WC 15796). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Although all these claims were heard together, this decision is on Petitioner's September 10, 2010 claim, in which the issues in dispute are as follows: 1) accident; 2) medical expenses; 3) TTD and maintenance; and 4) nature and extent.

Petitioner was 52 years old at the time of this injury and 61 years at the time of this hearing. He has a 12th grade education and has worked for the Respondent since 1996. His prior jobs involved housekeeping and working for temporary agencies.

On September 10, 2010, Petitioner was working for Respondent as a building service worker. On that date, Petitioner was moving tables weighing approximately 50 lbs. At the time, Petitioner was working with lifting restrictions on his right hand/arm, which was in a sling due to a prior injury from August 19, 2010 and is the subject of companion case 11 WC 15795. Petitioner was doing all the lifting with his left hand/arm. On September 10, 2010, Petitioner was moving a table when he felt a twinge in his back and pain in his left arm. In the initial incident reports, Petitioner described experiencing increased lower back pain and a bad cramping in his left arm. (RX 5)

Petitioner was already treating with Dr. Lawrence Li and Dr. Joseph Liu for his prior August 19, 2010 work injury to his right arm and back. At the time of the September 10, 2010 accident, Petitioner was awaiting authorization for surgery to his right arm.

Petitioner saw Dr. Joseph Liu on September 15, 2010 and reported that the pain in his left shoulder and his back was hurting his ability to sleep at night, both because his left shoulder hurt, and because he felt like he had a big knot in his tailbone. (PX 38, p. 14; PX 40, pp. 32-35) Dr. Liu gave Petitioner work restrictions of no lifting over 10 lbs. and no repetitive activities involving Petitioner's back. Dr. Liu continued to treat Petitioner for his back and shoulder complaints by prescribing physical therapy and pain medication.

On September 23, 2010, Dr. Lawrence Li noted that Petitioner had aggravated his left arm at work, over the anterior aspect of the shoulder and with pain raising the left arm. At the time, Dr. Li speculated that this was from overuse of the left arm due to the fact that Petitioner could not use his right arm. (PX 35) Dr. Li provided an off work slip restricting Petitioner from work pending his right shoulder surgery. (Px. 36) Dr. Li performed surgery on Petitioner's right shoulder on September 29, 2010 and on his right elbow on January 25, 2011. Dr. Li subsequently treated Petitioner for his left shoulder, including surgery on March 7, 2017. The surgery involved a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, extensive debridement of tenosynovitis, and excision of distal clavicle. (PX 53) Petitioner subsequently underwent physical therapy at Orthopedic & Shoulder Center. Petitioner's follow up treatment with Dr. Li also included pain medication and a kenalog injection.

On October 25, 2017, Dr. Stephen F. Weiss examined Petitioner to evaluate his left arm injury at the Respondent's request. (RX. 8) Dr. Weiss opined that Petitioner's left shoulder condition was probably caused

by his September 10, 2010 accident. Dr. Weiss indicated that Petitioner's medical treatment for his left shoulder was reasonable and necessary. He further opined that Petitioner requires permanent work and life restrictions regarding his left shoulder.

Petitioner testified that his last day of work with Respondent was the day that he injured his left arm and back when moving tables at work, September 10, 2010. He further testified that he is still under work restrictions for both shoulders and his back that include his inability to safely lift from floor to knuckle level of more than 29 pounds, inability to carry more than 24 pounds or to push more than 84.7 pounds or pull more than 67.3 pounds. Petitioner began vocational rehabilitation in December, 2015. He worked with a vocational counselor by conducting job searches, attending computer classes, and applying for jobs on-line, via telephone, and in-person. Petitioner testified, and records reflect, that between November 28, 2015, when Petitioner began vocational rehabilitation and May 20, 2019 when vocational rehabilitation stopped, Petitioner had approximately 1,166 job contacts or applications while working with vocational rehabilitation. (PX 51) Petitioner further testified that even when vocational rehabilitation was put on hold, he continued his job search without the assistance of the vocational counselor. Petitioner testified that he is willing to work, but cannot find any work or any employers that will hire him.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the documentary evidence submitted at the time of trial. The Arbitrator finds credible the Petitioner's description of injuring his back and left shoulder while moving 50 lb. tables with one hand on September 10, 2010. At that time, Petitioner was working light duty with his right arm in a sling from a prior injury involving his right arm and back. All of these factors created an increased risk of injury for Petitioner that was distinct to his job as a building service worker. As such, the Arbitrator concludes that the Petitioner sustained an accident while working for Respondent on September 10, 2010.

2. Based on the Arbitrator's conclusions regarding the issue of accident, the Arbitrator further finds that the Petitioner's medical treatment for his left shoulder and back stemming from the September 10, 2010 accident has been reasonable and necessary. Subject to the Fee Schedule, Respondent shall pay any outstanding medical expenses related to treatment for Petitioner's left shoulder and back as set forth in Petitioner's medical bill exhibits. Respondent shall receive a credit for any related medical expenses it has already paid.

3. Regarding the issues of TTD and maintenance, the Arbitrator finds that the Petitioner was temporarily totally disabled for this left arm injury from September 11, 2010 through September 28, 2010, and from December 16, 2013 through November 1, 2017. Petitioner was off work and temporarily totally disabled from his prior right arm injury from September 29, 2010 - the date of his right shoulder surgery - through December 16, 2013 – the date Petitioner reached MMI for his right shoulder injury as per the IME with Dr. Paletta. From December 16, 2013 through November 1, 2017 - the date Dr. Weiss placed Petitioner at MMI for his left shoulder condition - Petitioner remained off work due to this claim involving his left arm injury and is entitled to TTD for that time period. Therefore, Respondent shall pay Petitioner TTD from September 11, 2010 through September 28, 2010 and from December 16, 2013 through November 1, 2017 – a period of 205 weeks. Respondent has paid Petitioner some TTD benefits during these time periods and shall receive a credit for any TTD it has already paid.

21IWCC0140

The Arbitrator further finds that the Petitioner is entitled to maintenance benefits from November 2, 2017 through the date of the arbitration hearing. The evidence shows that Petitioner has permanent work restrictions as a result of his September 10, 2010 accident and actively participated in the vocational rehabilitation process from December 2015 through the date of the arbitration hearing. Although he reached MMI for his left shoulder injury as of November 1, 2017 per Dr. Weiss, he continued to actively participate in vocational rehabilitation – either through the assistance of a counselor or on his own. Therefore, Respondent shall pay Petitioner maintenance benefits from November 2, 2017 through the date of the arbitration hearing – a period of 121 and 2/7 weeks. Respondent shall receive a credit for any maintenance benefits it may have paid for this time period.

4. With regard to the issue of nature and extent, the Arbitrator concludes that based on the Petitioner's medical evidence and his unrebutted testimony regarding his medical treatment, complaints and physical limitations following his work accident, the Petitioner's injuries stemming from his August 19, 2010 accident have resulted in him becoming permanently totally disabled under the "odd lot" category. The Appellate Court held in Pisano v Ill Workers Comp Comm'n, 2018 IL app (1st)172712WC, if an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to permanent total disability by proving he or she fits within the "odd lot" category, which consists of employees who, "though not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." The Appellate Court further noted that an employee generally fulfills the burden of establishing that he or she falls into the "odd lot" category in one of two ways: 1) by showing a diligent but unsuccessful search for employment; or 2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. Pisano v IL Worker's Compensation Comm'n, 2018 IL App (1st)172712WC, paragraph 73. In the present case, the Petitioner has shown a diligent but unsuccessful search for employment – thereby satisfying the first criteria of falling into an odd-lot category per Pisano. Furthermore, the facts show that Petitioner has satisfied the second criteria set forth in the Pisano decision, given Petitioner's current age of 61, his 12th grade education, his limited work experience in housekeeping/building maintenance, his permanent work restrictions, and his inability to find work after a protracted job search with the assistance of a vocational case manager for almost three and a half years, with over 1,666 job contacts.

Therefore, the Respondent shall pay Petitioner Respondent shall pay Petitioner permanent and total disability benefits of $ 428.58/week for life, commencing February 28, 2020, as provided in Section 8(f) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Magdalena Trujillo Lopez,

Petitioner,

vs. No. 17 WC 10180

Corsicana Investors,

21IWCC0141

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(B) AND §8(A)

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary disability and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0141

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $29,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 23 2021
o-03/18/2021
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LOPEZ, MARIA MAGDALENA TRUJILLO Case# **17WC010180**
Employee/Petitioner

CORSICANA INVESTORS
Employer/Respondent

21IWCC0141

On 6/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.32% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5122 PORRO NIERMANN LAW GROUP
MICHELLE PORRO
821 W GALENA BLVD
AURORA, IL 60506

3227 HOLECEK & ASSOCIATES
MONICA DEMBNY
PO BOX 64093
ST PAUL, MN 55164-0093

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

21IWCC0141

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Maria Magdalena Trujillo Lopez
Employee/Petitioner

v.

Corsicana Investors
Employer/Respondent

Case # **17** WC **10180**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **3/8/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

21IWCC0141

FINDINGS

On the date of accident, **2/16/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**31,481.84**; the average weekly wage was $**605.42**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **-0-** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $2,786.65 for TTD, $3,049.73 for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $5,836.38.

Respondent is entitled to a credit of $**-0-** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $**301.76** to **Dreyer Clinic**, $**171.00** to **Hinsdale Orthopaedic** provided in Sections 8(a) and 8.2 of the Act, as set forth in the Conclusions of Law attached hereto,

Respondent shall authorize and pay the medical treatment proposed by Dr. Chudik, consisting of left shoulder surgery and right knee MRI, pursuant to Section 8(a) of the Act, as set forth in the Conclusions of Law attached hereto,

Respondent shall pay Petitioner temporary total disability benefits of **$403.61**/week for **70-4/7ths** weeks, commencing **10/30/17** through **3/8/19**, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/31/2019
Date

ICArbDec19(b)

JUN 3 – 2019

Procedural History

This matter was tried on March 8, 2019 pursuant to Sections 19(b) and 8(a) of the Act. The issues in dispute are whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and whether Petitioner is entitled to prospective medical care. Respondent paid TTD benefits from 7/22/17 through 8/28/17. Respondent paid Petitioner's medical expenses through 10/27/17. Respondent asserts that Petitioner reached maximum medical improvement as of 10/27/17 and has denied TTD benefits and medical treatment after that date. (Arb. Ex. #1)

Finding of Facts

Magdalena Trujillo Lopez (hereafter referred to as "Petitioner") worked for Corsican Investors (hereafter referred to as "Respondent") as a mattress seamstress. Petitioner was employed with Respondent for 2 ½ years. Petitioner testified that she works between 12 to 16 hours a day and her shift ends at 7:30 P.M.

Petitioner testified, on February 16, 2017, at approximately 7:15 P.M., she was working when a manager turned off the lights in the shop. The only light was from emergency lighting. As Petitioner was leaving her work station, she tripped over a wooden cart. Petitioner's left foot stepped into the wooden cart and got caught causing her to fall. Petitioner testified that she first struck her right knee on the floor followed by her left knee. Petitioner tried to break the fall with her outstretched hands and arms but her left elbow buckled and went into her ribs. Petitioner fell striking her face on the ground. Petitioner testified that when the left side of her face struck the ground her glasses cut her nose. Petitioner also testified the force of the fall caused her to break a bone in her left hand.

Petitioner testified that after the fall she was taken to Physicians Immediate Care (hereafter referred to as the "Clinic"). The Clinic medical records, dated February 16, 2017, show that Petitioner reported pain in her left wrist, left hand, right knee and neck after tripping on a cart at work. Petitioner also reported striking her right knee. Petitioner said that she tried to catch herself but that her left hand folded causing her to strike her face on the ground. Petitioner reported pain levels of 9 out of 10 in her wrist pain, left hand and right knee. The examination noted that Petitioner's left paraspinal muscle was tender and her left wrist was swollen. Petitioner had ecchymosis on the right knee and left forehead. A laceration of the nasal bridge was also noted. X-rays of the knees were ordered. Petitioner was diagnosed with a laceration of

the head, contusion of the head, left knee contusion, left elbow contusion, sprain of the left wrist, cervical sprain, contusion of the left hand and right knee. Petitioner was placed on restrictions of no kneeling, squatting, twisting, bending and only right-handed work. (PX 12).

Petitioner returned to the Clinic on February 17, 2017. Petitioner reported intense pain in her neck, right knee, left hand and neck. Petitioner indicated that she placed her left and out when falling to stop the rest of her body from striking the ground but her arms could not hold her weight. The records show that Petitioner's right knee and left hand were not improving. The examination showed paraspinal muscle tenderness along the cervical muscle. Petitioner was assessed with a worsening right knee contusion and ligament sprain of the cervical spine. (PX 12).

Petitioner continued to treat at the Clinic. On March 10, 2017, Petitioner reported left shoulder and upper back pain which was gradually getting worse. At that visit, Petitioner further reported some improvement with her left and right knee pain but that she was experiencing buckling of her right knee. The records indicate that Petitioner sustained a closed fracture of the left fifth metacarpal.

On March 23, 2017, Petitioner returned to the Clinic for a followed-up visit. At that time, Petitioner's left hand was not improving. The medical records show that Petitioner was also experiencing left shoulder and upper back pain that was gradually worsening. An MRI of the right knee was ordered. Petitioner was issued work restrictions of no prolong kneeling, squatting, bending and, for the left arm, no lifting over the shoulder greater than 1 pound. (PX 12).

The MRI of the right knee showed a meniscal tear, PCL tear and an MCL sprain. Petitioner was referred to Dr. Thomas for her left hand and Dr. Burt for her right knee. (T 23) Dr. Burt performed surgery on Petitioner's right knee.

Midwest Sports

On April 25, 2017, Petitioner presented to Dr. Burt, Midwest Sports. Petitioner was working with restrictions. Dr. Burt reviewed the MRI of the right knee and assessed meniscus tear and MCL/PCL sprains. Dr. Burt recommended surgery. Right knee arthroscopy was completed July 22, 2017. The post-operative diagnoses consisted of a partial healed tear, of the posterior root medical meniscus with grade 3 chondromalacial of the patella and trochlea and grade 3 chondromalacial of the medical femoral condyle. After

surgery, Petitioner attended physical therapy and a Functional Capacity Examination (hereafter referred to as the "FCE') at Athletico. The FCE was completed on October 25, 2017. The FCE indicated that Petitioner performance was inconsistent, and her efforts were unacceptable. The FCE determined that Petitioner's job description was at the light physical demand level and Petitioner can perform light physical demand duties. The FCE found that Petitioner was functionally employable and could be placed in a position within the physical capabilities and tolerances outlined in the report. On October 27, 2017, Petitioner returned to Dr. Burt. At that time, Petitioner complained of pain after the FCE. Dr. Burt noted the FCE findings and released Petitioner to work. Dr. Burt recommended a left sided foot petal for the sewing machine. (PX 14).

Northwestern Medicine

Petitioner was referred to Dr. Thomas for consultation regarding her upper left extremity. Dr. Thomas noted tenderness to palpation over the fifth metacarpal base. The Finkelstein's maneuver was negative. The Tinel's at the carpal tunnel was negative but Petitioner had a positive Tinel's sign at the Guyon's canal and the cubital tunnel. The digital compression test at the carpal tunnel caused paradoxical numbness and the elbow flexion test caused increased numbness.

Dr. Thomas assessed ulnar neuropathy of the left upper extremity. Dr. Thomas did not recommend any additional treatment regarding the fifth metacarpal base fracture. Dr. Thomas noted that Petitioner's history was negative for prior numbness and tingling. Dr. Thomas stated, in his records, that Petitioner is diabetic which may make her predisposed to ulnar nerve difficulties and the impact of the hand could cause neuropraxia to the ulnar nerve at Guyon's canal. Dr. Thomas indicated that if Petitioner's symptoms continue for four months electrodiagnostic studies of the left upper extremity may be needed. Dr. Thomas subsequently ordered an upper extremity EMG which was performed on August 29, 2017. The assessment showed electromyographic evidence of mild ulnar neuropathy at the left elbow.

Petitioner returned to Dr. Thomas on September 13, 2017. Petitioner reported that her symptoms were still present and that she experiences off-and-on numbness and tingling at the right and small fingers of the left hand. After reviewing the EMG, Dr. Thomas assessed mild left ulnar neuropathy and cubital tunnel syndrome. Dr. Thomas opined that

the cubital tunnel syndrome was not related to her fall. Dr. Thomas released Petitioner to work. (Px 15).

Presence Mercy Medical Center

On October 30, 2017, Petitioner went to the emergency room at Presence Mercy Medical Center. Petitioner reported pain in her shoulders, mid back and chest after undergoing a physical therapy test on October 25, 2017. Petitioner was assessed with unspecified dorsalgia and she was advised to follow up with an orthopedic physician. Petitioner was proscribed Flexeril and taken off work until scene by an orthopedic physician. Petitioner was also advised to discontinue physical therapy. (PX 16).

Hinsdale Orthopedics

On November 9, 2017 Petitioner was seen by Dr. Lorenz at Hinsdale Orthopedics. Dr. Lorenz noted that Petitioner had significant pain in the left shoulder with deltoid and biceps strength testing, decreased strength with upside down can testing and abduction against resistance. Pain was also noted over the left AC joint. Petitioner had a positive 3/5 Waddell signs. Dr. Lorenze assessed left shoulder pain secondary to work related injury on February 16, 2017. Dr. Lorenze noted that Petitioner's pain was not originating from the spine. Dr. Lorenze referred Petitioner to Dr. Chudik for evaluation and treatment of the left shoulder. Dr. Lorenze restricted Petitioner from work at that time. (PX 11).

Petitioner was examined by Dr. Chudik on November 13, 2017. Petitioner reported left shoulder pain that began approximately on February 16, 2017. Petitioner said that she fell forward and landed on her knees, left upper extremity and left hand, wrist and face. Petitioner reported that she initially experienced left shoulder pain after the February 16, 2017 fall and that her complaints were treated based upon the severity of the injury. Petitioner also reported that her shoulder pain inhibited her completing a physical therapy test.

Dr. Chudik indicated that Petitioner's left shoulder pain was the result of Petitioner's work fall on February 16, 2017. Dr. Chudik noted that Petitioner did not suffer any prior injuries to her left shoulder. Dr. Chudik assessed a left rotator cuff supraspinatus tear. Dr. Chudik recommended an MRI of the left shoulder to confirm his assessment. Dr. Chudik restricted Petitioner from working. Petitioner underwent the MRI on November 21, 2017.

Petitioner returned to Dr. Chudik on December 1, 2017. Dr. Chudik reviewed the MRI which identified a small bursal sided rotator cuff tear with subacromial fluid. Dr. Chudik assessed a small rotator cuff tear and cervical radiculopathy. Dr. Chudik noted that some of Petitioner's symptoms were stemming from the cervical spine. Dr. Chudik recommended left shoulder physical therapy and he referred Petitioner to Dr. Lorenz for further evaluation of the spine.

On December 13, 2013, Petitioner returned to Dr. Lorenz. Petitioner reported left thoracic back pain which radiates to her left shoulder and left side of the chest. Dr. Lorenz recommended a cervical MRI to determine if there is an underlying cervical radiculopathy. The cervical MRI showed no disc desiccation, herniation or cervical stenosis. On January 10, 2018, Dr. Lorenz recommended that Petitioner continue treating with Dr. Chudik.

On January 15, 2018, Petitioner returned to Dr. Chudik who noted that Petitioner was not responding to conservative treatment. Dr. Lorenz recommended arthroscopic rotator cuff repair surgery. Dr. Chudik also noted that Petitioner was also complaining of right knee pain, but that Petitioner did not wish to address the knee until after the shoulder surgery.

On April 11, 2018, Petitioner returned to Dr. Chudik complaining of right knee pain. Petitioner reported numbness and burning in the right thigh over the past two weeks. Dr. Chudik noted that Petitioner was walking with an antalgic gait. X-rays of the right knee were taken and found to be normal except for medical compartment arthritis. Dr. Chudik noted that Petitioner underwent a prior medial menisectomy and the x-rays show signs of medical compartment arthritis. Dr. Chudik recommended an MRI. (PX 11).

Section 12 Examination

On February 20, 2018, Petitioner was examined by Dr. Gleason, an orthopedic surgeon, pursuant to Section 12 of the Act. At the examination, Petitioner reported falling over a small cart after the lights had been turned off. Petitioner fell forward onto a cement floor. After the fall, Petitioner developed pain in the neck, left shoulder, upper back, lower back, both knees and the left wrist. Petitioner was given work restrictions and she continued to work over the next month. Petitioner continued to complain of left wrist pain and bilateral knee pain. Surgery was on the right knee. Petitioner was off of work approximately 1 ½ months due to the right knee surgery. Petitioner was taken off work by

Drs. Lorenz and Chudik as of October 26, 2017. Dr. Gleason noted a non-antalgic gait being somewhat stiff legged favoring the right lower extremity. Dr. Gleason also noted mild lumbar pain and left upper and mid para-lumbar tenderness upon palpation. Petitioner's shoulder range of motion was symmetric, but Petitioner had pain on extremes of motion. Dr. Gleason also noted the left range of motion was decreased on the left side during internal rotation. Petitioner had a positive impingement test and cross over test on the left. Dr. Gleason diagnosed mild ulnar neuropathy and left shoulder impingement.

Dr. Gleason agreed that an orthopedic follow-up with respect to the left shoulder including the possibility of an arthroscopy of the left shoulder should be considered but that treatment would be unrelated to Petitioner's work accident of February 16, 2017. Dr. Gleason opined that Petitioner reached maximum medical improvement, as of May 31, 2017, and that she could return to work full duty. Dr. Gleason further opined that Petitioner sustained a soft tissue type sprain and or temporary exacerbation of a pre-existing condition to her left shoulder, cervical, thoracic and lumbar spine. (RX E).

Testimony of Dr. Gleason-Section 12 Examiner

Dr. Gleason examined Petitioner on February 20, 2018. At that time, Petitioner reported neck, upper back, low back pain and left shoulder pain. During the exam, Petitioner complained of pain knee pain upon rotation of the hips without engaging the knee joint. Dr. Gleason noted that Petitioner reported pain to the knees upon walking and she walked in a non-antalgic fashion. Dr. Gleason reviewed the cervical MRI and the left shoulder MRI. (RX D at 21). Dr. Gleason opined that had Petitioner been injured her rotator cuff her active range of motion would be have been diminished and she would not have had normal motion without tenderness for two or three days after the injury. (RX D at 25-27). Dr. Gleason reviewed the FCE and noted that Petitioner was able to perform sustained forward reach with no mechanical changes and she was able to climb 20 of 20 rungs on a ladder. (RX D at 31-33). Dr. Gleason further opined that had Petitioner's rotator cuff been symptomatic that she would not have been able to complete the tasks on the FCE.

Dr. Gleason opined that Petitioner suffered soft tissue contusions and/or sprains of the left knee, left elbow, left hand, cervical spine, right knee, non-displaced fracture of left 5th metacarpal because of her work accident of February 16, 2017. (RX D at 35-26).

Dr. Gleason opined that the left shoulder arthroscopy would be unrelated to her work accident of February 16, 2017. Dr. Gleason said that Petitioner would have had immediate symptoms had the work injury caused or aggravated a rotator cuff tear. (RX D at 36-37). Dr. Gleason said rotator cuff tears can occur because of aging, wearing, degeneration and, in part, related to genetics and heredity. Dr. Gleason opined the MRI findings suggests a chronic process. Dr. Gleason agrees that Petitioner should seek treatment for her shoulder condition, but that condition is not related to her work injury of February 16, 2017.

Dr. Gleason also opined that Petitioner had recovered from her knee surgery and that Petitioner had no other significant musculoskeletal symptomatic conditions. (RX D at 32).

Testimony of Dr. Chudik

Dr. Chudik testified that he began treating Petitioner on November 13, 2017. Petitioner reported that she had not suffered any prior shoulder injury. Petitioner reported tripping over a wooden cart at work. Petitioner fell forward landing on her knees and left upper extremity. Petitioner experienced immediate pain in the left hand, left wrist, upper left extremity, and numbness over the left side. Petitioner started treating at a clinic and she subsequently underwent right knee surgery in July of 2017. Petitioner reported that she experienced immediate left shoulder pain but that she was treating her other injuries based upon priority and severity. Petitioner also reported that her left shoulder pain inhibited her in physical therapy and testing.

The examination found tenderness over the AC joint, weakness and pain with resisted abduction and external rotation. Petitioner had some apprehension with forward flection. Dr. Chudik testified that he was concerned about a tear involving the supraspinatus rotator cuff based upon the exam and history. An MRI was ordered to confirm his diagnosis. The MRI revealed a high-grade bursal surface partial thickness tear of the supraspinatus with some retraction. Dr. Chudik testified that he believed Petitioner sustained a bursal sided rotator cuff tear with some subacromial fluid. Dr. Chudik testified the MRI, which was objective evidence of a rotator cuff tear, was consistent with his findings and the Petitioner's symptoms. Dr. Chudik recommended left shoulder arthroscopy and rotator cuff repair. (PX 1 at 14).

Petitioner also complained of right knee pain but she did not wish to address the knee until after her shoulder surgery. Petitioner reported that she had persistent pain

following her right knee surgery. Petitioner further reported that after the independent medical examination her right knee pain increased. Dr. Chudik noted that Petitioner walks with an antalgic gait. The exam showed tenderness to palpation on the medial and lateral sides of the joint line and Petitioner had a positive McMurray test. The x-ray showed that Petitioner developed medial compartment arthritis or narrowing of the joint space. Dr. Chudik opined that the operative report shows the injury caused damage to the root of the meniscus and injury to the cartilage that developed into posttraumatic arthritis. Dr. Chudik testified that he ordered an MRI to get a sense of what has progressed to determine what treatment may be needed. (PX 1 at 19).

Dr. Chudik opined that the type of fall Petitioner had, with enough force to cause a fracture in her left hand and wrist area, could also damage her rotator cuff. Dr. Chudik further opined that upon a review of the record and operative report, Petitioner's right knee condition is consistent with a traumatic injury. (PX 1 at 22). Dr. Chudik testified that based upon the operative report that the type of cartilage damage in the medial compartment and the compromised meniscus function leads to accelerated posttraumatic arthritis. (PX 1 at 24). Dr. Chudik also opined that Petitioner is unable to return to her duties and her job at this time. (PX 1 at 23).

After reviewing Dr. Gleason's February 27, 2018, Dr. Chudik noted that it is interesting that Dr. Gleason identifies Petitioner's pains, objective findings of pathology and MRI's but claim that there are not causally related to Petitioner's February 16, 2017 without any reasonable explanation. Dr. Chudik noted that Dr. Gleason doesn't even say why he feels differently. Dr. Chudik testified that "*...he just opines that they are not related without any reasonable explanation which is rather odd in my opinion to give that kind of medical opinion and not a foundation why when all facts point to that they are related. I think that's highly irregular.*". (RX 1 at 26-27).

Petitioner testified that she was paid TTD benefits from 7/22/17 through 8/28/17 and that she worked light duty from 8/29/17 through 10/27/17 and received her benefits. Petitioner testified that she has been off work from 10/28/17 through the date of the trial without receiving any benefits. (T 26). Petitioner also testified that medical bills from Dreyer and Hinsdale Orthopedics are unpaid.

Petitioner performed an FCE at Athletico on 10/25/17. Petitioner testified that the person who performed the exam was asking her to do things that hurt her and told her to do it, so they could examine her knee. (T 27) The examiner told petitioner to kneel on the floor, but petitioner told her that it hurt a lot. (T 29). The examiner told her that she did not know that the left knee was also painful because it had not been examined. (T 29) After the FCE, Petitioner went to the ER because of pain in her back and chest from lifting at the FCE. (T 29-30).

Petitioner testified that her right knee, left shoulder, and left hand still hurts. Petitioner testified that prior to her injury at work that she never injured her left shoulder or leg. Petitioner also testified that her right knee feels as if it is asleep.

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With Respect to Issue (F) Is Petitioner's Current Condition of Ill-being Causally Related to The Injury, The Arbitrator finds as follows:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that her current left shoulder and right knee conditions are causally related to Petitioner's work accident of February 16, 2017, as more fully explained below.

Petitioner testified that prior to her work accident she did not suffer any injuries to her right leg, left leg, left wrist or hand, left shoulder, low back, neck, or chest. Petitioner also testified that she has not sustained any subsequent injuries to her right leg, left leg, left wrist or hand, left shoulder, low back, neck, or chest.

Dr. Gleason opined that Petitioner suffered soft tissue type sprains and or temporary exacerbation of pre-existing conditions to her left shoulder, cervical, thoracic and lumbar spine but that she reached maximum medical improvement by May 31, 2017. (RX E). Dr. Gleason opined that Petitioner's left rotator cuff tear was not related to her work accident of February 16, 2017, in part, because individuals with acute tears of the rotator cuff or aggravations of a preexisting conditions would have immediate symptoms and Petitioner had normal physical findings immediately after her fall of February 16, 2017. (RX E at 36-37). Immediately after the accident, Petitioner had paraspinal muscle tenderness along the cervical muscle. Petitioner was diagnosed with a left wrist, sprain, cervical sprain, contusions of the left hand, both knees, left elbow contusion and laceration with contusion of the head. By March 10, 2010, Petitioner was reporting left shoulder pain. Petitioner testified that she had left shoulder pain immediately after her February 16, 2017 fall and the pain gradually increased. Petitioner also testified that the treatment immediately after the fall focused on the more painful and serious complaints. Petitioner was diagnosed with a fracture of the left fifth metacarpal and she underwent right knee surgery.

The Arbitrator notes that Petitioner sustained a closed fracture of the left fifth metacarpal at the time of her fall and, at that time, Petitioner was complaining of significant left wrist, hand and arm pain. Petitioner was also complaining of cervical and lumbar pain and she had paraspinal muscle tenderness. The Arbitrator finds Petitioner's testimony credible regarding the immediate onset of left shoulder pain that gradually increased and consistent with the medical records. The Arbitrator finds the opinion of Dr. Gleason regarding the lack of immediate left

shoulder complaints not to be persuasive because his opinions do not account for the nature and scope of Petitioner's condition immediately after the fall.

The Arbitrator finds the opinions of Dr. Chudik to be more persuasive then the opinions of Dr. Gleason. Dr. Chudik believed Petitioner's complaints and exam findings were consistent with a rotator cuff tear and ordered an MRI which confirmed his diagnoses. Dr. Chudik further testified that Petitioner's mechanism of injury was consistent with the type of rotator cuff tear diagnosed and that Petitioner did not have any prior left shoulder injuries. Dr. Gleason testified that Petitioner suffered a left shoulder soft tissue type sprain or temporary exacerbation of a pre-existing condition but the need of surgery is not related to Petitioner's fall. The Arbitrator notes that Dr. Gleason does not provide an opinion as to when the temporary exacerbation resolved. The Arbitrator finds that Dr. Gleason did not provide a reasonable explanation or foundation supporting his opinion.

Regarding the right knee condition. Petitioner sustained a meniscus tear and underwent surgery. There is no issue reading the initial right knee injury or surgery. Dr. Gleason opines that Petitioner's current right knee condition is not related to her fall. Dr. Chudik opines that the operative report shows the initial injury caused damage to the root of the meniscus and an injury to the cartilage that is now developing into posttraumatic arthritis. Dr. Chudik testified the operative report shows cartilage damage in the medial compartment and a compromised meniscus that leads to accelerated posttraumatic arthritis. The Arbitrator finds that Petitioner's current right knee condition to be related to her February 16, 2016 fall. The Arbitrator finds the opinions of Dr. Chudik to be more persuasive than the opinion of Dr. Gleason.

With Respect to Issue (J) Whether the Medical Services Were Reasonable and Necessary and Whether Respondent Has Paid All Appropriate Changes For All Reasonable And Necessary Medical Services, the Arbitrator Finds As Follows:

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury.

Based in part on the conclusions relating to causal connection above, the Arbitrator further finds that the treatment that Petitioner received from Dreyer Clinic, in the amount of $301.76, and Hinsdale Orthopaedic, in the amount of $171.00, reasonable, necessary and

causally related to her accident of February 16, 2017. As such, Respondent shall pay Petitioner the sum of $301.76 due Dreyer Clinic and the sum of $171.00 due Hinsdale Orthopaedic. The sums shall be paid pursuant to Sections 8 and 8.2 of the Act and subject to fee schedule.

With Respect to Issue (K), Is Petitioner Entitled to Prospective Medical Care, the Arbitrator finds as follows:

The Arbitrator concludes Petitioner is entitled to prospective medical care as recommended by Dr. Chudik (right knee MRI and left shoulder arthroscopy and rotator cuff repair). The Arbitrator finds that Petitioner proved by the preponderance of the medical evidence that the treatment and tests recommended by Dr. Chudik to be supported by the objective medical evidence and reasonable, necessary and related treatment intending to alleviate Petitioner's current state of ill-being.

With Respect to Issue (L) What Temporary Benefits, If Any, Is Petitioner Entitled, The Arbitrator Finds as Follows:

A claimant is temporarily and totally disabled from the time an injury incapacitates her until such time as she is as far recovered or restored as the permanent character of her injury will permit. *Westin Hotel. V. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007). In determining whether a claimant is no longer entitled to continue receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of return to the workforce. *Interstate Scaffolding, Inc. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). Once a claimant has reached MMI, her condition has become permanent and she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d. 107 (1990).

Petitioner claims to be entitled to temporary total disability benefits from October 28, 2017 through March 8, 2019 representing 76 4/7 weeks. On October 27, 2017, Dr. Burt released Petitioner to return to work based upon the findings of the FCE. The FCE was performed on October 25, 2017. The FCE found that Petitioner's job qualified as a light duty position, Petitioner was capable for working light duty and, as a result, Petitioner was functionally employable. On October 30, 2017, Petitioner went to the emergency room at Presence Mercy Medical Center due to pain complaints associated, in part, with the participation in the FCE. Upon being released from Presence Mercy Medical Center, Petitioner was taken off work until she follows up with an orthopedic physical. On November 9, 2017, Petitioner was examined by

Dr. Lorenz who kept Petitioner off work. Dr. Lorenz referred Petitioner to Dr. Chudik for her left shoulder complaints. Dr. Chudik also issued restrictions keeping Petitioner off work. Dr. Chudik has recommended surgery and he has maintained the work restrictions.

The Arbitrator finds that Petitioner has proven that she has been temporarily and totally disabled from the October 30, 2017 through March 8, 2019 and that she has not recovered or restored from the permanent character of her injury. Based upon the opinions of Dr. Chudik regarding the need for additional medical treatment, the Arbitrator finds that Petitioner's condition has not stabilized to the extent that she is capable of return to the workforce. As such, the Respondent shall pay Petitioner TTD benefits from October 30, 2017 through March 8, 2019.

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify Down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Janet Kaiser,

Petitioner,

vs. NO: 14 WC 33647

St. Michael's Counseling Center Inc. and the State Treasurer as Ex Officio Custodian of the Illinois Injured Workers' Benefit Fund,

21IWCC0142

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund ("IWBF") herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner worked as a nurse in a methadone clinic owned by Respondent St. Michael's Counseling Center, Inc. ("Respondent"). Petitioner's job duties originally included taking blood pressure and dispensing medication. On August 22, 2014, the clinic owner added drawing patients' blood to Petitioner's duties. Petitioner's first patient that day was addicted to heroin and had hepatitis C. The clinic doctor wanted Petitioner to draw the patient's blood to test for other diseases including HIV. Petitioner testified that after she inserted the needle into the vein and started to draw blood, the patient jumped, and the needle came out and pricked her left thumb.

Petitioner testified that she was a little panicked after the needle prick because she knew she could potentially contract a contagious disease due to the incident. Petitioner was particularly worried she might contract hepatitis C or HIV. Petitioner visited the ER later that day. Medical personnel drew Petitioner's blood and ran tests for both hepatitis and HIV. The doctor prescribed a 28-day course of antiviral medications as well as an HIV prophylaxis. After filling her prescriptions, Petitioner was to follow up for viral testing in three months and six months. Petitioner testified that the medications made her physically ill. She testified that she was nauseous for over a month and experienced significant abdominal pains. Petitioner testified, "There were days where it was really hard to get out of bed, go to work, and I had to get driven to work because

physically I couldn't. And then I would come home and I would just crawl up in a ball because the pain was so bad." (Tr. at 31).

On March 12, 2015, Dr. Patel examined Petitioner. Dr. Patel noted Petitioner's blood work in September 2014 was negative for HIV and hepatitis C and A. He wrote, "Since then, the patient has remained asymptomatic. No abdominal pain, fatigue, nausea or vomiting." The tests Dr. Patel performed that day were also negative for HIV and hepatitis C and A. Petitioner was to undergo an additional hepatitis C test in six months. Petitioner did not return to Dr. Patel following this visit and there is no evidence that she underwent the recommended additional hepatitis C test.

Petitioner testified that the work incident caused her to experience stress. She testified that she was worried about what could happen because of the incident. Petitioner testified that she was stressed every day for months after the incident due to her worries and was also stressed for most of the first year following the incident. Petitioner testified that she continues to think about the incident occasionally. She has never developed any symptoms of hepatitis C and has never tested positive for any communicable disease including HIV and hepatitis C. Petitioner testified that she continues to discuss the incident with her family doctor as the latency period for hepatitis C is five to six years.

Under cross-examination, Petitioner admitted that she has never sought any treatment from a counselor, therapist, psychologist, or psychiatrist due to the work incident. She continued to work for Respondent until 2016, but refused to perform any more blood draws because she was uncomfortable. Petitioner testified that she eventually left her job with Respondent due to an incident unrelated to this work incident. Petitioner continues to work as a nurse.

The Arbitrator concluded that Petitioner met her burden of proving she sustained a 3.5% loss of use of the whole person due to the August 22, 2014, work incident. The Arbitrator primarily based his conclusion on Petitioner's testimony that she experienced "some stress" because she remained within the latency period for developing hepatitis C and HIV.

After considering the evidence, the Commission views the case differently. After carefully weighing the relevant factors pursuant to Section 8.1b(b) of the Act, the Commission finds Petitioner failed to meet her burden of proving she sustained any permanent disability as a result of the work incident. While Petitioner testified that she occasionally thinks about the incident and continues to discuss the matter with her doctor, Petitioner submitted no credible evidence that she has sustained any level of disability because of the work exposure. The Commission notes that while Petitioner testified that she remains concerned that she might test positive for a disease, there is no evidence that Petitioner ever followed up with Dr. Patel to undergo the recommended additional hepatitis C test in 2015. There is no evidence that Petitioner has undergone *any* additional testing for HIV or hepatitis in the three years since her visit with Dr. Patel in March 2015. Petitioner also has admittedly never tested positive for any disease as a result of the work incident and has never exhibited any symptoms relating to any possible communicable disease.

The Commission does not take Petitioner's exposure to HIV and hepatitis C lightly. However, there is absolutely no medical evidence that Petitioner sustained any level of permanent disability due to this work exposure. While Petitioner understandably may have experienced a

level of stress following the work incident, there is no indication that the stress she experienced caused a permanent disability. After all, Petitioner has never sought any medical treatment relating to her stress. Petitioner has also never been diagnosed with any type of stress or anxiety disorder. Petitioner's valid worries regarding the incident also did not prevent her from continuing her work as a nurse. Furthermore, while Petitioner refused to draw blood following this incident, she continued to work for Respondent and left her employment due to an unrelated dispute.

After considering the totality of the evidence, the Commission finds Petitioner failed to meet her burden of proving she sustained any level of permanent disability as a result of the August 22, 2014, work incident. For the foregoing reasons, the Commission modifies the Decision of the Arbitrator and finds Petitioner sustained no permanent partial disability due to the work incident.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 22, 2018, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner sustained no permanent disability as a result of the August 22, 2014, work incident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services of $**5,720.28**, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

IT IS FURTHER ORDERED that the Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 24 2021

d: 1/26/21
TJT/jds
51

Maria Elena Portela

Maria E. Portela

Kathryn A. Doerries

Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving the August 22, 2014, work incident caused her to sustain a loss of 3.5% use of the whole person.

Petitioner worked for Respondent as a nurse. She testified that this was her first job after she completed her nursing studies. On the date of accident, she was told to draw blood from a patient who had at least one known communicable disease. Without any additional training, she attempted to fulfill this new job duty. Unfortunately, she ended up pricking her thumb with the needle used to draw the patient's blood. As a nurse, Petitioner was keenly aware of the dangers she faced due to this needle prick. Given the patient's history of drug use, Petitioner was especially worried about contracting HIV and hepatitis C. Luckily, Petitioner has never shown any symptoms of either of these diseases and has never tested positive for any disease related to this work incident.

Contrary to the majority, I believe Petitioner more than met her burden of proving she sustained a permanent partial disability due to the work incident. Petitioner credibly testified that she was panicked in the days and weeks following the incident. She credibly testified that she became physically ill for a time due to both the antiviral medications she had to take and her heightened stress level. Additionally, while Petitioner has not tested positive for any diseases, she remains within the latency period; therefore, the chance remains that she could still contract either HIV or hepatitis C. Petitioner credibly testified that she remains concerned and even continues to discuss her worries with her family doctor. I believe the majority's view diminishes the emotional effect this type of exposure can have on a person. Even after all these years, Petitioner continues to be haunted by the potential effects of this work incident. I do not believe a person must seek professional help or receive a medical diagnosis before she meets her burden of proving that she suffered a permanent disability under these circumstances.

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For the forgoing reasons, I would affirm and adopt the Decision of the Arbitrator in its entirety. Petitioner clearly met her burden of proving she sustained a permanent partial disability due to the August 22, 2014, work incident.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KAISER, JANET
Employee/Petitioner

Case# **14WC033647**

ST MICHAEL'S COUNSELING CENTER INC AND THE STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0142

On 10/22/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

1905 LAW OFFICE OF STEVEN A SIGMOND
345 N CANAL ST
SUITE 1208
CHICAGO, IL 60606

0000 ST MICHAELS COUNSELING CTR
7124 W GRAND AVE
CHICAGO, IL 60707

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

J. Kaiser v. St. Michaels, etc. and the IWBF, 14 WC 033647

21IWCC0142

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Janet Kaiser
Employee/Petitioner

Case # **14** WC **033647**

v.

St. Michael's Counseling Center, Inc., and the Illinois State Treasurer as Ex Officio Custodian of the Illinois Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **July 10, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Insurance-Liability of the IWBF**

21IWCC0142

FINDINGS

On **August 22, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employer-employee relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent-Employer.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$27,092.00**; the average weekly wage was **$521.00**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent-Employer ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $5,720.28, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner permanent partial disability benefits of $312.60 per week for 17.5 weeks, because the injuries sustained caused the 3-1/2% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 8/22/2014 through 7/102018, and shall pay the remainder of the award, if any, in weekly payments.

Injured Workers' Benefit Fund

The Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act. In the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injury Workers' Benefit Fund.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

October 22, 2018
Date

OCT 22 2018

21IWCC0142

FINDINGS OF FACT

Procedural Background

Janet Kaiser ("Petitioner") alleged injuries occurring on 8/22/14 arising in and out of and in the course of her employment with St. Michaels Counseling Center, Inc ("Respondent-Employer"). An appearance of representative was filed on behalf of Respondent-Employer by Attorney Ryan Sullivan of the firm, Kozonis & Associates, Ltd on November 17,2014. Subsequently, Mr. Sullivan filed a motion to withdraw which was granted on 6/11/2015. No further appearance has ever been filed on behalf of Respondent.

In 2016, Petitioner moved to amend the Application to name the State Treasurer as ex officio custodian of the Injured Workers Benefit Fund ("The Fund"), which was allowed. The Fund has been represented by Maggie Timlin of the Illinois Attorney General's Office. Respondent has been properly certified as uninsured by an employee of the National Council on Compensation Insurance. (PX 1)

Notice was sent by regular and certified mail to the Respondent-Employer both of the intent of Request a Hearing, and of the Actual Hearing date. Hearing was held on July 10, 2018. Petitioner and her Counsel were present, as was the attorney for the Fund. Respondent-Employer did not appear or participate in the hearing.

Testimonial and Other Evidence

Petitioner testified that she was employed by Respondent-Employer as a Nurse. Petitioner is a LPN. At the time of the accident, Respondent-Employer operated a for-profit business as a methadone clinic. Respondent-Employer was not and is not affiliated with any religious or charitable organization. Respondent accepted only cash payments. The clinic was operated by George J. Gikopoulos. Respondent employed George Sianis, a medical doctor who was the uncle of George Gikopoulos. Patients of the clinic would generally see Dr. Sianis for a prescription, then not see him again unless they needed the dosage changed. It was Petitioner's job to dispense the medicine to patients and perform initial assessments.

Testimony of Petitioner regarding the Respondent-Employer corporation is corroborated by PX 7, a corporation detail report from the office of the Illinois Secretary of State showing Respondent-Employer to be an Active Corporation.

Petitioner testified that she had worked for Respondent-Employer for over one full year and was paid $17.00 per hour for at least 30 hours per week.

Petitioner testified that on August 22, 2014, she was working at the Respondent's clinic. The only other employee present was Yasmine, a receptionist. Petitioner had been recently informed by Gikopoulos that she would have to begin taking blood draws from patients. Her understanding was that she would be fired if she refused to do so. On 8/22/14, she was instructed to take blood from "NR" a patient whom she knew to be infected with Hepatitis C. She understood that the purpose of the blood draw was to determine whether or not "NR" had also been infected with HIV.

While Petitioner was drawing blood from NR, the patient jumped, and a needle which had already began taking blood from NR punctured the glove and skin of Petitioner. Based upon her education and training as an LPN, Petitioner was concerned about the possibility of contracting Hep C and/or AIDS.

Later that day, on 8/22/14, petitioner called Gikopoulos, and informed him of the event and her intention to seek medical treatment.

Petitioner then went to the Resurrection Medical Center Emergency Room. Records show that she gave a history of having been stuck by a needle while drawing blood from a patient known to have Hepatitis C. Lab tests were ordered, antiviral medications were prescribed, and Petitioner was instructed to return to work. (PX 2)

Petitioner followed up with her Primary Care Physician, Marek Gawrysz, MD, who reviewed the bloodwork and recommended a specialist. (PX 3) In accordance with the recommendation, Petitioner followed up at Community First Medical Center. (PX 4)

Petitioner testified that she has yet to develop symptoms of Hep C or AIDS, but remains concerned and aware of the possibility that this still could happen as a result of the accident in question. There could be a 5 to 6 year latency period. Petitioner testified that she was under stress due to the blood born pathogen exposure, which has improved lately.

Petitioner testified regarding medical expenses incurred and paid and submitted Petitioner's Exhibit 6, her bills exhibit. Exhibit 6 consists of a letter dated January 20, 2015 from Petitioner's counsel to Respondent-Employer's (then) attorney of record, demanding payment of medical bills for which Petitioner was out of pocket, as well as an attached summary of the bills and copies of the bills themselves. The Exhibit includes bills from Resurrection Medical Center for $2,095.50, Addison Central Pathology for $150.00, Dr. Gawrysz for $591.00, and Medtar Lab for $86.50 Also attached were paid receipts from Walgreens dated 8/23/14 for prescription medicines purchased at a cost of $2,797.28 Petitioner testified that she paid for the medications prescribed with her credit card and offered foundational testimony for all of the bills listed, as paid bills. She has received no reimbursement from Respondent-Employer.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

To obtain compensation under the Act, petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980)), including that there is some causal relationship between her employment and his injury. Caterpillar Tractor Company v. Industrial Commission, 129 Ill.2d 52, 63 (1989) To be compensable under the Act, an injury need only be a cause of an employee's condition of ill-being, not the sole or primary causative factor. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 205 (2003)

Decisions of the Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1 (e)

Petitioner's unrebutted testimony is found to be credible and forthright. The Arbitrator's findings are based upon Petitioner's testimony, unless otherwise stated.

WITH RESPECT TO ISSUE (A), WAS RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:

Respondent was operating under the Act, in accordance with Section 3.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS AS FOLLOWS:

There was an employee/employer relationship between Petitioner and Respondent-Employer.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT-EMPLOYER, AND ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 22, 2014. This finding is based upon Petitioner's testimony and the medical records.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Timely Notice was given to Respondent.

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's current condition of ill-being, to wit: status post injection wound with potential exposure to blood born pathogens (still in potential latency period), is causally related to the injury. This finding is based upon Petitioner's testimony and the medical records.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's AWW was $510.00.

WITH RESPECT TO ISSUE (H), WHAT WAS THE PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, AND ISSUE (I), WHAT WAS THE PETITIONER'S MARITAL STATUS AT THE TIME OF THE ACCIDENT,THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was 31 years old and single with no dependents on the date of accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The medical services provided to Petitioner are found to be reasonable and necessary to cure or relieve the effects of the injury, based upon the medical records and Petitioner's testimony.

Accordingly, the following medical bills are awarded:

Resurrection Medical Center for $2,095.50, Addison Central Pathology for $150.00, Dr. Gawrysz for $591.00, and Medtar Lab for $86.50, along with Prescription reimbursement to Petitioner of $2,797.28, a total of $5,720.28. The same shall be paid to Petitioner, in accordance with Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

When making the determination of permanent partial disability as related to Petitioner's injuries, the Arbitrator is to address five factors, pursuant to Section 8.1b(b) of the Workers' Compensation Act: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records."

With regard to subsection (i) of Section 8.lb(b), the reported level of impairment pursuant to Section 8.1b(a), the Arbitrator notes that neither party entered into evidence an impairment rating. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of Section 8.lb(b), the occupation of the injured employee, Petitioner testified that she currently works as a nurse, as she did at the time of the accident. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of the injury, Petitioner was 31 years old at the time of his work injury. Petitioner therefore has more work years in which she may experience the lingering effects of his injury than an older employee. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, Petitioner testified that she was able to return to his prior line of employment at full duty. No evidence was presented that Petitioner's

future earnings capacity was diminished due to this work injury. The Arbitrator gives moderate weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, Petitioner testified that she is within the latency period for development of very serios systemic conditions and she has some stress related to this. While she is not seeking active treatment for this, the Arbitrator gives moderate weight to this factor.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors, of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 3.5% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.

WITH RESPECT TO ISSUE (O), Liability of the IWBF, THE ARBITRATOR FINDS AS FOLLOWS:

RX 1 establishes that Respondent-Employer had no Workers' Compensation insurance on 8/22/2014, the date of accident. Accordingly, liability of the IWBF is established.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dwayne Cooper,
Petitioner,

vs.

No: 11 WC 030282
(Consolidated with 12 WC 023801, 14 WC 007604)

21IWCC0143

City of Chicago,
Respondent.

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, maintenance, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Respondent's Petition for Review listed all three consolidated cases. However, in its Statement of Exceptions, Respondent concedes that this case, 11 WC 030282, should be affirmed in its entirety. The issues raised by Respondent on review pertain only to consolidated Case No. 14 WC 007604 and have been addressed by the Commission in a separate opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 27, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0143

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
MAR 24 2021

mp/dk
o-3/18/21
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, DWAYNE
Employee/Petitioner

Case# **11WC030282**

12WC023801
14WC007604

CITY OF CHICAGO
Employer/Respondent

21IWCC0143

On 3/27/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.80% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0010 CITY OF CHICAGO DEPT OF LAW
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0143

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DWAYNE COOPER
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **11** WC **30282**

Consolidated cases: **12 WC 23801 & 14 WC 07604**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **July 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **August 5, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**71,468.80**; the average weekly wage was $**1,376.40**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**40,315.44** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**40,315.44**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner's left shoulder condition is causally related to the August 5, 2011 accident.

Respondent shall pay the reasonable and necessary medical expenses from **RX Development totaling $895.08** (Px7) and **Dr. Silver totaling $26,155.00** (Px1), as provided in Sections 8(a) and 8.2 (Medical Fee Schedule) of the Act.

Respondent shall be given a credit for any and all of the awarded medical expenses that have been paid by Respondent prior to hearing, whether via workers' compensation or Section 8(j) covered group health insurance, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$695.78 per week**, the maximum statutory rate, for **35 weeks**, because the injuries sustained caused the loss of use of **7% of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **August 5, 2011** through **July 22, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 26, 2020
Date

MAR 27 2020

STATEMENT OF FACTS

Petitioner testified he has worked as a garbage truck driver for Respondent for about 26 years. His duties involved driving down city alleys, letting his laborers fill the truck with garbage and going to dump the truckload. Petitioner testified he has to climb up into the truck, push the bed blade up and push the track back. How long this takes depending on whether it gets stuck. If he does get stuck, he has to get back into the truck to shake the compost loose. His normal shift ran from 6 am to 2:30 pm, five days per week.

On 8/5/11, Petitioner testified he was getting out of his truck. The steps down were slippery due to being at the dump, and he slipped and fell and hurt his left shoulder. He testified he felt a tingling sensation and pain, and later was unable to lift his arm. He contacted his supervisor and was taken to MercyWorks. He testified he was referred to a specialist, Dr. Silver.

On 8/12/11, Petitioner initially saw Dr. Silver. He reported that while working on a garbage truck on 7/5/11 he was trying to loosen some tight clamps by pounding them with a brick and he felt severe left shoulder pain. He indicated he had no left shoulder problems prior to this incident. Left shoulder x-rays were normal. Following exam, Dr. Silver diagnosed rotator cuff impingement and injected the shoulder. He also prescribed physical therapy, noting that anti-inflammatories would not be used due to Petitioner's chronic renal failure. Petitioner was held off work for 4 weeks. (Px1).

At 9/16/11 follow-up, Dr. Silver noted Petitioner's shoulder continued to do poorly with positive impingement and loss of motion. A left shoulder MRI was prescribed, and he was continued off work. (Px1).

The left shoulder MRI on 10/4/11 reflected articular surface and intrasubstance tearing of the supraspinatus without full thickness tearing, prominent erosion and degenerative change along the inferior glenoid with posterior inferior labral tear not excluded, as well as biceps tenosynovitis. Cystic changes were also noted in various locations. (Px1).

Noting a left partial thickness rotator cuff tear, Dr. Silver on 10/5/11 noted Petitioner's symptoms continued despite the injection and therapy. Arthroscopic surgery was prescribed, which would be followed by a continuous passive motion (CPM) machine "due to the severe stiffness and frozen shoulder that he presently has." (Px1).

Surgery was performed on 12/13/11, involving arthroscopic debridement, synovectomy, lysis of adhesions, distal clavicle resection and subacromial decompression with partial anterior acromioplasty and coracoacromial ligament transection. Diagnosis was left rotator cuff impingement. The report notes that the labrum, articular

surfaces, biceps tendon, subscapularis tendon and articular surface of the rotator cuff were all normal, but there was obvious cuff impingement. (Px1). The Arbitrator notes there is a dispensary note prescribing not only the CPM machine, but also a Game Ready Cooling Device and a Thermal Tech/Vascutherm. (Px1).

Petitioner testified that he still had pain and the shoulder felt weak after surgery. On 1/3/12, it was noted Petitioner had a PCM machine at home and was to move from Stage 1 to Stage 2. On 2/10/12, Petitioner had regained approximately 160 degrees of forward flexion and lateral abduction. He was limited to right hand use only and if this could not be accommodated, he was to remain off work. On 2/24/12, Dr. Silver indicated that Respondent had obtained a Utilization Review regarding the use of the PCM machine, opining the device was needed due to Petitioner having had a frozen shoulder, and indicating that a 2/21/12 attempt to contact Dr. Ross for peer-to-peer review failed because the phone number Ross left would not accept incoming calls. On 3/23/12, Dr. Silver indicated Petitioner had regained full forward flexion and lateral abduction and would begin working on rotational motion and strengthening. He was to continue PCM use. On 4/20/12, Petitioner had regained rotational motion and was limited to a 5-pound lifting restriction. On 6/1/12, Dr. Silver determined Petitioner had reached MMI and could return to his regular work duties. (Px1).

When Dr. Silver returned him to work in June, Petitioner testified he was still having left shoulder pain. He also testified that Dr. Silver injected the shoulder, but there is no record of this. He did return to work as a truck driver but testified he had ongoing problems with the left shoulder when climbing down from his truck and pushing and pulling the controls. The pain was sharp, but he continued to perform his work duties.

While working on 7/11/12, Petitioner testified that he fell again while trying to climb up into the truck, resulting in his body being partly inside and partly outside of the truck. He testified he injured his right shoulder at that time with sharp pain. HIs supervisor came out to the scene, had Petitioner complete an accident report and he was again sent to MercyWorks. He testified that he had x-rays and was again referred to a specialist. The records of MercyWorks were not located within the evidence submitted.

Petitioner returned to Dr. Silver on 7/13/12. The report states that Petitioner hurt his right shoulder on 7/10/12 while climbing into his garbage truck, slipping and falling into the cab, striking his right shoulder. Petitioner reported he had no prior right shoulder problems. He reported persistent pain and limited range of motion. Dr. Silver made the same diagnosis as with the left shoulder, rotator cuff impingement, and injected the shoulder. Petitioner was referred to physical therapy, held off work and advised to follow up in 4 weeks. A revised report was prepared which modified the injury date from 7/10/12 to 7/11/12. (Px1).

On 8/10/12, Petitioner reported only temporary relief with the injection. Right shoulder MRI was ordered, and Petitioner was continued off work. The radiologist reported the 8/31/12 films showed arthritic changes of the AC joint as well as the glenohumeral joint. Also noted was articular surface tearing of the supraspinatus tendon without evidence of a full thickness tear, thickening of the inferior glenohumeral ligament with degenerative changes of the glenoid labrum, moderate joint effusion and adherent debris suspected along the anterior subcoracoid process. Petitioner followed up on the same date with Dr. Silver and he prescribed arthroscopic surgery, again noting a PCM machine would be utilized post-surgery. Dr. Silver also opined that the surgery was causally related to the 7/11/12 accident. (Px1).

Petitioner was examined by orthopedic surgeon Dr. Cole with regard to his right shoulder on 10/22/12 at the Respondent's request pursuant to Section 12 of the Act. He reported slipping and falling hard getting into his truck on 7/11/12, resulting in constant 10 out of 10 (10/10) pain as a result. He denied any prior right shoulder problems or treatment. He noted MercyWorks had taken negative shoulder x-rays and diagnosed a strain. After obtaining new x-rays, indicating loss of glenohumeral space but no bone-on-bone findings, and reviewing the MRI, Dr. Cole diagnosed a possible partial thickness rotator cuff tear with preexisting arthritis. It was his

opinion that Petitioner aggravated his preexisting condition and this resulted in his need for care. He noted his concern was that Petitioner had gross osteoarthritis and pain below shoulder level. He noted the prognosis was "a bit more guarded" because he didn't have great relief with the injection and there was no significant cuff tear indicated on MRI. Dr. Cole stated: "Although it is reasonable to consider surgery, the prognosis is a bit more guarded given the above factors. As a result, I would first and foremost, recommend an injection into the glenohumeral joint itself and a few more weeks of physical therapy. Surgery in the arena of osteoarthritis in the shoulder with a questionable rotator cuff tear is a bit more guarded as well for the reasons outlined above." He opined that Petitioner should not lift over 5 pounds above shoulder level and do nothing repetitive over 10 pounds lifting, pushing and pulling below shoulder level. (Rx1).

Dr. Silver on 11/9/12 noted he reviewed Dr. Cole's report and performed the injection into the Petitioner's right shoulder, which was to be followed by three weeks of therapy. On 11/30/12, Dr. Silver noted the injection did not relieve Petitioner's symptoms and he therefore planned to perform surgery. The next note of 1/18/13 indicated Petitioner's surgery would be performed "over the coming weeks" and that he remained off work pending same. Norco, Meloxicam and Omeprazole were prescribed. (Px1).

Right shoulder arthroscopic surgery was performed by Dr. Silver on 1/29/13, and the procedure was virtually identical to what had been performed on the left side, with an identical post-surgical diagnosis of rotator cuff impingement. (Px1).

Petitioner testified he had ongoing pain after this surgery as well. Petitioner continued to follow up with Dr. Silver postoperatively. He was advised to start therapy on 2/6/13 and to continue to use his CPM machine. On 3/8/13, Dr. Silver noted Petitioner had only recently started therapy due to delay in authorization. On 4/12/13, he continued therapy and released Petitioner to left-handed work only. On 5/17/13, Dr. Silver indicated Petitioner had full forward flexion and lateral abduction with internal rotation to the belt line. Petitioner was advised he could lift up to 5 pounds with the right arm below shoulder level but that he was still unable to climb into or drive the garbage truck. (Px1). Petitioner testified that during therapy he was getting some numbness and "a little pain."

On 6/21/13, Dr. Haskell examined Petitioner on behalf of Dr. Silver, noting Petitioner had "improved somewhat in strength and range of motion but not sufficiently to return to his former work." He was advised to continue therapy and to limit to left arm use only. On 7/12/13, Dr. Silver indicated Petitioner continued to improve and was capable of a 10-pound lifting restriction. He was to continue therapy for four weeks. On 8/16/13, his restriction was changed to 20 to 25 pounds of lifting. It was noted that he needed to lift over 100 pounds at his job. Therapy was continued. (Px1).

Petitioner was reexamined by Dr. Cole on 8/26/13. His understanding of the surgery was "an arthroscopy/clean out", though he acknowledged he did not have the actual operative report to review. Petitioner reported 50% subjective improvement since surgery. Left shoulder exam was unremarkable. Dr. Cole stated: "Of note, (Petitioner) has ongoing knee complaints. He is walking with a cane. He has bilateral lower extremity edema as well." He further stated: "Also noteworthy is his morbid obesity. The combination of his comorbidities is enough to significantly restrict him in any activity. I would submit that, absent of the significant comorbidities, he is actually capable of working a full-duty job with no restrictions as related to the right shoulder. If he vehemently was unable to conduct the duties of his full job, then a functional capacity evaluation (FCE) would be warranted. Please note that I would make every attempt to avoid an FCE, as I think he is a legitimate risk to injure himself further during the FCE and would likely be invalid as well." Dr. Cole indicated that Petitioner had a moderate ongoing right shoulder disability with pain but with no significant objective findings on exam. He opined that Petitioner was at MMI and could work as noted. (Rx2).

Petitioner testified he continued to treat with Dr. Silver until 9/6/13, when he was released to return to work. However, on 9/20/13, a Dr. Silver note stated: "Per phone conversation with (Petitioner) we are recommending an FCE be performed at this time." (Px1).

The Arbitrator notes that there are additional records in Px1 which indicate that Dr. Silver had been prescribing hydrocodone in two different doses simultaneously (one for regular pain and one for more severe pain), Mobic and Tranzgel Pain Relief Gel, Voltaren gel and Terocin Lotion.

Petitioner testified that after he was released, he continued to have right shoulder problems. He would awaken in the morning with sharp pain. He was taking Tylenol and would use the cream rub each morning so he could be ready to work. While he continued to work, he testified he felt pain and the numb feeling when he would climb up into the truck.

On 2/26/14, Petitioner testified that while working he and his crew pulled into a McDonald's during a break to use the restroom. While exiting the truck he testified he fell again, indicating this time he fell to the ground, injuring his left side, right knee and re-injuring his right shoulder.

Petitioner was taken to Roseland Community Hospital, where he testified he was advised by the doctor there that they really couldn't do anything for him and advised him to go to the County to see a specialist. These records are not in the evidentiary record. Petitioner testified that he called his supervisor and was instead advised to see a doctor on Dearborn Street in downtown Chicago, who indicated he had a torn rotator cuff but "didn't really look at my knee." It is unclear when this occurred or who the provider on Dearborn is.

Petitioner testified he had no left shoulder injuries prior to 8/5/11 and has not reinjured it since. He had no right shoulder injuries prior to 7/11/12. He testified he'd had no problems with his right knee prior to 2/26/14.
Petitioner returned to Dr. Silver on 3/5/14. Petitioner reported he slipped on slippery steps getting out of his garbage truck on 2/26/14, falling to the ground and "crashing upon his right knee and hyperflexing it as well as onto his right shoulder." He reported pain in the shoulder and knee since the accident with painful and limited motion. No fractures were indicated at the ER. X-rays of the right knee showed complete loss of articular cartilage in the medial compartment. Diagnosis was preexisting asymptomatic degenerative changes of the right knee that were exacerbated and accelerated by the injury, and recurrent right rotator cuff impingement. The plan was to prescribe pain and anti-inflammatory medication and physical therapy. A right knee injection was performed, and a right shoulder injection was planned. (Px2).

Petitioner testified that the right knee injection only helped temporarily. The knee would pop, and he would have difficulty getting out of a chair after prolonged sitting.

Respondent referred Petitioner back to Dr. Cole for examination on 4/7/14. Petitioner reported he had returned to regular duty since his last visit with Cole and did well as to the right shoulder from 9/2013 to 2/26/14, when he fell off the back of the truck and injured his right shoulder and right knee. Petitioner noted he also was awaiting a kidney transplant for chronic renal failure due to hypertension. Petitioner was noted to have had preexisting right knee arthritis but indicated he had no symptoms prior to 2/26/14. He reported injection provided only temporary relief and he continued to have unresolved anterior and anterolateral right knee pain since the injury. As to the shoulder, Dr. Cole recommended a subacromial injection followed by 4 to 6 weeks of therapy. As to the knee, he recommended a series of 3 to 4 viscosupplementation injections, which he indicated is appropriate for symptomatic osteoarthritis in the knee. Dr. Cole noted that none of these conditions were related to the 2012 injury. He opined the Petitioner could work with restrictions of no over-the-shoulder work with the right arm. As to the knee, he diagnosed a work-related aggravation of right knee osteoarthritis and a new injury to the right shoulder on 2/26/14. (Px2).

On 4/18/14, Petitioner told Dr. Silver the right knee injection provided only mild temporary relief and that his therapy had been denied. His right shoulder had worsened. Dr. Silver injected the right shoulder and prescribed Meloxicam, Ultram, hydrocodone and Terocin cream and patches, and again prescribed therapy. On 5/30/14, Petitioner reported improvement with the right shoulder injection. Dr. Silver indicated he was awaiting authorization for a right knee replacement surgery "due to the articular cartilage damage he sustained" on 2/26/14. Petitioner was noted to have to use a cane to ambulate. He was continued off work. (Px2).

On 7/18/14, Dr. Silver reported that Petitioner had regained 160 degrees of flexion and abduction in the right shoulder following the injection and that impingement signs were now negative. He nevertheless continued therapy for the shoulder and again indicated Petitioner remained temporarily disabled pending the recommended right knee replacement surgery. Medications were continued. By 8/29/14, Petitioner had regained 170 degrees of shoulder motion. Therapy and medications were again continued. (Px2).

Petitioner was reexamined by Dr. Cole on 9/8/14. Petitioner indicated he had relief with the right shoulder cortisone injection in the spring and was "overall plus/minus better now" compared to 4/7/14, but that the right knee has failed to thrive with therapy. He was awaiting kidney transplant. Dr. Cole noted: "As a reminder, (Petitioner) is morbidly obese, diabetic, and dealing with chronic renal failure." He understood the mechanism of injury and inciting event to be falling onto the right shoulder and knee. Petitioner complained of pain all over the right knee, while the shoulder hurt with overhead movement. Petitioner was using a cane and "is actually seen in a wheelchair today as he was transported from the entrance to the exam room" and remained in the wheelchair for exam, which reflected mild right shoulder impingement signs but nearly full active range of motion. The right knee was warm with an effusion and mild tenderness medially and laterally. March 2014 right knee x-rays showed advanced bone on bone degenerative joint disease (DJD) with collapse medially on the right and left. Dr. Cole diagnosed an essentially resolved right shoulder, which was at MMI and with no need for work restrictions, and advanced DJD in the right knee with aggravation of the preexisting condition. While he agreed that a total knee replacement was "the next and most viable appropriate and definitive option for him", but "from a causality standpoint, I cannot state that the need for right knee care is categorically related to the February 2014 injury in question." He noted Petitioner did fall off the truck and struck the knee directly, and he "undoubtedly aggravated a preexisting condition", but the condition was of advanced, end-stage DJD in association with comorbidities of chronic renal failure, diabetes and morbid obesity. He stated: "In my opinion, undoubtedly the claimant would have arrived at a need for care for the right knee in the near future, even absent of this injury. I cannot categorically state that the injury in question in February 2014 really changed the fate/natural history of the right knee to any large degree, but rather simply might have brough the claimant to a need for care somewhat sooner than otherwise might have been necessary." He opined that Petitioner as not at MMI as to the right knee and was capable of only a job with "minimum walking and sedentary/seated desk based work." (Rx3).

On 10/3/14, Dr. Silver drafted a letter in response to the report of Dr. Cole. Silver disputed Cole's opinion that he could not say the "2/2/14" accident really changed the natural history of Petitioner's right knee. Dr. Silver states that Petitioner's right knee was asymptomatic prior to the accident, he had no history of previous symptoms or medical treatment for the knee and had been working full duty at the time of the injury. He stated: "He definitely sustained an injury to the right knee as noted previously and this has caused a permanent exacerbation and acceleration of asymptomatic pre-existing degenerative changes." Petitioner was to continue his medications and right shoulder therapy pending knee replacement surgery. (Px2).

Petitioner returned to Dr. Silver on 11/7/14, 12/12/14 and 1/16/15, and the doctor indicated his right shoulder was at a "4 to 4+ level" with negative impingement signs, but he again continued physical therapy for the shoulder while awaiting knee surgery authorization. Medications, including hydrocodone, were continued.

Another letter from Dr. Silver on 1/23/15 to Petitioner's counsel reiterates this opinion, noting Petitioner "had no previous history whatsoever of any symptoms, care or treatment to the right knee and therefore the opinion that he was in eminent [sic] need of a total knee replacement does not make any orthopedic sense unfortunately with all due respect." (Px2).

On 12/9/14, Dr. Cole issued an addendum report in response to questions from Respondent. He stated that Petitioner had an aggravation of his preexisting right knee condition "that has not been temporized to the point to reach an end of care. This being stated, I cannot categorically say that the injury in question changed the natural history of his knee condition in any significant way. The claimant maintained such a diathesis for arthritis that on a more likely than not basis he would have become symptomatic in the near imminent future absent of the injury." He also stated that Petitioner's obesity, chronic renal failure and diabetes creates a significant predisposition to knee osteoarthritis. Dr. Cole concluded the report by stating that Petitioner more likely than not would have needed a total knee replacement regardless of the 2/26/14 accident and that he didn't believe the accident accelerated the need to any large degree "given the fact pattern provided and his significant diathesis for osteoarthritis of the knee." (Px2).

Petitioner continued to follow up with Dr. Silver throughout 2015 (8 visits). Despite what appears to have been relatively normal right shoulder function, the reports note formal physical therapy was continued. The right knee remained significantly symptomatic while awaiting surgical authorization, and Meloxicam, hydrocodone, Ultram and Terocin cream continued to be prescribed. On 2/27/15, Dr. Silver noted the replacement surgery was needed due to articular cartilage damage at the time of the work injury. On 8/14/15, Dr. Silver found that Petitioner's right shoulder motion had "regressed somewhat" to a 150-degree range of motion. Therapy was continued. On 9/25/15, Dr. Silver again opined that the work accident damaged the articular knee cartilage resulting in a bone-on-bone situation, again noting the knee was asymptomatic prior to the accident. By 11/9/15, he indicated the shoulder motion had regressed to 130 degrees of flexion and abduction, and to 120 degrees by 12/18/15. (Px2).

Petitioner was examined by orthopedic surgeon Dr. Jimenez on 2/11/16. His understanding was that Petitioner injured his right knee on 2/26/14 when he slipped and fell of the running board on his truck, injuring the knee and right shoulder. He reviewed the records of Dr. Silver and Dr. Cole. Petitioner's current complaints included clicking, popping and swelling in the knee, difficulty arising from a chair, walking great distances and going down stairs. Examination and x-rays were consistent with end-stage knee osteoarthritis, and Dr. Jimenez agreed with the recommendation for total knee replacement given worsening pain and activity limitations and the failure of conservative measures. He noted Petitioner had a history of high blood pressure, cholesterol and morbid obesity, but indicated he had no history of diabetes. Dr. Jimenez opined that the knee replacement was related to the aggravation of Petitioner's preexisting right knee arthritis as a result of the 2/26/14 accident. He related that Petitioner's right knee was "relatively asymptomatic" prior to 2/26/14 and that there had been significant worsening following the accident "and therefore the timeline and the necessity for knee replacement has been moved up and the timeline has been shortened because of his work-related event." (Px3). It is unclear to the Arbitrator whether this examination was requested by the Petitioner's counsel or Respondent.

Petitioner was again seen by Dr. Silver on 1/29/16 and 3/11/16. On the latter date, he indicated Petitioner's right knee pain had worsened to the point that he had to walk with two canes with 10/10 pain that would reduce to 7/10 to 8/10 pain with medication. On 4/22/16, Dr. Silver indicated that he was awaiting further physical therapy to maximize Petitioner's functional shoulder capacity, "otherwise he will be permanently restricted with regard to his right shoulder with no use of the right arm above the shoulder level and no repetitive motion activities of the right shoulder with a 10 pound lifting restriction." He indicated Petitioner had been weaned down to a 2.5 mg dose of hydrocodone for severe pain and Ultram for lesser pain. On 6/3/16, Dr. Silver noted Petitioner's shoulder motion had improved back to 140 degrees while still awaiting authorization for further

therapy. He continued to await right knee replacement authorization. Off work status was continued throughout 2015 and through this 6/3/16 report, which appears to be the last report of Dr. Silver. (Px2).

Petitioner had a preoperative visit with Dr. Jimenez on 7/26/16. His elevated body mass index (BMI) was noted to be a risk. (Px3).

Petitioner testified he had been waiting for seven years for a kidney transplant and going through dialysis, and he received a call on 8/2/16 indicating he had to be at the hospital that same night and he underwent the kidney transplant, resulting in postponement of his planned right knee surgery. As a result, the parties indicated Petitioner's TTD was suspended as of 1/29/16 and reinstated as of 3/10/16.

Following a 3/9/17 pre-surgery visit, Petitioner ultimately underwent right total knee replacement surgery with Dr. Jimenez on 5/17/17. (Px3).

Petitioner underwent extensive post-operative physical therapy, initially as an inpatient at a rehabilitation facility (Carlton On The Lake), and continued to follow up with Dr. Jimenez through 12/14/17. Petitioner was at Carlton On The Lake from 5/21/17 to 7/10/17 (see Px11). After his release from Carlton, Petitioner testified he was still having problems walking and still had pain in his shoulder. He initially used a cane while at Carlton, and ultimately began to use a wheelchair. He testified it was difficult to get in and out of the wheelchair initially, but therapy helped him build the strength to do so. He continued to use a wheelchair following his release and testified the Respondent installed a lift at his home so he could get in and out of the house. He also has a motorized scooter.

On 7/13/17, Dr. Jimenez noted that Petitioner indicated he was using a walker but appeared for the visit in a wheelchair, and he recommended work on gait training and avoiding sitting in a wheelchair for any prolonged period of time to prevent any sacral ulcers. On 8/17/17, Petitioner was ambulating with a walker and was using Tramadol for pain control. Petitioner was noted to have left knee swelling on 10/3/17, x-rays showed degenerative changes, and the left knee was injected while therapy continued for the right knee. On 11/7/17, Petitioner reported doing well with therapy and x-rays showed good right knee alignment. There was full right knee range of motion and no evidence of instability. Dr. Jimenez discontinued therapy and ordered an FCE. Petitioner was held off work throughout this time. (Px3).

The 11/6/17 final physical therapy report from Athletico notes Petitioner attended 34 of 37 visits. While he had full right knee range of motion, he continued to have deficits in right knee and hip strength, muscular endurance, balance and gait. He was using a cane or walker due to complaints of the right knee giving out. His progress had been affected by his comorbidities. He was noted to have achieved his short-term goal and two out of three long term goals, falling short in ambulating without any assistive devices. He was to have two additional sessions focused on providing him with a home exercise program and strengthening. (Px6). Petitioner agreed his walking was getting a little bit better with therapy at Athletico but testified he still had right shoulder pain and had difficulty with overhead lifting.

On 12/6/17, Athletico physical therapist Paul Sullivan reported that when Petitioner was attempting to perform the FCE, during the musculoskeletal portion Petitioner demonstrated significant restrictions to his right shoulder range of motion along with significant pain behaviors with resisted shoulder flexion and abduction. Impingement sign was positive for right shoulder pain behaviors. Sullivan stated: "Given the client's significant ROM and strength limitations and pain behaviors to his right shoulder, he is recommended to seek medical clearance for performance of the FCE regarding his right shoulder." A separate letter was issued by therapist Sullivan that same day indicating that Petitioner reported a history of kidney replacement surgery in August 2016 and kidney removal surgery in April 2017. As he indicated his kidney surgeon had not been made aware

that he was going to be performing an FCE, Sullivan indicated that given Petitioner's surgeries and current comorbidities, he had to also seek clearance from is kidney physician. (Px6).

At the last visit of 12/14/17, Dr. Jimenez noted Petitioner's knee on exam showed some residual pain and stiffness on range of motion but was improving. There were no neurologic issues and x-rays showed good hardware positioning with no evidence of loosening. He advised Petitioner to advance activity, continue strengthening and range of motion, and weightbearing as tolerated. Dr. Jimenez found Petitioner to be at MMI and stated: "I am recommending at this juncture since he was unable to complete the FCE, they staged the function of his renal issues and other issues to determine if this patient is at MMI. He will have permanent restriction with sedentary duty on the right knee." He was to follow up annually. (Px3).

Petitioner testified he was examined by orthopedic surgeon Dr. Wolin for his right shoulder due to continued pain and inability to use the arm overhead. Petitioner saw Dr. Wolin on 2/6/18, whose report notes it was with regard to the shoulders. Noted was the 2/26/14 accident where he fell on his right side with the knee and shoulder hitting the ground first. Petitioner complained of right greater than left shoulder pain. He was unable to use anti-inflammatory medication due to his kidneys. The report states Petitioner underwent bilateral rotator cuff repairs in 2005 and had done well since then. He had not worked since 2/26/14. Following examination and review of right shoulder x-rays reflecting moderate glenohumeral narrowing, Dr. Wolin performed a right intraarticular shoulder injection and prescribed physical therapy. The records of Dr. Wolin indicate Petitioner was then a no show for a 3/7/18 visit and canceled an 8/20/18 visit. (Px4). Petitioner testified that 3/7/18 was his last visit with Dr. Wolin because Respondent was not paying his bill.

Petitioner was again examined by Dr. Cole at Respondent's request on 4/16/18. He noted that he felt that Petitioner was likely to have needed a right knee replacement regardless of injury due to his comorbidities, but stated: "I thought he might have arrived at a need for care sooner than otherwise might have been necessary but to an indeterminate degree." Petitioner reported 8/10 level right knee pain, and he refused height and weight measurements, reporting that he weighed 400 pounds. Examination took place with Petitioner in a wheelchair, and he had full range of motion and strength, the knee did feel warm with no effusion. He noted Petitioner felt he was "half-way there" with recovery, and Dr. Cole felt he had a great outcome but needed to lose weight, noting it "will surely help him in many ways, both prolonging the longevity of his right knee replacement and quite literally possibly save his life with regard to his comorbidities." Dr. Cole opined that Petitioner's current complaints were really residuals related to his preexisting disease and comorbidities. Dr. Cole found Petitioner had reached MMI, advised against an FCE ("it really will only over limit him and risk further injury with unnecessary risk and expense") and recommended permanent sedentary restrictions with limited squatting, kneeling and climbing. His final statement was: "Regarding his extensive disability, I would loosely label his level of disability as 'marked/severe' but this does not relate directly to the right knee injury." (Rx4).

Petitioner testified that after his 5/17/17 release from Dr. Jimenez he wasn't able to "get about" without a wheelchair or scooter, but he agreed he could get in and out of the chair and "can walk some, yes." He testified: "Well, I walk to like the bathroom and the kitchen, but I can't stand too long. I get pain in my back and legs." He cannot use stairs. Petitioner was using a scooter at the time of the hearing. He believed he had seen Dr. Jimenez after 5/7/17, but could not recall the date, then testified that his benefits were being paid until an 11/9/18 visit with Dr. Jimenez, at which point they were terminated. He indicated that right after the 11/9/18 release Respondent asked him to perform a job search.

On 9/11/18, Respondent's Committee on Finance sent a letter to Petitioner indicating it was determined he had temporary or permanent work restrictions and "may be required to pursue certain job search and/or vocational rehabilitation as part of your continued entitlement to workers' compensation benefits." He was to participate in an orientation at DHR on 9/16/18, at which time he was to receive resources and tools aimed at helping him

maximize his ability to find a job. He was to meet with a DHR representative who would help him to create a profile for the City online job screening system as well as guidance on performing a self-directed job search outside of City employment. This would apply whether Petitioner was in a formal vocational rehabilitation program or not. He was advised to bring to the orientation: current resume, email address, driver's license, copies of evidence of specialized skills or training. It was noted that a failure to attend could jeopardize his benefits. Copies were sent to both attorneys. (Px10).

Petitioner testified that the Respondent's Ashley Pak sent a 12/24/18 letter to him (Rx8), after which Petitioner made an appointment to see her. Prior to meeting with Ms. Pak, Petitioner was evaluated by Vocamotive with regard to vocational rehabilitation. He agreed he did not provide the report from this evaluation to Ms. Pak and did not bring any of his medical records to the meeting with Ms. Pak. He testified she advised him that he had to take a written test "to see what the job was about" but wasn't told what the job was. Petitioner also testified that prior to this time, on 10/26/18, he attended a vocational orientation at Respondent's request, where he watched films regarding how to write a resume and to obtain employment. No job leads were provided, he was requested to do his own job search. He testified he had to look for jobs ("Calling places to find out if they're hiring, filling out applications.") and send weekly job logs to Respondent evidencing compliance. Petitioner provided his logs to Respondent weekly but was unable to secure employment.

Petitioner testified that the Respondent offered him the job as a watchman. He had to go to the City Water Department, where he met Ms. Pak. He testified she did not provide him with a job description, testifying: "No. All she did was hand me some paperwork I had to fill out", which he agreed included a "Willingness and Ability, Watchman" questionnaire. (Rx10). Petitioner testified the questionnaire described what his duties and physical requirements would be as a watchman and for each asked if he was "able" and/or "willing" to perform the job. Petitioner acknowledged that he indicated he was not able or willing to walk or stand too long, use steel toed boots or perform patrols, as well as deal with the weather. He then testified: "The only problem I had was the walking." He testified he was not told at that time how much he would have to walk. Petitioner then agreed that he was provided with job descriptions for the watchman position (Rx11), testifying his answers to the questionnaire was based on the indicated descriptions. Petitioner testified he was not asked for any of his medical records or physical restrictions. Overall, he did not feel he could perform the watchman job, mainly due to the walking and standing. He testified that he presented himself to Ms. Pak that day the same way he presented to the hearing, i.e. using an assistive vehicle for ambulation. Ms. Pak indicated that it was not her decision and that corporation counsel would get back to him. Petitioned testified that he never was contacted, and he was never offered any other job by Respondent. His benefits were again terminated, and he was not provided an explanation why.

A second essentially identical letter was sent to Petitioner by the Committee on Finance on 10/15/18, this time with a 10/26/18 date of orientation. He was to call to confirm by 10/23/18. (Rx7).

Rx12 is the MMI orientation packet that was presented to Petitioner on 10/26/18. There is a sign in page with a signature next to Petitioner's name. Of note, the packet contains job search tips, instructions on how to apply for City positions (involving a power point demo), resume advice, a copy of the City's reasonable accommodation policy and a form for requesting a reasonable accommodation, and a discussion regarding pension benefits. (Rx12).

Two job descriptions for a watchman, Codes 6327 and 6328 was submitted into evidence as Rx11. The latter code is dated July 2011 and indicates as the physical requirements of the job the ability to stand and walk for extended or continuous periods of time and the ability to climb staircases. The essential duties include responding to alarms system wide, patrolling the interior and exterior of designated facilities and locations during working and non-working hours to protect the premises, walking through the interiors and exteriors of

facilities, checking that doors are secured, fence lines are intact and that lighting is in working order. It also includes driving to various locations as part of a roving or mobile patrol to check various facilities. In reviewing the description with code 6327, dated February 2014, the Arbitrator notes that the document is virtually identical to code 6328 in all relevant ways. (Rx11).

The Respondent's Ashley Pak testified that the watchman job descriptions are not given to the employee but are available online. As to the two separate descriptions, she believed one was an updated version.

The "Willingness and Ability Questionnaire" for the watchman job completed by Petitioner was submitted into evidence as Rx10. Petitioner indicated both that he was not physically able or willing to perform the following: 1) working in all weather conditions with a uniform and possible steel toed boots, rain gear and safety vest; 2) remain attentive while monitoring video cameras and occasionally via random patrols of critical Water Department infrastructure; 4) be part of a roving patrol involving driving; and 5) be assigned to various Water Department locations throughout the city. He indicated he was not physically able to check exterior facility doors, check the property perimeter fence, check vehicle gates, check lighting as being in working order, checking the perimeter of construction sites for unsecured materials and tools, but that he was willing to perform these activities. (Rx10).

On 12/24/18, a letter was sent from Ms. Pak to Petitioner on Department of Water Management letterhead indicating that a watchman job was located which fit within his physical capabilities and that it was being offered to Petitioner. He was to contact Ms. Pak to start the process. He was advised that the paperwork involved required confirmation that he is able to perform the job duties of a watchman, and that if he believed his restrictions would prevent him from performing the duties "you MUST bring the relevant documentation to the appointment." (Rx8).

Petitioner testified he continued to perform a self-directed job search but did not find employment. Petitioner was again advised to contact the city via letter (Rx9). The 3/20/19 letter was sent by the City Department of Fleet and Facility Management's Paul Plantz to Petitioner indicating his name had been forwarded by the Department on Finance indicating he was capable of performing the job of watchman. Petitioner was advised to contact Mr. Plantz by 3/27/19 to discuss, and that if he failed to make contact it could result in the suspension of his benefits. (Rx9). Petitioner testified he called Mr. Platz and indicated he did not refuse the watchman job, but rather that he couldn't do the job. He asked Mr. Platz if he had any information regarding his physical restrictions and was told no. Petitioner testified he never heard from him again.

Petitioner was reevaluated a final time by Dr. Cole on 5/13/19. Petitioner reported he felt a "little better" since the last evaluation as to the right knee but reported still having difficulty with weightbearing for long periods of time and ambulating. Petitioner again appeared in a wheelchair. Dr. Cole was provided with a "watchman" job description and was asked if Petitioner could perform the job. Dr. Cole opined that "I have reviewed the job description of 'watchman' and believe he is capable of doing almost all that job description. However, the job needs to be primarily seated with minimal ambulation on his feet. It is my opinion after examining him again today and reviewing his fact pattern of medical records, the claimant will almost certainly have a difficult time with any significant amount of walking. A reasonable accommodation needs to be made there, but otherwise I think he can do the job." Petitioner remained at MMI. (Rx5).

Petitioner testified he has not received any additional benefits or medical treatment since he saw Dr. Cole on 5/13/19. Currently, he testified he continues to wake up with sharp left shoulder pain. He has to take Tylenol or put an over-the-counter cream/rub on it. He testified that every now and then he gets a sharp pain up the arm when he sleeps on that side, and it's hard to lift that arm overhead. As to the right shoulder he testified: "just it's a little weak." He continues to have pain and popping in the right knee, and sometimes it gives way. He has pain

with walking and has to walk slower. He can walk about 40 to 50 feet and has to take a break because he loses his breath. He testified that it is very hard for him to use stairs. He does not drive, he uses Pace transportation, which is how he got to the hearing.

Petitioner testified he has not had any other accidents besides what has already been testified to. His activities basically involve getting himself up, resting a little bit, sitting up. He takes Tylenol and uses Icy Hot on his knee so he can stand. He testified he doesn't do housework. He tries but really can't because it involves walking and lifting. He has a medical service / Salvation Army to do his housekeeping, and someone helps to either shop for him or to get a scooter for him to go into the grocery store.

On cross-examination, Petitioner testified he is currently 6'1", 399 pounds. Asked what his permanent restrictions from Dr. Jimenez were, Petitioner testified "just walking and climbing up and down stairs. . . and lifting something heavy." He didn't know exactly how much he was restricted from lifting. He did not recall what level of work Dr. Cole indicated he could do. He could not say exactly when he started using a cane, but that it was prescribed by Dr. Silver. He could not recall when he started using a wheelchair, though he believed Dr. Jimenez prescribed the wheelchair, scooter and a walker.

Petitioner testified he was unable to return to his regular job as a motor truck driver due to his restrictions. During his job search he testified that he initially applied for 10 jobs per week, which was later changed to 12 per week. He testified he generally applied by phone, though his friend drove him to some in person. He would call and ask to speak to the manager of the prospective employer. He received benefits while performing this search. Petitioner then testified that he would look for maybe 5 jobs on a daily basis, and that he would apply for about 10 jobs per week in person and 5 per week by phone. He would do this throughout the week, maybe a 50/50 split between phone and in person applications.

Petitioner testified he was diagnosed with chronic kidney failure and diabetes in 2014. His weight in 2013 was approximately 350 pounds.

Petitioner acknowledged that on 10/26/18 he attended an the MMI orientation at Respondent's request and received the information package submitted into evidence as Rx12. He testified that he submitted the contained paperwork to request a reasonable accommodation but did not recall when or to which department he submitted it. When questioned on re-cross, he testified he provided it to the Department of Personnel. Petitioner did not create a profile on the City Career website, testifying "I'm not good with computers. I'm computer illiterate. I don't know how to work computers." Petitioner verified that his mailing address is 125 East 87th Street and acknowledged that he received the 12/24/18 letter from Respondent (Rx8). He acknowledged the letter advised him that if he believed his restrictions would have prevented him from performing the job duties of a watchman, he was to bring relevant documentation to his appointment with Ms. Pak and agreed he did not do so in January 2019. As to some of the questions asked and his responses on the questionnaire he completed (Rx10) on 1/10/19, Petitioner agreed he had no medical restrictions on wearing a uniform, his ability to concentrate or his ability to drive. Petitioner agreed he received a 3/20/19 letter from Respondent's Department of Fleet and Facility Management (Rx9).

Petitioner initially agreed that at the time he saw Dr. Cole on 8/26/13, he was using a cane, walker, scooter and wheelchair to ambulate. Questioned on redirect, Petitioner indicated he didn't realize that the 8/26/13 exam with Dr. Cole preceded his 2/26/14 accident, and that he was there for a shoulder exam, and that he therefore was not using any assistive devices to ambulate on 8/26/13. He meant a later exam with Dr. Cole. As to his 5/13/19 exam with Dr. Cole, Petitioner answered "no" when asked if it was his understanding that Dr. Cole determined he was able to perform the watchman job: "He said the only thing you could do is sit behind a desk and watch a

. . . TV screen." He testified that he did not discuss accommodations with Dr. Cole, and that the Respondent did not offer any accommodations to the watchman job offer.

At the MMI orientation, Petitioner agreed he was provided with information on how to prepare a resume, but not as to how to perform a job search. He was never told whether he should look for work in person or by phone: "I was never told none of that. They just gave me – I picked up the sheets, and I went for the job search." Someone named "Bates" gave the packet to him and "just said you have to go to places and get it filled out." No one ever indicated he was doing the job logs he submitted to Respondent incorrectly, and he continued to receive benefits during his job searches until the dispute arose about the watchman job, at which point his benefits were suspended. At no time was he told he could return to his regular job. As to Dr. Jimenez, Petitioner could not recall what specific restriction he had on walking, standing or lifting.

Petitioner testified that while his chronic kidney condition was diagnosed in 2014, he was able to continue to perform his regular job with Respondent until the 2/26/14 accident occurred. When he met with Ms. Pak, she did not have a copy of his work restrictions. Neither did Mr. Platz when he spoke to him, and he did not ask Petitioner to provide him with them. Petitioner testified that while he did make copies of his job logs, he turned the originals in to Respondent, and he left his copies in his prior home when it was foreclosed on. This was the same situation with his copy of his request to Respondent for reasonable accommodation. Petitioner testified that he would dispute Dr. Cole's 8/26/13 record if it indicates he said he had to use a cane to ambulate. He has no future appointments scheduled with Dr. Silver or Dr. Jimenez.

Ms. Ashley Pak testified on behalf of the Respondent. She is an Administrative Service Officer I for the Department of Water Management, which she testified is a human resources position. She testified that she is familiar with the watchman position.

Ms. Pak indicated that she receives an "MMI" (maximum medical improvement) list from the City's Committee on Finance, which lists City employees with workers' compensation injuries who have reached their maximum potential through medical treatment. She testified that there are many candidates and she would hire watchmen from this list. The process involved contacting the candidate, indicating the opportunity is available, and asking them to make contact to get a "willing and able" questionnaire to start the process. An appointment would be scheduled at Ms. Pak's office and the questionnaire is provided to the employee and completed. If the employee answers yes to all questions, they would next be sent for finger printing. Once they are then cleared by the Department of Human Resources (DHR), the employee would be provided with a date to start work.
For someone looking for a watchman job who is not on the MMI list, they would find the job posting on the City of Chicago careers website, apply, and then a recruiter would review the candidates from a list. Ms. Pak then would also contact the candidate to have them complete the questionnaire, after which they would be sent for a physical and for fingerprints. The DHR has to review the package and approve an offer for the job being made. People on the MMI list, on the other hand, get a job offer right away after fingerprinting and questionnaire.

As to the 12/24/18 letter (Rx8), Ms. Pak recalled sending the letter to the Petitioner based on him being on the MMI list, indicating he was to contact her to start the process for the watchman job. He was asked to bring in any medical statements relevant to the job. Ms. Pak testified that when a worker on the list answers "no" to some willing and able questions, they need to provide supporting documentation to present to Committee on Finance. She recalled the Petitioner completed the questionnaire (Rx10) in January 2019, testifying that he did not provide medical documentation of his inability to perform work tasks he indicated he was unable to perform. She was not aware of Petitioner's permanent restrictions. Based on the Petitioner indicating he was unable to perform some of the tasks, she let him know he needed to send in the medical info in support of his

inabilities. Ms. Pak testified that a job candidate can ask questions about the form, though she could not recall if Petitioner asked her any questions about the form at the meeting.

Petitioner was no longer considered for the position after this because he didn't answer yes to the questions. Had Petitioner indicated that he could perform all the duties of a watchman in the questionnaire, he would have been sent for fingerprinting and his paperwork would have been forwarded to the Department of Human Resources, which she indicated was the same thing as the Department of Personnel, and Petitioner would have been hired. Petitioner was a priority on the MMI list based on his classification, so had he indicated he was willing and able to perform the job and went through fingerprinting, he would be able to get the job
On cross exam, Ms. Pak agreed that workers on the MMI list would have some type of physical restrictions. She believed that there were about 50 people on the list Petitioner was on while there were only 11 or 12 openings. However, she testified that there would have been an immediate job available to Petitioner had he completed the questionnaire and indicated he was capable of performing the job. Ms. Pak testified that the MMI list comes from the Committee on Finance and they don't provide any additional information on the worker's physical restrictions. She does not specifically review the job description (Rx11) with the employee. She would think the Department would have Petitioner's medical records and thus his restrictions. She has never asked the Department on Finance for this type of information herself. She reiterated that she asked the Petitioner for his work restrictions and he didn't provide anything to her. Had he sent them at a later time, she would have had it in her file. The MMI questionnaire goes to the Committee on Finance. Ms. Pak is not involved in whether the Petitioner received benefits or not, indicating she believed the Committee on Finance decides this based on copies of letters she has received from them indicating a workers' benefits were being terminated. She was not certain whether the Committee would consider Petitioner for the watchman job if he provided his work restrictions a couple weeks after the questionnaire was completed, as she had never had this happen. She has never had an employee say they wanted to re-do the questionnaire. Ms. Pak agreed the only job she would be able to offer an MMI employee is a watchman job. She is not privy to what the prior departments or jobs were of employees on the MMI list.

At the request of his attorney, the Petitioner was evaluated by vocational counselor Kari Stafseth of Vocamotive on 8/3/18 and issued a 9/24/18 report. Petitioner indicated he used assistive devices to walk all of the time, including a cane, walker, wheelchair and scooter. He used a walker with a seat for the meeting. He reported he didn't drive much, hadn't driven in 4 months and generally used a Pace bus to get around. Someone else washed his clothes and cleaned his home. He reported difficulty in getting his day started in the morning, and that this would take one to two hours. She noted that Petitioner was limited to sedentary work by both Dr. Jimenez and Dr. Cole. His job with Respondent was at the medium level, and he is no longer able to perform it. He completed high school and had a year of junior college but reported difficulty with math, reading and spelling and that he participated in special education classes throughout high school. His work experience was essentially limited to various driving jobs, so he therefore had minimal transferrable skills. She indicated the Social Security Administration considered him to be at an advanced age which significantly "affects a person's ability to adjust to other work." His multiple comorbidities were also noted. Counselor Stafseth, concluded that: "Given Mr. Cooper's age, education, narrow work history, lack of transferable skills, sedentary restrictions, and overall presentation, it is the opinion of this consultant that Mr. Cooper does not have access to a viable, stable labor market" due to his age, education, narrow work history, lack of transferable skills, sedentary restrictions and overall presentation. Ms. Stafseth also opined that the Petitioner is not a viable vocational rehabilitation candidate. (Px8).

On 4/30/19, vocational rehabilitation counselor Julie Bose completed a report to address whether the Petitioner has the residual functional capabilities to perform the work of a watchman. Ms. Bose indicated it was her understanding that Petitioner was offered two different watchman positions. She reviewed the Respondent's job description for a watchman, indicating the essential duties included monitoring security cameras, receiving calls

from watchmen, calling 911 if necessary, and to patrol the interior and exterior of the building. The indicated physical requirements included a "need to stand and walk for extended or continuous periods." Because the standing and walking were not further defined, Ms. Bose asked for a clarification in order to determine whether the Petitioner was able to perform the watchman's job per Dr. Cole's restrictions. She stated that the City's Assistant Commissioner of Security indicated that standing and walking was minimal in both of the offered watchman positions, and totaled less than three hours in a watchman's eight-hour workday. Ms. Bose noted that "sedentary work does allow for up to three hours in an eight-hour workday" based on the definition of the U.S. Department of Labor DOT. Her review of the watchman job description indicated squatting, kneeling, and climbing are not required. She further stated: "It is important to note that this consultant is familiar with the City of Chicago's watchman position, as this consultant has placed individuals in watchman positions in the past. Also, of note, the watchman is a recognized position in the Dictionary of Occupational Titles and is not a temporary modified duty position or makeshift position. Based on the information provided and reviewed, it is this consultant's opinion that the watchman position offered to Mr. Cooper falls within the parameters of the work restrictions by Dr. Cole on 4/16/18." (Rx6).

On 5/22/19 vocational counselor Stafseth was deposed by the parties regarding her 9/24/2018 vocational report. In her deposition, counselor Stafseth reiterated her opinion that Petitioner had no transferrable skills "and that he did not have any experience performing any type of work that is within the sedentary level of his physical command." This included the fact that the Petitioner reported a work history almost exclusively involving the driving industry, and that he had a level of learning disability which Counselor Stafseth indicated impacted his ability to undergo vocational retraining. She opined that he had lost access to his previous job as a motor truck driver due his work injury, that he is permanently restricted to a sedentary duty level and that he was facing multiple barriers to a successful return to work and did not have access to any viable stable labor market. Regarding the watchman's position that was offered by Respondent, counselor Stafseth stated that the position required activities that were outside Petitioner's sedentary restrictions and was considered a light-duty job according to the Dictionary of Occupational Titles. (Px9).

On cross-examination, counselor Stafseth acknowledged that she usually is retained by claimants and has been retained by Petitioner's counsel 20 to 30 times in her career since earning her certification in 2009. She testified she did not recommend that Petitioner undergo aptitude or interest-based testing because looking at his overall picture he would not have access to gainful employment. She testified that the sedentary physical demand work level involves lifting no more than 10 pounds, sitting for the majority of the shift. As to whether a job involving three hours of walking fits within the category depends on other factors such as frequency and duration of the walking. However, she acknowledged that as long as the job involved only occasionally lifting up to 10 pounds and sitting for the majority of the day it would fall within the definition of sedentary duty. She agreed he has not been medically permanently disabled from work and has not been medically restricted from driving. When she met with the Petitioner, she was not aware that he had been offered a job as a watchman. She agreed he should have no problems wearing a uniform or paying attention to a monitor. (Px9).

On redirect, counselor Stafseth testified that her understanding of a watchman job would involve some level of patrolling, which would involve walking exterior or interior facilities, standing a post and/or checking in people/drivers. She disputed such a job being sedentary in that, based on her experience, it requires the ability to stand and walk, which would be the light physical demand work level. (Px9).

Petitioner submitted the prescription expenses he claims to be causally related to the accidents at issue as Px7. Respondent submitted documentation of medical expenses and weekly benefits paid to or on behalf of the Petitioner. (Rx12).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified before the 8/5/11 accident, he had never injured his left shoulder before, nor had he reinjured his left shoulder since that date. The Petitioner's credibility on this count is suspect, given that Dr. Wolin indicated he had undergone bilateral rotator cuff repairs in 2005.

At the same time, there is no evidence that Petitioner has had any ongoing treatment since 2005, and the evidence supports that he was working his regular duty job at the time of the 8/5/11 accident and had been for some time. The Arbitrator noted there also is discrepancy in the accident description that the Petitioner testified to, that he slipped on his truck steps, and the history provided to Dr. Silver, that he was trying to loosen some tight clamps by pounding them with a brick and he felt severe left shoulder pain. However, the Respondent stipulated that an accident occurred on that date which arose out of and in the course of his employment. The Petitioner's initial complaints were clearly related to the left shoulder.

The Arbitrator finds that the Petitioner's left shoulder condition is causally related to the 8/5/11 accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

While Petitioner was under the care of Dr. Silver for his left shoulder injury, he was prescribed Medrox patches for the use of pain relief for the left shoulder. According to the RX Development bill dated 7/11/17 contained within Px7, Petitioner received thirty Medrox patches on 6/21/13 for his 8/5/11 injury, totaling $895.08. While Respondent's payment listings (Rx13) for the 8/5/11 accident lists receipt of the $895.08 bill, there is no indication the Arbitrator could locate that indicates this bill was ever paid. Additionally, the bill for Dr. Silver's medical and surgical services for Petitioner's left shoulder totaling $26,155.00, contained within Px1, does not appear to have been paid by Respondent according to Rx13.

The Arbitrator finds that the Petitioner is entitled to have these expenses paid by Respondent pursuant to Sections 8(a) and 8.2 (Medical Fee Schedule) of the Act. As the Arbitrator is not an expert in deciphering the Respondent's payment records, the Arbitrator finds that the Respondent is entitled to credit for any and all payments made towards the awarded bills, and Respondent shall hold Petitioner safe and harmless with regard to same. The Arbitrator would further note that the Respondent's liability for the awarded expenses is limited to that allowed by the Medical Fee Schedule, and Dr. Silver may not seek to recover any remaining balances that may be alleged beyond what the Fee Schedule allows from either the Petitioner or the Respondent.

The parties stipulated at hearing that the Respondent may address medical expense issues directly with the providers and, if applicable, make any outstanding payments directly to the providers.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, a number of specific factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after 9/1/11. As this accident predates 9/1/11, §8.1b is not applicable to the case at bar.

The Petitioner was diagnosed with left shoulder impingement and underwent what essentially was a clean-out decompression procedure. The MRI indicated no full thickness tears, and the surgical report notes no tendon or ligament repairs were performed, outside of coracoacromial ligament transection that was related to decompression. Dr. Silver released Petitioner to regular work duties following his recovery. Petitioner testified he continues to awaken with sharp left shoulder pain and difficulty with overhead use. It is relevant to the Arbitrator that the Petitioner's testimony regarding how the accident occurred does not match with the records of Dr. Silver, as well as that he testified he had no prior left shoulder problems and then reported to Dr. Wolin that he had previously undergone bilateral rotator cuff repairs, and the fact that the surgery really addressed degeneration and impingement as opposed to internal derangement.

Based on the record as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of 7% of the person as a whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dwayne Cooper,
Petitioner,

vs.

No: 12 WC 023801
(Consolidated with 11 WC 030282, 14 WC 007604)

City of Chicago,
Respondent.

21IWCC0144

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, maintenance, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Respondent's Petition for Review listed all three consolidated cases. However, in its Statement of Exceptions, Respondent concedes that this case, 12 WC 023801, should be affirmed in its entirety. The issues raised by Respondent on review pertain only to consolidated Case No. 14 WC 007604 and have been addressed by the Commission in a separate opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 27, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0144

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 24 2021

Marc Parker

mp/dk
o-3/18/21
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, DWAYNE
Employee/Petitioner

Case# **12WC023801**

11WC030282
14WC007604

CITY OF CHICAGO
Employer/Respondent

21IWCC0144

On 3/27/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.80% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0010 CITY OF CHICAGO DEPT OF LAW
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0144

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DWAYNE COOPER
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **12** WC **23801**

Consolidated cases: **11 WC 30282 & 14 WC 07604**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **July 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **July 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**71,468.80**; the average weekly wage was $**1,374.40**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**55,240.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**55,240.40**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner's right shoulder condition is causally related to the July 11, 2012 accident.

Respondent shall pay Petitioner permanent partial disability benefits of $712.15 per week, the maximum allowable statutory rate, for 35 weeks, because the injuries sustained caused the loss of use of 7% of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **July 11, 2012** through **July 22, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 26, 2020
Date

MAR 27 2020

STATEMENT OF FACTS

Petitioner testified he has worked as a garbage truck driver for Respondent for about 26 years. His duties involved driving down city alleys, letting his laborers fill the truck with garbage and going to dump the truckload. Petitioner testified he has to climb up into the truck, push the bed blade up and push the track back.. How long this takes depending on whether it gets stuck. If he does get stuck, he has to get back into the truck to shake the compost loose. His normal shift ran from 6 am to 2:30 pm, five days per week.

On 8/5/11, Petitioner testified he was getting out of his truck. The steps down were slippery due to being at the dump, and he slipped and fell and hurt his left shoulder. He testified he felt a tingling sensation and pain, and later was unable to lift his arm. He contacted his supervisor and was taken to MercyWorks. He testified he was referred to a specialist, Dr. Silver.

On 8/12/11, Petitioner initially saw Dr. Silver. He reported that while working on a garbage truck on 7/5/11 he was trying to loosen some tight clamps by pounding them with a brick and he felt severe left shoulder pain. He indicated he had no left shoulder problems prior to this incident. Left shoulder x-rays were normal. Following exam, Dr. Silver diagnosed rotator cuff impingement and injected the shoulder. He also prescribed physical therapy, noting that anti-inflammatories would not be used due to Petitioner's chronic renal failure. Petitioner was held off work for 4 weeks. (Px1).

At 9/16/11 follow-up, Dr. Silver noted Petitioner's shoulder continued to do poorly with positive impingement and loss of motion. A left shoulder MRI was prescribed, and he was continued off work. (Px1).

The left shoulder MRI on 10/4/11 reflected articular surface and intrasubstance tearing of the supraspinatus without full thickness tearing, prominent erosion and degenerative change along the inferior glenoid with posterior inferior labral tear not excluded, as well as biceps tenosynovitis. Cystic changes were also noted in various locations. (Px1).

Noting a left partial thickness rotator cuff tear, Dr. Silver on 10/5/11 noted Petitioner's symptoms continued despite the injection and therapy. Arthroscopic surgery was prescribed, which would be followed by a continuous passive motion (CPM) machine "due to the severe stiffness and frozen shoulder that he presently has." (Px1).

Surgery was performed on 12/13/11, involving arthroscopic debridement, synovectomy, lysis of adhesions, distal clavicle resection and subacromial decompression with partial anterior acromioplasty and coracoacromial ligament transection. Diagnosis was left rotator cuff impingement. The report notes that the labrum, articular surfaces, biceps tendon, subscapularis tendon and articular surface of the rotator cuff were all normal, but there was obvious cuff impingement. (Px1). The Arbitrator notes there is a dispensary note prescribing not only the CPM machine, but also a Game Ready Cooling Device and a Thermal Tech/Vascutherm. (Px1).

Petitioner testified that he still had pain and the shoulder felt weak after surgery. On 1/3/12, it was noted Petitioner had a PCM machine at home and was to move from Stage 1 to Stage 2. On 2/10/12, Petitioner had regained approximately 160 degrees of forward flexion and lateral abduction. He was limited to right hand use only and if this could not be accommodated, he was to remain off work. On 2/24/12, Dr. Silver indicated that Respondent had obtained a Utilization Review regarding the use of the PCM machine, opining the device was needed due to Petitioner having had a frozen shoulder, and indicating that a 2/21/12 attempt to contact Dr. Ross for peer-to-peer review failed because the phone number Ross left would not accept incoming calls. On 3/23/12, Dr. Silver indicated Petitioner had regained full forward flexion and lateral abduction and would begin working on rotational motion and strengthening. He was to continue PCM use. On 4/20/12, Petitioner had regained

rotational motion and was limited to a 5-pound lifting restriction. On 6/1/12, Dr. Silver determined Petitioner had reached MMI and could return to his regular work duties. (Px1).

When Dr. Silver returned him to work in June, Petitioner testified he was still having left shoulder pain. He also testified that Dr. Silver injected the shoulder, but there is no record of this. He did return to work as a truck driver but testified he had ongoing problems with the left shoulder when climbing down from his truck and pushing and pulling the controls. The pain was sharp, but he continued to perform his work duties.

While working on 7/11/12, Petitioner testified that he fell again while trying to climb up into the truck, resulting in his body being partly inside and partly outside of the truck. He testified he injured his right shoulder at that time with sharp pain. HIs supervisor came out to the scene, had Petitioner complete an accident report and he was again sent to MercyWorks. He testified that he had x-rays and was again referred to a specialist. The records of MercyWorks were not located within the evidence submitted.

Petitioner returned to Dr. Silver on 7/13/12. The report states that Petitioner hurt his right shoulder on 7/10/12 while climbing into his garbage truck, slipping and falling into the cab, striking his right shoulder. Petitioner reported he had no prior right shoulder problems. He reported persistent pain and limited range of motion. Dr. Silver made the same diagnosis as with the left shoulder, rotator cuff impingement, and injected the shoulder. Petitioner was referred to physical therapy, held off work and advised to follow up in 4 weeks. A revised report was prepared which modified the injury date from 7/10/12 to 7/11/12. (Px1).

On 8/10/12, Petitioner reported only temporary relief with the injection. Right shoulder MRI was ordered, and Petitioner was continued off work. The radiologist reported the 8/31/12 films showed arthritic changes of the AC joint as well as the glenohumeral joint. Also noted was articular surface tearing of the supraspinatus tendon without evidence of a full thickness tear, thickening of the inferior glenohumeral ligament with degenerative changes of the glenoid labrum, moderate joint effusion and adherent debris suspected along the anterior subcoracoid process. Petitioner followed up on the same date with Dr. Silver and he prescribed arthroscopic surgery, again noting a PCM machine would be utilized post-surgery. Dr. Silver also opined that the surgery was causally related to the 7/11/12 accident. (Px1).

Petitioner was examined by orthopedic surgeon Dr. Cole with regard to his right shoulder on 10/22/12 at the Respondent's request pursuant to Section 12 of the Act. He reported slipping and falling hard getting into his truck on 7/11/12, resulting in constant 10 out of 10 (10/10) pain as a result. He denied any prior right shoulder problems or treatment. He noted MercyWorks had taken negative shoulder x-rays and diagnosed a strain. After obtaining new x-rays, indicating loss of glenohumeral space but no bone-on-bone findings, and reviewing the MRI, Dr. Cole diagnosed a possible partial thickness rotator cuff tear with preexisting arthritis. It was his opinion that Petitioner aggravated his preexisting condition and this resulted in his need for care. He noted his concern was that Petitioner had gross osteoarthritis and pain below shoulder level. He noted the prognosis was "a bit more guarded" because he didn't have great relief with the injection and there was no significant cuff tear indicated on MRI. Dr. Cole stated: "Although it is reasonable to consider surgery, the prognosis is a bit more guarded given the above factors. As a result, I would first and foremost, recommend an injection into the glenohumeral joint itself and a few more weeks of physical therapy. Surgery in the arena of osteoarthritis in the shoulder with a questionable rotator cuff tear is a bit more guarded as well for the reasons outlined above." He opined that Petitioner should not lift over 5 pounds above shoulder level and do nothing repetitive over 10 pounds lifting, pushing and pulling below shoulder level. (Rx1).

Dr. Silver on 11/9/12 noted he reviewed Dr. Cole's report and performed the injection into the Petitioner's right shoulder, which was to be followed by three weeks of therapy. On 11/30/12, Dr. Silver noted the injection did not relieve Petitioner's symptoms and he therefore planned to perform surgery. The next note of 1/18/13

indicated Petitioner's surgery would be performed "over the coming weeks" and that he remained off work pending same. Norco, Meloxicam and Omeprazole were prescribed. (Px1).

Right shoulder arthroscopic surgery was performed by Dr. Silver on 1/29/13, and the procedure was virtually identical to what had been performed on the left side, with an identical post-surgical diagnosis of rotator cuff impingement. (Px1).

Petitioner testified he had ongoing pain after this surgery as well. Petitioner continued to follow up with Dr. Silver postoperatively. He was advised to start therapy on 2/6/13 and to continue to use his CPM machine. On 3/8/13, Dr. Silver noted Petitioner had only recently started therapy due to delay in authorization. On 4/12/13, he continued therapy and released Petitioner to left-handed work only. On 5/17/13, Dr. Silver indicated Petitioner had full forward flexion and lateral abduction with internal rotation to the belt line. Petitioner was advised he could lift up to 5 pounds with the right arm below shoulder level but that he was still unable to climb into or drive the garbage truck. (Px1). Petitioner testified that during therapy he was getting some numbness and "a little pain."

On 6/21/13, Dr. Haskell examined Petitioner on behalf of Dr. Silver, noting Petitioner had "improved somewhat in strength and range of motion but not sufficiently to return to his former work." He was advised to continue therapy and to limit to left arm use only. On 7/12/13, Dr. Silver indicated Petitioner continued to improve and was capable of a 10-pound lifting restriction. He was to continue therapy for four weeks. On 8/16/13, his restriction was changed to 20 to 25 pounds of lifting. It was noted that he needed to lift over 100 pounds at his job. Therapy was continued. (Px1).

Petitioner was reexamined by Dr. Cole on 8/26/13. His understanding of the surgery was "an arthroscopy/clean out", though he acknowledged he did not have the actual operative report to review. Petitioner reported 50% subjective improvement since surgery. Left shoulder exam was unremarkable. Dr. Cole stated: "Of note, (Petitioner) has ongoing knee complaints. He is walking with a cane. He has bilateral lower extremity edema as well." He further stated: "Also noteworthy is his morbid obesity. The combination of his comorbidities is enough to significantly restrict him in any activity. I would submit that, absent of the significant comorbidities, he is actually capable of working a full-duty job with no restrictions as related to the right shoulder. If he vehemently was unable to conduct the duties of his full job, then a functional capacity evaluation (FCE) would be warranted. Please note that I would make every attempt to avoid an FCE, as I think he is a legitimate risk to injure himself further during the FCE and would likely be invalid as well." Dr. Cole indicated that Petitioner had a moderate ongoing right shoulder disability with pain but with no significant objective findings on exam. He opined that Petitioner was at MMI and could work as noted. (Rx2).

Petitioner testified he continued to treat with Dr. Silver until 9/6/13, when he was released to return to work. However, on 9/20/13, a Dr. Silver note stated: "Per phone conversation with (Petitioner) we are recommending an FCE be performed at this time." (Px1).

The Arbitrator notes that there are additional records in Px1 which indicate that Dr. Silver had been prescribing hydrocodone in two different doses simultaneously (one for regular pain and one for more severe pain), Mobic and Tranzgel Pain Relief Gel, Voltaren gel and Terocin Lotion.

Petitioner testified that after he was released, he continued to have right shoulder problems. He would awaken in the morning with sharp pain. He was taking Tylenol and would use the cream rub each morning so he could be ready to work. While he continued to work, he testified he felt pain and the numb feeling when he would climb up into the truck.

On 2/26/14, Petitioner testified that while working he and his crew pulled into a McDonald's during a break to use the restroom. While exiting the truck he testified he fell again, indicating this time he fell to the ground, injuring his left side, right knee and re-injuring his right shoulder.

Petitioner was taken to Roseland Community Hospital, where he testified he was advised by the doctor there that they really couldn't do anything for him and advised him to go to the County to see a specialist. These records are not in the evidentiary record. Petitioner testified that he called his supervisor and was instead advised to see a doctor on Dearborn Street in downtown Chicago, who indicated he had a torn rotator cuff but "didn't really look at my knee." It is unclear when this occurred or who the provider on Dearborn is.

Petitioner testified he had no left shoulder injuries prior to 8/5/11 and has not reinjured it since. He had no right shoulder injuries prior to 7/11/12. He testified he'd had no problems with his right knee prior to 2/26/14.
Petitioner returned to Dr. Silver on 3/5/14. Petitioner reported he slipped on slippery steps getting out of his garbage truck on 2/26/14, falling to the ground and "crashing upon his right knee and hyperflexing it as well as onto his right shoulder." He reported pain in the shoulder and knee since the accident with painful and limited motion. No fractures were indicated at the ER. X-rays of the right knee showed complete loss of articular cartilage in the medial compartment. Diagnosis was preexisting asymptomatic degenerative changes of the right knee that were exacerbated and accelerated by the injury, and recurrent right rotator cuff impingement. The plan was to prescribe pain and anti-inflammatory medication and physical therapy. A right knee injection was performed, and a right shoulder injection was planned. (Px2).

Petitioner testified that the right knee injection only helped temporarily. The knee would pop, and he would have difficulty getting out of a chair after prolonged sitting.

Respondent referred Petitioner back to Dr. Cole for examination on 4/7/14. Petitioner reported he had returned to regular duty since his last visit with Cole and did well as to the right shoulder from 9/2013 to 2/26/14, when he fell off the back of the truck and injured his right shoulder and right knee. Petitioner noted he also was awaiting a kidney transplant for chronic renal failure due to hypertension. Petitioner was noted to have had preexisting right knee arthritis but indicated he had no symptoms prior to 2/26/14. He reported injection provided only temporary relief and he continued to have unresolved anterior and anterolateral right knee pain since the injury. As to the shoulder, Dr. Cole recommended a subacromial injection followed by 4 to 6 weeks of therapy. As to the knee, he recommended a series of 3 to 4 viscosupplementation injections, which he indicated is appropriate for symptomatic osteoarthritis in the knee. Dr. Cole noted that none of these conditions were related to the 2012 injury. He opined the Petitioner could work with restrictions of no over-the-shoulder work with the right arm. As to the knee, he diagnosed a work-related aggravation of right knee osteoarthritis and a new injury to the right shoulder on 2/26/14. (Px2).

On 4/18/14, Petitioner told Dr. Silver the right knee injection provided only mild temporary relief and that his therapy had been denied. His right shoulder had worsened. Dr. Silver injected the right shoulder and prescribed Meloxicam, Ultram, hydrocodone and Terocin cream and patches, and again prescribed therapy. On 5/30/14, Petitioner reported improvement with the right shoulder injection. Dr. Silver indicated he was awaiting authorization for a right knee replacement surgery "due to the articular cartilage damage he sustained" on 2/26/14. Petitioner was noted to have to use a cane to ambulate. He was continued off work. (Px2).

On 7/18/14, Dr. Silver reported that Petitioner had regained 160 degrees of flexion and abduction in the right shoulder following the injection and that impingement signs were now negative. He nevertheless continued therapy for the shoulder and again indicated Petitioner remained temporarily disabled pending the recommended right knee replacement surgery. Medications were continued. By 8/29/14, Petitioner had regained 170 degrees of shoulder motion. Therapy and medications were again continued. (Px2).

Petitioner was reexamined by Dr. Cole on 9/8/14. Petitioner indicated he had relief with the right shoulder cortisone injection in the spring and was "overall plus/minus better now" compared to 4/7/14, but that the right knee has failed to thrive with therapy. He was awaiting kidney transplant. Dr. Cole noted: "As a reminder, (Petitioner) is morbidly obese, diabetic, and dealing with chronic renal failure." He understood the mechanism of injury and inciting event to be falling onto the right shoulder and knee. Petitioner complained of pain all over the right knee, while the shoulder hurt with overhead movement. Petitioner was using a cane and "is actually seen in a wheelchair today as he was transported from the entrance to the exam room" and remained in the wheelchair for exam, which reflected mild right shoulder impingement signs but nearly full active range of motion. The right knee was warm with an effusion and mild tenderness medially and laterally. March 2014 right knee x-rays showed advanced bone on bone degenerative joint disease (DJD) with collapse medially on the right and left. Dr. Cole diagnosed an essentially resolved right shoulder, which was at MMI and with no need for work restrictions, and advanced DJD in the right knee with aggravation of the preexisting condition. While he agreed that a total knee replacement was "the next and most viable appropriate and definitive option for him", but "from a causality standpoint, I cannot state that the need for right knee care is categorically related to the February 2014 injury in question." He noted Petitioner did fall off the truck and struck the knee directly, and he "undoubtedly aggravated a preexisting condition", but the condition was of advanced, end-stage DJD in association with comorbidities of chronic renal failure, diabetes and morbid obesity. He stated: "In my opinion, undoubtedly the claimant would have arrived at a need for care for the right knee in the near future, even absent of this injury. I cannot categorically state that the injury in question in February 2014 really changed the fate/natural history of the right knee to any large degree, but rather simply might have brough the claimant to a need for care somewhat sooner than otherwise might have been necessary." He opined that Petitioner as not at MMI as to the right knee and was capable of only a job with "minimum walking and sedentary/seated desk based work." (Rx3).

On 10/3/14, Dr. Silver drafted a letter in response to the report of Dr. Cole. Silver disputed Cole's opinion that he could not say the "2/2/14" accident really changed the natural history of Petitioner's right knee. Dr. Silver states that Petitioner's right knee was asymptomatic prior to the accident, he had no history of previous symptoms or medical treatment for the knee and had been working full duty at the time of the injury. He stated: "He definitely sustained an injury to the right knee as noted previously and this has caused a permanent exacerbation and acceleration of asymptomatic pre-existing degenerative changes." Petitioner was to continue his medications and right shoulder therapy pending knee replacement surgery. (Px2).

Petitioner returned to Dr. Silver on 11/7/14, 12/12/14 and 1/16/15, and the doctor indicated his right shoulder was at a "4 to 4+ level" with negative impingement signs, but he again continued physical therapy for the shoulder while awaiting knee surgery authorization. Medications, including hydrocodone, were continued. Another letter from Dr. Silver on 1/23/15 to Petitioner's counsel reiterates this opinion, noting Petitioner "had no previous history whatsoever of any symptoms, care or treatment to the right knee and therefore the opinion that he was in eminent [sic] need of a total knee replacement does not make any orthopedic sense unfortunately with all due respect." (Px2).

On 12/9/14, Dr. Cole issued an addendum report in response to questions from Respondent. He stated that Petitioner had an aggravation of his preexisting right knee condition "that has not been temporized to the point to reach an end of care. This being stated, I cannot categorically say that the injury in question changed the natural history of his knee condition in any significant way. The claimant maintained such a diathesis for arthritis that on a more likely than not basis he would have become symptomatic in the near imminent future absent of the injury." He also stated that Petitioner's obesity, chronic renal failure and diabetes creates a significant predisposition to knee osteoarthritis. Dr. Cole concluded the report by stating that Petitioner more likely than not would have needed a total knee replacement regardless of the 2/26/14 accident and that he didn't

believe the accident accelerated the need to any large degree "given the fact pattern provided and his significant diathesis for osteoarthritis of the knee." (Px2).

Petitioner continued to follow up with Dr. Silver throughout 2015 (8 visits). Despite what appears to have been relatively normal right shoulder function, the reports note formal physical therapy was continued. The right knee remained significantly symptomatic while awaiting surgical authorization, and Meloxicam, hydrocodone, Ultram and Terocin cream continued to be prescribed. On 2/27/15, Dr. Silver noted the replacement surgery was needed due to articular cartilage damage at the time of the work injury. On 8/14/15, Dr. Silver found that Petitioner's right shoulder motion had "regressed somewhat" to a 150-degree range of motion. Therapy was continued. On 9/25/15, Dr. Silver again opined that the work accident damaged the articular knee cartilage resulting in a bone-on-bone situation, again noting the knee was asymptomatic prior to the accident. By 11/9/15, he indicated the shoulder motion had regressed to 130 degrees of flexion and abduction, and to 120 degrees by 12/18/15. (Px2).

Petitioner was examined by orthopedic surgeon Dr. Jimenez on 2/11/16. His understanding was that Petitioner injured his right knee on 2/26/14 when he slipped and fell of the running board on his truck, injuring the knee and right shoulder. He reviewed the records of Dr. Silver and Dr. Cole. Petitioner's current complaints included clicking, popping and swelling in the knee, difficulty arising from a chair, walking great distances and going down stairs. Examination and x-rays were consistent with end-stage knee osteoarthritis, and Dr. Jimenez agreed with the recommendation for total knee replacement given worsening pain and activity limitations and the failure of conservative measures. He noted Petitioner had a history of high blood pressure, cholesterol and morbid obesity, but indicated he had no history of diabetes. Dr. Jimenez opined that the knee replacement was related to the aggravation of Petitioner's preexisting right knee arthritis as a result of the 2/26/14 accident. He related that Petitioner's right knee was "relatively asymptomatic" prior to 2/26/14 and that there had been significant worsening following the accident "and therefore the timeline and the necessity for knee replacement has been moved up and the timeline has been shortened because of his work-related event." (Px3). It is unclear to the Arbitrator whether this examination was requested by the Petitioner's counsel or Respondent.

Petitioner was again seen by Dr. Silver on 1/29/16 and 3/11/16. On the latter date, he indicated Petitioner's right knee pain had worsened to the point that he had to walk with two canes with 10/10 pain that would reduce to 7/10 to 8/10 pain with medication. On 4/22/16, Dr. Silver indicated that he was awaiting further physical therapy to maximize Petitioner's functional shoulder capacity, "otherwise he will be permanently restricted with regard to his right shoulder with no use of the right arm above the shoulder level and no repetitive motion activities of the right shoulder with a 10 pound lifting restriction." He indicated Petitioner had been weaned down to a 2.5 mg dose of hydrocodone for severe pain and Ultram for lesser pain. On 6/3/16, Dr. Silver noted Petitioner's shoulder motion had improved back to 140 degrees while still awaiting authorization for further therapy. He continued to await right knee replacement authorization. Off work status was continued throughout 2015 and through this 6/3/16 report, which appears to be the last report of Dr. Silver. (Px2).

Petitioner had a preoperative visit with Dr. Jimenez on 7/26/16. His elevated body mass index (BMI) was noted to be a risk. (Px3).

Petitioner testified he had been waiting for seven years for a kidney transplant and going through dialysis, and he received a call on 8/2/16 indicating he had to be at the hospital that same night and he underwent the kidney transplant, resulting in postponement of his planned right knee surgery. As a result, the parties indicated Petitioner's TTD was suspended as of 1/29/16 and reinstated as of 3/10/16.

Following a 3/9/17 pre-surgery visit, Petitioner ultimately underwent right total knee replacement surgery with Dr. Jimenez on 5/17/17. (Px3).

Petitioner underwent extensive post-operative physical therapy, initially as an inpatient at a rehabilitation facility (Carlton On The Lake), and continued to follow up with Dr. Jimenez through 12/14/17. Petitioner was at Carlton On The Lake from 5/21/17 to 7/10/17 (see Px11). After his release from Carlton, Petitioner testified he was still having problems walking and still had pain in his shoulder. He initially used a cane while at Carlton, and ultimately began to use a wheelchair. He testified it was difficult to get in and out of the wheelchair initially, but therapy helped him build the strength to do so. He continued to use a wheelchair following his release and testified the Respondent installed a lift at his home so he could get in and out of the house. He also has a motorized scooter.

On 7/13/17, Dr. Jimenez noted that Petitioner indicated he was using a walker but appeared for the visit in a wheelchair, and he recommended work on gait training and avoiding sitting in a wheelchair for any prolonged period of time to prevent any sacral ulcers. On 8/17/17, Petitioner was ambulating with a walker and was using Tramadol for pain control. Petitioner was noted to have left knee swelling on 10/3/17, x-rays showed degenerative changes, and the left knee was injected while therapy continued for the right knee. On 11/7/17, Petitioner reported doing well with therapy and x-rays showed good right knee alignment. There was full right knee range of motion and no evidence of instability. Dr. Jimenez discontinued therapy and ordered an FCE. Petitioner was held off work throughout this time. (Px3).

The 11/6/17 final physical therapy report from Athletico notes Petitioner attended 34 of 37 visits. While he had full right knee range of motion, he continued to have deficits in right knee and hip strength, muscular endurance, balance and gait. He was using a cane or walker due to complaints of the right knee giving out. His progress had been affected by his comorbidities. He was noted to have achieved his short-term goal and two out of three long term goals, falling short in ambulating without any assistive devices. He was to have two additional sessions focused on providing him with a home exercise program and strengthening. (Px6). Petitioner agreed his walking was getting a little bit better with therapy at Athletico but testified he still had right shoulder pain and had difficulty with overhead lifting.

On 12/6/17, Athletico physical therapist Paul Sullivan reported that when Petitioner was attempting to perform the FCE, during the musculoskeletal portion Petitioner demonstrated significant restrictions to his right shoulder range of motion along with significant pain behaviors with resisted shoulder flexion and abduction. Impingement sign was positive for right shoulder pain behaviors. Sullivan stated: "Given the client's significant ROM and strength limitations and pain behaviors to his right shoulder, he is recommended to seek medical clearance for performance of the FCE regarding his right shoulder." A separate letter was issued by therapist Sullivan that same day indicating that Petitioner reported a history of kidney replacement surgery in August 2016 and kidney removal surgery in April 2017. As he indicated his kidney surgeon had not been made aware that he was going to be performing an FCE, Sullivan indicated that given Petitioner's surgeries and current comorbidities, he had to also seek clearance from is kidney physician. (Px6).

At the last visit of 12/14/17, Dr. Jimenez noted Petitioner's knee on exam showed some residual pain and stiffness on range of motion but was improving. There were no neurologic issues and x-rays showed good hardware positioning with no evidence of loosening. He advised Petitioner to advance activity, continue strengthening and range of motion, and weightbearing as tolerated. Dr. Jimenez found Petitioner to be at MMI and stated: "I am recommending at this juncture since he was unable to complete the FCE, they staged the function of his renal issues and other issues to determine if this patient is at MMI. He will have permanent restriction with sedentary duty on the right knee." He was to follow up annually. (Px3).

Petitioner testified he was examined by orthopedic surgeon Dr. Wolin for his right shoulder due to continued pain and inability to use the arm overhead. Petitioner saw Dr. Wolin on 2/6/18, whose report notes it was with

regard to the shoulders. Noted was the 2/26/14 accident where he fell on his right side with the knee and shoulder hitting the ground first. Petitioner complained of right greater than left shoulder pain. He was unable to use anti-inflammatory medication due to his kidneys. The report states Petitioner underwent bilateral rotator cuff repairs in 2005 and had done well since then. He had not worked since 2/26/14. Following examination and review of right shoulder x-rays reflecting moderate glenohumeral narrowing, Dr. Wolin performed a right intraarticular shoulder injection and prescribed physical therapy. The records of Dr. Wolin indicate Petitioner was then a no show for a 3/7/18 visit and canceled an 8/20/18 visit. (Px4). Petitioner testified that 3/7/18 was his last visit with Dr. Wolin because Respondent was not paying his bill.

Petitioner was again examined by Dr. Cole at Respondent's request on 4/16/18. He noted that he felt that Petitioner was likely to have needed a right knee replacement regardless of injury due to his comorbidities, but stated: "I thought he might have arrived at a need for care sooner than otherwise might have been necessary but to an indeterminate degree." Petitioner reported 8/10 level right knee pain, and he refused height and weight measurements, reporting that he weighed 400 pounds. Examination took place with Petitioner in a wheelchair, and he had full range of motion and strength, the knee did feel warm with no effusion. He noted Petitioner felt he was "half-way there" with recovery, and Dr. Cole felt he had a great outcome but needed to lose weight, noting it "will surely help him in many ways, both prolonging the longevity of his right knee replacement and quite literally possibly save his life with regard to his comorbidities." Dr. Cole opined that Petitioner's current complaints were really residuals related to his preexisting disease and comorbidities. Dr. Cole found Petitioner had reached MMI, advised against an FCE ("it really will only over limit him and risk further injury with unnecessary risk and expense") and recommended permanent sedentary restrictions with limited squatting, kneeling and climbing. His final statement was: "Regarding his extensive disability, I would loosely label his level of disability as 'marked/severe' but this does not relate directly to the right knee injury." (Rx4).

Petitioner testified that after his 5/17/17 release from Dr. Jimenez he wasn't able to "get about" without a wheelchair or scooter, but he agreed he could get in and out of the chair and "can walk some, yes." He testified: "Well, I walk to like the bathroom and the kitchen, but I can't stand too long. I get pain in my back and legs." He cannot use stairs. Petitioner was using a scooter at the time of the hearing. He believed he had seen Dr. Jimenez after 5/7/17, but could not recall the date, then testified that his benefits were being paid until an 11/9/18 visit with Dr. Jimenez, at which point they were terminated. He indicated that right after the 11/9/18 release Respondent asked him to perform a job search.

On 9/11/18, Respondent's Committee on Finance sent a letter to Petitioner indicating it was determined he had temporary or permanent work restrictions and "may be required to pursue certain job search and/or vocational rehabilitation as part of your continued entitlement to workers' compensation benefits." He was to participate in an orientation at DHR on 9/16/18, at which time he was to receive resources and tools aimed at helping him maximize his ability to find a job. He was to meet with a DHR representative who would help him to create a profile for the City online job screening system as well as guidance on performing a self-directed job search outside of City employment. This would apply whether Petitioner was in a formal vocational rehabilitation program or not. He was advised to bring to the orientation: current resume, email address, driver's license, copies of evidence of specialized skills or training. It was noted that a failure to attend could jeopardize his benefits. Copies were sent to both attorneys. (Px10).

Petitioner testified that the Respondent's Ashley Pak sent a 12/24/18 letter to him (Rx8), after which Petitioner made an appointment to see her. Prior to meeting with Ms. Pak, Petitioner was evaluated by Vocamotive with regard to vocational rehabilitation. He agreed he did not provide the report from this evaluation to Ms. Pak and did not bring any of his medical records to the meeting with Ms. Pak. He testified she advised him that he had to take a written test "to see what the job was about" but wasn't told what the job was. Petitioner also testified that prior to this time, on 10/26/18, he attended a vocational orientation at Respondent's request, where he watched

films regarding how to write a resume and to obtain employment. No job leads were provided, he was requested to do his own job search. He testified he had to look for jobs ("Calling places to find out if they're hiring, filling out applications.") and send weekly job logs to Respondent evidencing compliance. Petitioner provided his logs to Respondent weekly but was unable to secure employment.

Petitioner testified that the Respondent offered him the job as a watchman. He had to go to the City Water Department, where he met Ms. Pak. He testified she did not provide him with a job description, testifying: "No. All she did was hand me some paperwork I had to fill out", which he agreed included a "Willingness and Ability, Watchman" questionnaire. (Rx10). Petitioner testified the questionnaire described what his duties and physical requirements would be as a watchman and for each asked if he was "able" and/or "willing" to perform the job. Petitioner acknowledged that he indicated he was not able or willing to walk or stand too long, use steel toed boots or perform patrols, as well as deal with the weather. He then testified: "The only problem I had was the walking." He testified he was not told at that time how much he would have to walk. Petitioner then agreed that he was provided with job descriptions for the watchman position (Rx11), testifying his answers to the questionnaire was based on the indicated descriptions. Petitioner testified he was not asked for any of his medical records or physical restrictions. Overall, he did not feel he could perform the watchman job, mainly due to the walking and standing. He testified that he presented himself to Ms. Pak that day the same way he presented to the hearing, i.e. using an assistive vehicle for ambulation. Ms. Pak indicated that it was not her decision and that corporation counsel would get back to him. Petitioned testified that he never was contacted, and he was never offered any other job by Respondent. His benefits were again terminated, and he was not provided an explanation why.

A second essentially identical letter was sent to Petitioner by the Committee on Finance on 10/15/18, this time with a 10/26/18 date of orientation. He was to call to confirm by 10/23/18. (Rx7).

Rx12 is the MMI orientation packet that was presented to Petitioner on 10/26/18. There is a sign in page with a signature next to Petitioner's name. Of note, the packet contains job search tips, instructions on how to apply for City positions (involving a power point demo), resume advice, a copy of the City's reasonable accommodation policy and a form for requesting a reasonable accommodation, and a discussion regarding pension benefits. (Rx12).

Two job descriptions for a watchman, Codes 6327 and 6328 was submitted into evidence as Rx11. The latter code is dated July 2011 and indicates as the physical requirements of the job the ability to stand and walk for extended or continuous periods of time and the ability to climb staircases. The essential duties include responding to alarms system wide, patrolling the interior and exterior of designated facilities and locations during working and non-working hours to protect the premises, walking through the interiors and exteriors of facilities, checking that doors are secured, fence lines are intact and that lighting is in working order. It also includes driving to various locations as part of a roving or mobile patrol to check various facilities. In reviewing the description with code 6327, dated February 2014, the Arbitrator notes that the document is virtually identical to code 6328 in all relevant ways. (Rx11).

The Respondent's Ashley Pak testified that the watchman job descriptions are not given to the employee but are available online. As to the two separate descriptions, she believed one was an updated version.

The "Willingness and Ability Questionnaire" for the watchman job completed by Petitioner was submitted into evidence as Rx10. Petitioner indicated both that he was not physically able or willing to perform the following: 1) working in all weather conditions with a uniform and possible steel toed boots, rain gear and safety vest; 2) remain attentive while monitoring video cameras and occasionally via random patrols of critical Water Department infrastructure; 4) be part of a roving patrol involving driving; and 5) be assigned to various Water

Department locations throughout the city. He indicated he was not physically able to check exterior facility doors, check the property perimeter fence, check vehicle gates, check lighting as being in working order, checking the perimeter of construction sites for unsecured materials and tools, but that he was willing to perform these activities. (Rx10).

On 12/24/18, a letter was sent from Ms. Pak to Petitioner on Department of Water Management letterhead indicating that a watchman job was located which fit within his physical capabilities and that it was being offered to Petitioner. He was to contact Ms. Pak to start the process. He was advised that the paperwork involved required confirmation that he is able to perform the job duties of a watchman, and that if he believed his restrictions would prevent him from performing the duties "you MUST bring the relevant documentation to the appointment." (Rx8).

Petitioner testified he continued to perform a self-directed job search but did not find employment. Petitioner was again advised to contact the city via letter (Rx9). The 3/20/19 letter was sent by the City Department of Fleet and Facility Management's Paul Plantz to Petitioner indicating his name had been forwarded by the Department on Finance indicating he was capable of performing the job of watchman. Petitioner was advised to contact Mr. Plantz by 3/27/19 to discuss, and that if he failed to make contact it could result in the suspension of his benefits. (Rx9). Petitioner testified he called Mr. Platz and indicated he did not refuse the watchman job, but rather that he couldn't do the job. He asked Mr. Platz if he had any information regarding his physical restrictions and was told no. Petitioner testified he never heard from him again.

Petitioner was reevaluated a final time by Dr. Cole on 5/13/19. Petitioner reported he felt a "little better" since the last evaluation as to the right knee but reported still having difficulty with weightbearing for long periods of time and ambulating. Petitioner again appeared in a wheelchair. Dr. Cole was provided with a "watchman" job description and was asked if Petitioner could perform the job. Dr. Cole opined that "I have reviewed the job description of 'watchman' and believe he is capable of doing almost all that job description. However, the job needs to be primarily seated with minimal ambulation on his feet. It is my opinion after examining him again today and reviewing his fact pattern of medical records, the claimant will almost certainly have a difficult time with any significant amount of walking. A reasonable accommodation needs to be made there, but otherwise I think he can do the job." Petitioner remained at MMI. (Rx5).

Petitioner testified he has not received any additional benefits or medical treatment since he saw Dr. Cole on 5/13/19. Currently, he testified he continues to wake up with sharp left shoulder pain. He has to take Tylenol or put an over-the-counter cream/rub on it. He testified that every now and then he gets a sharp pain up the arm when he sleeps on that side, and it's hard to lift that arm overhead. As to the right shoulder he testified: "just it's a little weak." He continues to have pain and popping in the right knee, and sometimes it gives way. He has pain with walking and has to walk slower. He can walk about 40 to 50 feet and has to take a break because he loses his breath. He testified that it is very hard for him to use stairs. He does not drive, he uses Pace transportation, which is how he got to the hearing.

Petitioner testified he has not had any other accidents besides what has already been testified to. His activities basically involve getting himself up, resting a little bit, sitting up. He takes Tylenol and uses Icy Hot on his knee so he can stand. He testified he doesn't do housework. He tries but really can't because it involves walking and lifting. He has a medical service / Salvation Army to do his housekeeping, and someone helps to either shop for him or to get a scooter for him to go into the grocery store.

On cross-examination, Petitioner testified he is currently 6'1", 399 pounds. Asked what his permanent restrictions from Dr. Jimenez were, Petitioner testified "just walking and climbing up and down stairs. . . and lifting something heavy." He didn't know exactly how much he was restricted from lifting. He did not recall

what level of work Dr. Cole indicated he could do. He could not say exactly when he started using a cane, but that it was prescribed by Dr. Silver. He could not recall when he started using a wheelchair, though he believed Dr. Jimenez prescribed the wheelchair, scooter and a walker.

Petitioner testified he was unable to return to his regular job as a motor truck driver due to his restrictions. During his job search he testified that he initially applied for 10 jobs per week, which was later changed to 12 per week. He testified he generally applied by phone, though his friend drove him to some in person. He would call and ask to speak to the manager of the prospective employer. He received benefits while performing this search. Petitioner then testified that he would look for maybe 5 jobs on a daily basis, and that he would apply for about 10 jobs per week in person and 5 per week by phone. He would do this throughout the week, maybe a 50/50 split between phone and in person applications.

Petitioner testified he was diagnosed with chronic kidney failure and diabetes in 2014. His weight in 2013 was approximately 350 pounds.

Petitioner acknowledged that on 10/26/18 he attended an the MMI orientation at Respondent's request and received the information package submitted into evidence as Rx12. He testified that he submitted the contained paperwork to request a reasonable accommodation but did not recall when or to which department he submitted it. When questioned on re-cross, he testified he provided it to the Department of Personnel. Petitioner did not create a profile on the City Career website, testifying "I'm not good with computers. I'm computer illiterate. I don't know how to work computers." Petitioner verified that his mailing address is 125 East 87th Street and acknowledged that he received the 12/24/18 letter from Respondent (Rx8). He acknowledged the letter advised him that if he believed his restrictions would have prevented him from performing the job duties of a watchman, he was to bring relevant documentation to his appointment with Ms. Pak and agreed he did not do so in January 2019. As to some of the questions asked and his responses on the questionnaire he completed (Rx10) on 1/10/19, Petitioner agreed he had no medical restrictions on wearing a uniform, his ability to concentrate or his ability to drive. Petitioner agreed he received a 3/20/19 letter from Respondent's Department of Fleet and Facility Management (Rx9).

Petitioner initially agreed that at the time he saw Dr. Cole on 8/26/13, he was using a cane, walker, scooter and wheelchair to ambulate. Questioned on redirect, Petitioner indicated he didn't realize that the 8/26/13 exam with Dr. Cole preceded his 2/26/14 accident, and that he was there for a shoulder exam, and that he therefore was not using any assistive devices to ambulate on 8/26/13. He meant a later exam with Dr. Cole. As to his 5/13/19 exam with Dr. Cole, Petitioner answered "no" when asked if it was his understanding that Dr. Cole determined he was able to perform the watchman job: "He said the only thing you could do is sit behind a desk and watch a . . . TV screen." He testified that he did not discuss accommodations with Dr. Cole, and that the Respondent did not offer any accommodations to the watchman job offer.

At the MMI orientation, Petitioner agreed he was provided with information on how to prepare a resume, but not as to how to perform a job search. He was never told whether he should look for work in person or by phone: "I was never told none of that. They just gave me – I picked up the sheets, and I went for the job search." Someone named "Bates" gave the packet to him and "just said you have to go to places and get it filled out." No one ever indicated he was doing the job logs he submitted to Respondent incorrectly, and he continued to receive benefits during his job searches until the dispute arose about the watchman job, at which point his benefits were suspended. At no time was he told he could return to his regular job. As to Dr. Jimenez, Petitioner could not recall what specific restriction he had on walking, standing or lifting.

Petitioner testified that while his chronic kidney condition was diagnosed in 2014, he was able to continue to perform his regular job with Respondent until the 2/26/14 accident occurred. When he met with Ms. Pak, she

did not have a copy of his work restrictions. Neither did Mr. Platz when he spoke to him, and he did not ask Petitioner to provide him with them. Petitioner testified that while he did make copies of his job logs, he turned the originals in to Respondent, and he left his copies in his prior home when it was foreclosed on. This was the same situation with his copy of his request to Respondent for reasonable accommodation. Petitioner testified that he would dispute Dr. Cole's 8/26/13 record if it indicates he said he had to use a cane to ambulate. He has no future appointments scheduled with Dr. Silver or Dr. Jimenez.

Ms. Ashley Pak testified on behalf of the Respondent. She is an Administrative Service Officer I for the Department of Water Management, which she testified is a human resources position. She testified that she is familiar with the watchman position.

Ms. Pak indicated that she receives an "MMI" (maximum medical improvement) list from the City's Committee on Finance, which lists City employees with workers' compensation injuries who have reached their maximum potential through medical treatment. She testified that there are many candidates and she would hire watchmen from this list. The process involved contacting the candidate, indicating the opportunity is available, and asking them to make contact to get a "willing and able" questionnaire to start the process. An appointment would be scheduled at Ms. Pak's office and the questionnaire is provided to the employee and completed. If the employee answers yes to all questions, they would next be sent for finger printing. Once they are then cleared by the Department of Human Resources (DHR), the employee would be provided with a date to start work.
For someone looking for a watchman job who is not on the MMI list, they would find the job posting on the City of Chicago careers website, apply, and then a recruiter would review the candidates from a list. Ms. Pak then would also contact the candidate to have them complete the questionnaire, after which they would be sent for a physical and for fingerprints. The DHR has to review the package and approve an offer for the job being made. People on the MMI list, on the other hand, get a job offer right away after fingerprinting and questionnaire.

As to the 12/24/18 letter (Rx8), Ms. Pak recalled sending the letter to the Petitioner based on him being on the MMI list, indicating he was to contact her to start the process for the watchman job. He was asked to bring in any medical statements relevant to the job. Ms. Pak testified that when a worker on the list answers "no" to some willing and able questions, they need to provide supporting documentation to present to Committee on Finance. She recalled the Petitioner completed the questionnaire (Rx10) in January 2019, testifying that he did not provide medical documentation of his inability to perform work tasks he indicated he was unable to perform. She was not aware of Petitioner's permanent restrictions. Based on the Petitioner indicating he was unable to perform some of the tasks, she let him know he needed to send in the medical info in support of his inabilities. Ms. Pak testified that a job candidate can ask questions about the form, though she could not recall if Petitioner asked her any questions about the form at the meeting.

Petitioner was no longer considered for the position after this because he didn't answer yes to the questions. Had Petitioner indicated that he could perform all the duties of a watchman in the questionnaire, he would have been sent for fingerprinting and his paperwork would have been forwarded to the Department of Human Resources, which she indicated was the same thing as the Department of Personnel, and Petitioner would have been hired. Petitioner was a priority on the MMI list based on his classification, so had he indicated he was willing and able to perform the job and went through fingerprinting, he would be able to get the job
On cross exam, Ms. Pak agreed that workers on the MMI list would have some type of physical restrictions. She believed that there were about 50 people on the list Petitioner was on while there were only 11 or 12 openings. However, she testified that there would have been an immediate job available to Petitioner had he completed the questionnaire and indicated he was capable of performing the job. Ms. Pak testified that the MMI list comes from the Committee on Finance and they don't provide any additional information on the worker's physical restrictions. She does not specifically review the job description (Rx11) with the employee. She would think the

Department would have Petitioner's medical records and thus his restrictions. She has never asked the Department on Finance for this type of information herself. She reiterated that she asked the Petitioner for his work restrictions and he didn't provide anything to her. Had he sent them at a later time, she would have had it in her file. The MMI questionnaire goes to the Committee on Finance. Ms. Pak is not involved in whether the Petitioner received benefits or not, indicating she believed the Committee on Finance decides this based on copies of letters she has received from them indicating a workers' benefits were being terminated. She was not certain whether the Committee would consider Petitioner for the watchman job if he provided his work restrictions a couple weeks after the questionnaire was completed, as she had never had this happen. She has never had an employee say they wanted to re-do the questionnaire. Ms. Pak agreed the only job she would be able to offer an MMI employee is a watchman job. She is not privy to what the prior departments or jobs were of employees on the MMI list.

At the request of his attorney, the Petitioner was evaluated by vocational counselor Kari Stafseth of Vocamotive on 8/3/18 and issued a 9/24/18 report. Petitioner indicated he used assistive devices to walk all of the time, including a cane, walker, wheelchair and scooter. He used a walker with a seat for the meeting. He reported he didn't drive much, hadn't driven in 4 months and generally used a Pace bus to get around. Someone else washed his clothes and cleaned his home. He reported difficulty in getting his day started in the morning, and that this would take one to two hours. She noted that Petitioner was limited to sedentary work by both Dr. Jimenez and Dr. Cole. His job with Respondent was at the medium level, and he is no longer able to perform it. He completed high school and had a year of junior college but reported difficulty with math, reading and spelling and that he participated in special education classes throughout high school. His work experience was essentially limited to various driving jobs, so he therefore had minimal transferrable skills. She indicated the Social Security Administration considered him to be at an advanced age which significantly "affects a person's ability to adjust to other work." His multiple comorbidities were also noted. Counselor Stafseth, concluded that: "Given Mr. Cooper's age, education, narrow work history, lack of transferable skills, sedentary restrictions, and overall presentation, it is the opinion of this consultant that Mr. Cooper does not have access to a viable, stable labor market" due to his age, education, narrow work history, lack of transferable skills, sedentary restrictions and overall presentation. Ms. Stafseth also opined that the Petitioner is not a viable vocational rehabilitation candidate. (Px8).

On 4/30/19, vocational rehabilitation counselor Julie Bose completed a report to address whether the Petitioner has the residual functional capabilities to perform the work of a watchman. Ms. Bose indicated it was her understanding that Petitioner was offered two different watchman positions. She reviewed the Respondent's job description for a watchman, indicating the essential duties included monitoring security cameras, receiving calls from watchmen, calling 911 if necessary, and to patrol the interior and exterior of the building. The indicated physical requirements included a "need to stand and walk for extended or continuous periods." Because the standing and walking were not further defined, Ms. Bose asked for a clarification in order to determine whether the Petitioner was able to perform the watchman's job per Dr. Cole's restrictions. She stated that the City's Assistant Commissioner of Security indicated that standing and walking was minimal in both of the offered watchman positions, and totaled less than three hours in a watchman's eight-hour workday. Ms. Bose noted that "sedentary work does allow for up to three hours in an eight-hour workday" based on the definition of the U.S. Department of Labor DOT. Her review of the watchman job description indicated squatting, kneeling, and climbing are not required. She further stated: "It is important to note that this consultant is familiar with the City of Chicago's watchman position, as this consultant has placed individuals in watchman positions in the past. Also, of note, the watchman is a recognized position in the Dictionary of Occupational Titles and is not a temporary modified duty position or makeshift position. Based on the information provided and reviewed, it is this consultant's opinion that the watchman position offered to Mr. Cooper falls within the parameters of the work restrictions by Dr. Cole on 4/16/18." (Rx6).

On 5/22/19 vocational counselor Stafseth was deposed by the parties regarding her 9/24/2018 vocational report. In her deposition, counselor Stafseth reiterated her opinion that Petitioner had no transferrable skills "and that he did not have any experience performing any type of work that is within the sedentary level of his physical command." This included the fact that the Petitioner reported a work history almost exclusively involving the driving industry, and that he had a level of learning disability which Counselor Stafseth indicated impacted his ability to undergo vocational retraining. She opined that he had lost access to his previous job as a motor truck driver due his work injury, that he is permanently restricted to a sedentary duty level and that he was facing multiple barriers to a successful return to work and did not have access to any viable stable labor market. Regarding the watchman's position that was offered by Respondent, counselor Stafseth stated that the position required activities that were outside Petitioner's sedentary restrictions and was considered a light-duty job according to the Dictionary of Occupational Titles. (Px9).

On cross-examination, counselor Stafseth acknowledged that she usually is retained by claimants and has been retained by Petitioner's counsel 20 to 30 times in her career since earning her certification in 2009. She testified she did not recommend that Petitioner undergo aptitude or interest-based testing because looking at his overall picture he would not have access to gainful employment. She testified that the sedentary physical demand work level involves lifting no more than 10 pounds, sitting for the majority of the shift. As to whether a job involving three hours of walking fits within the category depends on other factors such as frequency and duration of the walking. However, she acknowledged that as long as the job involved only occasionally lifting up to 10 pounds and sitting for the majority of the day it would fall within the definition of sedentary duty. She agreed he has not been medically permanently disabled from work and has not been medically restricted from driving. When she met with the Petitioner, she was not aware that he had been offered a job as a watchman. She agreed he should have no problems wearing a uniform or paying attention to a monitor. (Px9).

On redirect, counselor Stafseth testified that her understanding of a watchman job would involve some level of patrolling, which would involve walking exterior or interior facilities, standing a post and/or checking in people/drivers. She disputed such a job being sedentary in that, based on her experience, it requires the ability to stand and walk, which would be the light physical demand work level. (Px9).

Petitioner submitted the prescription expenses he claims to be causally related to the accidents at issue as Px7. Respondent submitted documentation of medical expenses and weekly benefits paid to or on behalf of the Petitioner. (Rx12).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that prior to the 7/11/12 accident, he had never injured the right shoulder before. It is unclear to the Arbitrator if this is accurate, as he gave a history to Dr. Wolin of bilateral rotator cuff repair surgeries in 2005. However, the parties have stipulated that a compensable accident occurred on that date, and his unrebutted testimony was that he reported the 7/11/12 incident to his supervisor, who came to the scene, an accident report was completed and Petitioner was referred to MercyWorks before seeing Dr. Silver on 7/13/12 with right shoulder complaints. Furthermore, in his 8/26/13 report, Section 12 examiner Dr. Cole opined that Petitioner incurred an aggravation of a preexisting condition and was "brought to a need for care" as a result of the 7/11/12 fall at work. The Arbitrator finds that the preponderance of the evidence supports the finding that the Petitioner's right shoulder condition was causally related to the 7/11/12 accident.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party has presented an AMA permanent partial impairment rating or report into evidence. Therefore, this factor carries no weight in the permanency determination.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a motor truck driver at the time of the accident and was released to return to unrestricted duties in that position. He testified he did return to that job that he is/is not able to return to work in his prior capacity as a result of said injury.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. Neither party has presented evidence which would tend to show the impact of the Petitioner's age on any permanent disability resulting from the 7/11/12 accident. This factor carries minimal weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to his regular job when he returned to work after the 7/11/12 accident. There is no evidence which would support that his future earnings were impacted by this right shoulder injury. This factor carries moderate weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Silver performed surgery on 1/29/13, consisting of an arthroscopic subacromial decompression with partial anterior acromioplasty, coracoaromial ligament transection, distal clavicle resection, synovectomy resection, synovectomy and debridement of the right shoulder. The postoperative diagnosis was right rotator impingement and Petitioner underwent post-operative physical therapy. The Arbitrator notes that Petitioner last saw Dr. Silver on 8/16/13, at which time the doctor reduced Petitioner's work restrictions, noting

he needed to be able to lift 100 pounds at work. When he saw Dr. Cole on 8/26/13, Petitioner reported subjective improvement of 50% with surgery. Dr. Cole opined that Petitioner was capable of regular work duties as to the right shoulder, but that his combination of comorbidities were significant enough to restrict him. As such, he did not recommend an FCE. Petitioner's Statement of Exceptions indicates Petitioner was released to full duty as of 9/7/13. Dr. Silver documented a 9/20/13 phone conversation with Petitioner and that he was recommending an FCE. There is no evidence this was ever completed. The Petitioner then re-injured his right shoulder on 2/26/14 after having returned to regular duty work for several months. The Arbitrator finds that this is the most significant factor in the permanency determination.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 7% of the person as a whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dwayne Cooper,
Petitioner,

vs. No: 14 WC 007604
(Consolidated with 11 WC 030282, 12 WC 023801)

City of Chicago,
Respondent.

21IWCC0145

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, maintenance, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 27, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 24 2021

Marc Parker

mp/dk
o-3/18/21
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, DWAYNE
Employee/Petitioner

Case# **14WC007604**

11WC030282
12WC023801

CITY OF CHICAGO
Employer/Respondent

21IWCC0145

On 3/27/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.80% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0010 CITY OF CHICAGO DEPT OF LAW
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0145

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☒ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e) 18)
- ☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DWAYNE COOPER
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **14** WC **07604**

Consolidated cases: **11 WC 30282 & 12 WC 23801**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **July 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **February 26, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**71,015.42**; the average weekly wage was $**1,365.68**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**206,321.78** for TTD, $**0** for TPD, $**12,746.86** for maintenance, and $**0** for other benefits, for a total credit of $**219,068.64**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the February 26, 2014 accident.

The parties have stipulated that Petitioner is entitled to temporary total disability benefits of **$910.45 per week** for **245-2/7 weeks**, commencing **February 27, 2014 through November 9, 2018**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$206,321.78** for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of **$910.45 per week** for **36-3/7 weeks**, commencing **November 10, 2018 through July 22, 2019**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$12,746.86** for maintenance benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$7,014.56 to Advanced Physical Medicine, $28,973.70 to RX Development, $611.72 to Infinite Strategic Innovations and $2,066.00 to Athletico**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a **credit for any and all awarded medical expenses that have been paid by Respondent prior to the hearing date**, either via workers' compensation or nonoccupational group health coverage, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent may address any unpaid expenses directly with the providers pursuant to stipulation.

Respondent shall pay Petitioner permanent and total disability benefits of $**910.45 per week for life**, commencing **July 23, 2019**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

Petitioner's Petitions for Penalties pursuant to Section 19(k) of the Act and Attorney Fees pursuant to Section 16 of the Act are denied.

Respondent shall pay Petitioner compensation that has accrued from **February 26, 2014** through **July 22, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 26, 2020
Date

MAR 27 2020

STATEMENT OF FACTS

Petitioner testified he has worked as a garbage truck driver for Respondent for about 26 years. His duties involved driving down city alleys, letting his laborers fill the truck with garbage and going to dump the truckload. Petitioner testified he has to climb up into the truck, push the bed blade up and push the track back. How long this takes depending on whether it gets stuck. If he does get stuck, he has to get back into the truck to shake the compost loose. His normal shift ran from 6 am to 2:30 pm, five days per week.

On 8/5/11, Petitioner testified he was getting out of his truck. The steps down were slippery due to being at the dump, and he slipped and fell and hurt his left shoulder. He testified he felt a tingling sensation and pain, and later was unable to lift his arm. He contacted his supervisor and was taken to MercyWorks. He testified he was referred to a specialist, Dr. Silver.

On 8/12/11, Petitioner initially saw Dr. Silver. He reported that while working on a garbage truck on 7/5/11 he was trying to loosen some tight clamps by pounding them with a brick and he felt severe left shoulder pain. He indicated he had no left shoulder problems prior to this incident. Left shoulder x-rays were normal. Following exam, Dr. Silver diagnosed rotator cuff impingement and injected the shoulder. He also prescribed physical therapy, noting that anti-inflammatories would not be used due to Petitioner's chronic renal failure. Petitioner was held off work for 4 weeks. (Px1).

At 9/16/11 follow-up, Dr. Silver noted Petitioner's shoulder continued to do poorly with positive impingement and loss of motion. A left shoulder MRI was prescribed, and he was continued off work. (Px1).

The left shoulder MRI on 10/4/11 reflected articular surface and intrasubstance tearing of the supraspinatus without full thickness tearing, prominent erosion and degenerative change along the inferior glenoid with posterior inferior labral tear not excluded, as well as biceps tenosynovitis. Cystic changes were also noted in various locations. (Px1).

Noting a left partial thickness rotator cuff tear, Dr. Silver on 10/5/11 noted Petitioner's symptoms continued despite the injection and therapy. Arthroscopic surgery was prescribed, which would be followed by a continuous passive motion (CPM) machine "due to the severe stiffness and frozen shoulder that he presently has." (Px1).

Surgery was performed on 12/13/11, involving arthroscopic debridement, synovectomy, lysis of adhesions, distal clavicle resection and subacromial decompression with partial anterior acromioplasty and coracoacromial ligament transection. Diagnosis was left rotator cuff impingement. The report notes that the labrum, articular surfaces, biceps tendon, subscapularis tendon and articular surface of the rotator cuff were all normal, but there was obvious cuff impingement. (Px1). The Arbitrator notes there is a dispensary note prescribing not only the CPM machine, but also a Game Ready Cooling Device and a Thermal Tech/Vascutherm. (Px1).

Petitioner testified that he still had pain and the shoulder felt weak after surgery. On 1/3/12, it was noted Petitioner had a PCM machine at home and was to move from Stage 1 to Stage 2. On 2/10/12, Petitioner had regained approximately 160 degrees of forward flexion and lateral abduction. He was limited to right hand use only and if this could not be accommodated, he was to remain off work. On 2/24/12, Dr. Silver indicated that Respondent had obtained a Utilization Review regarding the use of the PCM machine, opining the device was needed due to Petitioner having had a frozen shoulder, and indicating that a 2/21/12 attempt to contact Dr. Ross for peer-to-peer review failed because the phone number Ross left would not accept incoming calls. On 3/23/12, Dr. Silver indicated Petitioner had regained full forward flexion and lateral abduction and would begin working on rotational motion and strengthening. He was to continue PCM use. On 4/20/12, Petitioner had regained rotational motion and was limited to a 5-pound lifting restriction. On 6/1/12, Dr. Silver determined Petitioner had reached MMI and could return to his regular work duties. (Px1).

When Dr. Silver returned him to work in June, Petitioner testified he was still having left shoulder pain. He also testified that Dr. Silver injected the shoulder, but there is no record of this. He did return to work as a truck driver but testified he had ongoing problems with the left shoulder when climbing down from his truck and pushing and pulling the controls. The pain was sharp, but he continued to perform his work duties.

While working on 7/11/12, Petitioner testified that he fell again while trying to climb up into the truck, resulting in his body being partly inside and partly outside of the truck. He testified he injured his right shoulder at that time with sharp pain. HIs supervisor came out to the scene, had Petitioner complete an accident report and he was again sent to MercyWorks. He testified that he had x-rays and was again referred to a specialist. The records of MercyWorks were not located within the evidence submitted.

Petitioner returned to Dr. Silver on 7/13/12. The report states that Petitioner hurt his right shoulder on 7/10/12 while climbing into his garbage truck, slipping and falling into the cab, striking his right shoulder. Petitioner reported he had no prior right shoulder problems. He reported persistent pain and limited range of motion. Dr. Silver made the same diagnosis as with the left shoulder, rotator cuff impingement, and injected the shoulder.

Petitioner was referred to physical therapy, held off work and advised to follow up in 4 weeks. A revised report was prepared which modified the injury date from 7/10/12 to 7/11/12. (Px1).

On 8/10/12, Petitioner reported only temporary relief with the injection. Right shoulder MRI was ordered, and Petitioner was continued off work. The radiologist reported the 8/31/12 films showed arthritic changes of the AC joint as well as the glenohumeral joint. Also noted was articular surface tearing of the supraspinatus tendon without evidence of a full thickness tear, thickening of the inferior glenohumeral ligament with degenerative changes of the glenoid labrum, moderate joint effusion and adherent debris suspected along the anterior subcoracoid process. Petitioner followed up on the same date with Dr. Silver and he prescribed arthroscopic surgery, again noting a PCM machine would be utilized post-surgery. Dr. Silver also opined that the surgery was causally related to the 7/11/12 accident. (Px1).

Petitioner was examined by orthopedic surgeon Dr. Cole with regard to his right shoulder on 10/22/12 at the Respondent's request pursuant to Section 12 of the Act. He reported slipping and falling hard getting into his truck on 7/11/12, resulting in constant 10 out of 10 (10/10) pain as a result. He denied any prior right shoulder problems or treatment. He noted MercyWorks had taken negative shoulder x-rays and diagnosed a strain. After obtaining new x-rays, indicating loss of glenohumeral space but no bone-on-bone findings, and reviewing the MRI, Dr. Cole diagnosed a possible partial thickness rotator cuff tear with preexisting arthritis. It was his opinion that Petitioner aggravated his preexisting condition, and this resulted in his need for care. He noted his concern was that Petitioner had gross osteoarthritis and pain below shoulder level. He noted the prognosis was "a bit more guarded" because he didn't have great relief with the injection and there was no significant cuff tear indicated on MRI. Dr. Cole stated: "Although it is reasonable to consider surgery, the prognosis is a bit more guarded given the above factors. As a result, I would first and foremost, recommend an injection into the glenohumeral joint itself and a few more weeks of physical therapy. Surgery in the arena of osteoarthritis in the shoulder with a questionable rotator cuff tear is a bit more guarded as well for the reasons outlined above." He opined that Petitioner should not lift over 5 pounds above shoulder level and do nothing repetitive over 10 pounds lifting, pushing and pulling below shoulder level. (Rx1).

Dr. Silver on 11/9/12 noted he reviewed Dr. Cole's report and performed the injection into the Petitioner's right shoulder, which was to be followed by three weeks of therapy. On 11/30/12, Dr. Silver noted the injection did not relieve Petitioner's symptoms and he therefore planned to perform surgery. The next note of 1/18/13 indicated Petitioner's surgery would be performed "over the coming weeks" and that he remained off work pending same. Norco, Meloxicam and Omeprazole were prescribed. (Px1).

Right shoulder arthroscopic surgery was performed by Dr. Silver on 1/29/13, and the procedure was virtually identical to what had been performed on the left side, with an identical post-surgical diagnosis of rotator cuff impingement. (Px1).

Petitioner testified he had ongoing pain after this surgery as well. Petitioner continued to follow up with Dr. Silver postoperatively. He was advised to start therapy on 2/6/13 and to continue to use his CPM machine. On 3/8/13, Dr. Silver noted Petitioner had only recently started therapy due to delay in authorization. On 4/12/13, he continued therapy and released Petitioner to left-handed work only. On 5/17/13, Dr. Silver indicated Petitioner had full forward flexion and lateral abduction with internal rotation to the belt line. Petitioner was advised he could lift up to 5 pounds with the right arm below shoulder level but that he was still unable to climb into or drive the garbage truck. (Px1). Petitioner testified that during therapy he was getting some numbness and "a little pain."

On 6/21/13, Dr. Haskell examined Petitioner on behalf of Dr. Silver, noting Petitioner had "improved somewhat in strength and range of motion but not sufficiently to return to his former work." He was advised to continue

therapy and to limit to left arm use only. On 7/12/13, Dr. Silver indicated Petitioner continued to improve and was capable of a 10-pound lifting restriction. He was to continue therapy for four weeks. On 8/16/13, his restriction was changed to 20 to 25 pounds of lifting. It was noted that he needed to lift over 100 pounds at his job. Therapy was continued. (Px1).

Petitioner was reexamined by Dr. Cole on 8/26/13. His understanding of the surgery was "an arthroscopy/clean out", though he acknowledged he did not have the actual operative report to review. Petitioner reported 50% subjective improvement since surgery. Left shoulder exam was unremarkable. Dr. Cole stated: "Of note, (Petitioner) has ongoing knee complaints. He is walking with a cane. He has bilateral lower extremity edema as well." He further stated: "Also noteworthy is his morbid obesity. The combination of his comorbidities is enough to significantly restrict him in any activity. I would submit that, absent of the significant comorbidities, he is actually capable of working a full-duty job with no restrictions as related to the right shoulder. If he vehemently was unable to conduct the duties of his full job, then a functional capacity evaluation (FCE) would be warranted. Please note that I would make every attempt to avoid an FCE, as I think he is a legitimate risk to injure himself further during the FCE and would likely be invalid as well." Dr. Cole indicated that Petitioner had a moderate ongoing right shoulder disability with pain but with no significant objective findings on exam. He opined that Petitioner was at MMI and could work as noted. (Rx2).

Petitioner testified he continued to treat with Dr. Silver until 9/6/13, when he was released to return to work. However, on 9/20/13, a Dr. Silver note stated: "Per phone conversation with (Petitioner) we are recommending an FCE be performed at this time." (Px1).

The Arbitrator notes that there are additional records in Px1 which indicate that Dr. Silver had been prescribing hydrocodone in two different doses simultaneously (one for regular pain and one for more severe pain), Mobic and Tranzgel Pain Relief Gel, Voltaren gel and Terocin Lotion.

Petitioner testified that after he was released, he continued to have right shoulder problems. He would awaken in the morning with sharp pain. He was taking Tylenol and would use the cream rub each morning so he could be ready to work. While he continued to work, he testified he felt pain and the numb feeling when he would climb up into the truck.

On 2/26/14, Petitioner testified that while working he and his crew pulled into a McDonald's during a break to use the restroom. While exiting the truck he testified he fell again, indicating this time he fell to the ground, injuring his left side, right knee and re-injuring his right shoulder.

Petitioner was taken to Roseland Community Hospital, where he testified he was advised by the doctor there that they really couldn't do anything for him and advised him to go to the County to see a specialist. These records are not in the evidentiary record. Petitioner testified that he called his supervisor and was instead advised to see a doctor on Dearborn Street in downtown Chicago, who indicated he had a torn rotator cuff but "didn't really look at my knee." It is unclear when this occurred or who the provider on Dearborn is.

Petitioner testified he had no left shoulder injuries prior to 8/5/11 and has not reinjured it since. He had no right shoulder injuries prior to 7/11/12. He testified he'd had no problems with his right knee prior to 2/26/14.
Petitioner returned to Dr. Silver on 3/5/14. Petitioner reported he slipped on slippery steps getting out of his garbage truck on 2/26/14, falling to the ground and "crashing upon his right knee and hyperflexing it as well as onto his right shoulder." He reported pain in the shoulder and knee since the accident with painful and limited motion. No fractures were indicated at the ER. X-rays of the right knee showed complete loss of articular cartilage in the medial compartment. Diagnosis was preexisting asymptomatic degenerative changes of the right knee that were exacerbated and accelerated by the injury, and recurrent right rotator cuff impingement. The plan

was to prescribe pain and anti-inflammatory medication and physical therapy. A right knee injection was performed, and a right shoulder injection was planned. (Px2).

Petitioner testified that the right knee injection only helped temporarily. The knee would pop, and he would have difficulty getting out of a chair after prolonged sitting.

Respondent referred Petitioner back to Dr. Cole for examination on 4/7/14. Petitioner reported he had returned to regular duty since his last visit with Cole and did well as to the right shoulder from 9/2013 to 2/26/14, when he fell off the back of the truck and injured his right shoulder and right knee. Petitioner noted he also was awaiting a kidney transplant for chronic renal failure due to hypertension. Petitioner was noted to have had preexisting right knee arthritis but indicated he had no symptoms prior to 2/26/14. He reported injection provided only temporary relief and he continued to have unresolved anterior and anterolateral right knee pain since the injury. As to the shoulder, Dr. Cole recommended a subacromial injection followed by 4 to 6 weeks of therapy. As to the knee, he recommended a series of 3 to 4 viscosupplementation injections, which he indicated is appropriate for symptomatic osteoarthritis in the knee. Dr. Cole noted that none of these conditions were related to the 2012 injury. He opined the Petitioner could work with restrictions of no over-the-shoulder work with the right arm. As to the knee, he diagnosed a work-related aggravation of right knee osteoarthritis and a new injury to the right shoulder on 2/26/14. (Px2).

On 4/18/14, Petitioner told Dr. Silver the right knee injection provided only mild temporary relief and that his therapy had been denied. His right shoulder had worsened. Dr. Silver injected the right shoulder and prescribed Meloxicam, Ultram, hydrocodone and Terocin cream and patches, and again prescribed therapy. On 5/30/14, Petitioner reported improvement with the right shoulder injection. Dr. Silver indicated he was awaiting authorization for a right knee replacement surgery "due to the articular cartilage damage he sustained" on 2/26/14. Petitioner was noted to have to use a cane to ambulate. He was continued off work. (Px2).

On 7/18/14, Dr. Silver reported that Petitioner had regained 160 degrees of flexion and abduction in the right shoulder following the injection and that impingement signs were now negative. He nevertheless continued therapy for the shoulder and again indicated Petitioner remained temporarily disabled pending the recommended right knee replacement surgery. Medications were continued. By 8/29/14, Petitioner had regained 170 degrees of shoulder motion. Therapy and medications were again continued. (Px2).

Petitioner was reexamined by Dr. Cole on 9/8/14. Petitioner indicated he had relief with the right shoulder cortisone injection in the spring and was "overall plus/minus better now" compared to 4/7/14, but that the right knee has failed to thrive with therapy. He was awaiting kidney transplant. Dr. Cole noted: "As a reminder, (Petitioner) is morbidly obese, diabetic, and dealing with chronic renal failure." He understood the mechanism of injury and inciting event to be falling onto the right shoulder and knee. Petitioner complained of pain all over the right knee, while the shoulder hurt with overhead movement. Petitioner was using a cane and "is actually seen in a wheelchair today as he was transported from the entrance to the exam room" and remained in the wheelchair for exam, which reflected mild right shoulder impingement signs but nearly full active range of motion. The right knee was warm with an effusion and mild tenderness medially and laterally. March 2014 right knee x-rays showed advanced bone on bone degenerative joint disease (DJD) with collapse medially on the right and left. Dr. Cole diagnosed an essentially resolved right shoulder, which was at MMI and with no need for work restrictions, and advanced DJD in the right knee with aggravation of the preexisting condition. While he agreed that a total knee replacement was "the next and most viable appropriate and definitive option for him", but "from a causality standpoint, I cannot state that the need for right knee care is categorically related to the February 2014 injury in question." He noted Petitioner did fall off the truck and struck the knee directly, and he "undoubtedly aggravated a preexisting condition", but the condition was of advanced, end-stage DJD in association with comorbidities of chronic renal failure, diabetes and morbid obesity. He stated: "In my opinion,

undoubtedly the claimant would have arrived at a need for care for the right knee in the near future, even absent of this injury. I cannot categorically state that the injury in question in February 2014 really changed the fate/natural history of the right knee to any large degree, but rather simply might have brough the claimant to a need for care somewhat sooner than otherwise might have been necessary." He opined that Petitioner as not at MMI as to the right knee and was capable of only a job with "minimum walking and sedentary/seated desk-based work." (Rx3).

On 10/3/14, Dr. Silver drafted a letter in response to the report of Dr. Cole. Silver disputed Cole's opinion that he could not say the "2/2/14" accident really changed the natural history of Petitioner's right knee. Dr. Silver states that Petitioner's right knee was asymptomatic prior to the accident, he had no history of previous symptoms or medical treatment for the knee and had been working full duty at the time of the injury. He stated: "He definitely sustained an injury to the right knee as noted previously and this has caused a permanent exacerbation and acceleration of asymptomatic pre-existing degenerative changes." Petitioner was to continue his medications and right shoulder therapy pending knee replacement surgery. (Px2).

Petitioner returned to Dr. Silver on 11/7/14, 12/12/14 and 1/16/15, and the doctor indicated his right shoulder was at a "4 to 4+ level" with negative impingement signs, but he again continued physical therapy for the shoulder while awaiting knee surgery authorization. Medications, including hydrocodone, were continued. Another letter from Dr. Silver on 1/23/15 to Petitioner's counsel reiterates this opinion, noting Petitioner "had no previous history whatsoever of any symptoms, care or treatment to the right knee and therefore the opinion that he was in eminent [sic] need of a total knee replacement does not make any orthopedic sense unfortunately with all due respect." (Px2).

On 12/9/14, Dr. Cole issued an addendum report in response to questions from Respondent. He stated that Petitioner had an aggravation of his preexisting right knee condition "that has not been temporized to the point to reach an end of care. This being stated, I cannot categorically say that the injury in question changed the natural history of his knee condition in any significant way. The claimant maintained such a diathesis for arthritis that on a more likely than not basis he would have become symptomatic in the near imminent future absent of the injury." He also stated that Petitioner's obesity, chronic renal failure and diabetes creates a significant predisposition to knee osteoarthritis. Dr. Cole concluded the report by stating that Petitioner more likely than not would have needed a total knee replacement regardless of the 2/26/14 accident and that he didn't believe the accident accelerated the need to any large degree "given the fact pattern provided and his significant diathesis for osteoarthritis of the knee." (Px2).

Petitioner continued to follow up with Dr. Silver throughout 2015 (8 visits). Despite what appears to have been relatively normal right shoulder function, the reports note formal physical therapy was continued. The right knee remained significantly symptomatic while awaiting surgical authorization, and Meloxicam, hydrocodone, Ultram and Terocin cream continued to be prescribed. On 2/27/15, Dr. Silver noted the replacement surgery was needed due to articular cartilage damage at the time of the work injury. On 8/14/15, Dr. Silver found that Petitioner's right shoulder motion had "regressed somewhat" to a 150-degree range of motion. Therapy was continued. On 9/25/15, Dr. Silver again opined that the work accident damaged the articular knee cartilage resulting in a bone-on-bone situation, again noting the knee was asymptomatic prior to the accident. By 11/9/15, he indicated the shoulder motion had regressed to 130 degrees of flexion and abduction, and to 120 degrees by 12/18/15. (Px2).

Petitioner was examined by orthopedic surgeon Dr. Jimenez on 2/11/16. His understanding was that Petitioner injured his right knee on 2/26/14 when he slipped and fell of the running board on his truck, injuring the knee and right shoulder. He reviewed the records of Dr. Silver and Dr. Cole. Petitioner's current complaints included clicking, popping and swelling in the knee, difficulty arising from a chair, walking great distances and going

down stairs. Examination and x-rays were consistent with end-stage knee osteoarthritis, and Dr. Jimenez agreed with the recommendation for total knee replacement given worsening pain and activity limitations and the failure of conservative measures. He noted Petitioner had a history of high blood pressure, cholesterol and morbid obesity, but indicated he had no history of diabetes. Dr. Jimenez opined that the knee replacement was related to the aggravation of Petitioner's preexisting right knee arthritis as a result of the 2/26/14 accident. He related that Petitioner's right knee was "relatively asymptomatic" prior to 2/26/14 and that there had been significant worsening following the accident "and therefore the timeline and the necessity for knee replacement has been moved up and the timeline has been shortened because of his work-related event." (Px3). It is unclear to the Arbitrator whether this examination was requested by the Petitioner's counsel or Respondent.

Petitioner was again seen by Dr. Silver on 1/29/16 and 3/11/16. On the latter date, he indicated Petitioner's right knee pain had worsened to the point that he had to walk with two canes with 10/10 pain that would reduce to 7/10 to 8/10 pain with medication. On 4/22/16, Dr. Silver indicated that he was awaiting further physical therapy to maximize Petitioner's functional shoulder capacity, "otherwise he will be permanently restricted with regard to his right shoulder with no use of the right arm above the shoulder level and no repetitive motion activities of the right shoulder with a 10 pound lifting restriction." He indicated Petitioner had been weaned down to a 2.5 mg dose of hydrocodone for severe pain and Ultram for lesser pain. On 6/3/16, Dr. Silver noted Petitioner's shoulder motion had improved back to 140 degrees while still awaiting authorization for further therapy. He continued to await right knee replacement authorization. Off work status was continued throughout 2015 and through this 6/3/16 report, which appears to be the last report of Dr. Silver. (Px2).

Petitioner had a preoperative visit with Dr. Jimenez on 7/26/16. His elevated body mass index (BMI) was noted to be a risk. (Px3).

Petitioner testified he had been waiting for seven years for a kidney transplant and going through dialysis, and he received a call on 8/2/16 indicating he had to be at the hospital that same night and he underwent the kidney transplant, resulting in postponement of his planned right knee surgery. As a result, the parties indicated Petitioner's TTD was suspended as of 1/29/16 and reinstated as of 3/10/16.

Following a 3/9/17 pre-surgery visit, Petitioner ultimately underwent right total knee replacement surgery with Dr. Jimenez on 5/17/17. (Px3).

Petitioner underwent extensive post-operative physical therapy, initially as an inpatient at a rehabilitation facility (Carlton On The Lake) and continued to follow up with Dr. Jimenez through 12/14/17. Petitioner was at Carlton On The Lake from 5/21/17 to 7/10/17 (see Px11). After his release from Carlton, Petitioner testified he was still having problems walking and still had pain in his shoulder. He initially used a cane while at Carlton, and ultimately began to use a wheelchair. He testified it was difficult to get in and out of the wheelchair initially, but therapy helped him build the strength to do so. He continued to use a wheelchair following his release and testified the Respondent installed a lift at his home so he could get in and out of the house. He also has a motorized scooter.

On 7/13/17, Dr. Jimenez noted that Petitioner indicated he was using a walker but appeared for the visit in a wheelchair, and he recommended work on gait training and avoiding sitting in a wheelchair for any prolonged period of time to prevent any sacral ulcers. On 8/17/17, Petitioner was ambulating with a walker and was using Tramadol for pain control. Petitioner was noted to have left knee swelling on 10/3/17, x-rays showed degenerative changes, and the left knee was injected while therapy continued for the right knee. On 11/7/17, Petitioner reported doing well with therapy and x-rays showed good right knee alignment. There was full right knee range of motion and no evidence of instability. Dr. Jimenez discontinued therapy and ordered an FCE. Petitioner was held off work throughout this time. (Px3).

The 11/6/17 final physical therapy report from Athletico notes Petitioner attended 34 of 37 visits. While he had full right knee range of motion, he continued to have deficits in right knee and hip strength, muscular endurance, balance and gait. He was using a cane or walker due to complaints of the right knee giving out. His progress had been affected by his comorbidities. He was noted to have achieved his short-term goal and two out of three long term goals, falling short in ambulating without any assistive devices. He was to have two additional sessions focused on providing him with a home exercise program and strengthening. (Px6). Petitioner agreed his walking was getting a little bit better with therapy at Athletico but testified he still had right shoulder pain and had difficulty with overhead lifting.

On 12/6/17, Athletico physical therapist Paul Sullivan reported that when Petitioner was attempting to perform the FCE, during the musculoskeletal portion Petitioner demonstrated significant restrictions to his right shoulder range of motion along with significant pain behaviors with resisted shoulder flexion and abduction. Impingement sign was positive for right shoulder pain behaviors. Sullivan stated: "Given the client's significant ROM and strength limitations and pain behaviors to his right shoulder, he is recommended to seek medical clearance for performance of the FCE regarding his right shoulder." A separate letter was issued by therapist Sullivan that same day indicating that Petitioner reported a history of kidney replacement surgery in August 2016 and kidney removal surgery in April 2017. As he indicated his kidney surgeon had not been made aware that he was going to be performing an FCE, Sullivan indicated that given Petitioner's surgeries and current comorbidities, he had to also seek clearance from is kidney physician. (Px6).

At the last visit of 12/14/17, Dr. Jimenez noted Petitioner's knee on exam showed some residual pain and stiffness on range of motion but was improving. There were no neurologic issues and x-rays showed good hardware positioning with no evidence of loosening. He advised Petitioner to advance activity, continue strengthening and range of motion, and weightbearing as tolerated. Dr. Jimenez found Petitioner to be at MMI and stated: "I am recommending at this juncture since he was unable to complete the FCE, they staged the function of his renal issues and other issues to determine if this patient is at MMI. He will have permanent restriction with sedentary duty on the right knee." He was to follow up annually. (Px3).

Petitioner testified he was examined by orthopedic surgeon Dr. Wolin for his right shoulder due to continued pain and inability to use the arm overhead. Petitioner saw Dr. Wolin on 2/6/18, whose report notes it was with regard to the shoulders. Noted was the 2/26/14 accident where he fell on his right side with the knee and shoulder hitting the ground first. Petitioner complained of right greater than left shoulder pain. He was unable to use anti-inflammatory medication due to his kidneys. The report states Petitioner underwent bilateral rotator cuff repairs in 2005 and had done well since then. He had not worked since 2/26/14. Following examination and review of right shoulder x-rays reflecting moderate glenohumeral narrowing, Dr. Wolin performed a right intraarticular shoulder injection and prescribed physical therapy. The records of Dr. Wolin indicate Petitioner was then a no show for a 3/7/18 visit and canceled an 8/20/18 visit. (Px4). Petitioner testified that 3/7/18 was his last visit with Dr. Wolin because Respondent was not paying his bill.

Petitioner was again examined by Dr. Cole at Respondent's request on 4/16/18. He noted that he felt that Petitioner was likely to have needed a right knee replacement regardless of injury due to his comorbidities, but stated: "I thought he might have arrived at a need for care sooner than otherwise might have been necessary but to an indeterminate degree." Petitioner reported 8/10 level right knee pain, and he refused height and weight measurements, reporting that he weighed 400 pounds. Examination took place with Petitioner in a wheelchair, and he had full range of motion and strength, the knee did feel warm with no effusion. He noted Petitioner felt he was "half-way there" with recovery, and Dr. Cole felt he had a great outcome but needed to lose weight, noting it "will surely help him in many ways, both prolonging the longevity of his right knee replacement and quite literally possibly save his life with regard to his comorbidities." Dr. Cole opined that Petitioner's current

complaints were really residuals related to his preexisting disease and comorbidities. Dr. Cole found Petitioner had reached MMI, advised against an FCE ("it really will only over limit him and risk further injury with unnecessary risk and expense") and recommended permanent sedentary restrictions with limited squatting, kneeling and climbing. His final statement was: "Regarding his extensive disability, I would loosely label his level of disability as 'marked/severe' but this does not relate directly to the right knee injury." (Rx4).

Petitioner testified that after his 5/17/17 release from Dr. Jimenez he wasn't able to "get about" without a wheelchair or scooter, but he agreed he could get in and out of the chair and "can walk some, yes." He testified: "Well, I walk to like the bathroom and the kitchen, but I can't stand too long. I get pain in my back and legs." He cannot use stairs. Petitioner was using a scooter at the time of the hearing. He believed he had seen Dr. Jimenez after 5/7/17, but could not recall the date, then testified that his benefits were being paid until an 11/9/18 visit with Dr. Jimenez, at which point they were terminated. He indicated that right after the 11/9/18 release Respondent asked him to perform a job search.

On 9/11/18, Respondent's Committee on Finance sent a letter to Petitioner indicating it was determined he had temporary or permanent work restrictions and "may be required to pursue certain job search and/or vocational rehabilitation as part of your continued entitlement to workers' compensation benefits." He was to participate in an orientation at DHR on 9/16/18, at which time he was to receive resources and tools aimed at helping him maximize his ability to find a job. He was to meet with a DHR representative who would help him to create a profile for the City online job screening system as well as guidance on performing a self-directed job search outside of City employment. This would apply whether Petitioner was in a formal vocational rehabilitation program or not. He was advised to bring to the orientation: current resume, email address, driver's license, copies of evidence of specialized skills or training. It was noted that a failure to attend could jeopardize his benefits. Copies were sent to both attorneys. (Px10).

Petitioner testified that the Respondent's Ashley Pak sent a 12/24/18 letter to him (Rx8), after which Petitioner made an appointment to see her. Prior to meeting with Ms. Pak, Petitioner was evaluated by Vocamotive with regard to vocational rehabilitation. He agreed he did not provide the report from this evaluation to Ms. Pak and did not bring any of his medical records to the meeting with Ms. Pak. He testified she advised him that he had to take a written test "to see what the job was about" but wasn't told what the job was. Petitioner also testified that prior to this time, on 10/26/18, he attended a vocational orientation at Respondent's request, where he watched films regarding how to write a resume and to obtain employment. No job leads were provided, he was requested to do his own job search. He testified he had to look for jobs ("Calling places to find out if they're hiring, filling out applications.") and send weekly job logs to Respondent evidencing compliance. Petitioner provided his logs to Respondent weekly but was unable to secure employment.

Petitioner testified that the Respondent offered him the job as a watchman. He had to go to the City Water Department, where he met Ms. Pak. He testified she did not provide him with a job description, testifying: "No. All she did was hand me some paperwork I had to fill out", which he agreed included a "Willingness and Ability, Watchman" questionnaire. (Rx10). Petitioner testified the questionnaire described what his duties and physical requirements would be as a watchman and for each asked if he was "able" and/or "willing" to perform the job. Petitioner acknowledged that he indicated he was not able or willing to walk or stand too long, use steel toed boots or perform patrols, as well as deal with the weather. He then testified: "The only problem I had was the walking." He testified he was not told at that time how much he would have to walk. Petitioner then agreed that he was provided with job descriptions for the watchman position (Rx11), testifying his answers to the questionnaire was based on the indicated descriptions. Petitioner testified he was not asked for any of his medical records or physical restrictions. Overall, he did not feel he could perform the watchman job, mainly due to the walking and standing. He testified that he presented himself to Ms. Pak that day the same way he presented to the hearing, i.e. using an assistive vehicle for ambulation. Ms. Pak indicated that it was not her

decision and that corporation counsel would get back to him. Petitioned testified that he never was contacted, and he was never offered any other job by Respondent. His benefits were again terminated, and he was not provided an explanation why.

A second essentially identical letter was sent to Petitioner by the Committee on Finance on 10/15/18, this time with a 10/26/18 date of orientation. He was to call to confirm by 10/23/18. (Rx7).

Rx12 is the MMI orientation packet that was presented to Petitioner on 10/26/18. There is a sign in page with a signature next to Petitioner's name. Of note, the packet contains job search tips, instructions on how to apply for City positions (involving a power point demo), resume advice, a copy of the City's reasonable accommodation policy and a form for requesting a reasonable accommodation, and a discussion regarding pension benefits. (Rx12).

Two job descriptions for a watchman, Codes 6327 and 6328 was submitted into evidence as Rx11. The latter code is dated July 2011 and indicates as the physical requirements of the job the ability to stand and walk for extended or continuous periods of time and the ability to climb staircases. The essential duties include responding to alarms system wide, patrolling the interior and exterior of designated facilities and locations during working and non-working hours to protect the premises, walking through the interiors and exteriors of facilities, checking that doors are secured, fence lines are intact and that lighting is in working order. It also includes driving to various locations as part of a roving or mobile patrol to check various facilities. In reviewing the description with code 6327, dated February 2014, the Arbitrator notes that the document is virtually identical to code 6328 in all relevant ways. (Rx11).

The Respondent's Ashley Pak testified that the watchman job descriptions are not given to the employee but are available online. As to the two separate descriptions, she believed one was an updated version.

The "Willingness and Ability Questionnaire" for the watchman job completed by Petitioner was submitted into evidence as Rx10. Petitioner indicated both that he was not physically able or willing to perform the following: 1) working in all weather conditions with a uniform and possible steel toed boots, rain gear and safety vest; 2) remain attentive while monitoring video cameras and occasionally via random patrols of critical Water Department infrastructure; 4) be part of a roving patrol involving driving; and 5) be assigned to various Water Department locations throughout the city. He indicated he was not physically able to check exterior facility doors, check the property perimeter fence, check vehicle gates, check lighting as being in working order, checking the perimeter of construction sites for unsecured materials and tools, but that he was willing to perform these activities. (Rx10).

On 12/24/18, a letter was sent from Ms. Pak to Petitioner on Department of Water Management letterhead indicating that a watchman job was located which fit within his physical capabilities and that it was being offered to Petitioner. He was to contact Ms. Pak to start the process. He was advised that the paperwork involved required confirmation that he is able to perform the job duties of a watchman, and that if he believed his restrictions would prevent him from performing the duties "you MUST bring the relevant documentation to the appointment." (Rx8).

Petitioner testified he continued to perform a self-directed job search but did not find employment. Petitioner was again advised to contact the city via letter (Rx9). The 3/20/19 letter was sent by the City Department of Fleet and Facility Management's Paul Plantz to Petitioner indicating his name had been forwarded by the Department on Finance indicating he was capable of performing the job of watchman. Petitioner was advised to contact Mr. Plantz by 3/27/19 to discuss, and that if he failed to make contact it could result in the suspension of his benefits. (Rx9). Petitioner testified he called Mr. Platz and indicated he did not refuse the watchman job, but

rather that he couldn't do the job. He asked Mr. Platz if he had any information regarding his physical restrictions and was told no. Petitioner testified he never heard from him again.

Petitioner was reevaluated a final time by Dr. Cole on 5/13/19. Petitioner reported he felt a "little better" since the last evaluation as to the right knee but reported still having difficulty with weightbearing for long periods of time and ambulating. Petitioner again appeared in a wheelchair. Dr. Cole was provided with a "watchman" job description and was asked if Petitioner could perform the job. Dr. Cole opined that "I have reviewed the job description of 'watchman' and believe he is capable of doing almost all that job description. However, the job needs to be primarily seated with minimal ambulation on his feet. It is my opinion after examining him again today and reviewing his fact pattern of medical records, the claimant will almost certainly have a difficult time with any significant amount of walking. A reasonable accommodation needs to be made there, but otherwise I think he can do the job." Petitioner remained at MMI. (Rx5).

Petitioner testified he has not received any additional benefits or medical treatment since he saw Dr. Cole on 5/13/19. Currently, he testified he continues to wake up with sharp left shoulder pain. He has to take Tylenol or put an over-the-counter cream/rub on it. He testified that every now and then he gets a sharp pain up the arm when he sleeps on that side, and it's hard to lift that arm overhead. As to the right shoulder he testified: "just it's a little weak." He continues to have pain and popping in the right knee, and sometimes it gives way. He has pain with walking and has to walk slower. He can walk about 40 to 50 feet and has to take a break because he loses his breath. He testified that it is very hard for him to use stairs. He does not drive, he uses Pace transportation, which is how he got to the hearing.

Petitioner testified he has not had any other accidents besides what has already been testified to. His activities basically involve getting himself up, resting a little bit, sitting up. He takes Tylenol and uses Icy Hot on his knee so he can stand. He testified he doesn't do housework. He tries but really can't because it involves walking and lifting. He has a medical service / Salvation Army to do his housekeeping, and someone helps to either shop for him or to get a scooter for him to go into the grocery store.

On cross-examination, Petitioner testified he is currently 6'1", 399 pounds. Asked what his permanent restrictions from Dr. Jimenez were, Petitioner testified "just walking and climbing up and down stairs. . . and lifting something heavy." He didn't know exactly how much he was restricted from lifting. He did not recall what level of work Dr. Cole indicated he could do. He could not say exactly when he started using a cane, but that it was prescribed by Dr. Silver. He could not recall when he started using a wheelchair, though he believed Dr. Jimenez prescribed the wheelchair, scooter and a walker.

Petitioner testified he was unable to return to his regular job as a motor truck driver due to his restrictions. During his job search he testified that he initially applied for 10 jobs per week, which was later changed to 12 per week. He testified he generally applied by phone, though his friend drove him to some in person. He would call and ask to speak to the manager of the prospective employer. He received benefits while performing this search. Petitioner then testified that he would look for maybe 5 jobs on a daily basis, and that he would apply for about 10 jobs per week in person and 5 per week by phone. He would do this throughout the week, maybe a 50/50 split between phone and in person applications.

Petitioner testified he was diagnosed with chronic kidney failure and diabetes in 2014. His weight in 2013 was approximately 350 pounds.

Petitioner acknowledged that on 10/26/18 he attended an the MMI orientation at Respondent's request and received the information package submitted into evidence as Rx12. He testified that he submitted the contained paperwork to request a reasonable accommodation but did not recall when or to which department he submitted

it. When questioned on re-cross, he testified he provided it to the Department of Personnel. Petitioner did not create a profile on the City Career website, testifying "I'm not good with computers. I'm computer illiterate. I don't know how to work computers." Petitioner verified that his mailing address is 125 East 87th Street and acknowledged that he received the 12/24/18 letter from Respondent (Rx8). He acknowledged the letter advised him that if he believed his restrictions would have prevented him from performing the job duties of a watchman, he was to bring relevant documentation to his appointment with Ms. Pak and agreed he did not do so in January 2019. As to some of the questions asked and his responses on the questionnaire he completed (Rx10) on 1/10/19, Petitioner agreed he had no medical restrictions on wearing a uniform, his ability to concentrate or his ability to drive. Petitioner agreed he received a 3/20/19 letter from Respondent's Department of Fleet and Facility Management (Rx9).

Petitioner initially agreed that at the time he saw Dr. Cole on 8/26/13, he was using a cane, walker, scooter and wheelchair to ambulate. Questioned on redirect, Petitioner indicated he didn't realize that the 8/26/13 exam with Dr. Cole preceded his 2/26/14 accident, and that he was there for a shoulder exam, and that he therefore was not using any assistive devices to ambulate on 8/26/13. He meant a later exam with Dr. Cole. As to his 5/13/19 exam with Dr. Cole, Petitioner answered "no" when asked if it was his understanding that Dr. Cole determined he was able to perform the watchman job: "He said the only thing you could do is sit behind a desk and watch a . . . TV screen." He testified that he did not discuss accommodations with Dr. Cole, and that the Respondent did not offer any accommodations to the watchman job offer.

At the MMI orientation, Petitioner agreed he was provided with information on how to prepare a resume, but not as to how to perform a job search. He was never told whether he should look for work in person or by phone: "I was never told none of that. They just gave me – I picked up the sheets, and I went for the job search." Someone named "Bates" gave the packet to him and "just said you have to go to places and get it filled out." No one ever indicated he was doing the job logs he submitted to Respondent incorrectly, and he continued to receive benefits during his job searches until the dispute arose about the watchman job, at which point his benefits were suspended. At no time was he told he could return to his regular job. As to Dr. Jimenez, Petitioner could not recall what specific restriction he had on walking, standing or lifting.

Petitioner testified that while his chronic kidney condition was diagnosed in 2014, he was able to continue to perform his regular job with Respondent until the 2/26/14 accident occurred. When he met with Ms. Pak, she did not have a copy of his work restrictions. Neither did Mr. Platz when he spoke to him, and he did not ask Petitioner to provide him with them. Petitioner testified that while he did make copies of his job logs, he turned the originals in to Respondent, and he left his copies in his prior home when it was foreclosed on. This was the same situation with his copy of his request to Respondent for reasonable accommodation. Petitioner testified that he would dispute Dr. Cole's 8/26/13 record if it indicates he said he had to use a cane to ambulate. He has no future appointments scheduled with Dr. Silver or Dr. Jimenez.

Ms. Ashley Pak testified on behalf of the Respondent. She is an Administrative Service Officer I for the Department of Water Management, which she testified is a human resources position. She testified that she is familiar with the watchman position.

Ms. Pak indicated that she receives an "MMI" (maximum medical improvement) list from the City's Committee on Finance, which lists City employees with workers' compensation injuries who have reached their maximum potential through medical treatment. She testified that there are many candidates and she would hire watchmen from this list. The process involved contacting the candidate, indicating the opportunity is available, and asking them to make contact to get a "willing and able" questionnaire to start the process. An appointment would be scheduled at Ms. Pak's office and the questionnaire is provided to the employee and completed. If the employee

answers yes to all questions, they would next be sent for finger printing. Once they are then cleared by the Department of Human Resources (DHR), the employee would be provided with a date to start work.
For someone looking for a watchman job who is not on the MMI list, they would find the job posting on the City of Chicago careers website, apply, and then a recruiter would review the candidates from a list. Ms. Pak then would also contact the candidate to have them complete the questionnaire, after which they would be sent for a physical and for fingerprints. The DHR has to review the package and approve an offer for the job being made. People on the MMI list, on the other hand, get a job offer right away after fingerprinting and questionnaire.

As to the 12/24/18 letter (Rx8), Ms. Pak recalled sending the letter to the Petitioner based on him being on the MMI list, indicating he was to contact her to start the process for the watchman job. He was asked to bring in any medical statements relevant to the job. Ms. Pak testified that when a worker on the list answers "no" to some willing and able questions, they need to provide supporting documentation to present to Committee on Finance. She recalled the Petitioner completed the questionnaire (Rx10) in January 2019, testifying that he did not provide medical documentation of his inability to perform work tasks he indicated he was unable to perform. She was not aware of Petitioner's permanent restrictions. Based on the Petitioner indicating he was unable to perform some of the tasks, she let him know he needed to send in the medical info in support of his inabilities. Ms. Pak testified that a job candidate can ask questions about the form, though she could not recall if Petitioner asked her any questions about the form at the meeting.

Petitioner was no longer considered for the position after this because he didn't answer yes to the questions. Had Petitioner indicated that he could perform all the duties of a watchman in the questionnaire, he would have been sent for fingerprinting and his paperwork would have been forwarded to the Department of Human Resources, which she indicated was the same thing as the Department of Personnel, and Petitioner would have been hired. Petitioner was a priority on the MMI list based on his classification, so had he indicated he was willing and able to perform the job and went through fingerprinting, he would be able to get the job
On cross exam, Ms. Pak agreed that workers on the MMI list would have some type of physical restrictions. She believed that there were about 50 people on the list Petitioner was on while there were only 11 or 12 openings. However, she testified that there would have been an immediate job available to Petitioner had he completed the questionnaire and indicated he was capable of performing the job. Ms. Pak testified that the MMI list comes from the Committee on Finance and they don't provide any additional information on the worker's physical restrictions. She does not specifically review the job description (Rx11) with the employee. She would think the Department would have Petitioner's medical records and thus his restrictions. She has never asked the Department on Finance for this type of information herself. She reiterated that she asked the Petitioner for his work restrictions and he didn't provide anything to her. Had he sent them at a later time, she would have had it in her file. The MMI questionnaire goes to the Committee on Finance. Ms. Pak is not involved in whether the Petitioner received benefits or not, indicating she believed the Committee on Finance decides this based on copies of letters she has received from them indicating a workers' benefits were being terminated. She was not certain whether the Committee would consider Petitioner for the watchman job if he provided his work restrictions a couple weeks after the questionnaire was completed, as she had never had this happen. She has never had an employee say they wanted to re-do the questionnaire. Ms. Pak agreed the only job she would be able to offer an MMI employee is a watchman job. She is not privy to what the prior departments or jobs were of employees on the MMI list.

At the request of his attorney, the Petitioner was evaluated by vocational counselor Kari Stafseth of Vocamotive on 8/3/18 and issued a 9/24/18 report. Petitioner indicated he used assistive devices to walk all of the time, including a cane, walker, wheelchair and scooter. He used a walker with a seat for the meeting. He reported he didn't drive much, hadn't driven in 4 months and generally used a Pace bus to get around. Someone else washed his clothes and cleaned his home. He reported difficulty in getting his day started in the morning, and

that this would take one to two hours. She noted that Petitioner was limited to sedentary work by both Dr. Jimenez and Dr. Cole. His job with Respondent was at the medium level, and he is no longer able to perform it. He completed high school and had a year of junior college but reported difficulty with math, reading and spelling and that he participated in special education classes throughout high school. His work experience was essentially limited to various driving jobs, so he therefore had minimal transferrable skills. She indicated the Social Security Administration considered him to be at an advanced age which significantly "affects a person's ability to adjust to other work." His multiple comorbidities were also noted. Counselor Stafseth, concluded that: "Given Mr. Cooper's age, education, narrow work history, lack of transferable skills, sedentary restrictions, and overall presentation, it is the opinion of this consultant that Mr. Cooper does not have access to a viable, stable labor market" due to his age, education, narrow work history, lack of transferable skills, sedentary restrictions and overall presentation. Ms. Stafseth also opined that the Petitioner is not a viable vocational rehabilitation candidate. (Px8).

On 4/30/19, vocational rehabilitation counselor Julie Bose completed a report to address whether the Petitioner has the residual functional capabilities to perform the work of a watchman. Ms. Bose indicated it was her understanding that Petitioner was offered two different watchman positions. She reviewed the Respondent's job description for a watchman, indicating the essential duties included monitoring security cameras, receiving calls from watchmen, calling 911 if necessary, and to patrol the interior and exterior of the building. The indicated physical requirements included a "need to stand and walk for extended or continuous periods." Because the standing and walking were not further defined, Ms. Bose asked for a clarification in order to determine whether the Petitioner was able to perform the watchman's job per Dr. Cole's restrictions. She stated that the City's Assistant Commissioner of Security indicated that standing and walking was minimal in both of the offered watchman positions and totaled less than three hours in a watchman's eight-hour workday. Ms. Bose noted that "sedentary work does allow for up to three hours in an eight-hour workday" based on the definition of the U.S. Department of Labor DOT. Her review of the watchman job description indicated squatting, kneeling, and climbing are not required. She further stated: "It is important to note that this consultant is familiar with the City of Chicago's watchman position, as this consultant has placed individuals in watchman positions in the past. Also, of note, the watchman is a recognized position in the Dictionary of Occupational Titles and is not a temporary modified duty position or makeshift position. Based on the information provided and reviewed, it is this consultant's opinion that the watchman position offered to Mr. Cooper falls within the parameters of the work restrictions by Dr. Cole on 4/16/18." (Rx6).

On 5/22/19 vocational counselor Stafseth was deposed by the parties regarding her 9/24/2018 vocational report. In her deposition, counselor Stafseth reiterated her opinion that Petitioner had no transferrable skills "and that he did not have any experience performing any type of work that is within the sedentary level of his physical command." This included the fact that the Petitioner reported a work history almost exclusively involving the driving industry, and that he had a level of learning disability which Counselor Stafseth indicated impacted his ability to undergo vocational retraining. She opined that he had lost access to his previous job as a motor truck driver due his work injury, that he is permanently restricted to a sedentary duty level and that he was facing multiple barriers to a successful return to work and did not have access to any viable stable labor market. Regarding the watchman's position that was offered by Respondent, counselor Stafseth stated that the position required activities that were outside Petitioner's sedentary restrictions and was considered a light-duty job according to the Dictionary of Occupational Titles. (Px9).

On cross-examination, counselor Stafseth acknowledged that she usually is retained by claimants and has been retained by Petitioner's counsel 20 to 30 times in her career since earning her certification in 2009. She testified she did not recommend that Petitioner undergo aptitude or interest-based testing because looking at his overall picture he would not have access to gainful employment. She testified that the sedentary physical demand work level involves lifting no more than 10 pounds, sitting for the majority of the shift. As to whether a job involving

three hours of walking fits within the category depends on other factors such as frequency and duration of the walking. However, she acknowledged that as long as the job involved only occasionally lifting up to 10 pounds and sitting for the majority of the day it would fall within the definition of sedentary duty. She agreed he has not been medically permanently disabled from work and has not been medically restricted from driving. When she met with the Petitioner, she was not aware that he had been offered a job as a watchman. She agreed he should have no problems wearing a uniform or paying attention to a monitor. (Px9).

On redirect, counselor Stafseth testified that her understanding of a watchman job would involve some level of patrolling, which would involve walking exterior or interior facilities, standing a post and/or checking in people/drivers. She disputed such a job being sedentary in that, based on her experience, it requires the ability to stand and walk, which would be the light physical demand work level. (Px9).

Petitioner filed a Petition for Penalties based on Section 19(k) and attorney fees based on Section 16 of the Act. The Petition is based on Respondent's termination of benefits based on Petitioner's failure to follow through in trying to obtain the watchman position, as this was an offer of a job the Respondent knew he wouldn't be able to perform. (Px12).

Petitioner submitted the prescription expenses he claims to be causally related to the accidents at issue as Px7. Respondent submitted documentation of medical expenses and weekly benefits paid to or on behalf of the Petitioner. (Rx12).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he slipped and fell to the ground from the cab of his truck. injuring his right knee and reinjuring his right shoulder on 2/26/14. The parties stipulated that the Petitioner suffered a compensable accident on that date. Prior to this accident, Petitioner was performing his regular duties as a motor truck driver for Respondent and was not under any active medical treatment for his right knee or right shoulder. He hadn't treated for the right shoulder since August 2013. Petitioner testified that he had no injury to his right knee before the accident.

Respondent points out that Dr. Cole in his 8/26/13 report indicated that Petitioner had ongoing knee complaints and was walking with a cane. It's clear from the objective diagnostic testing that the Petitioner had severe osteoarthritis in his right knee prior to 2/26/14, but no evidence has been presented to rebut the Petitioner's testimony that he had no right knee problems or treatment prior to that date.

Dr. Cole did point out that Petitioner was morbidly obese, and the treating medical records support this. The Petitioner testified that his weight ranged between 350 to nearly 400 pounds. Petitioner's weight had increased from 325 pounds when he was first examined by Dr. Cole on 7/11/12 and increased steadily following his subsequent work-related injuries. It makes common sense that Petitioner's excessive weight placed a strain on his knees even before the 2/24/14 accident, however the Arbitrator notes that in Illinois "it is axiomatic that employers take their employees as they find them," *Baggett v. Industrial Commission*, 201 Ill.2d 187, 199 (2002). The fact that Petitioner is obese cannot be used against him to deny compensability.

Following the 2/26/14 accident, Petitioner was examined by Dr. Cole on 9/8/14 for the right shoulder and knee injuries he sustained as a result of the fall. With respect to the right shoulder, Dr. Cole noted that Petitioner exhibited some mild impingement signs, that the injury had essentially resolved and that he was at MMI.

Regarding the right knee, Dr. Cole stated that the 2/26/14 accident appeared "to have been the inciting event that brought him to the need for care of the right knee" and did agree that Petitioner "undoubtedly aggravated a pre-existing condition" to his right knee, though he opined that Petitioner would have arrived at a need for care for the right knee in the near future regardless of the accident.

The latter portion of Dr. Cole's opinion, while likely accurate, is speculative in terms of when the Petitioner may have arrived at the need for care. The former portion of his opinion acknowledges that the 2/26/14 accident was the reason that right knee care was sought and administered. The Petitioner had been working his regular job with no known indication of right knee problems, and there is no evidence that the Petitioner's right knee condition ever improved following the injury to where he reached a pain free baseline condition. As such, it appears to the Arbitrator to be more likely than not that the accident accelerated the Petitioner's need for treatment and, ultimately, a right knee arthroplasty.

The Arbitrator's determination is also supported by Dr. Jimenez, who opined that Petitioner had pre-existing right knee arthritis prior to the 2/26/14 but that his right knee was relatively asymptomatic before the accident. Dr. Jimenez stated that Petitioner's need for a knee replacement was related to the 2/26/14 accident based on previously asymptomatic knee arthritis becoming significantly symptomatic following this injury, moving up the timeline and the necessity for a knee replacement. Dr. Jimenez noted that the worsening of Petitioner right knee included swelling, problems rising from a chair, difficulty walking any great distances or going downstairs.

Under Illinois law, a worker's compensation claimant need prove only that some act or phase of the employment was a causative factor in the ensuing injury. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of the worker's compensation claimant's condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003). *Vogel v. Industrial Commission*, 821 N.E.2d 807 (Ill.App.2 Dist. 2005). It would be very difficult to argue in this case, given that the accident was stipulated and the Petitioner's description of the accident was unrebutted, that the work accident was not at least a cause of the Petitioner suffering an onset of symptoms on 2/26/14 that began a period of treatment culminating in knee replacement surgery.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the following unpaid medical expenses were reasonable and necessary for the treatment of Petitioner's injuries, based upon the medical records presented and Petitioner's unrebutted testimony.

A physical therapy bill from Advance Physical Medicine totaling $7,014.56 remains unpaid. According to Respondent's list of payment relating to the 2/26/14 injury, on page 4 of 15, the bill was received by Respondent, but no voucher was noted to have issued for payment.

According to the RX Development bill for Petitioner's 2/26/14 injuries contained within Petitioner's Exhibit #7, there remained a balance due of $28,973.70, with supportive HCVA forms attached. Respondent's payment sheet shows only two payments to RX Development. The first payment was made on 4/3/15 for $2,492.35; the second payment was made on 6/2/15 for $2,451.42. Both payments were made before the RX Development bill was generated on 7/11/17.

Petitioner received physical therapy from Athletico from 7/9/17 through 11/1/17. (Pet. Ex. #6). During that period of time he received physical therapy from 7/9/17 through 11/1/17. According to Athletico's bill contained within Petitioner's Exhibit #6, there remains unpaid charges between 9/6/17 and 9/15/17 totaling $2,066.00. Those charges are supported by services rendered within Athletico's records. According to Respondent's payment list, Respondent notes receipt of those charges, however no voucher was issued for their payment.

Also unpaid is the charge from Infinite Strategic Development in the amount of $611.52, contained within Petitioner's Exhibit #7 in the amount of $611.52 for hydrocodone prescribed by Dr. Silver. According to Respondent's payment list, no payments were made to Infinite Strategic Development.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

The parties have stipulated that the Petitioner was temporarily totally disabled from 2/27/14 to 11/9/18, and that the Respondent is entitled to a credit of $206,321.78 for payment of the stipulated TTD benefits. The parties dispute the period for which the Petitioner is entitled to maintenance, with Petitioner arguing entitlement from 11/10/18 through the 7/22/19 hearing date, and Respondent arguing that his entitlement to maintenance benefits ended as of 2/15/19.

The Arbitrator also finds that Petitioner is entitled to weekly maintenance benefits from 2/17/19 to 07/22/19. While, as noted in the penalties section below, that the Petitioner's effort in seeking employment during his job search and in following up on the watchman position was either unclear, due to a lack of job logs in evidence, or left something to be desired, given a lack of evidence as to whether he sought a reasonable accommodation for the watchman position, the preponderance of the evidence demonstrates that the Petitioner was paid benefits by Respondent during his job search, with Petitioner testifying he provided logs as requested by Respondent. The Arbitrator finds that this supports the institution of maintenance. While it does appear that there is a possibility the Petitioner could have performed the watchman's position and could have made a stronger effort to determine if he could have with a reasonable accommodation, the job description itself certainly appears to include walking and standing activities that would be difficult for Petitioner to perform, and the Respondent provided insufficient evidence as to whether any reasonable accommodation could ever have been made for the watchman position based on Petitioner's specific restrictions. While Ms. Pak made it clear that the job would have been offered to Petitioner had he not indicated an inability and/or unwillingness to perform aspects of the job, she had no real information on what the job entails and how a reasonable accommodation could have been made for the position, or for example whether or not other people working in the watchman position had been reasonably accommodated or how.

The preponderance of the evidence supports the Petitioner's entitlement to maintenance benefits from 11/10/18 through 7/22/19.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner injured his right knee and right shoulder on 2/26/14. The right shoulder injury consisted of re-aggravation of the right shoulder impingement. Dr. Silver administered a cortisone injection to the right shoulder and prescribed physical therapy and pain medication. Petitioner was later seen by Dr. Wolin on 2/6/18 due to continuing complaints of pain and stiffness to his right shoulder. At that time, Dr. Wolin administered an injection to the right shoulder and prescribed physical therapy. Petitioner testified that he continued to

experience pain in his right shoulder and wanted to return to Dr. Wolin but did not because the Respondent wouldn't authorize it. Petitioner testified that he continues to have pain and stiffness to his right shoulder.

As to the right knee, Petitioner ultimately underwent right knee replacement surgery with by Dr. Jimenez. Following rehab, Dr. Jimenez, who released him from his care on 12/14/16 when he determined Petitioner to be at MMI with permanent restrictions that would preclude him from returning to work with sedentary duty and weight-bearing as tolerated.

Respondent's Section 12 examiner, Dr. Cole, examined the Petitioner on 4/16/18 and agreed that Petitioner was at MMI with respect to his right knee and suggested a sedentary-based job with regard to the right knee with limited squatting, kneeling and climbing.

Petitioner underwent a vocational assessment analysis on 9/24/18 with Kari Stafseth, a Certified Rehabilitation Counselor at Vocamotive. At her deposition, Ms. Stafseth testified that several factors, including Petitioner's age, education (consisting of special education throughout his time in high school) and work history, the vast majority of which involved driving-related activities, reflected that the Petitioner did not really have transferrable skills to the sedentary level of physical demand, which he is limited to by both Dr. Jimenez and Dr. Cole. Therefore, Ms. Stafseth stated that she thought that Petitioner would not have access to any viable or stable job market. She also testified that Petitioner's reliance on the use of supportive devices, and their negative impact on his ability to be placed in the job market.

Petitioner testified that he mainly ambulates with assistive devices, including a cane, walker, scooter and wheelchair, particularly with walking longer distances. Ms. Stafseth testified that Petitioner "painted a picture" of difficulties performing the most basic daily activities. Ms. Stafseth stated that Petitioner told her that while he was sitting, he experienced pain in his knees and that he was unable to stand a very long time and that on some days he couldn't stand at all. Petitioner also stated that he was not able to squat or kneel and avoided stair climbing and reported difficulties with overhead reaching due to pain in his shoulders. He also told Ms. Stafseth that he had difficulty reading and was "scared" to use a computer and had no keyboarding skills.

Despite his significant limitations and lack of transferrable skills, Petitioner continued to comply with Respondent's job placement program. He acknowledged that he received an MMI Orientation letter from Respondent and attended the vocational orientation on 10/26/18, as confirmed by his signature on the attendance sheet on the front page of the orientation packet. Petitioner testified that the orientation proved him with information on how to apply for a job. He testified that he was given job search forms and further testified that he was searching for jobs either in person or by phone and dropping the forms off at City Hall on a weekly basis. It should also be noted that Petitioner's benefits were not terminated until the issue of the watchman job came up, so it is reasonable to assume his job search was either sufficient from the Respondent's perspective or that the Respondent was not paying much attention to the job logs.

Petitioner agreed he received a 12/24/18 letter from Ms. Pak indicating the Respondent had identified a "watchman" position with the Department of Water Management as being within Petitioner's physical restrictions, and he made an appointment to meet with her regarding the position.

Ms. Pak testified that her function was to call in employees considered to be at MMI from a list from the Committee on Finance. Ms. Pak testified that all such candidates for the watchman's position were given two job descriptions for a watchman (while there are two, the Arbitrator notes they are virtually identical) along with a questionnaire entitled "Watchman Willingness and Ability Questionnaire."
Among the essential duties set forth in the job descriptions of a watchman are patrolling the interior and exterior of designated facilities, walking through interior of facilities, ensuring that only authorized personnel are in the

building, walk the exterior of buildings and checking that doors and gates are secure, and driving to various locations as part of a roving patrol . The physical requirements contained within the watchman's job description there was the "Ability to stand and walk for extended or continuous periods of time" along with the "Ability to climb staircases." Another requirement of the position was the knowledge of "basic computer operations relating to security monitors." There was nothing within the watchman description that specified the frequency or the number of hours a watchman would be required to stand or walk.

The "Watchman Willingness and Ability Questionnaire" that Petitioner was required to fill out consisted of questions relating to the employee's willingness and ability to perform certain tasks. Petitioner testified that he filled out the questionnaire truthfully, indicating what he believed he could and could not do. In answering the questionnaire, Petitioner answered that he was not physically able to perform duties or was unwilling to perform duties that required significant walking or climbing. It seems reasonable for Petitioner to state that he was both physically unable and unwilling to perform duties that were outside of his restrictions. For example, regarding question #2, Petitioner believed that he could not perform random patrols due to his limited ability to walk and would not be willing to do so. The Arbitrator would also note that some of the questions in the questionnaire were compound and not easy to answer in one fell swoop.

Ms. Pak testified that she did not decide who did or didn't qualify for the watchman; that she merely turned in the form to the Committee on Finance, who made that decision. Ms. Pak testified that all prospective employees were asked to bring any medical information indicating their restrictions, which Petitioner did not do. However, Ms. Pak did acknowledge that the function of the Committee on Finance was to administer Respondent's workers' compensation claims, which included gathering medical records of all workers' compensation claimants. Thus while the Petitioner, again, should have provided a better effort to, for example, bring his medical restrictions to the meeting with Ms. Pak as requested, it would also seem to the Arbitrator that if the Committee on Finance had enough information to know that Petitioner was MMI and therefore that it is reasonable to assume that they were aware of Petitioner's permanent restrictions, especially given the fact that Respondent had obtained five examinations with Dr. Cole pursuant to Section 12.

Petitioner's maintenance benefits were then terminated, effective 2/16/19. Following the termination of benefits Petitioner received a letter from Respondent, dated 3/20/19, from Paul Plantz, Administrative Manager from Respondent's Department of Fleet and Facility Management, stating that the Committee on Finance believed that Petitioner could perform the duties of a Watchman. Mr. Plantz was not called to testify in this regard.

To bolster its assertion that Petitioner could perform the watchman's job, Respondent obtained an opinion from vocational expert Julie Bose of MedVoc. According to the report, Julie Bose relied not a full assessment of Petitioner's capabilities but upon Dr. Cole's 4/16/18 report, which only addressed Petitioner's physical capabilities that indicated Petitioner could perform a sedentary-based job with limited squatting, kneeling or climbing and upon an unidentified "Assistant Commissioner of Security for the City of Chicago" who stated that the job required minimal standing and walking and that standing, and walking totaled less than three hours in an eight-hour workday. The Respondent's own job description required a watchman to have the ability to stand and walk for extended or continuous periods of time and the ability to climb staircases, Ms. Bose relied upon the U.S. Department of Labor which outlined in their Dictionary of Occupational Titles, that sedentary work does allow for up to three hours of standing and walking and then went on to say that the watchman's job description did not require a watchman to squat, kneel and climb – instead of relying on the actual watchman description tendered by the Respondent that defines the job as:

- Patrol the interior and exterior of designated facilities;
- Walking through interior of facilities, ensuring that only authorized personnel are in the building; walk the exterior of buildings, checking that doors are secure, etc.;

- Drive to various locations as part of a roving patrol
- The physical requirements contained within the watchman's job description there was the "Ability to stand and walk for extended or continuous periods of time" along with the "Ability to climb staircases."
- Another requirement of the position was the knowledge of "basic computer operations relating to security monitors.

While Ms. Bose concluded that the watchman's position offered to Petitioner fell within the "parameters of the work descriptions as outlined by Dr. Cole", it should be noted that Ms. Bose never met Petitioner, nor did she perform a vocational assessment upon him. She never discussed Petitioner's limited education, or his lack of the most basic computer skills required to perform the duties of a watchman.

Then Respondent had Petitioner examined an additional time by Dr. Cole on 5/13/19, mainly to obtain his opinion regarding Petitioner's ability to perform the watchman job. Of note are Dr. Cole's comments regarding Petitioner's physical restrictions. After being provided with a copy of the requirements of the watchman's position by Respondent, Dr. Cole stated that Petitioner could perform "almost all" of the duties described, "however, the job needs to be primarily seated with minimal ambulation on his feet." Dr. Cole's opinion was that Petitioner "will almost certainly have a difficult time with any significant amount of walking" and that "a reasonable accommodation needs to be made." At no time did the Respondent provide evidence of whether any accommodation could or would be made for Petitioner, nor was any other job offered to Petitioner within his restrictions.

At her 5/29/19 deposition, counselor Stafseth was asked about her understanding of what a watchman did, she responded that it was "pretty much another name for a security guard." She also testified that she was personally familiar with the Respondent's watchman's position, having reviewed the job description, and that a watchman would be required to do some type of patrolling, involving walking around maybe the exterior or interior of a building. When asked if the job title of watchman would be considered sedentary work, Stafseth believed that it wouldn't. She stated that a watchman is classified as a light duty job according to the Dictionary Titles, not a sedentary one. Counselor Stafseth was also asked if she ever had any clients who had been working as a City watchman, stated that she had and that they were only clients who had gone back to the City of Chicago as a watchman as an accommodated position.

The Arbitrator's impression in this case is that the employer has a "watchman" position that is made available to City workers who have work injuries and have reached MMI with permanent restrictions, regardless of where they came from within City employment. In this case, the job appears to be one, as noted by Dr. Cole, that would only be possible for the Petitioner to perform if reasonable accommodations were made. Instead of sitting down with the Petitioner and determining how or if this could occur, the Petitioner appears to be part of a larger group of such workers who attended a seminar on how to find a job. He then was put into a protocol for a job that fairly clearly would require accommodations, but left it to the Petitioner to pursue this. While, again, the Petitioner's own efforts in this are questionable to the Arbitrator, the effort of the Respondent to assist him in this was also questionable, particularly given the Petitioner's limited employment history outside of driving and his unrebutted testimony that much of his high schooling involved special education. While the Arbitrator is not saying that the watchman job would be considered a "make work" position, it nevertheless appears that they were attempting to put a round peg into a square hole in trying to fit the Petitioner into a position that was not within his restrictions without additional accommodation. Based on the evidence in this case, the Arbitrator believes it would be very difficult for Petitioner to obtain or perform a watchman job in the regular job market given his noted restrictions, age, education and transferrable skills.

Based upon the foregoing, the Arbitrator finds that the Petitioner has sufficiently established by the preponderance of the evidence that he is an "odd lot" total permanent. A claimant falls into the "odd lot"

category in one of two ways: 1) by showing diligent but unsuccessful attempts to find work; or 2) by showing that, because of his age, skills, training and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel v. Industrial Commission*, 372 Ill.App.3d 527, 544 (2007). The Arbitrator relies on the following in finding that Petitioner made both of these showings:

1. Petitioner's age (56) as of the hearing;
2. The permanent sedentary restrictions imposed by both Dr. Jimenez and Dr. Cole;
3. The fact that the permanent sedentary restrictions, which are not in dispute, prevented Petitioner from being able to resume his position as a motor truck driver;
4. The fact that Respondent did not provide Petitioner with work within his restrictions. Respondent's job as a watchman appears to be outside of his restrictions without a reasonable accommodation, as indicated by Respondent's Section 12 examiner Dr. Cole.
5. Petitioner's lack of a formal education past high school and his involvement in special education programming.
6. Petitioner's narrow work history as a motor truck driver.
7. Petitioner's ultimately unsuccessful job search.
8. The fact that, as of the hearing, Petitioner has been out of the workforce for more than five years.
9. Kari Stafseth's persuasive testimony that the watchman's position offered by Respondent was outside of Petitioner's sedentary work restrictions; that Petitioner has a limited ability to learn and lacks even the most basic computer skills that are required by a watchman that Petitioner does not have access to a stable labor market as a watchman, or any other position as a result of his injuries.

For the foregoing reasons the Arbitrator finds that Petitioner is totally and permanently disabled as of 7/23/19.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator denies the Petitioner's request for penalties and fees pursuant to Sections 19(k) and 16. The reality is that the Petitioner appears to have done what the Respondent asked of him in terms of a job search up until the time the issue arose regarding the watchman job. At the same time, the facts of the case demonstrate that the Petitioner did not provide any true significant effort beyond what was asked of him. Additionally, his failure to take the steps needed to try to work with the City to see if he could fit within that job, possibly with a reasonable accommodation, is a factor. While the Petitioner testified he had copies of his job logs and that he applied for a reasonable accommodation, his excuse for not having these documents left a lot to be desired, beyond the fact that there is no evidence that a subpoena or other type of request was made to the Respondent to obtain these documents for presentation at trial. The Arbitrator has determined that the Petitioner is permanently and totally disabled as a result of the 2/26/14 accident, but his own actions were certainly contributory to the Respondent's termination of benefits. The Arbitrator does not see sufficient evidence of unreasonable and vexatious behavior in doing so pursuant to Section 19(k), and therefore penalties and attorney fees are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DIEDRE ZIEGLER,

Petitioner,

21IWCC0146

vs.

NO: 18WC007067

ROSATI'S PIZZA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of employee/employer relationship, causal connection, temporary total disability, permanent partial disability, medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

21IWCC0146

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 25 2021
o020321
SJM/jrc
044

Stephen Mathis

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZIEGLER, DIEDRE
Employee/Petitioner

Case# 18WC007067

ROSAIT'S PIZZA
Employer/Respondent

21IWCC0146

On 2/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5395 JEFFREY FRIEDMAN PC
225 W WASHINGTON ST
SUITE 2200
CHICAGO, IL 60606

0766 HENNESSY & ROACH PC
NATALIE BAGLEY
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0146

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§ 8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Diedre Ziegler
Employee/Petitioner

v.

Rosati's Pizza
Employer/Respondent

Case # **18** WC **7067**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **December 19, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **March 2, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to her claimed current lower back, right hip and right leg conditions of ill-being. The Arbitrator further finds that Petitioner established causation as to the need for the concussion-related physical therapy evaluations of April and May 2018 but did not establish causation as to any current head condition of ill-being. Petitioner did not testify to any current head complaints.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established concurrent employment. The Arbitrator finds Petitioner's average weekly wage to be $218.70. See the attached decision for an explanation of the Arbitrator's calculation.

On the date of accident, Petitioner was **19** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay the following reasonable and necessary medical expenses, subject to the fee schedule: 1) Matteson Fire Department, 3/2/18, ambulance service, $898.00; 2) Franciscan Alliance, Emergency Room, 3/2/18, $20,021.60; 3) Franciscan Alliance, Emergency Room, 3/5/18, $12,592.70; 4) Radiology Imaging Consultants, 3/2/18 and 3/5/18, $3,580.00; 5) Franciscan Health, 4/16/18, physical therapy evaluation, $610.00; and 6) Equian, LLC, physician services at Emergency Room, 3/5/18, $946.20. PX 5. The Arbitrator declines to award the other claimed physical therapy bills as they are not supported by correlating records. The Arbitrator also declines to award certain of the claimed Radiology Imaging Consultants charges as they relate to treatment Petitioner underwent on November 3, 2017, before the work accident.

Respondent shall pay Petitioner temporary total disability benefits at a rate of $218.70/week from April 9, 2018 through May 28, 2018, a period of 7 1/7 weeks.

Petitioner placed nature and extent at issue (Arb Exh 1) but credibly testified she was subject to restrictions and still under active treatment as of the hearing. The Arbitrator concludes Petitioner has not reached maximum medical improvement and therefore does not address the issue of permanency.

On this record, the Arbitrator declines to find Respondent liable for penalties or fees.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason

Signature of Arbitrator

1/31/19
Date

Diedre Ziegler v. Rosati's Pizza
18 WC 7067

Summary of Disputed Issues

Petitioner claims she was employed by Respondent as of March 2, 2018, the date she was injured in a motor vehicle accident. She testified the accident occurred while she was driving back to Respondent after delivering a pizza to a customer.

On the morning of the hearing, the Arbitrator met with both counsel prior to going on the record. Petitioner's counsel indicated he was seeking a hearing solely on the issue of employment. The Arbitrator declined his request, citing the need to avoid piecemeal litigation. She indicated the trial would have to be on all issues. Petitioner's counsel indicated he still wanted to proceed. Because Petitioner remained under active treatment, the Arbitrator discussed the option of proceeding under Section 19(b) or 8(a). T. 6. The Request for Hearing form lists the following disputed issues: employment, accident, causal connection, earnings, medical expenses, temporary total disability, nature and extent and penalties/fees. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner was 20 years old as of the hearing. She was born on August 4, 1998. T. 14.

Petitioner testified she was employed by Popeye's Chicken as well as Respondent as of the March 2, 2018 accident. T. 14. At Popeye's, she worked as a bagger and cashier. She earned $8.25 or $9.00 per hour and worked 20 to 40 hours per week. T. 34.

Petitioner testified she discussed her Popeye's job with Kevin, her manager at Respondent. T. 21. Kevin's real name is "Ketan." T. 16. Kevin accommodated her schedule at Popeye's. T. 36-37. Kevin made sure her hours at Respondent did not overlap with the hours she put in at Popeye's. T. 37. Before the accident, she would bring lunch from Popeye's for the workers at Respondent. She did this every other week. If she was running late for her job at Respondent, due to her job at Popeye's, she would communicate this to Kevin via text. T. 40.

Petitioner testified she first began working at Respondent in August 2016. T. 17. Kevin hired her. Until November 2016, she worked between 20 and 40 hours per week as a cashier for Respondent. T. 17, 19. Between November 2016 and October 2017, she continued working for Respondent on an occasional basis. She would periodically help out as a cashier or work as a delivery driver. During this period, she drove for Respondent once or twice a month, to make extra cash. T. 20.

Petitioner testified she began working for Respondent on a regular basis in October 2017, after she talked with Kevin about getting more hours. T. 21. As of October 2017, she worked two or three shifts per week for Respondent, taking orders via phone, cashiering and making deliveries. She typically worked between 4 PM and closing time at 11 PM or midnight. T. 24-25. During this same period, she continued working for Popeye's. Her combined hours for both businesses varied between 35 and 60 per week. T. 35-36.

Petitioner testified that Kevin controlled Respondent's operation at the store where she was based. Kevin set the rules. T. 24. He did the hiring and firing. He had the authority to discipline her but never did so. T. 29. He directed her activities on a daily basis. T. 22.

Petitioner testified that Respondent paid her $9.25 per hour for the time she worked as a cashier. When she worked as a driver, Respondent paid her $3 per delivery plus tips. After November 2017, Respondent paid her in cash, regardless of whether she worked as a cashier or driver. T. 69. Her driving-related earnings varied between $25 and over $100 per night. T. 66.

Petitioner testified that, when she worked as a driver, she would clock in, wait for an assignment, perform the delivery, collect payment from the customer, drive back to the mall where Respondent was located and wait for the next assignment. T. 25. The drivers rotated. T. 26. Petitioner testified she would initially sign in under one of three drivers' names. One of those drivers was Kevin. She occasionally signed in under Kevin's name at Kevin's direction. T. 27. The computer would show the driver the customer's order and address. The computer would also show whether the customer had already paid or payment needed to be collected. T. 28. The computer was the only available source of this information. T. 28.

Petitioner testified that Respondent also had separate delivery-related devices used by two contractors, Grub Hub and Uber Eats. Grub Hub maintained a Samsung device while Uber Eats maintained a mini I Pad. Grub Hub did not supply drivers but Uber Eats did. T. 31. With respect to the Uber Eats deliveries, Respondent workers would prepare an order and leave it in a bin for pick-up by the Uber Eats driver. Petitioner testified she never delivered an Uber Eats order. T. 32.

Petitioner testified she arrived at work for Respondent at about 4 PM on March 2, 2018. T. 16. She then delivered a pizza to a relative of hers who lived about a mile away. She drove back to Respondent, picked up another pizza and delivered it to a customer in the Timber Ridge trailer park complex. The accident occurred at about 5 PM, while she was on her way back to Respondent after making the Timber Ridge delivery. T. 15. She was involved in a collision. T. 45. Paramedics came to the scene and transported her to the Emergency Room at St. James Hospital. T. 45. Petitioner testified she primarily complained of her right hip, right leg and back at the Emergency Room. T. 46.

A Matteson Fire Department patient care record dated March 2, 2018 reflects that paramedics arrived at the scene of a collision in Sauk Village, Illinois, and encountered Petitioner. The record describes Petitioner's vehicle as having "two feet of intrusion on the passenger side from the collision." The record also reflects that the front air bags deployed. Petitioner complained of severe pain in both hips. She declined pain medication and was placed on a back board. PX 6.

One Emergency Room note describes Petitioner as a "restrained driver in a T-bone accident on the passenger side". The note also mentions a "prolonged extrication" from the vehicle. The examining physician noted complaints of head pain, 8/10 right hip pain resulting in inability to move the right leg and less severe left hip pain. Another note reflects that Petitioner was unaware of how the accident occurred, was not wearing a seatbelt, recalled striking the left side of her head against a window and complained of hip pain.

The examining physician noted that Petitioner was unable to flex her right hip or right foot due to right hip pain.

Petitioner underwent an EKG, laboratory work and multiple radiographic studies. A CT scan of the abdomen and pelvis, performed with contrast, showed no acute abnormalities. CT scans of the head and cervical spine were unremarkable. Pelvic and chest X-rays were negative. PX 6.

Petitioner was discharged from the hospital with prescriptions for Hydrocodone, Norco and Ibuprofen and instructions to follow up with Dr. Mulk. The discharge instructions reflect diagnoses of motor vehicle collision, cerebral concussion, acute cervical strain and acute right hip pain. PX 6.

Petitioner testified that, the following day, her entire right leg became numb after she started moving out of a seated position. She notified her mother of this. The following morning, her mother drove her back to the hospital. T. 47-48.

Petitioner returned to the Emergency Room on March 5, 2018, complaining of intermittent right hip numbness and pain since the motor vehicle collision. The examining physician noted marked tenderness to palpation of the right hip and right lower back, along with a decreased range of motion secondary to pain. He ordered a lumbar spine MRI without contrast. This study showed a posterior central disc protrusion at L5-S1 causing a mass effect on both lateral recesses but no significant stenosis. A right lower extremity CT scan, performed without contrast, showed no acute abnormalities. Petitioner initially denied pain medication but eventually agreed to undergo a Toradol injection. T. 49. At discharge, she was directed to "avoid heavy lifting or twisting" and seek follow-up care with Dr. Mulk, an internist, and Dr. DePhillips, a neurosurgeon. PX 6.

Petitioner testified she then began seeing Dr. Stagg, an associate of Dr. DePhillips. Dr. Stagg prescribed physical therapy. T. 50.

Petitioner filed an Application for Adjustment of Claim on March 7, 2018, alleging an accident of March 2, 2018 and an average weekly wage of $400.00. [Notice is not in dispute.]

Records in PX 6 identify Patrick Stagg as a physician's assistant in the neurosurgery division of the Franciscan Physician Network. It appears Petitioner first saw Stagg on April 9, 2018 but no note of that date concerning his findings is in evidence. He issued a letter "to whom it may concern" indicating Petitioner was under his care and was to remain "off" for six weeks. On the same date, Stagg prescribed four weeks of physical therapy and set up an appointment for Petitioner to see Dr. DePhillips on May 25, 2018. The physical therapy referral form sets forth diagnoses of lumbar radiculopathy, lumbar disc herniation and h/o concussion.

On April 16, 2018, Petitioner underwent an initial physical therapy evaluation at Franciscan Health Care in Crown Point, Indiana. The records identify Patrick Stagg, PA as the prescribing medical provider. The evaluating therapist, Jennifer Guillen, PT, documented a history of the motor vehicle accident, noting that Petitioner was driving about 45 miles per hour, "working pizza delivery," when she was struck on the right side of her vehicle. Guillen also noted that Petitioner had to be extricated from the vehicle. She documented complaints of headaches, right-sided neck pain, dizziness, short-term memory loss, difficulty focusing and sleeping and sensitivity to light and noise. She described Petitioner as "work[ing] two part-time jobs but not cleared to work until after 6 weeks of PT." She recommended therapy to work on neck range of motion, decrease dizziness and improve visual tracking. She also prescribed home exercises. PX 6.

Petitioner testified she underwent physical therapy twice a week for four weeks. The therapy consisted of exercises, stretching and massage. T. 51. The therapy was not continuous. Delays occurred due to lack of workers' compensation authorization or missed appointments. T. 52.

An itemized bill in PX 6 reflects that Petitioner underwent additional physical therapy at Franciscan Health between May 8 and June 19, 2018, again at Stagg's recommendation. The only records in evidence concerning this therapy consist of an initial evaluation of May 8, 2018. The evaluating therapist, Jennifer Guillen, PT, noted a diagnosis of "post concussion." She indicated that Petitioner's back complaints had worsened during the preceding two weeks and that "this morning, [Petitioner] woke up and fell secondary to decreased sensation of RLE."

A note authored by Dr. DePhillips on June 20, 2018 (see last page of PX 6) reflects that the doctor released Petitioner to work on May 28, 2018 and released her to full activities, as tolerated, as of June 20, 2018. The note does not set forth the doctor's examination findings or diagnosis.

Petitioner underwent lumbar spine X-rays on July 6, 2018, at Stagg's recommendation. The interpreting radiologist compared the films with the previous lumbar spine MRI. He interpreted the films as showing mild retrolisthesis at L5-S1. PX 6.

Petitioner testified she never resumed working for Respondent after the accident. In May 2018, she returned to work for Popeye's. Thereafter, she worked between 20 and 40 hours per week for Popeye's until July 2018. During this time, she needed longer breaks and it took her more time than usual to perform her typical cashiering and bagging duties. After she left Popeye's, she began working full-time at Kirby Vacuum. She works in the field as a canvasser, going door to door to display products. Due to her injuries, she has to take breaks while canvassing. She is physically able to perform the other, more administrative aspects of the job. T. 62.

On August 31, 2018, Petitioner returned to Stagg and complained of worsening, intense back pain and intense right leg pain and weakness. Stagg noted that Petitioner "presented after herniating a disc at work, had acute back and leg pain, went to PT and got better," returned to work and got worse. He described Petitioner's gait as impaired. He prescribed a repeat lumbar spine MRI. PX 6.

Petitioner testified she went back to the Emergency Room about two weeks prior to the hearing. She underwent another injection during this visit. T. 54. The MRI was scheduled for two days after this most recent Emergency Room visit. Hospital personnel directed her to follow up with her neurosurgeon afterward. T. 54-56. The doctor wrote a note restricting her from walking for long periods and lifting more than 5 pounds. T. 59-60. She is supposed to see a family practitioner if she requires additional care or medication. [No records concerning this recent treatment are in evidence.]

Petitioner testified she is "over the accident to an extent" but continues to experience back spasms, leg numbness and hip pain at times. The hip pain radiates to mid-thigh. Her mobility has decreased since the accident. She experiences more pain when bending. T. 63-65.

Under cross-examination, Petitioner testified she worked solely as a cashier for Respondent between August and November 2016. Between December 2016 and October 2017, she worked as both a cashier and a delivery driver. She continued performing both functions between November 2017 and the accident of March 2, 2018. T. 67-68. With respect to most of her shifts, she knew in advance whether she was going to be cashiering or making deliveries. T. 68. After November 2017, she was

always paid in cash, regardless of which job she performed. She earned $9.25 per hour as a cashier and $3 plus tips per delivery. T. 69. When she worked as a driver, she would clock in and wait for a delivery assignment. She could wait in her car or anywhere. She typically waited in a cigar shop that was in the same mall as Respondent. T. 70. Kevin would call or text her to give her the assignment. She drove her own car while making deliveries. She paid for her own gas. Kevin would not tell her which route to take. She used GPS to determine the route. T. 71-72. After making a delivery, she would return, wait if necessary and then go out on the next delivery. She was paid each night, at the end of her shift. She kept any cash tips and reported the customers' credit card tips to Respondent. Respondent paid her the credit card tips. She would complete a W2 form whenever she cashiered but no tax forms with respect to the delivery driver job. When she drove for Respondent, she could wear her own clothes. She called Kevin each week, at his request, to provide him with her schedule. T. 73-74. She does not know exactly when Popeye's hired her. She has worked at two Popeye's locations. She believes she started in 2016. T. 75. She took a three or four-month break from Popeye's when she initially began worked at Respondent. T. 75. She does not know how many shifts she worked at Popeye's or how much she earned from Popeye's with respect to the period from February 27, 2017 through March 2, 2018. T. 75-76. She is not currently in possession of her Popeye's paycheck stubs. She does not know how many shifts she worked at Respondent or how much she earned from Respondent with respect to the period from February 27, 2017 through March 2, 2018. She did not bring any salary-related documentation from Respondent for the period 2017 through 2018. T. 77-78. On March 2, 2018, she worked solely as a delivery driver for Respondent. She did not perform any cashiering that day. T. 78. On that date, she made two deliveries before the accident. T. 78-80. She was on her way back to Respondent when the accident took place. T. 79-80.

On redirect, Petitioner testified she could not wait at home for her next delivery assignment. She had to stay near Respondent. If she was not available, Kevin would ask her why and she would lose out on an assignment. Another Respondent driver would take it. T. 80-81. There was never a time when she was not available to take an assignment. T. 82-83. During her wait times, she was within a two-minute walk of Respondent's building. T. 83. She used a GPS to set her routes per Respondent's policy. T. 83-84. Before she would head out to make a delivery, she had a rough understanding of the distance that was involved. T. 85. If a delivery took longer than usual, due to traffic, Kevin would tell her she took too long. T. 86. Respondent had policies she had to adhere to. One policy related to the timeliness of deliveries. A driver needed to make sure the delivery arrived intact and in a timely fashion, to avoid customer complaints. R. 88. She could put an order in a Respondent bag to keep the food warm. T. 88. She has no expertise in accounting or taxes. With respect to the work she performed for Respondent, she did not make the decision as to which tax forms were appropriate. She could gain access to her Popeye's schedule and paycheck stubs but is not sure what documents exist with respect to the work she did for Respondent. T. 89-91.

Under re-cross, Petitioner acknowledged it was not financially beneficial for her to wait for assignments at a location far from Respondent. The more deliveries she made, the more money she earned. T. 92.

Katen Limbachiya (a/k/a "Kevin") testified on behalf of Respondent. Limbachiya testified he works at Respondent's Matteson location. He has worked as a manager for Respondent for 2 ½ years. T. 97. His job duties include hiring/firing workers, creating work schedules and overseeing food orders. He knows Petitioner because she worked as both a cashier and driver. T. 98. On March 2, 2018, Petitioner worked only as a driver. T. 98. Respondent's drivers wait for deliveries, make deliveries and

return. They can opt to put the food orders in "hot bags" to keep them warm. He contacts drivers to let them know when orders are ready. T. 99.

Limbachiya testified he had a conversation with Petitioner about her status as an independent contractor. This conversation took place "maybe in December 2017" because that is when he asked her to start making deliveries. T. 99-100. During this conversation, he told Petitioner her insurance would cover any accident she was involved in. Petitioner drove her own car while making deliveries. Respondent did not pay for her gas, vehicle maintenance or insurance. T. 100-101. Respondent provided drivers with "hot bags" to keep the orders warm but the drivers were not required to use them. T. 101. Respondent paid Petitioner $4 per delivery plus the tips she earned. Petitioner received her pay in cash at the end of each night. She kept the cash tips and reported the credit card tips to Respondent. T. 101-102.

Limbachiya testified that Respondent did not give Petitioner a W2 form for the work she performed as a driver. T. 103. Respondent did not withhold taxes or Social Security from its drivers' earnings. At the start of a shift, Petitioner would clock in to show her availability and then wait for a delivery. T. 106. Petitioner could wait anywhere but usually chose to wait in a cigar store that was next door to Respondent. T. 106. Petitioner was free to choose the route she took while making a delivery. He did not designate the route. Petitioner was not required to wear a uniform. T. 107. She could wear what she wanted while making deliveries. Petitioner could refuse to make a delivery if the distance was too great or if the customer lived in a dangerous neighborhood. He did not penalize Petitioner for refusing deliveries. T. 108. Petitioner was not penalized if the food she delivered was damaged or the delivery was late. T. 109.

Limbachiya testified he first spoke with Respondent's counsel the Thursday before the hearing. Respondent's counsel called him to ask about Petitioner's earnings. He tried to obtain Petitioner's pay information but the notice was too short. T. 108-109.

Limbachiya testified he created a schedule for the delivery drivers. Petitioner called him each week to relay her availability. He used this information when creating the schedule. T. 110.

Under cross-examination, Limbachiya testified that Respondent had no written contract with Petitioner. T. 111. He is not aware of Respondent having a written contract with any of its delivery drivers. T. 112-113. At some point, he verified that Petitioner had automobile insurance. Petitioner showed him her insurance card but he cannot recall the name of her carrier. T. 113. Respondent required Petitioner to carry insurance on her vehicle. He would have fired Petitioner if she lacked insurance. Petitioner showed him a paper, not a card. T. 114. He did not read the entire paper. He only noted the coverage start and expiration dates. He cannot presently recall those dates. He does not know the limit of liability. T. 114-116. Respondent provided its drivers with "hot bags." The drivers did not need any other equipment. T. 116-117. If Petitioner received tips via credit card payments, he would pay those tips to her in cash. He never sought advice from an accountant as to what tax forms, if any, he should give to Petitioner. T. 118. When Petitioner was awaiting delivery assignments, she frequently waited in the cigar shop that was next door to Respondent. From the time he informed her of an assignment, it took her one minute or less to arrive at Respondent. T. 119. Petitioner used GPS to set delivery routes. He approved of this. He preferred she use GPS because he wanted her to avoid getting lost. T. 119-121. If Respondent's drivers got lost while making deliveries, that would interfere with Respondent's business. T. 120-121. If a customer complained about a driver, he would not discuss this with the driver. He would simply try to resolve the complaint with the customer. T. 121. He hired

Petitioner and had the authority to discipline or fire her. T. 122. Petitioner brought no special skills to the job. T. 122. Petitioner did not need to have a CDL. Petitioner could refuse a delivery. Petitioner refused deliveries on a couple of occasions because the customers lived in a rough area, such as Chicago Heights. When Petitioner refused, he would make the delivery himself. He cannot recall exactly when this occurred. T. 123. Respondent keeps payment records on its computer, using a program called "Food Tech." He could access these records and print out Petitioner's pay records for the last twelve months. T. 124-125. He did not have the exact date of Petitioner's accident until the day before the hearing. T. 126. Petitioner told him about her job at Popeye's and he accommodated her schedule. He assigned Petitioner evening shifts that ran from 5 PM to 9:30 or 10:00 PM. These were Respondent's peak hours. T. 127. Petitioner left early on many occasions and he said nothing about this. He told Petitioner what hours she would drive. Petitioner had no right to drive for Respondent when Respondent was closed. Petitioner had to be there to accommodate Respondent's needs. Petitioner received the delivery information via computer. Petitioner did not perform any cashiering for Respondent after January 2018. T. 131. Between January and March of 2018, Petitioner worked only as a driver for Respondent. He has some payroll information for this period.

On redirect, Limbachiya reiterated that Petitioner could choose whether to put orders in "hot bags." T. 131. In determining which route to take, Petitioner could have looked at a map or guessed. T. 132. He does not have all of the information concerning Petitioner's earnings due to short notice. Petitioner clocked in under her own name and under others' names. He identified RX 1 as the payroll information he brought to the hearing. This is not all of the information Respondent has concerning Petitioner. T. 135. Some of the documents he brought relate to Petitioner's cashier earnings. The last two "screen shots" relate to deliveries Petitioner made on November 19, 2017 and March 2, 2018. [The first "screen shot" shows that Petitioner worked as a delivery driver from 5:29 PM to 7:34 PM on November 19, 2017. It shows gross receipts of $138.72, "driver reimbursements" of $12.00, cash tips of $5.90 and a credit card tip of $3.00. The second "screen shot" shows that Petitioner received reimbursements of $6.00 plus tips on March 2, 2018 (the date of the claimed accident).] All of Respondent's drivers contact him so that he can create a schedule. T. 140. He did not single Petitioner out because of her second job. T. 140. Petitioner left early at times but he still put her on the schedule. T. 141. He initially hired Petitioner as a cashier in 2016 or 2017. T. 141-142. At a later point Petitioner became a driver. He could terminate Petitioner as a cashier or driver simply by not offering her any shifts. T. 142. He could do this with respect to any of Respondent's drivers. T. 142.

Petitioner was recalled. She testified she and Kevin had a conversation about her automobile insurance at Respondent in November or December 2017. T. 150-151. This conversation took place inside Respondent's store. T. 151. Kevin asked if she had insurance on her vehicle and she said no. T. 151. She continued driving for Respondent following this conversation. T. 152. She was sometimes asked to make deliveries to customers in Chicago Heights. She never refused to make these deliveries. T. 152.

Arbitrator's Conclusions of Law

Did an employment relationship exist between Petitioner and Respondent as of March 2, 2018?

Many of the facts bearing on the issue of employment are not disputed. The parties agree that Petitioner performed two functions for Respondent between December 2017 and at least January 2018. Petitioner claims she continued performing both functions between January 2018 and the March 2, 2018 accident. Respondent claims Petitioner worked solely as a delivery driver during that period. The

parties also agree that they were not bound by any written contract and that Petitioner's GPS usage benefited them both. Petitioner benefited because she was competing with other drivers for assignments, based on Respondent's rotating system. Respondent benefited because deliveries were more likely to be timely. Respondent did not refute Petitioner's testimony that, during the period she performed two functions, she typically knew in advance of a scheduled shift whether she would be working as a cashier or delivery driver. Respondent's sole witness conceded he hired Petitioner and had the authority to discipline or fire her. T. 122. He also agreed he was aware of Petitioner's concurrent employment at Popeye's and worked with Petitioner, schedule-wise, to accommodate that employment. He conceded he set the drivers' schedules. T. 127. He also acknowledged that drivers did not bring any special skills to the workplace (T. 122), that drivers were required to sign in at the beginning of their shifts and that he could "terminate" any cashier or driver simply by refusing to put him or her on the schedule. He did not dispute Petitioner's testimony that he sometimes directed her to sign in under his name or the name of a different driver. Petitioner, for her part, conceded she used her own vehicle when she made deliveries, was not reimbursed for gas or other vehicle-related expenses and was not required to wear a uniform while making deliveries.

The Arbitrator relies on Roberson v. Industrial Commission, 225 Ill.2d 159 (2007) in finding that an employment relationship existed between the parties as of the March 2, 2018 accident. In Roberson, the Supreme Court upheld the Commission's finding of employment despite the fact the claimant truck driver had to provide his own workers' compensation coverage and was responsible for the expenses associated with operating his truck. The Court held that, of the tests used to determine employment, the most significant were "right to control" and "nature of the work." In the instant case, Respondent's witness acknowledged he had the right to terminate or discipline Petitioner. He also acknowledged setting the drivers' schedules and sometimes requiring Petitioner to sign in under his name or the name of another driver. He did not refute Petitioner's testimony that, during the periods when she performed more than one role for Respondent, she had no say as to whether she would work as a driver or cashier/food preparer. Nor did he refute Petitioner's testimony that she stayed within close range of Respondent while awaiting assignments to further Respondent's goal of timely deliveries. With respect to the "nature of the work" test, it is undisputed that Petitioner brought no special skills to the workplace and, as a driver, incorporated herself into Respondent's pizza delivery business. It is not as if Petitioner was a skilled tradesman who entered Respondent's premises to perform a task no one else was equipped to perform. The tasks she performed seamlessly meshed with Respondent's operation.

Respondent relies on Bauer v. Industrial Commission, 51 Ill.2d 169 (1972) in maintaining that Petitioner was in fact an independent contractor. The Arbitrator views Bauer as factually distinguishable from the instant case. In Bauer, the claimant signed a contract that essentially prevented the respondent from asserting control over him. No such written agreement exists in the instant case.

Did Petitioner sustain an accident on March 2, 2018 arising out of and in the course of her employment?

The Arbitrator finds that the motor vehicle accident of March 2, 2018 arose out and in the course of Petitioner's employment by Respondent. Petitioner credibly testified the accident occurred as she was driving back to Respondent after making deliveries to two customers. The March 2, 2018 "screen shot" produced by Limbachiya, Respondent's sole witness, establishes Petitioner received a cash payment for the two deliveries she made on that date. Limbachiya agreed that Petitioner made deliveries for Respondent at that time, although he viewed her as an independent contractor. Limbachiya did not suggest that Petitioner deviated from her delivery duties before the collision

occurred. Petitioner was a "traveling employee" engaged in reasonable and foreseeable conduct at the time of the accident. Kertis v. IWCC, 2013 Ill. App. LEXIS 410 (2013).

Did Petitioner establish a causal connection between the March 2, 2018 accident and any claimed condition of ill-being?

Petitioner testified to being involved in a collision at about 5 PM on March 2, 2018. T. 44. She did not provide any details as to the mechanics of the collision. Nor did she testify as to her general state of health prior to the accident. She testified she experienced symptoms in her right leg, hip and back after the accident. T. 46-47. As of the hearing, she had recovered "to an extent" but was subject to recent walking- and lifting-related restrictions and continuing to experience right leg, hip and back symptoms. T. 59-64.

The Arbitrator finds that Petitioner established causation as to her claimed current right leg, hip and back conditions of ill-being. In so finding, the Arbitrator relies on Petitioner's credible testimony concerning her post-accident symptoms along with the available treatment records. The Arbitrator further finds that Petitioner established causation as to the need for the Emergency Room treatment provided on March 2 and 5, 2018. In so finding, the Arbitrator relies on the Matteson Fire Department report of March 2, 2018 and the Emergency Room records. The Matteson Fire Department report establishes that the impact was significant enough to cause front airbag deployment and "two feet of intrusion" into the passenger's side of Petitioner's vehicle. It also documents a complaint of hip pain. The Arbitrator finds it reasonable for Petitioner to have undergone Emergency Room work-ups on March 2 and 5, 2018.

The Arbitrator also finds that Petitioner established causation as to the need for the concussion-related physical therapy evaluations of April 16, 2018 and May 8, 2018. In so finding, the Arbitrator relies on the evaluation notes of those two dates and the March 2, 2018 Emergency Room note that reflects Petitioner struck her head at the time of impact. The Arbitrator does not, however, find causation as to any current head condition of ill-being. Petitioner did not testify to any head-related symptoms.

What is Petitioner's average weekly wage?

On the Request for Hearing form (Arb Exh 1), Petitioner claimed earnings of $20,800.00 during the year preceding the March 2, 2018 accident and an average weekly wage of $400.00. Respondent disputed this claim and did not assert any alternative figures.

In Illinois, it has long been held that a worker's compensation claimant has the burden of proving by a preponderance of the evidence the elements of his or her claim. Cook v. Industrial Commission, 98 Ill.2d 1 (1983). One of those elements is earnings.

As indicated above, there is no dispute that Petitioner was concurrently employed during the year preceding the March 2, 2018 accident. With respect to Popeye's, Petitioner credibly testified she earned $8.25 or $9.00 per hour. She did not know exactly how many shifts she worked at Popeye's during the relevant period but credibly testified to working 20 to 40 hours per week. T. 34. With respect to Respondent, Petitioner credibly testified she worked "maybe once or twice a month, just every once in a while" between November 2016 and November 2017 (T. 19-20), "maybe 10 to 25 hours a week" in approximately October 2017 (T. 24) and "anywhere between 10 to 20" hours a week

between October 2017 and the accident (T. 34). She earned $9.25 per hour when she cashiered and $3 per delivery plus tips when she drove. She testified her delivery-related earnings varied. When she drove, she could earn as little as $25 per night and as much as $100.

Petitioner testified she believed Popeye's would have documents concerning her schedule and earnings but she did not produce any such documents. T. 77, 90.

Respondent's sole witness, Limbachiya, testified that, between approximately December 2017 and the accident, Petitioner worked solely as a driver for Respondent. He also testified Respondent paid Petitioner $4 per delivery and allowed Petitioner to keep the tips customers gave her. T. 101-102. He indicated that Respondent did not give Petitioner a W2 form concerning her driver earnings. He recalled telling Petitioner she would be an independent contractor driver but could not recall whether Respondent gave her a 1099. T. 99-101, 103. He conceded that Petitioner's hours and earnings would be reflected in Respondent's internal computer system but, with respect to the year prior to the accident, produced only two "screen shots" of driver reports concerning the deliveries Petitioner made on November 19, 2017 and March 2, 2018. RX 1. Those "screen shots" are the only documents in evidence bearing on earnings during the year in question. They bear the name "Diedre." [Respondent's witness conceded Petitioner did not always drive under her own name but he did not produce any "screen shots" for shifts Petitioner drove under his or another individual's name.] They appear to confirm that Respondent paid Petitioner $3 rather than $4 per delivery. The first "screen shot" shows a cash payout of $17.90 on November 19, 2017 (with Petitioner working two hours that day). The second shows a cash payout of $11.00 on March 2, 2018. That document confirms the two deliveries Petitioner testified to making prior to the accident.

The Arbitrator finds that Petitioner was concurrently employed during the year preceding the accident. The Arbitrator finds Petitioner's average weekly wage at Popeye's to be $165.00. The Arbitrator arrives at this figure by conservatively multiplying the lower hourly rate of $8.25 by the lower number of hours per week, 20.

The Arbitrator finds credible Petitioner's testimony that the work she performed for Respondent between October 2017 and the accident did not consist solely of driving. The Arbitrator also finds credible Petitioner's testimony that she worked between 10 and 20 hours per week for Respondent during that time period, earned $9.25 per hour when she cashiered and was always paid in cash after November 2017. It is not possible to determine, however, how much of Petitioner's schedule between October 2017 and the accident was devoted to driving versus other tasks. As noted earlier, the only relevant salary-related documents in evidence are the two driver report "screen shots" offered by Respondent. RX 1. The Arbitrator does not view the second "screen shot" as representative of a typical workday because it relates to deliveries Petitioner made on the day of the accident. Petitioner's work was cut short that day.

Based on the very limited available documentary evidence, the Arbitrator finds Petitioner's average weekly wage at Respondent to be $53.70 ($17.90 x 3).

The Arbitrator arrives at an average weekly wage of $218.70 by adding $165.00 and $53.70, in accordance with the methodology of Mason Manufacturing, Inc. v. Industrial Commission, 331 Ill.App.3d 575 (4th Dist. 2002).

Is Petitioner entitled to temporary total disability benefits?

On the Request for Hearing form, Petitioner claimed she was temporarily totally disabled from March 2, 2018, the date of the claimed accident, through May 28, 2018, the date Dr. DePhillips released her to unrestricted activity. Respondent claimed that no temporary total disability benefits are owed. Arb Exh 1. At the hearing, Petitioner testified that, following the accident, she was "probably" off work for two to three months. T. 60.

To prove temporary total disability, a claimant must show that he did not work and that he was unable to work for a period of time. County of Cook v. Industrial Commission, 177 Ill.App.3d 264 (1st Dist. 1988). The claimant must also show he was incapacitated by reason of his injury.

The Arbitrator finds no clear evidentiary basis for awarding temporary total disability benefits between the accident and April 9, 2018. The Emergency Room discharge note of March 2, 2018 does not list any restrictions. When Petitioner was discharged from the Emergency Room on March 5, 2018, she was directed to avoid twisting and heavy lifting but there is no evidence that either of her jobs involved these activities. The available records reflect that, after March 5, 2018, Petitioner next sought care on April 9, 2018, when she saw Patrick Stagg, a physician's assistant affiliated with Dr. DePhillips, the neurosurgeon recommended by the Emergency Room. A very brief note in PX 6 reflects that, on that date, Stagg prescribed therapy and took Petitioner "off" for six weeks. An accompanying therapy referral note lists diagnoses of lumbar disc radiculopathy, lumbar disc herniation and history of concussion. Petitioner underwent therapy in April and May 2018. Dr. DePhillips released Petitioner to work on May 28, 2018.

The Arbitrator finds that Petitioner's causally related back, right hip and right leg conditions were unstable from April 9, 2018 through May 28, 2018. Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator awards Petitioner temporary total disability benefits from April 9, 2018 through May 28, 2018, a period of 7 1/7 weeks.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims certain medical expenses. PX 5. The Arbitrator notes that one of the bills she offered into evidence involves someone other than her. The Arbitrator has disregarded this bill. Another bill, relating to physical therapy Petitioner underwent in May and June 2018, is supported only by an initial evaluation note of May 8, 2018. The subsequent therapy records are not in evidence. Yet another bill, from Radiology Imaging Consultants, contains some charges relating to studies Petitioner underwent on November 3, 2017, four months before the accident.

Based on the foregoing causation-related findings and the available, correlating records, the Arbitrator awards the following medical expenses, subject to the fee schedule: 1) Matteson Fire Department, ambulance service, 3/2/18, $898.00; 2) Franciscan Alliance, Emergency Room, 3/2/18, $20,021.60; 3) Franciscan Alliance, Emergency Room, 3/5/18, $12,592.70; 4) Radiology Imaging Consultants, 3/2/18 and 3/5/18, $3,580.00; 5) Franciscan Health, 4/16/18, physical therapy evaluation, $610.00; and 6) Equian, LLC, physician services at Emergency Room, 3/5/18, $946.20.

What is the nature and extent of the injury?

Petitioner opted to place permanency at issue but credibly testified she was subject to restrictions and still under active treatment as of the hearing.

The Arbitrator does not address permanency as Petitioner has not reached maximum medical improvement.

Is Respondent liable for penalties and fees?

Petitioner placed penalties and fees at issue on the Request for Hearing form but did not file a petition for penalties and fees. T. 7. Petitioner did not offer into evidence any "written demand for payment of benefits," as required by Section 19(l) of the Act.

On this record, the Arbitrator declines to find Respondent liable for penalties or fees.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAVIER MORENO,

Petitioner,

vs. NO: 14 WC 32681

NOT JUST GRASS, INC.,

21IWCC0147

Respondent.

DECISION AND OPINION ON REMAND

This cause comes before the Illinois Workers' Compensation Commission ("Commission") pursuant to the Rule 23 Order of the Appellate Court, Second District, Workers' Compensation Commission Division (Appellate Court), No. 2-17-0736WC, entered January 14, 2020. The Appellate Court reversed the Circuit Court of Kane County, Sixteenth Judicial Circuit, Miscellaneous Remedies Division's ("Circuit Court") decision, 17-MR-64, confirming a decision of the Commission which affirmed and adopted the Arbitrator's Decision, and further remanded the matter to the Commission for further proceedings.

Based upon the Remand Order, an analysis of the Petitioner's work duties, the record in its entirety including the testimony, the medical evidence and expert opinions, the Commission reverses the Arbitrator's Decision regarding accident, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, awards TTD, reasonable, necessary, related medical expenses and prospective medical pursuant to §8(a) and §8.2, and remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

21IWCC0147

Background

On February 22, 2016, Arbitrator Brian Cronin issued a Decision in case number 14 WC 32681, finding that the Petitioner failed to prove the issue of accident, denying benefits, and rendering all other issues moot.

Petitioner timely filed a Petition for Review of the Arbitrator's Decision, raising issues of accident, medical expenses, prospective medical, temporary total disability (TTD), permanent disability and penalties under §19(k), §19(l) and §16. On November 1, 2016, oral arguments were heard in the matter, with both parties represented by counsel. On December 22, 2016, the Commission, after considering the issues raised by Petitioner, and being advised of the facts and law, affirmed and adopted the February 22, 2016, Arbitrator's Decision in its entirety and clarifying that the Commission based its decision on the Petitioner's testimony that he was injured when he bent over and finding that the act of bending over, or the act of bending forward, is movement consistent with normal daily activity and by itself is not an activity associated with a risk of employment. The Commission agreed with the Arbitrator that the Petitioner did not sustain his burden of proving accident under a neutral risk analysis relying on the court's analysis in *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC.

In *Noonan*, Petitioner alleged he hurt his right wrist when he leaned over in a rolling chair and fell while trying to retrieve a pen off the floor. He ultimately sought and received medical treatment, including surgery, for an injury to his right wrist.

The Court in *Noonan* held that the claimant's action of bending over or reaching while seated in his work chair, without more, was insufficient to establish a work related cause to his accidental injury. The risk of injury at issue was simply not one "distinctly associated" with claimant's employment. *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC, 65 N.E.3d 530.

In a specially concurring opinion in *Noonan*, Presiding Justice Holdridge emphasized "a claimant may not obtain benefits for injuries caused by activities of everyday living (such as bending, reaching, or stooping), even if he was ordered or instructed to perform those activities as part of his job duties, unless the claimant's job required him to perform those activities more frequently than members of a the general public or in a manner that increased the risk." quoting from *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC. "In other words, such injuries should be analyzed under neutral risk principles. *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 41. The Commission therefore concluded that the Arbitrator properly applied the neutral risk analysis and found the evidence to establish accident deficient under either the qualitative or quantitative analysis.

Petitioner sought judicial review in the Circuit Court of Kane County. On August 25, 2017, Judge David Akemann, Circuit Judge of the Sixteenth Judicial Circuit Court, affirmed the Commission Decision in its entirety and Petitioner filed a timely appeal to the Appellate Court,

Second District, Workers' Compensation Commission Division. In a unanimous Decision, with Justice Holdridge specially concurring, the Court remanded the case to the Commission. The Court held that the Commission employed an improper analysis in categorizing the risk of harm, the injury involved a risk incidental to his employment, thus, remand to the Commission is necessary. The Court relied on their holding in *McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶ 38, 430 Ill. Dec. 434, 126 N.E.3d 522, where a majority of the court rejected the neutral-risk analysis utilized in *Adcock* finding that *Adcock's* analysis was at odds with other decisions of the court, which did "not automatically exclude from the definition of an employment-related risk activities that might involve common bodily movements or *** 'everyday activities.'" *McAllister*, 2019 IL App (1st) 162747WC, ¶ 38. The Court further held that when presented with employment-risk and neutral-risk alternatives, the trier of fact should first consider whether the risk at issue had employment-related characteristics. *Id.* ¶ 68. Additionally, the *McAllister* Court stated the following:

> "[A]n 'arising out of' determination requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis."

McAllister v. Illinois Workers' Comp. Comm'n,, 2019 IL App (1st) 162747WC, ¶ 73,

The Appellate Court further reasoned that both the arbitration and Commission decisions reflect adherence to the *Adcock* analysis and application of the neutral-risk definition that was rejected in *McAllister*. "In other words, the Commission automatically excluded the claimant's risk of injury from the employment-risk category because the activity resulting in injury involved a common bodily movement. The Commission's decision reflects that, because it applied an *Adcock* analysis, it did not consider the nature of the claimant's employment and his required work duties before finding that the claimant's injury stemmed from a neutral risk." *Moreno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 170736WC-U, P29-P31, 2020 Ill. App. Unpub. LEXIS 54, *15-16

Given these circumstances, the case was remanded to the Commission so that it may apply the proper risk analysis, make necessary findings of facts and draw reasonable inferences from the evidence to determine whether the claimant's injury arose out of his employment.

Therefore, the Court reversed the circuit court's judgment confirming the Commission's decision, vacated the Commission's decision and remanded this case to the Commission with directions to employ the proper risk-analysis set forth in *McAllister v. v. Illinois Workers' Comp. Comm'n,* 2019 IL App (1st) 162747W, 2019 IL App (1st) 162747WC, 430 Ill. Dec. 434, 126 N.E.3d 522.

In accordance with the Remand Order, after considering the entire record, and being advised of the facts and law, the Commission reverses the Arbitrator's Decision regarding

accident. The Commission finds that the Petitioner's act of bending to pick up a gas can was incidental to his employment and that he has proved that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, based upon the following:

Since the subject case was appealed and the Appellate Court remand issued, the claimant in *McAllister* filed a petition for leave to appeal to the Supreme Court which was granted to settle the issue of whether a compensable injury can arise out of an employee's employment when the employee is injured while performing job duties that involve common bodily movements or routine "everyday" activities", such as bending, twisting, reaching, or standing up from a kneeling position. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P20, 2020 Ill. LEXIS 561, *7

The Supreme Court enunciated the proper risk analysis that should be applied in the context of sustaining injury while performing job duties that involve common bodily movements or routine "everyday activities" as follows:

> The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill. Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill. Dec. 359, 67 N.E.3d 571. ***, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident [**16] to his or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill. Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P46, 2020 Ill. LEXIS 561, *15-16

Confusion resulting from several Appellate Decisions culminated in the split between the majority and dissenting opinions in *McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, and those Decisions were analyzed in the special concurrence written by Justice Holdridge, and joined by Justice Hoffman (*McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, P78-P116). The divergent opinions were addressed by the Supreme Court as follows:

> *Caterpillar Tractor* prescribes [**27] the proper test for analyzing whether an injury "arises out of" a claimant's employment, when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. *Sisbro* and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the

> common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill. 2d at 58.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P63, 2020 Ill. LEXIS 561, *26-27.

Further, the Supreme Court held that *Adcock* and its progeny required an additional unnecessary step in the risk analysis and as such were essentially overruled "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P64, 2020 Ill. LEXIS 561, *28.

Findings of Fact

Accident

Based upon the risk analysis as detailed by the Supreme Court in *McAllister* (citations omitted), we turn our analysis to Petitioner's job duties based on his testimony, the medical histories, and the expert opinions. Petitioner testified that he was employed as a general laborer for Respondent performing mowing, different types of construction on some jobs, and landscaping. (T, 18) Petitioner further testified that he did heavy lifting as part of his job duties, including lifting rocks, stones, heavy machines and trees, and mowing lawns and trimming trees. When he began working for Respondent he was completely fine to work and was never diagnosed with a herniated disc or sought treatment for lower back pain. (T, 19- 20) Petitioner testified to an incident on August 25, 2014, wherein his supervisor would not let him move heavy, "like 150 pounds each stone", with a Bobcat; instead his supervisor insisted that they move these flagstone stones quickly because they had to do something else. Petitioner helped his supervisor lift the stones from one pallet to another pallet and he started feeling a "low pain in my back, like real light in my lower back." (T, 21) He did not think it was an emergency or that he had to go to a doctor at the time. He did not report the incident at that time and kept working. (T, 21-22)

Petitioner continued to work through August 30, 2014. Thereafter, he was off for the Labor Day holiday and missed two days of work due to an unrelated incident and returned to work September 4, 2014. (T, 22-24) On September 5, 2014, Petitioner was working with two co-workers mowing lawns. He was getting machines ready, filling them up with gas. Petitioner testified that the gas can was six liters or about 30 pounds, and "then I bend over and I reach with my right hand

and when my body gets tense and I hear my back pop." (T, 25) He then testified that he bent over and grabbed the gas can but he never lifted it. The can was on the ground because when Petitioner bent over and felt his back pop, he could not move. (T, 26) Petitioner testified that his co-worker provided an Ibuprofen pill for pain, and massaged a cream on his back. (T, 29-30)

Petitioner reported the incident to his supervisor when he arrived at the next house, and he continued working that shift. He noticed "real sharp pain" in his lower back, and it started to go in his left leg and left testicle and he was not able to walk. He held his back all the time the whole day. (T, 30) Prior to September 5th, he had never felt pain going from his back down his left leg or into his left testicle. He reported the incident to his boss, Greg, the owner of the company, at the shop around 6:00 in the afternoon (sic). (T, 31)

Petitioner testified that he was off for the weekend and on Monday texted with his boss and reported he was going to the emergency room because his pain had not gone away over the weekend. (T, 36-38)

Greg Voirin, (Greg) the owner of the landscaping company, was called as an adverse witness by Petitioner. Greg testified that Petitioner worked for him as a laborer/landscaper. As part of his duties Petitioner cut grass, using a variety of equipment, i.e., riding mowers, walk behind mowers, trimming equipment. (T, 123) As part of his duties, if the machines run out of gas, they need to be refilled. There are different places where a gas can would be kept. A trailer would be one of them. If one of his employees moves the gas can from the trailer to the ground, he would have to pick it up to get gas to put in the trimmer or whatever equipment he was using. (T, 124-125) Depending on the job, it could be common for workers to pick up rocks or heavy debris. There are usually different sizes, whether it be landscaping materials and what not, and usually there is a one-to-two man carrying system and he would pick things up. That would be expected of his general duties. (T, 127) Greg also testified he does communicate with workers via text and recalled the text message exchange with Petitioner. Greg testified that he was in favor of Petitioner making a claim if he was hurt. If he was hurt, he should seek treatment. (T, 132-133)

Greg further testified light duty work would still require using hand tools and machines for various repairs and when Petitioner had asked for light duty work initially, he was taking Vicodin. Greg did not think that was a wise decision. Thus, if Petitioner was still taking prescription medications, such as Vicodin or Norco, Greg would not be able to offer him light duty work. (T, 133)

Petitioner treated at Rush Copley Medical Center on September 8, 2014. His chief complaint was back pain. The history stated that the symptoms started two days prior when he was trying to pick up a gas can. He started experiencing mild left testicular pain. The Assessment was left-sided back pain that radiates to the left groin. The differential diagnosis included back pain/flank pain, kidney stone, UTI, muscle strain. The diagnosis was noted to be a strain of the lumbar paraspinous muscle; acute back pain. He was discharged and released to return to work September 9, 2014. (PX1)

On September 23, 2014, the Petitioner presented to Dr. Samir Sharma, at Illinois Orthopedic Network, a board certified anesthesiologist, where his chief complaint was listed as low back pain. The history notes the following:

> This is a 32 year old gentleman who sustained a work related injury on September 5, 2014, while he was employed as a landscaper. He was doing a job including repetitive bending, lifting, twisting, moving locks (sic) that were over 100 pounds in weight when he felt a slight strain which was aggravated when the patient was bending to lift a gas can to fill a lawnmower. The patient states at that time he bent forward and felt a strain in his left low back aggravated it as he was going to a standing position around 10:30 a.m. on September 5, 2014, and it was reported to his supervisor at approximately 11:30 a.m. *** (PX2)

The Petitioner's history form stated that the "Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + con.t working." Dr. Sharma diagnosed the Petitioner with low back pain and left lumbar radiculopathy and instructed the claimant to remain off work. He prescribed medication, ordered an MRI and recommended physical therapy. (PX2)

On September 24, 2014, the Petitioner started physical therapy. On January 29, 2015, Petitioner was seen by Dr. Matthew Ross at Respondent's request pursuant to §12. Dr. Ross authored a report and documented the history that Petitioner provided to him. Dr. Ross noted that Petitioner is a laborer doing construction and landscape work. On September 25, 2014, Petitioner bent forward to pick-up a gasoline can to refill the tanks of the machines. He experienced immediate sharp lower back pain preventing him from standing upright. He states that he did not actually lift the can of gasoline. He slowly was able to stand back up. He notified his boss. The boss did not tell him to do anything about it. He continued working that day. He was off for the weekend. His pain continued to worsen. By Monday he was barely able to get out of bed. He then went to the emergency room for treatment. He first began experiencing back pain approximately a week earlier when he had to lift and carry heavy rocks weighing as much as 150 pounds. At that time, he had only "light" pain; he continued working. At the onset of pain, there was also some radiation of discomfort into his left testicle. After his emergency room visit he started treating with a chiropractor. He had had three months physical therapy with limited relief. After an injection he had pain radiating down his left posterior thigh to his lower leg and foot. Not sure if left leg will give out and has occasional numbness in the left leg and foot. He specifically denies any prior history of back pain or injury. He had an altercation 2 weeks (sic) before but was hit in the head. (PX22, RX3)

The Commission finds that based upon the Petitioner and the owner's testimony that as a general laborer working in the landscape business, the act of bending to pick up a gas can was incidental to the Petitioner's employment. Therefore, no additional analysis is required under

McAllister (citations omitted) and the Petitioner has sustained his burden of proving that he sustained an accident arising out of and in the course of his employment.

Causal Connection

On January 29, 2015, Dr. Ross, the expert retained by Respondent pursuant to §12, opined that there was "a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment." (PX22, RX3). Dr. Ross further stated that Petitioner had low back and left sciatic pain following his work incident and September 5, 2014, and noted the following:

> By history, Mr. Moreno started becoming symptomatic a week or two earlier with lifting heavy rocks at work. There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can. Although Mr. Moreno did not have an accident or overstress injury of his back on the date of major pain flare-up, his history of low level back pain following lifting rocks suggests that his injury actually occurred earlier. The L4-5 disc may have been initially injured lifting the rocks. The bending forward to lift the gas can may literally have been the straw that broke the camel's back. It is not uncommon to see disc herniation in evolution begin as back pain, and then erupt as sciatic pain following a trivial event. (PX22, RX3)

The Commission finds that based upon Dr. Ross's credible opinion, that the Petitioner's lumbar spine condition is causally related to the accident he sustained on September 5, 2014.

Medical

When Dr. Sharma saw Petitioner on September 23, 2014, the notes confirm that the Petitioner's pain was localized to the left lower back, with a moderate intensity described as an aching, throbbing sensation aggravated with any prolonged positioning including standing, sitting or walking for extended periods of time. (PX2) Petitioner had a lumbar spine MRI on September 25, 2014. The radiologist's impression noted a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On October 21, 2014, Dr. Sharma noted that Petitioner's pain was improved compared to initial evaluation with therapy; increasing with repetitive bending/lifting/twisting. His MRI showed a far lateral left L4-L5 disc herniation contributing to moderate lateral recess and foraminal stenosis as well as left facet joint effusion at the L4-5 level. Dr. Sharma's assessment/plan was to continue therapy. If he continued to improve, he would advance to work conditioning, followed by a functional capacity evaluation (FCE). If no improvement, he planned to discuss interventional options. Work restrictions included a maximum of 20-pound lifting, repetitively 10 pounds, with no repetitive bending, twisting, lifting, kneeling, crawling, or climbing ladders. (PX2)

On December 2, 2014, Dr. Sharma noted that the Petitioner's original pain subsided, however, now progressed to a burning sensation localized to his buttocks and his left posterior thigh with associated numbness and tingling involving his left leg, however, Petitioner denied any weakness involving the left lower extremity, radiculopathy or involvement with his right lower extremity. He completed eight weeks of therapy with persistent radicular pain. Options included a left L4-5 transforaminal ESI. He was to maintain current work restrictions of 20 pounds maximum and 10 pounds repetitive lifting, no repetitive bending, squatting, climbing ladders, or kneeling or crawling. Petitioner continued conservative treatment.

On January 9, 2015, Petitioner underwent an L4-L5 transforaminal epidural steroid injection (ESI). He underwent a second ESI on January 30, 2015.

On February 13, 2015, Petitioner presented to Dr. Goeffrey Dixon, an orthopedic surgeon. The history was somewhat inconsistent noting that Petitioner was lifting a large container of fuel for a lawnmower when he immediately began to have pain in his back. After the first ESI, he began to experience significant radiation into the left leg down to the knee and calf. Dr. Dixon's review of the lumbar spine MRI notes that it demonstrates a significant disc herniation at L4-L5 to the left extending into the lateral recess and foramen. There is a smaller disc protrusion at L5-S1 on the same side into the left lateral recess, however, Dr. Dixon thought this was likely asymptomatic. Dr. Dixon recommended an L4-L5 micro lumbar decompression and discectomy and opined that Petitioner should remain off work pending completion of treatment. (PX2)

On March 18, 2015, Petitioner underwent a second lumbar spine MRI at Fox Valley Imaging. The radiologist's findings document an L4-L5-moderate far left lateral herniated disc with an annular tear. The annular tear is identified on the axial images at the anterior aspect of the left neural foramen. There is hypertrophy of the facet joints and ligamentum flavum. There is resultant moderate to severe central spinal stenosis. There is moderate left neural foramen stenosis. At L5-S1, there is a small broad-based herniated disc. There is mild hypertrophy of the facet joints and ligamentum flavum. There is mild central spinal stenosis. The radiologist's impression was a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On March 20, 2015, Petitioner saw Dr. Dixon and discussed the findings of a new MRI which was obtained two days prior which again re-demonstrated the large left L4-L5 disc herniation within the lateral recess and foramen. His plan was to pursue workers' compensation authorization for the surgery, and Petitioner was to remain off work until such time as he has completed his treatment. (PX2)

Petitioner next presented to Dr. Dixon on April 17, 2015. The objective findings stated that Dr. Dixon reviewed the MRI which demonstrates a large left L4-L5 disc herniation causing central canal lateral recess and foraminal stenosis with increased T2 signal suggesting acute or subacute etiology as well as significant inflammation. The assessment/plan remained the same. Dr. Dixon again discussed the treatment options with Petitioner, comparing conservative therapy

with surgical intervention. He again recommended that he have a micro lumbar decompression and discectomy at L4-L5. He prescribed Norco 10/325. (PX3)

When Petitioner was seen for his §12 evaluation on January 29, 2015, Dr. Ross opined that the initial MRI was a poor quality study although documenting that it shows evidence of a left foraminal disc herniation at L4-L5. As a result, Dr. Ross was of the opinion that there is a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment. He recommended an updated MRI of his lumbar spine in a good quality scanner. The fact that the earlier scan was obtained when the patient was not really having leg symptoms suggests that it may not be an entirely accurate reflection of his current state. If the repeat scan continues to show a foraminal disc herniation at the L4-L5 level, Dr. Ross opined that he would agree that Petitioner would be an appropriate candidate for a left L4 (L4-5 foramen) selective nerve root block and transforaminal cortisone injection. The nerve root block would provide confirmation that this is the source of his pain complaints. If not, the patient could be a candidate for a lumbar discectomy.

Given Dr. Dixon's surgical recommendation, corroborated by Dr. Ross's opinion, the Commission finds that Respondent should provide and pay Petitioner's reasonable and necessary medical treatment related to Petitioner's lumbar spine injury and for prospective medical in the form of the surgery recommended by Dr. Dixon.

Temporary Total Disability

The combined work status notes reflect Petitioner was off work September 23, 2014, through October 21, 2014, then assigned restrictions with carrying, pushing/pulling, lifting less than 20 pounds, no bending, squatting, kneeling through January 26, 2015. When Petitioner saw Dr. Ross at Respondent's request on January 29, 2015, Dr. Ross opined that Petitioner was currently capable of working only in a sedentary position with a 15 pound lifting restriction. He would need to be allowed to vary his position from sit to stand or vice versa. Subsequent off work notes were authored by Dr. Dixon March 5, 2015, through April 17, 2015, with recommendation for surgery. The trial stipulation reflects Petitioner claimed lost time commencing September 23, 2014, through June 28, 2015. (ArbX2) The owner of the company, Greg Voirin, testified that he would not have light duty work if the Petitioner were taking Norco or Vicodin. (T, 133) There is no evidence in the record that after an initial inquiry, there was any further attempt to accommodate Petitioner's restrictions and there is evidence that he had pain prescriptions.

Given the Commission's findings regarding accident and causal connection referenced above, the Commission finds Petitioner has sustained his burden of proving that he is entitled to TTD commencing September 23, 2014, through June 28, 2015.

21IWCC0147

Conclusions of Law

Based upon the above evidence, the Commission reverses the Arbitrator's finding that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, finds that Petitioner sustained his burden of proving accident because the act of bending to pick up the gas can was incidental to his employment, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, and awards the Petitioner TTD, medical expenses and prospective medical, however, the Commission declines to award penalties and fees based upon the existing legal precedent at the time of the accident and both the Arbitration Hearing and Commission review of the Arbitration Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 22, 2016, is hereby reversed on the issue of accident for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $400.00 per week for a period of 39-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary related medical services as set forth in Petitioner's exhibits four through fifteen, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall also provide and pay for prospective medical care limited to treatment as it relates to Petitioner's lumbar spine, including surgery and expenses attendant to recovery thereafter, which is reasonably required to cure or relieve from the effects of the accidental injury, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,100.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
KAD/bsd
O111020
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK DUPREE,

Petitioner,

vs. NO: 17 WC 09232

DIAGEO NORTH AMERICA, INC.,

Respondent.

21IWCC0148

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 21, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
o- 3/23/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DUPREE, FRANK
Employee/Petitioner

Case# **17WC009232**

DIAGEO INC
Employer/Respondent

21IWCC0148

On 8/21/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.84% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1987 RUBIN LAW GROUP LTD
ARNOLD G RUBIN
20 S CLARK ST SUITE 1810
CHICAGO, IL 60603

2284 COZZI & GOGGIN-WARD
MARK ZAPF
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

FRANK DUPREE
Employee/Petitioner

v.

DIAGEO, INC.
Employer/Respondent

Case # 17 WC 9232

Consolidated cases: N/A

21IWCC0148

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **7/9/19 and 7/12/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On the date of accident, **2/15/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,656.00**; the average weekly wage was $**1,628.00**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay the further sum of $**3,300.40** for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bills of Physicians Immediate Care ($168.40) and Hinsdale Orthopedic ($3,132.00). The medical bills are awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule. The payment shall be sent directly to Petitioner's attorney in accordance with Section 7080.20 of the Rules Before the Illinois Workers' Compensation Commission.

Respondent shall authorize and provide payment for the medical treatment, including the pre-operative testing, MRI and surgery, recommended by Petitioner's treating physicians, Dr. Chudik. The authorization shall be in writing and forwarded to Petitioner's attorney.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Gerald Granada

8/20/19
Date

AUG 21 2019

FINDINGS OF FACT

This case involves Petitioner Frank DuPree, who alleges injuries sustained while working for Respondent Diageo North America, Inc. on February 15, 2017. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) date of accident; 3) notice; 4) causation; 5) medical expenses; and 6) TTD. The main point of contention - and the basis of the disputes - in this case is the date of Petitioner's alleged accident.

Petitioner initially filed an Application for Adjustment of Claim on March 28, 2017 alleging a date of accident on February 20, 2017 while working for Respondent. (AX 2) On June 5, 2017, Petitioner filed an Amended Application for Adjustment of Claim, in which the accident date was changed to February 15, 2017. (AX 3)

Petitioner's testimony

Petitioner testified that on February 15, 2017 he worked for Respondent as a maintenance mechanic or bottling technician. As part of his job duties, he serviced mechanical and electrical failures and fabricated new parts; lifted and carried up to 30 pounds on a normal day and 50 to 60 pounds on a stressful day; and used hand tools, measuring equipment and electrical equipment. Petitioner had worked for Respondent for four years prior to February 15, 2017. Petitioner is right handed. Petitioner worked from 6:00 in the evening to 6:00 in the morning, but his actual workdays changed from week to week and he did not always work from Monday through Friday. Petitioner testified that his supervisor was Yediel Melendez who had been Petitioner's supervisor for about a year prior to February 2017. Petitioner saw Mr. Melendez frequently during his work shift and they communicated about work orders, ordering parts and the condition of broken machinery. The communication with Mr. Melendez would be verbal, in writing or via text message on Mr. Melendez's cell phone. Petitioner's cell phone carrier is AT&T. Petitioner did not and does not have any relationship with Mr. Melendez outside of work.

Respondent's facility is located in Plainfield, Illinois. Petitioner normally worked in the machine shop. The facility had locker rooms. There are two locker rooms in the facility. Petitioner used the locker room in the main building. He accessed the locker room through the main corridor. To get to the locker room, Petitioner would go down the main hallway and then go through another hallway with a pair of double doors. He would opened the first door, go through a small hallway that has lockers and dirty clothes and then into a second hallway that led to the locker room. There is a small hallway that had a utility room and men's bathroom, which were located before the door to the locker room. The distance from the main hall to the first set of doors to the locker room is about 10 to 20 feet.

Petitioner testified that on February 15, 2017 at approximately 6:00 or 6:10 am, he was in the process of opening the door of the men's locker room. He grabbed the door handle with his right hand. The door handle is depicted in Petitioner's Exhibit 7. Petitioner pulled the door open a few inches. As he was pulling the door open, some men were coming out of the locker room. The men opened the door quickly while Petitioner's hand was still on the handle. When the door was pushed open, Petitioner's right arm and elbow were pushed backwards at a 90-degree angle. Petitioner was pushed back so far that he ended up leaning against the lockers. Petitioner let go of the door and tried to get out of the way. Petitioner did

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not know the names of the three individuals who exited through the door in a hurried manner. Following the accident, he noticed pain in his right elbow and biceps. After the accident, Petitioner got his coat from his locker, changed his shoes and went home. Petitioner testified that the accident happened on February 15, 2017.

When asked about the discrepancy in the accident dates as set forth in the original Application for Adjustment of Claim and the initial medical records, Petitioner testified that he was confused about the date of accident since the accident report was not filled out until March 10, 2017. Petitioner also testified that the medical records, which indicated a date of accident of February 20, 2017, were not correct and did not reflect the correct date of accident.

Petitioner testified that he was not scheduled to work on February 16, 2017. He did not report the injury on February 16, 2017 because he did not know what to do and it took him a while to figure out that he should call his supervisor. Although Petitioner confirmed that it was company policy to report accidents immediately (see RX 7), he did not report the accident on February 15, 2017 because he was on his way out of the building when the accident occurred, and he did not know where to find his supervisor at that time. Petitioner testified that he did not notice any bruising on his arm until after he left the work site.

On February 17, 2017, Petitioner noticed that his right biceps was bruised. Petitioner testified that pursuant to Respondent's policy, he was required to report the injury to his team lead Mr. Melendez. On that day, he called the cell phone number that he used for sending text messages to Mr. Melendez and reported the injury. (PX 6) Petitioner greeted Mr. Melendez and then reported the accident to him. He advised Mr. Melendez that there was an incident in the locker room and his arm was bruised. Petitioner said that Mr. Melendez advised that he would take care of it when he came to work. Petitioner did not recall calling Mr. Melendez on any other date.

Petitioner completed an accident report on March 10, 2017. (RX 9) Mr. Melendez was present when he completed the report. Petitioner filled out part of the report and gave it to Mr. Melendez. Petitioner did not complete the date of accident portion of the report. The accident report reflects a date of accident of February 20, 2017. Petitioner testified that the date is incorrect. The accident report was admitted into evidence. (RX 9) The accident report documented a date of accident of February 20 2017 in different handwriting than the rest of the report. (RX 9) The report stated that Petitioner was entering the locker room at the end of his shift when people were coming out. (RX 9) It was dark. (RX 9) As Petitioner reached for the door, he was struck in the arm with the door. (RX 9) Petitioner noticed bruising when he got home that became worse. (RX 9)

Petitioner continued to work for Respondent from February 15, 2017 to the date of the hearing. Petitioner testified that his right arm fatigued easily and he had limited lifting power. Petitioner compensated by using his left arm.

Mr. Yediel Melendez's testimony

Yediel Melendez testified on behalf of Respondent. Mr. Melendez is the operations manager for Respondent. In February 2017, Mr. Melendez was a maintenance team lead. Mr. Melendez's job duties

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included accident investigation. He worked for Respondent for eight years and at the Plainfield facility for four years. Mr. Melendez testified that he knew Petitioner. In 2017, Petitioner reported to Mr. Melendez, who was Petitioner's direct supervisor. He worked with Petitioner on a daily basis. Mr. Melendez testified that on February 22, 2017, Petitioner called him on his cell phone to report a work accident. He testified that Petitioner did not call him prior to February 22, 2017. Mr. Melendez did not recall Petitioner calling him on February 17, 2017 to report an accident. He testified that the first time that he heard about the accident was on February 22, 2017.

Mr. Melendez testified that he started an investigation of Petitioner's accident when he spoke with Petitioner on February 22, 2017. Mr. Melendez testified that he spoke with Petitioner on his cell phone about the accident on that date. The conversation continued at the plant. According to Mr. Melendez, the Petitioner advised him that he sustained an injury on February 20, 2017. Mr. Melendez testified that both he and the Petitioner completed the accident report, with Mr. Melendez completing the top portion of the accident report, including the date of accident, and Petitioner filling out the rest. (PX 9) The accident report was dated March 10, 2017. (PX 9) Mr. Melendez stated that he documented the date of accident of February 20, 2017 because that is what Petitioner told him. Mr. Melendez testified that the accident report was not completed until March 10, 2017 because he had to complete his investigation prior to filling out the report. Mr. Melendez testified that the accident report could have been completed on an earlier date, but he wanted to make sure that Petitioner received medical treatment prior to completing the accident report.

As part of the investigation, Mr. Melendez reviewed security footage from February 20, 2017. Mr. Melendez testified that Petitioner was seen going into the locker room. (RX 8) According to Mr. Melendez the video later shows, Petitioner leaving the locker room carrying something in each hand. (RX 8 at 5:56) Mr. Melendez testified that he was never notified that the date of accident changed from February 20, 2017. The video was viewed during Mr. Melendez's testimony at the arbitration hearing. While being shown the video, Mr. Melendez testified that he was sure the Petitioner was depicted in the video despite not being able to see the face of the individual who was purportedly the Petitioner. The video does not show the door where Petitioner claims to have injured his arm.

Mr. Melendez testified that Petitioner was a good employee and that he did not have any reason to doubt Petitioner's honesty. Mr. Melendez further testified that at the time of the accident his cell phone number was (787) 432-9105, which was a phone number issued in Puerto Rico. When asked whether he received a phone call from the Petitioner on February 17, 2017, Mr. Melendez testified "he was not qualified to answer the question." He later testified that based on his recollection he "know[s] for a fact" that Petitioner called him on February 22, 2017 to inform him of the incident. He did not recall having a conversation with Petitioner on February 17, 2017. Mr. Melendez would recall conversations of extreme importance. He testified that Petitioner contacted him on his cell phone on February 22, 2017 around 4:00 pm. Mr. Melendez testified that Petitioner called him just prior to the shift beginning at 6:00.

Mr. Melendez testified that he took Petitioner to Physicians Immediate Care. He did not recall the date, but it could have been on March 9, 2017. There was some confusion in the testimony of Mr. Melendez about why there was a delay in authorizing treatment for Petitioner. Mr. Melendez testified that he did not take Petitioner to Physicians Immediate Care at an earlier date because it was not recommended that

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the shift manager leave because it would stop work due to the shift schedule. The accident report was completed after Petitioner went to Physicians Immediate Care. He wrote the accident date of February 20, 2017 on the accident report because that is when Petitioner told him the accident occurred. Mr. Melendez agreed that Petitioner's description of the accident was consistent. The only difference was the date of accident.

Petitioner's phone records

Following the testimony of Mr. Melendez and the Petitioner, the Arbitrator granted leave for the parties to produce the Petitioner's complete phone records at a later date. Petitioner's Exhibit 6 is a copy of Petitioner's phone records from AT&T that show the Petitioner's phone activity for the month of February in 2017. The record shows a call to (787) 432-9105 on February 17, 2017. (PX 6) The number is listed at line number 93 and is highlighted on the Exhibit. (PX 6) The call was made at 3:31 pm to a number from Ponce, Puerto Rico. (PX 6) The phone records do not show any other calls made to this cell phone number from Puerto Rico. The parties stipulated that line number 137 of the phone records was a phone call from Petitioner to the Plainfield facility of Respondent on February 22, 2017 at 6:47 am. (PX 6) There is no record of a call being made to the (787) 432-9105 number from Puerto Rico on February 22, 2017.

Medical treatment

On March 9, 2017 Petitioner was initially examined at Physicians Immediate Care, which was arranged by the Respondent's company nurse. Mr. Melendez took Petitioner to this medical provider. The medical records from this provider document that Petitioner complained of right upper extremity pain since February 20, 2017. (RX 4) Petitioner was leaving the locker room in the corridor when three men opened the door and his right upper extremity was hit by the door pushing it backwards. (RX 4) Petitioner had a bruise on his arm and a "charley horse." (RX 4) The physician set forth that he had a spontaneous rupture of the tendon in the right upper extremity. (RX 4) Petitioner was referred to an orthopedic surgeon for the biceps tendon rupture. (RX 4) The records document that Dr. Koehler set forth that the mechanism of accident was not consistent with the MRI findings. (RX 4)

Petitioner underwent MRIs of the right elbow and right shoulder on March 20, 2017 at Naperville Imaging Center. (PX 2) The MRI of the right elbow revealed a complete radial collateral ligament tear, high-grade articular surface tear of the common extensor tendon, punctate interstitial tear of the common flexor tendon and trace olecranon bursitis. (PX 2) The MRI of the right shoulder revealed a full thickness tear of the proximal aspect of the long head biceps tendon with distal retraction of the long head biceps tendon to the level of the middle 1/3 of the humeral diaphysis and associated strain of the long head biceps tendon, the anterior to mid aspects of the distal supraspinatus tendon are not clearly visualized at the humeral insertion suggestive of a full thickness supraspinatus tear, mild subacromial/ subdeltoid bursal inflammation, no right humeral bone marrow edema and T2 hyperintense hepatic lobe lesion which may be a cyst. (PX 2)

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Dr. Chudik examined petitioner on April 7, 2017. (PX 3 & RX 5) Dr. Chudik documented that Petitioner complained of right elbow and right shoulder pain. (PX 3) Petitioner was injured at work on approximately February 20, 2017 when he was entering the locker room at work and his right arm was forced into the shoulder with extension of 90-degree flexion. (PX 3) Dr. Chudik set forth an impression of concern for proximal biceps rupture and rotator cuff tear post work injury of February 20, 2017, biceps rupture long and supraspinatus tear. (PX 3) Dr. Chudik recommended an MRI of the shoulder. (PX 3) Petitioner underwent the recommended MRI study of the right shoulder on January 26, 2018 at Hinsdale Orthopedic. (PX 4) The MRI revealed a full thickness supraspinatus tear, moderate infraspinatus tendinosis, suprascapularis tendinosis and a small undersurface tear, moderate supraspinatus muscle atrophy, long head biceps tendon rupture with retraction into the distal bicipital groove, superior labral degeneration and undersurface tearing and small glenohumeral joint effusion. (PX 4) On February 23, 2018, Dr. Chudik recommended surgery for the right rotator cuff and biceps tendon. (PX 3)

At the request of Respondent, Dr. Marra examined Petitioner on May 10, 2018. Petitioner testified that Dr. Marra agreed with the recommendations for surgery. Respondent did not offer into evidence Dr. Marra's report. However, the report was admitted as a Deposition Exhibit 6 at Dr. Chudik's deposition. (PX 5) Dr. Marra set forth that the mechanism of accident aggravated a pre-existing condition. (PX 5) He further recommended that Petitioner undergo surgery for the right shoulder condition. (PX 5)

Dr. Chudik last examined petitioner on January 7, 2019. (PX 3 & RX 6) Dr. Chudik documented that Petitioner had right shoulder pain, which worsened since the last visit. (PX 3) Petitioner had difficulty opening jars, using screwdrivers and overhead activity. (PX 3) He did not have any new injuries. (PX 3) Dr. Chudik set forth that Petitioner had a gross deformity of the right shoulder with proximal biceps tendon rupture deformity. (PX 3) He stated that Petitioner had right shoulder partial tearing of the undersurface subscapularis, tear of the supraspinatus retracted to the mid humerus and proximal biceps tendon rupture. (PX 3) He recommended surgery and possibly a repeat MRI study. (PX 3)

Dr. Steven Chudik's testimony

The evidence deposition of Dr. Steven Chudik was completed on January 14, 2019. (PX 5) Dr. Chudik documented a history that Petitioner sustained an injury in February 2017 to the right elbow and right shoulder. (PX 5 at 15) Petitioner was entering a locker room by pulling the door open when his shoulder was violently forced back with the elbow in 90 degrees of flexion. (PX 5 at 16) Dr. Chudik explained that Petitioner was opening the door and his right shoulder was forced back abruptly. (PX 5 at 17) If a person is pulling a door and it suddenly jerks the shoulder back, a sharp force is put on the biceps, which would be consistent with a rupture. (PX 5 at 17) It would also put forces on the shoulder, which is detrimental to the shoulder. (PX 5 at 17-18)

Dr. Chudik gave a diagnosis of rupture of the long head of the biceps and a supraspinatus rotator cuff tear. (PX 5 at 20) After reviewing the MRI study of January 26, 2018, Dr. Chudik stated that Petitioner sustained a right shoulder rotator cuff tear involving the supraspinatus and subscapularis and a rupture of the biceps tendon. (PX 5 at 23) Dr. Chudik testified that based on the medical history,

documentation, reports and MRI study, Petitioner sustained a right shoulder rotator cuff tear and biceps tendon injury. (PX 5 at 28) Petitioner had the subjective complaints of pain and limitation related to his right shoulder, which was consistent with the objective findings of the MRI, tears and pathology of the shoulder. (PX 5 at 29) Dr. Chudik recommended surgery for the rotator and biceps tendon tears. (PX 5 at 30) Dr. Chudik stated that the treatment was reasonable and necessary, and he also recommended pre-operative testing, which included an EKG, chest x-ray and laboratory work and a repeat MRI of the shoulder. (PX 5 at 33)

Dr. Chudik testified that the accident of February 15, 2017 directly caused the current condition of ill-being in Petitioner's shoulder and necessitated the need for medical treatment based on the mechanism of accident, reporting of the injury with elements of bruising, biceps deformity and objective findings. (PX 5 at 41) Dr. Chudik explained that when the shoulder is abruptly forced into extension the body will naturally resist and there is an eccentric contraction of the shoulder muscle. (PX 5 at 42) The eccentric contraction causes the tearing of the rotator cuff. (PX 5 at 42) The biceps crosses the shoulder joint when the arm is extended the biceps contracts to try to stabilize the joint and the extension forces cause injury to the biceps. (PX 5 at 43)

Dr. Chudik reviewed the reports of Dr. Marra. (PX 5 at 44) Dr. Chudik testified that Dr. Marra's history that Petitioner sustained an accident on February 15, 2017 was consistent with his history. (PX 5 at 45) Further, Dr. Marra's review of the MRI studies was consistent with Dr. Chudik's reading. (PX 5 at 45) Dr. Marra also agreed with Dr. Chudik's surgical recommendation and that the current condition of ill-being was causally connected to the work-related accident of February 15, 2017. (PX 5 at 46)

Dr. Chudik recommended restriction of minimal repetitive reaching or lifting away from the body. (PX 5 at 47) He further recommended no lifting more than 20 pounds. (PX 5 at 48) Dr. Chudik testified that Petitioner had not reached maximum medical improvement. (PX 5 at 48)

Dr. Chudik stated that he used the date of accident of February 20, 2017 in his medical records. (PX 5 at 51) He clarified that the fact that February 20, 2017 was repeated in his progress notes is not relevant since his office does not generally re-ask a patient the date of accident. (PX 5 at 53) Dr. Chudik stated that the progress note from Physician Immediate Care and Dr. Marra documented different dates of accident in February 2017, but contained a consistent description of the accident. (PX 5 at 59-60) Dr. Chudik testified that not all patients are good historians. (PX 5 at 61) Dr. Chudik testified that the actual date of accident did not change his opinions about medical causation. (PX 5 at 62) He relied on the specific mechanism of accident, which was consistent with the injury. (PX 5 at 62)

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based on the Petitioner's testimony and the preponderance of the documentary evidence, including the medical records and the accident report. All the records and the testimony of all the witnesses confirm that the Petitioner injured his right arm when he was opening a door to the Respondent's locker room at work. The history of Petitioner's mechanism of accident is consistent

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throughout the medical records, accident report and the testimony of all the witnesses. The facts presented at the arbitration hearing do not really dispute that Petitioner injured his right arm and that the incident arose out of and in the course of his employment with Respondent. Although Respondent presented video evidence that does not show any accident occurring on February 20, 2017 - notwithstanding the issue of the accident date - the video is not persuasive because it does not depict the door where the accident allegedly occurred, nor does it clearly show the Petitioner. Even Mr. Melendez's testimony does not refute the Petitioner's description of the mechanism of his accident. As noted at the onset of this decision, the main question is what is the date of Petitioner's accident.

2. Regarding the issue of accident date, the Arbitrator finds that the Petitioner's date of accident is February 15, 2017. This finding is based on the Petitioner's credible testimony and the documentary evidence, including the medical records, accident report and phone records. The Arbitrator notes that this is the main issue in dispute, the basis of the remaining issues, and a question of credibility. Petitioner claims that the initial accident date alleged of February 20, 2017 is incorrect and that due to his confusion, he initially used that date instead of February 15, 2017. The accident report, which was only partially completed by the Petitioner, indicates an accident date of February 20, 2017, and that date was subsequently reflected in the initial medical evidence. Notwithstanding the alleged date of Petitioner's accident, Petitioner's history of how he injured himself at work is consistent throughout the investigative and medical evidence. So the main question posed to the Arbitrator is whether the Petitioner's explanation - of his confusion regarding the date of accident - holds any credibility.

In assessing the Petitioner's credibility on this issue, the Arbitrator looks to the Petitioner's claim that he called his supervisor Mr. Melendez's cell phone on February 17, 2017 to report his February 15, 2017 accident. Mr. Melendez claims that Petitioner called him on his cell phone on February 22, 2017. Petitioner's phone records support Petitioner's claim and refute Mr. Melendez's testimony directly. The Arbitrator further found Mr. Melendez's testimony regarding the video evidence lacked credibility. Mr. Melendez testified that he was sure the Petitioner was shown in the video as he pointed to a certain individual seen in the video. In watching the video, the Arbitrator notes that the face of the individual purported to be the Petitioner is not clear. Furthermore, the video does not depict the area where the Petitioner claims to have been injured. Even assuming arguendo that the video is for the correct date of accident, its failure to clearly depict the Petitioner or the door responsible for Petitioner's injury undermines both the evidentiary weight of the video and the credibility of Mr. Melendez's testimony. The Arbitrator further notes that Mr. Melendez appeared to be evasive during his testimony, as seen when he responded that he "was not qualified to answer" when asked whether the Petitioner called him on February 17, 2017. On the other hand, the Petitioner appeared to be a meek and mild-mannered witness, who was honest in his admission that he was confused and at times did not know what to do in regard to his reporting, or that he could not remember what he may have said to his medical providers.

The Arbitrator further notes that Mr. Melendez initially documented the accident date of February 20, 2017. Petitioner's initial medical treatment was arranged through the company nurse and Mr. Melendez, and the records from the initial medical treatment reflect the date documented by Mr. Melendez. Given this meek and mild-mannered Petitioner's susceptibility to confusion and admitted lack of knowledge regarding the process of accident reporting, it is reasonable to conclude that Petitioner simply acquiesced to the accident date documented by Mr. Melendez, which was then used by the initial medical providers.

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Based on the above, the Arbitrator concludes that the date of Petitioner's accident is February 15, 2017.

3. With regard to the issue of notice, the Arbitrator finds that the Petitioner has met his burden of proof. As indicated above, the main dispute in this case is the date of Petitioner's accident. The testimony established that notice was provided either on February 17, 2017 or February 22, 2017. The Arbitrator finds that notice was provided on February 17, 2017 based on the phone records. However, either way, timely notice was provided since it is undisputed that Respondent had notice of the accident within 45 days, and thus cannot argue any prejudice based on the lack of sufficient notice.

4. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the witness testimony and the medical evidence, which all show that Petitioner sustained an injury to his right arm that has resulted in a rupture of the long head of the biceps and a supraspinatus rotator cuff tear – conditions which require surgical attention. Given the main issue in this case being the date of Petitioner's accident, there was little to no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill being in his right arm and shoulder are causally connected to his work accident from February 15, 2017.

5. With regard to the issue of medical expenses and consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner's medical treatment has been reasonable and necessary in addressing his work related arm injury. Therefore, the Arbitrator concludes that Respondent is liable for payment of the medical bills, subject to the Fee Schedule, from Physicians' Immediate Care in the amount of $168.40 and Hinsdale Orthopedics in the amount of $3,132. The Arbitrator further orders Respondent to make payment of the medical expenses to Petitioner's attorney pursuant to Section 7080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

6. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the prospective medical care recommended by Dr. Chudik - including the proposed surgery to address Petitioner's rupture of the long head of the biceps and a supraspinatus rotator cuff tear – is reasonable and necessary. Given the main issue in this case being the date of Petitioner's accident, there was no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Therefore, the Arbitrator concludes that Petitioner is entitled to payment for medical treatment recommended by his treating physician, Dr. Chudik, including the right arm and shoulder surgery, pre-operative testing and repeat MRI; and Respondent shall authorize and pay for said procedure.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES SHALES,

Petitioner,

vs.

NO: 12 WC 17815
14 WC 18638
16 WC 16860

STATE OF ILLINOIS-IDOT,

Respondent.

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DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical benefits, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner filed three worker's compensation claims which were consolidated for purposes of arbitration hearing – namely 12 WC 17815, 14 WC 18638, and 16 WC 16860. So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties and limit the incorporation of the Arbitrator's Findings of Facts to this extent. The Commission is also not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20

(1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission affirms the Arbitrator's ultimate decision to deny in their entirety Petitioner's claims in 12 WC 17815, 14 WC 18638, and 16 WC 16860. The Arbitrator found that Petitioner failed to prove that an injury arose out of and in the course of employment and that Petitioner failed to prove that his current conditions of ill-being were causally related to a workplace injury. The Commission further affirms the Arbitrator's denial of benefits.

The primary basis for the Arbitrator's denial of Petitioner's claim in 12 WC 17815 was Petitioner's lack of credibility, together with noted inconsistencies between Petitioner's testimony and the medical records, and omissions in evidence and testimony "that would add clarity and corroboration to the events of these claims." (Arbitrator's Decision, pg. 14). The Commission agrees and finds significant the various versions of how Petitioner hyperextended his left knee while in Respondent's parking lot on September 19, 2011, as well as the two-month delay in seeking treatment. The Commission further agrees with the Arbitrator's assessment and finds more persuasive the opinions of Respondent's Section 12 examiner, Dr. Cole, who also found the delay in treatment significant; Dr. Cole opined that he could not state that Petitioner's left knee injury was causally related to the September 2011 injury due to a lack of contemporaneous medical records.

With respect to Petitioner's second claim, 14 WC 18638, the Commission notes the Application for Adjustment of Claim and the Arbitrator's Decision were based on an accident date of March 19, 2014. The Request for Hearing form, the parties' Briefs, and the arbitration transcript refer to a February 22, 2014 accident date. Notwithstanding this, the parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of employment on February 22, 2014. The main issue herein was causal connection.

The Arbitrator found that the mechanism of injury – Petitioner driving Respondent's state vehicle into a hole on the roadway – did not comport with Petitioner's alleged complaints and symptoms to his bilateral shoulders, neck, back, left knee, and buttocks. The Arbitrator again noted that Petitioner did not seek immediate treatment.

The Commission relies upon and finds the opinions of Respondent's Section 12 examiner, Dr. Phillips, more persuasive than Petitioner's Section 12 examiner, Dr. Treister. Respondent had sent Petitioner to Dr. Phillips for an evaluation of the spine. Dr. Phillips also evaluated Petitioner's left shoulder but offered no opinion with respect to causation. Dr. Phillips noted a different date of accident, indicating February 15, 2014, but otherwise stated that after reviewing the records and evaluating Petitioner,

> I am not provided any evidence of this accident as provoking Mr. Shales' symptoms. He does subsequently when he presented to Dr. Montella in October 2014 describe the accident on February 3, 2014 in more detail. Assuming the information regarding the

> accident is actually correct and the accident is documented as occurring with Mr. Shales developing symptoms subsequent to this, I believe this would have at most caused a sprain/strain injury. (RX4).

Dr. Phillips stated that Petitioner's current spinal condition was most likely related to some underlying spondylosis.

On the contrary, Dr. Treister opined that as a result of the second work injury, Petitioner sustained a sprain/strain of the cervical and lumbar spine, a left shoulder rotator cuff tear and/or labral tear, a compensatory injury in the right shoulder, a perirectal abscess, and aggravation of Petitioner's pre-existing left knee condition. The Commission finds Dr. Treister's opinions equivocal and not persuasive. Dr. Treister testified, "I think it's related to the accidents. I can't say 12 percent to one and 70 percent to the other, but all these accidents fit together with this deterioration quite clearly." (PX21, pgs. 35-36).

The evidence demonstrated that the first medical record following the February 22, 2014 accident was from Petitioner's primary care physician, Dr. Gindorf, dated March 14, 2014 – about three weeks after the accident. At that appointment, Petitioner reported only neck and right shoulder pain; on March 21, 2014, Petitioner reported pain in both arms; and, on April 1, 2014, Petitioner reported back and rectal pain. The first time Petitioner's complaints were attributed to a work-related injury was Dr. Gindorf's letter addressed to "Dear Sirs" and dated April 8, 2014; that letter stated: "He reports pain in his shoulder and neck that he attributes to hitting potholes while driving around in his job as an inspector." (PX15).

Petitioner had also sought treatment with Dr. Flatt on March 19, 2014 – his chiropractor of 20 years for the neck and back. The medical record indicated that Petitioner had right arm pain that had been present for 11 days, or March 8, 2014, and the pain traveled from the neck to his wrist; Petitioner denied any trauma. After examining Petitioner's entire spine and right shoulder, Dr. Flatt diagnosed Petitioner with low back and thoracic spine pain, cervical spondylosis without myelopathy, right cervical radiculopathy, and right radial nerve irritation; however, the medical record indicated that the former three diagnoses had been present since June 29, 2012.

On April 4, 2014, Petitioner underwent an incision and drainage procedure for the perirectal abscess. The hospital and physical documentation stated that Petitioner had been experiencing rectal pain for the last week. There was no mention of the work accident. The left arm complaints appeared on April 11, 2014 in Dr. Flatt's records.

As to Petitioner's left knee condition, the arbitration record was void of any evidence of complaints or treatment from September 21, 2012 until Petitioner first saw Dr. Montella on October 6, 2014 – nearly eight months after the February 22, 2014 accident [Dr. Montella also had the wrong date of accident and noted February 3, 2014].

As in all workers' compensation claims, it is Petitioner's burden of proof; although it is the Commission's province to draw reasonable inferences from the evidence, the Commission's Decision must be supported by the record and not based on mere speculation or conjecture. *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)); *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 215 (2003).

The Commission finds that the evidence herein demonstrated a real disconnect between the accident date and the timeline of Petitioner's complaints, and a real disconnect with the medical evidence relating those complaints back to any alleged accident date. The medical records demonstrated a delay in complaints and treatment, and even then, not all of the injuries that Petitioner testified to were documented. Petitioner's complaints appeared in piecemeal over a course of up to eight months – with the injury to Petitioner's left knee finally appearing in Dr. Montella's office visit note dated October 6, 2014. The first time some of Petitioner's complaints were attributed to a work-related injury was on April 8, 2014, when Dr. Gindorf indicated that Petitioner attributed his right shoulder and neck complaints to "hitting potholes while driving around in his job as an inspector." (PX15).

In addition, and despite all the claimed injuries, Petitioner's testimony at arbitration narrowed his complaints following the 2014 accident to his neck and back. Drs. Treister and Phillips both opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease. However, Dr. Phillips found that Petitioner's current spinal condition was most likely related to some underlying spondylosis. This correlates with the record which demonstrated that Petitioner had a 20-year history of chiropractic treatment for his neck and back. The Commission therefore finds that Petitioner's current condition of ill-being with respect to his spine was pre-existing and unrelated to the second work accident in 2014.

For the remaining alleged injuries, Dr. Treister's significant diagnoses and favorable causation opinions related to Petitioner's shoulders, left knee, and perirectal abscess do not comport with the medical records that demonstrated a delayed onset of complaints and no documented work-related injury until months later as noted above. Additionally, with respect to Petitioner's right shoulder, Dr. Treister testified that it was the result of overuse causing irritation and bursitis and/or tendonitis. However, Petitioner testified that he attributed only his neck and back injuries to the 2014 accident; Petitioner did not testify to any overuse injury. He also denied any trauma with respect to any right arm pain [see Dr. Flatt's 3/19/2014 record], and the pain appeared to be related to Petitioner's neck injury.

Finally, as to Petitioner's alleged third injury in claim number 16 WC 16860, the Arbitrator noted that Petitioner reported injury to both shoulders, left knee, neck and back as a result of a collision while driving Respondent's vehicle on May 23, 2016. The Arbitrator found Petitioner incredible and noted the following: Petitioner misrepresented that the collision had been witnessed; there was no significant damage to the vehicle; there was no debris or skid marks on the roadway; Petitioner did not report the accident to his supervisor and misrepresented his conversation with the manager of the motor pool; and, "[h]e sought to deceive investigators

about his job duties and sought to mislead a claims adjuster about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle." (Arbitrator's Decision, pg. 17). The Commission further notes a significant discrepancy during Petitioner's testimony at arbitration. Petitioner testified that the collision occurred as he was turning into Respondent's IDOT parking lot "at the end of the night to return the vehicle." (T.40-41). However, both the Respondent's Employee Accident/Incident report and the Illinois Motorist Report from the Lake Zurich Police Department indicated that the collision occurred at approximately 1:40 PM. (RX7). The Arbitrator additionally noted Petitioner's delay in treatment, that Petitioner refused any ambulance and emergency treatment, and that "[h]e was not truthful in testifying he followed up with David Flatt." (Arbitrator's Decision, pg. 17).

The Commission agrees with the Arbitrator that issues of credibility exist with respect to the alleged accident date of May 23, 2016 and therefore affirms the Arbitrator's Decision denying Petitioner's claim.

In light of the foregoing and based on the evidence in its entirety, the Commission affirms the Arbitrator's ultimate conclusions. For claim number 12 WC 17815, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 14 WC 18638, Petitioner failed to prove that his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 16 WC 16860, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 14, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAR 31 2021
TJT/pm
O: 3/3/21
051

Kathryn A. Doerries

Stephen J. Mathis

21IWCC0149

DISSENT

I respectfully dissent from the Majority Decision for the following reasons:

For the first claim, 12 WC 17815, Petitioner testified to one version of his September 19, 2011 injury at arbitration – that he slipped and hyperextended his knee while in his employer's parking lot. The remaining histories were found in the medical records and reports; many of which had erroneous dates of injuries or dates of tests and treatments. Petitioner argued by his Brief that Respondent did not contest the mechanism of injury, but instead disputed liability based on causal connection. By its Brief, Respondent requests that this panel affirm the Arbitrator's Decision, and indeed made no argument relative to the issue of accident. In fact, there was no cross-examination by Respondent with respect to the September 2011 incident. Respondent instead argued that Petitioner's left knee condition was due to pre-existing osteoarthritis and not the result of any work-related accident in September 2011. (Respondent's Brief, pg. 10).

In reviewing the evidence, the medical records provided slight variations of Petitioner's ultimate testimony that he had slipped and hyperextended his left knee on September 19, 2011; the medical records also indicated that the accident happened in November 2011, but by this date, Petitioner had sought treatment for a left knee injury that was listed as occurring on September 19, 2011. Additionally, Respondent did not contest or rebut Petitioner's testimony that he was at work at 3:00 AM on September 19, 2011 in preparation for a week-long training in Springfield. Respondent also stipulated to notice of the injury. There was no argument against the time and place where Petitioner had alleged he injured his left knee, and no argument with respect to the mechanism of injury. Based on the parties' evidence and arguments, or lack thereof, there is sufficient basis to reverse the Arbitrator's Decision and find that Petitioner sustained a work-related accident on September 19, 2011.

With respect to causal connection, Petitioner testified that he did not seek treatment for his left knee injury until November 2011 – approximately two months after the alleged accident date. I find that the two-month delay in treatment does not defeat Petitioner's 2011 claim; by Petitioner's Brief and testimony, he had just started in his new job position with Respondent and was sorting through new insurance, as well as the worker's compensation process. Respondent eventually sent Petitioner to its company clinic in November 2011. The evidence submitted at arbitration included the Initial Workers' Compensation Medical report dated November 11, 2011 which was signed by a physician from Central DuPage Business Health. Petitioner had been diagnosed with a left knee strain and prescribed Ibuprofen and physical therapy. The next record was a work status from Central DuPage Business Health dated December 6, 2011, allowing Petitioner to return to work full duty without restriction. However, the work status note still indicated that Petitioner required medication and physical therapy for the left knee. Thereafter, Petitioner began treatment with Dr. Elstrom and eventually proceeded with left knee surgery.

The chain of events in this case supports a finding of causal connection in favor of Petitioner. The only prior history related to the left knee was the unrelated procedure that

Petitioner had in 1978 for Osgood-Schlatter disease; thereafter, Petitioner testified that he did not have any problems, limitations, or medical care for the left knee for approximately 30 years. Following the September 2011 injury, Petitioner was rendered symptomatic, necessitated medical care and diagnostic imaging, and underwent a left knee arthroscopy, debridement, and synovectomy on April 30, 2012. Petitioner's post-operative diagnoses were chondromalacia patella and capsular synovial plica. Thereafter, Petitioner completed post-operative physical therapy and received two additional injections [for an overall total of three injections] to the left knee.

Petitioner's Section 12 examiner, Dr. Treister, reviewed the operative report and found that the surgical pathology supported a more recent injury rather than a chronic one. Dr. Treister noted no "kissing legion" which would have been present in long-standing, chronic patellar chondromalacia. He opined that a hyperextension knee injury could cause the patella to strike the femur and cause central cartilaginous damage resulting in residual chondromalacia, inflammation, and secondary adjacent synovitis "which may become manifest as a thickened synovial plica, which by rubbing can be a source of pain. There was no other intra-articular pathology described. The findings at surgery were consistent with symptom production as described and with the time interval as described." (PX4; PX11; PX21, pgs. 9-11; 17-19). Respondent's Section 12 examiner, Dr. Cole, could not state that Petitioner's left knee injury was causally related to the September 2011 accident due to a lack of contemporaneous medical records. However, he conceded that the mechanism of injury described by Petitioner and as indicated in Dr. Elstrom's January 2012 office visit note "certainly represent an injury that might or could incite pain related to preexisting arthritis and cause an aggravation." (RX6).

I find Dr. Treister's opinions more thorough and persuasive than Dr. Cole's. Dr. Treister specifically reviewed and commented on the intra-operative findings for the left knee and noted evidence of a more recent than chronic injury. Dr. Cole also conceded that the history of injury could be an aggravating factor to Petitioner's left knee.

For the second claim, 14 WC 18638, the Majority notes that both Dr. Treister and Dr. Phillips opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease, but nonetheless relied on Dr. Phillips' opinion that Petitioner's current spinal condition was due to a pre-existing condition and unrelated to the second work injury.

I respectfully dissent and instead find that Petitioner sustained a strain/sprain of the cervical and lumbar spine in 2014 as opined by both Petitioner's and Respondent's Section 12 examiners, Dr. Treister and Dr. Phillips. Notwithstanding any pre-existing spinal conditions, the medical demonstrated no significant or active chiropractic treatment to the spine until after the 2014 accident.

I concur with the Majority's decision on the remaining alleged injuries and issues in this second worker's compensation claim. I further concur with the Majority with respect to the third worker's compensation claim, or 16 WC 16860.

21IWCC0149

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **12WC017815**

14WC018638
16WC016860

STATE OF ILLINOIS-IDOT
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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140 S DEARBORN ST SUITE 320
CHICAGO, IL 60603

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305 / 14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner

v.

State of Illinois-IDOT
Employer/Respondent

Case # **12** WC **17815**

Consolidated cases: **14 WC 18638; 16 WC 16860**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **September 19, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-12-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **14WC018638**

12WC017815
16WC016860

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner
v.

Case # **14** WC **18638**

Consolidated cases: **12 WC 17815; 16 WC 16860**

Illinois Department of Transportation
Employer/Respondent

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **March 19, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**59,717.00**; the average weekly wage was $**1,148.40**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove that his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4-10-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **16WC016860**

12WC017815
14WC018638

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Shales
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **16** WC **16860**

Consolidated cases: **12 WC 17815; 14 WC 18638**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **May 23, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** **not** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**61,230.00**; the average weekly wage was $**1,177.50**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4.10.2020
Date

ICArbDec19(b)

APR 14 2020

James Shales v. State of Illinois-IDOT, No. 12 WC 017815; James Shales v. Illinois Department of Transportation, No. 14 WC 18638; James Shales v. Illinois Department of Transportation, No. 16 WC 16860.

Preface

The parties proceeded to hearing August 28, 2019, recessed and resumed to October 3, 2019, and recessed and resumed to December 5, 2019, on separate Requests for Hearing on these three cases. The hearing on 16 WC 16860 proceeded on a Petition for Immediate Hearing Under Section 19(b) of the Act. The parties, at the beginning of the hearing, indicated the following disputed issues. In 12 WC 017815: whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is related to the injury; what were Petitioner's earnings and average weekly wage; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to a period of temporary total disability of two weeks; and what is the nature and extent of the injury. In 14 WC 18638, the disputed issues are: whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to four and 6/7 weeks temporary total disability; and what is the nature and extent of the injury. In 16 WC 16860, the disputed issues are: whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; and whether Petitioner is entitled to a period of temporary total disability of 161 and 6/7 weeks. James Shales v. Illinois Department of Transportation, Nos. 12 WC 017815; 14 WC 18638; 16 WC 16860 (Cons.) Transcript of Proceedings on Arbitration, August 28, 2019, at 4-7; Shales, October 3, 2019, at 4-5; Arbitrator's Exhibit 1; Arbitrator's Exhibit 2; Arbitrator's Exhibit 3; Arbitrator's Exhibit 4.

Petitioner filed three Applications for Adjustment of Claim: 12 WC 17875 claiming a date of accident of September 19, 2011, injuring a leg; 14 WC 18638 claiming a date of accident of March 19, 2014, injuring his head, neck, and back; and 16 WC 16860 claiming a date of accident of May 23, 2016, injuring his neck and right side of body. Arbitrator's Exhibit 5; Arbitrator's Exhibit 6; Arbitrator's Exhibit 7. Those filings indicate Petitioner is alleging three distinct claims. 50 Ill. Admin. Code Section 9020(b). And so that is how the Applications will be addressed.

Petitioner testified, as well as Joseph Harris, Lauder Hampson, Ken Martin, Greg Williamson and via evidence deposition, Dr. Michael Treister. The parties offered nearly 60 exhibits, and a major obstacle to resolution of these cases was the failure of either party to refer an exhibit to the specific case to which it was applicable, and the repeated attempts of Petitioner, as well as Treister, to conflate the three claims. An Arbitrator can only decide a case on the testimony and evidence before them, and simply cannot make the case for either party, or searching the record and manipulate the testimony and evidence to cobble together a preponderance of evidence for Petitioner.

I also note that many of the exhibits submitted were compromised by underlining, the addition of notations, and other distortions. This is disturbing. None of those pages will be considered. Petitioner's Exhibit 3 is a manufactured medical record, submitted without certification or in response to subpoena. It is a poor attempt at fashioning would be medical evidence. I give it no weight whatsoever. Petitioner's Exhibit 27 is likewise given no weight because of the handwritten notations on the exhibit.

Findings of Fact

Since the time he was hired by the State of Illinois (Respondent), James Shales (Petitioner) was always a Staff Assistant with the Department of Transportation. Those job duties say nothing about vehicle inspections. The job duties of a Staff Assistant such as Petitioner are to be accountable for assisting the overall development and coordination of policies and directives regarding bureau programs for the Division of Traffic Safety. The position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. The Staff Assistant provides policy interpretation and analysis of policy and provides assistance to local agencies, elected officials, and the general public. The Staff Assistant serves as confidential assistant to the Deputy Director, serves as a liaison between the Deputy Director and the Governor's office, a legislator, and other state agencies, and serves as department spokesperson for bureau programs conducting presentations to departments (management), elected officials, and the general public. The Staff Assistant coordinates and assists in implementing policy initiatives, reports on the process to management, develops informational documents presenting background and options for addressing issues of policy concerns and develops appropriate policy recommendations to provide maximum benefits to the division and provides analysis and recommendations policy issues. Petitioner was laid off in September 2016 from the position, along with 40 others. He was hired in 2011. Shales, August 28, 2019 at 12, 44, 109-116; Shales, October 13, 2019 at 32.

Petitioner was apparently one of hundreds of individuals, many with political connections, hired by the Illinois Department of Transportation as Rutan-exempt Staff Assistants from 2003 to 2013. The sordid history of the Staff Assistant position can be found at shakmanillinois.com/special-master-filings1. It is well worth reading all the reports of the Special Master. Petitioner is specifically mentioned as being a candidate sponsored by the Governor's Office and hired between 2009 and 2013. The Special Master noted the lack of experience or qualifications for appointment to Rutan-exempt positions, or not requested by the Department. See Corrected Fifth Report of the Special Master at 23, 24 (Petitioner was candidate for Kane County Board).

Ken Martin, retired after 38 years with Respondent, in positions in which he was familiar with Petitioner, testified the decision was made in 2014 to lay off Staff Assistants and then after working with the unions for two years, the eventual layoff was in 2016. Martin testified there is a federal monitor in the Department of Transportation because of the actions taken with the Staff Assistant program. Shales, August 28, 2019 at 95-96, 110, 116.

Petitioner testified that on September 19, 2011, he was in Respondent's parking lot in Schaumburg at 3:00 a.m. He parked his car in the lot and got the keys to a state vehicle. He got

the vehicle and drove it to his car to unload bags and clothes, ". . . slipped approximately maybe five yards. . . ." Petitioner said he hyperextended his left knee, and heard a pop and a lot of pain. He did not indicate how he knew the knee was hyperextended or give any testimony indicating the mechanics of how his slipping led to a hyperextension. The slip was unwitnessed. Petitioner testified he previously had surgery on his left knee in 1978. Shales, August 28, 2019 at 18-20.

I would note at this point, the Application for Adjustment of Claim for this accident appears to be defective, as it fails to set forth a description of how the accident occurred. Arbitrator's Exhibit 1; 50 Ill. Admin. Code 9020.20(c).

Although Petitioner testified he reported the accident immediately to his supervisor in Springfield, he did not complete the CMS Workers' Compensation Employees' Notice of Injury until November 11, 2011, two months later, failing to detail how the injury occurred or at what time. Shales, August 28, 2019; Petitioner's Exhibit 1.

Petitioner testified he first saw his primary care physician, a Dr. Popli. There are no records from Dr. Popli, and no support for Petitioner's testimony. He did not say when he first sought treatment. Petitioner then testified he saw some doctor at the St. Charles facility. The only records from Central DuPage Business Health/St. Charles is a Work Status dated December 6, 2011, three months after the supposed slip. Petitioner was placed on full duty without restrictions and diagnosed with "left knee strain—delayed recovery." Delayed recovery is left unexplained. Petitioner was prescribed physical therapy and 800 mg Ibuprofen. The CMS Initial Workers' Compensation Medical Report dated November 11, 2011, gives a history of "stepped in a puddle at work slipped and hyperextended left knee." A Dr. Mather diagnosed Petitioner with left knee strain. Dr. Popli was not referenced as giving Petitioner any prior treatment. Shales, August 28, 2019 at 22; Petitioner's Exhibit 1A; Petitioner's Exhibit 2.

Petitioner testified Dr. Popli referred him to a Dr. Elstrom. He did not say when or why. The records of Centegra Health System, referencing Dr. John Elstrom of April 19, 2012, indicate Petitioner was referred January 30, 2012, with left knee pain. Petitioner told Elstrom he slipped in a parking lot while running. The admitting diagnosis was gonoarthrosis of the left knee [a degenerative condition] with meniscal tear. There is no record of diagnostic supporting a meniscal tear. Petitioner, said the note, "decided to go ahead with arthroscopy of the left knee." There are no records of a recommendation for arthroscopy. There is an operative note of April 30, 2012, that an arthroscopy, debridement, synovectomy of the left knee was performed. The post operative diagnosis was chondromalacia patella and capsular synovial plica. Petitioner testified he was off work a week or so following surgery and a couple of days in May 2012 for physical therapy. Shales, August 28, 2019 at 23, 25; Petitioner's Exhibit 4.

The records of Accelerated Rehabilitation Centers from May 8, 2012, in an Initial Evaluation indicate a referral by Dr. Ehlstrom. In a history, Petitioner tells the therapist his knee begins to bother him in "Oct/Nov." It also notes "NA Work Comp claim." This physical therapy is clearly related to Petitioner's knee surgery of April 30, 2012. Petitioner's Exhibit 22.

What is disturbing about a large portion of Exhibit 22 is the manufactured records on pages 13-16, as well as the Leave Request on page 17. Petitioner's Exhibit List refers to Exhibit

22 as "Accelerated Rehab note 5-8-12." That is a misrepresentation of its contents. Pages 13-17 are stricken from the exhibit. The alterations on pages 13-16 are particularly disturbing and unprofessional.

On September 17, 2012, Dr. Elstrom wrote a letter to Dr. Vincent Cannestra referring Petitioner to Cannestra's practice. Elstrom indicates he first saw Petitioner January 30, 2012, complaining of an injury November 10, 2011. He says Petitioner has gonarthrosis of the knee and notes an MRI of June 11, 2012, showed a joint effusion but was otherwise normal regarding the ligaments, joint surfaces, and menisci. What is revealing in the letter is Elstrom's telling Cannestra, Petitioner ". . . wanted to go ahead with arthroscopic evaluation of the knee," not that it was recommended. Petitioner's Exhibit 3A; Petitioner's Exhibit 3B.

It is conspicuous that Petitioner offered no testimony regarding Dr. Cannestra. Cannestra saw Petitioner once, September 21, 2012. During that visit, Petitioner told him he was in an icy parking lot when his left foot slipped into a hole. Petitioner's x-rays and an MRI showed no gross abnormalities. Cannestra's impression was chondromalacia patella of the left knee, commonly called "runner's knee." He noted Petitioner was doing an exercise program on his own at the gym. In the Medical History Form completed by Petitioner September 21, 2012, he indicated he was working, not off work. He omitted answering "Is legal action/litigation pending due to this injury." I note his Application was filed May 23, 2012, four months earlier. Petitioner's Exhibit 5; Arbitrator's Exhibit 5.

At this point, I note the submission of Petitioner's Exhibit 7, a "To Whom It May Concern" document dated March 2, 2017. It has been altered, by whom it is not known. On Petitioner's Exhibit List it is vaguely described and misrepresented as "Dr. Popli-PCP MD." I give this document, obviously prepared for use in litigation, and unsupported by any medical records, no weight whatsoever.

Petitioner submitted to an Independent Medical Examination by Dr. Brian Cole, the Associate Chairman and Professor, in the Department of Orthopedics at Rush University Medical Center, May 1, 2017. Subsequent to his report, he issued an addendum, February 27, 2019, regarding the alleged injury of September 2011. Petitioner told Cole he slipped in a puddle and hyperextended the left knee. Cole noted that there is no medical record validating Petitioner's being seen until January 2012, four months later. He noted Petitioner's Notice of Injury was done over a month later. Cole saw no evidence Petitioner had medical treatment in September to early November. He said the medical records do not support an aggravation of preexisting arthritis. Cole said there did not appear there was any significant trauma incurred to Petitioner's left knee to any large degree. Respondent's Exhibit 5; Respondent's Exhibit 6.

Dr. Cole indicated going by what the Petitioner told him, he thought he hyperextended his knee when stepping into a puddle. But that was not Petitioner's testimony at trial, or told to Dr. Cannestra, or to Accelerated Rehabilitation Centers, or to Centegra Health System. So, Cole's opinion here is based on a false premise. In any event, Cole said the medical records do not support or substantiate Petitioner incurred any significant traumas to his knee as a result of anything that happened in the September 2011 incident. Shales, August 28, 2019 at 20; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Respondent's Exhibit 6.

Dr. Cole noted there was no timely report of the injury or witnesses to those events. He noted Petitioner received no medical evaluation between September 2011 through December 2011. Cole said Petitioner had relatively moderate/advanced preexisting osteoarthritis that manifested symptoms. He diagnosed Petitioner's current condition as left knee osteoarthritis unrelated to workplace expose or workplace event of September 2011. He based that on the medical records and fact pattern as provided. Respondent's Exhibit 6.

Petitioner was evaluated by a non-treating physician, Dr. Michael Treister, selected by his attorney seven years after the alleged accident. Petitioner's Exhibit 11. Treister's evaluation will subsequently be addressed in its entirety.

While back at work with Respondent, Petitioner testified he was injured February 22, 2014. The majority of Petitioner's testimony was spent on irrelevant descriptions of what he did at special events and the 15,000 yard signs assigned for the events, not connected to any accident at all. Petitioner's attorney asked him how he got injured, but Petitioner wanted to continue talking about the events. Finally, Petitioner testified he was traveling back to the Respondent's facility in Schaumburg from an event at Rauner Family YMCA. He was unsure of the time. He then said the vehicle was stationed in one of four places. He then said he was on his way to the Toll Authority in Gurnee. His testimony devolved into a mudded description of where he was going. Petitioner, in a generalized testimony, said he drove into the right lane of a viaduct he was in that was "completely" filled with water. He said he hit the water. His van sunk into construction and that's how he got injured. He said he hit his head on the roof of the vehicle, hit his butt, hit his left knee, hit both shoulders. He said he did not report the accident for two days. Shales, August 28, 2019 at 31, 28-33, 34.

There is no testimony or evidence as to where the accident happened; what damage was done to the van; no employee notice of injury; no witnesses; no police activity; no immediate medical response or treatment; and no explanation as to why Petitioner's Application for Adjustment of Claim for this accident indicates an accident date, a month later, of March 19, 2014. Arbitrator's Exhibit 6.

Where Petitioner allegedly drove his vehicle has been described as either: construction; a sink hole; or a pot hole. Shales, August 28, 2019; Petitioner's Exhibit 15. There is, for the purpose of determining precise origin or cause of any injury, no clear, credible testimony.

Petitioner offered no evidence he sought emergency medical treatment, or even required it. He never testified he felt immediate pain or discomfort. Petitioner testified he saw a Dr. Gindorf following the accident. The records of Dr. Jeffery Gindorf indicate he saw Petitioner March 14, 2014, three weeks after Petitioner said he drove into the hole, complaining of right shoulder and neck pain. Petitioner falsely testified he saw Gindorf for his back, neck, both arms, and left knee. There is no record Petitioner told Gindorf he was in a vehicle accident. Without any diagnostics, Gindorf assessed Petitioner with displacement of cervical intervertegral disc without myelopathy, and prescribed medication. One week later, Gindorf had the same assessment. On April 1 2014, Petitioner saw Gindorf with rectal pain and rectal urgency. He was assessed with an abscess of the anal and rectal regions and given a rectal cream and

medication. On April 4, 2014, Gindorf referred Petitioner to surgery for worsening rectal pain. Shales, August 28, 2019; Petitioner's Exhibit 15.

Petitioner testified he had surgery April 4, 2014, on a rectal abscess. The records of Good Shepherd Hospital, of April 4, 2014, indicate Petitioner had been experiencing rectal pain for the last week. There is nothing in the preoperative history and physical about a motor vehicle accident. Petitioner was diagnosed with perirectal abscess. An Operative Report of April 4, 2014, diagnosed a perirectal abscess. The procedure performed was an examination under anesthesia with incision and drainage of perirectal abscess. Shales, August 28, 2019; Petitioner's Exhibit 35.

At this point, I note an Initial Workers' Compensation Medical Report, largely illegible, but likely by Dr. Gindorf, done four months after the alleged accident and two months after rectal surgery, on June 20, 2014, indicating Petitioner hit his head, neck, and tailbone. It said he had been treated by Dr. Gindorf and David Flatt. Petitioner's Exhibit 36.

Gindorf's records contain an unexplained letter of April 8, 2014, "Dear Sirs." It places Petitioner off work until further notice. He states Petitioner ". . . reports pain in his shoulder and neck that he attributes to hitting pot holes while driving around as an inspector." Petitioner's Exhibit 15. There is no mention of the abscess or surgery. There is no mention of a motor vehicle accident. He is parroting Petitioner's latest story line, not one sink hole or pot hole, but apparently many. Petitioner's misrepresentation to his doctor was contradicted by his trial testimony that by 2013 he was overseeing 50 grantees in the Chicagoland area, in a public relations job. Shales, August 28, 2019 at 28-29.

Petitioner testified he treated with David Flatt, a chiropractor, regarding his neck and back. Petitioner testified Flatt was his chiropractor and he had been seeing him for "adjustments" for neck and back, for 20 years. The records of David Flatt indicate Petitioner saw Flatt a month after he testified he drove into the hole, March 19, 2014. Flatt indicated Petitioner has degenerative arthritis of the cervical spine, as well as ADHD. There is no history of a motor vehicle accident. Flatt specifically noted "Denies antecedent trauma." Flatt treated Petitioner with manipulative therapy, exercise, re-education, and traction nine times through April 30, 2014. He indicates he reviewed x-ray results, but never indicated what they were. Shales, August 28, 2019 at 36-37, 23; Petitioner's Exhibit 8.

Petitioner testified he started treating with Dr. Montella in 2014 for his back and neck. The record of Midwest Sports Medicine and Orthopaedic Surgical Specialists and Dr. Bruce Montella indicate Montella saw Petitioner eight months after he said he drove into a hole, October, 2014. Petitioner complained of pain in his left neck, knee, upper back, forearm, and midback. Petitioner told Montella the onset of his pain was February 3, 2014, a month before he claims to have driven into a hole. Petitioner told Montella he was seen in an emergency room and admitted to a hospital. In the absence of evidence and testimony by Petitioner, that is a fabrication. Petitioner, in a seemingly calculated attempt to obscure his true condition, repeatedly conflates his alleged accident of September 2011, and alleged driving into a hole. Montella, without any noted diagnostics, assessed Petitioner with cervical disc herniation, lumbar disc herniation, and tear in medial meniscus knee. The treatment proposed was

nonoperative management. Montella's records are largely duplicative, and that is troubling. Shales, August 28, 2019 at 36; Petitioner's Exhibit 12A.

Petitioner offered no testimony of his medical treatment from 2014 onward. He said Montella authorized him to be off work May 20, 2015, through June 2, 2015, then December 10, 2015, through December 17, 2015. He did not say why. The records of Midwest Sports Medicine indicate that on January 5, 2015, Petitioner was working full duty without restrictions. On February 13, 2015, Petitioner was diagnosed with osteoarthritis of the knee and advised to consider a total knee replacement. On March 17, 2015, Petitioner was noted to be working full duty without restrictions. On December 9, 2015, almost two years after Petitioner claims to have driven into a hole, Montella, with no noted basis, or complaints of left knee and low back pain, in his treatment plan says "the patient was injured at work due to exertion and a work related accident." In medical terms, exertion is the expenditure of energy by skeletal muscles. It means nothing in this context. What work related accident? Montella does not say. He says Petitioner ". . . is recommended to take off work starting December 10, 2015 . . . to . . . December 17, 2015. He does not say why. On December 16, 2015, Montella's records indicate Petitioner can return to work without restrictions December 16, 2015, full duty, and is able to drive a State vehicle. Shales, August 28, 2019; Petitioner's Exhibit 12B.

In May 2016, James Sterr, a Bureau Chief with Respondent, had a concern about Petitioner that proved prescient. He was concerned, because of Petitioner's two prior denied workers' compensation claims, and because Petitioner was facing a potential layoff as a Staff Assistant, that Petitioner sought to expand his duties to feign injury. Respondent's Exhibit 7. He just misread how.

On May 19, 2016, Petitioner had asked Dan Thompson, Unit Chief of the Vehicle Inspection Program, for a "crawler" that would allow him to inspect the underside of charitable vehicles. Thompson told Petitioner he should not be leaving his vehicle to look for CV plates, simply drive and look at locations. He was advised doing otherwise would put Respondent at risk for a major labor grievance. Petitioner was specifically told many times not to get under buses and do any inspections. Respondent's Exhibit 8.

Nonetheless, Petitioner testified that in May 2016, he was still visually inspecting school buses, crawling and climbing under the buses. This fabrication was contradicted by Ken Martin, a long time official with Respondent who knew Petitioner and supervised him. He testified inspections were not in Petitioner's duties. Those were done by a different union. Shales, August 28, 2019 at 39; 94-100.

Petitioner testified he sustained an injury May 23, 2016. He said he was injured in front of Respondent's facility in Lake Zurich. He said he was turning left into the facility when a vehicle struck his van at "50-60" miles per hour. Despite completing an Illinois Motorist Report indicating the incident happened at 1:40 p.m., as well as an Employee Accident/Incident Report saying the same, Petitioner said it happened ". . . at the end of the night . . ." Petitioner testified his left shoulder hit the windshield, the right got jammed underneath the steering wheel, he banged his left knee, and whiplashed his neck and back. Shales, August 28, 2019 at 39, 40, 41; Respondent's Exhibit 7.

Petitioner testified he filled out a report with the Lake Zurich Police Department and talked to ". . . Kerry, something like that. . . ." He did not call an ambulance. He said, despite testifying he was struck at "50-60" miles per hour, he was not sure of damage to his vehicle. Then he said there was not a lot of damage. Petitioner omitted much about the accident and the aftermath. Shales, August 28, 2019 at 41, 60, 61.

Greg Williamson, an investigator with Respondent, was asked to look into the circumstances surrounding Petitioner's claim that he was in an accident May 23, 2016. He testified at the hearing. He said he interviewed Petitioner at the Lake Zurich facility. Petitioner also had a representative with him. Williamson testified as to his investigation and the subsequent report. Petitioner chose not to cross examine Williamson. Shales, December 5, 2019 at 10, 12, 13, 22.

Petitioner was interviewed two days after he claimed to be hit by a vehicle going "50-60" miles per hour. He was accompanied by his union steward. He admitted his responsibilities included traveling to various locations to locate charitable vehicles and verify their CV plates bore a valid sticker. He mislead investigators by telling them he checks for holes in the floor boards and tire treads. He admitted Ken Martin was his immediate supervisor, and that he was returning to Lake Zurich at 1:40 p.m. Respondent's Exhibit 7; Respondent's Exhibit 8.

Petitioner told investigators a silver older model Mercedes driven by a man struck his vehicle. He said he could hear the tires of the Mercedes screeching immediately before impact. He told investigators the impact caused a loud boom and his vehicle "jerked pretty good to the left." He said he got out and saw the other vehicle drive away, saying he reported the incident, not to his supervisor, but to Kerry Kern, who managed the motor pool. He said Kern was not sure what to do. Petitioner admitted telling Kern he didn't get hurt bad and declined an ambulance, preferring to see his regular doctor. Petitioner told investigators he drove to the Lake Zurich Police Station to report the incident. Kern told investigators he advised Petitioner not to follow the other vehicle, but Petitioner said he did, in attempting to catch him. Kern said he told Petitioner to submit an Employee Accident/Incident Report, and noted Petitioner's vehicle was equipped with a manual detailing actions employee should take in the event of an accident. Pat Kewenakhone, an engineer at the Lake Zurich yard, told investigators Petitioner asked him for directions to the Police Station, and said employees in the facility are able to hear traffic noises, but no one heard a loud boom during the time of the alleged accident. He took the photographs of Petitioner's vehicle. Respondent's Exhibit 7.

Petitioner told investigators the other vehicle should have damage to its right side and door, admitting there was very little damage to his vehicle, and he saw no debris or skid marks in the street after the alleged collision. During the interview, Petitioner admitted he could not give a clear description of the vehicle that hit him, or the driver. He denied initially describing the driver as a man. Petitioner told investigators he received no medical treatment as a result of the alleged accident, but had an appointment for June 8, 2016, 14 days after the accident, and planned to be off work until then. He told investigators he is in pain "24/7" but continues to come to work ". . . because he loves his job." He said he wanted to be on Workers' Compensation and would appreciate it if his claim was approved. Respondent's Exhibit 7.

The vehicle driven by Petitioner had minor scuffs to the bumper and a small semicircular dent to the right of the rear bumper. There was a small crack in the right side of the rear bumper near the bottom with red paint transfer. Petitioner told Lake Zurich Police the rear passenger bumper was struck by a silver four door Mercedes. Petitioner told Dr. Roger Chams he was hit at 50 miles an hour. Petitioner's Exhibit 20. Kern told investigators the dent in the rear bumper of Petitioner's vehicle was very common, and practically all motor pool vans have similar dents.

Williamson testified there were quite a few inconsistencies regarding the circumstances of the accident. Shales, December 5, 2019 at 15-20.

Petitioner testified he was still under Dr. Montella's care and continued to see him after the latest alleged accident. He said he was also seeing David Flatt, but did not say why. Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the 2016 accident. He offered no elucidation of what was done or why. Shales, August 28, 2019 at 42.

The records of Dr. Montella indicate Petitioner was seen June 1, 2016, complaining of motor vehicle related aggravation of pain in the neck and lower back. Petitioner told Montella his symptoms began after an auto accident. This stands in stark contrast to what Petitioner told investigators May 25, 2016, that he is in constant pain "24/7," and telling Kern the day of the accident he was OK, and laughing "just normal back and neck, but that always hurts." Montella, with no new diagnostics, gave an impression of impingement syndrome of right shoulder, impingement of left shoulder, intervertegral disc displacement lumbosacral region, cervical disc disorder with radiculopathy mid cervical region. He suggested conservative treatment, NSAIDs, and a rehabilitation program. Norco tablets were prescribed, even though Montella's records clearly reflect Petitioner was allergic to Norco. Montella falsely represents that "Petitioner had a work related motor vehicle accident in 2011." Petitioner's Exhibit 12C; Respondent's Exhibit 7.

On June 1, 2016, Montella prepared two documents. In an initial Workers' Compensation Medical Report, Montella wrote Petitioner was involved in a hit and run May 23, 2016. He parroted back Petitioner's complaints of neck, back, and shoulder pain and soreness. He indicated Petitioner was to be off work until his next scheduled appointment. That was in three weeks. At the same time, on the same date, Montella completed an Authorization for Disability Leave and Return to Work that was glaringly inconsistent with his treatment of Petitioner and subsequent work pronouncements. Montella signed the Physicians Statement, saying Petitioner had severe limitation of functional capacity and was incapable of minimal (sedentary) activity. He stated in his opinion Petitioner was temporarily totally disabled, and permanently and totally disabled for employment. Petitioner's Exhibit 12C.

Montella's records contain a June 2, 2016, denial of claim for Petitioner and Workers' Compensation from Tristar. Investigators of the alleged accident reviewed an audio recording of Petitioner with Tristar on May 23, 2016, in which he told them he would seek immediate medical attention and would go to the emergency room. He did neither. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

Two weeks after stating Petitioner was totally disabled for employment, June 15, 2016, the records of Montella reveal Montella wrote a Work Restriction Form, saying Petitioner may return to work without restrictions. At the same time, he restricted Petitioner to no lifting over 20 pounds and no climbing, bending, or sitting in a work chair all day. That same day, a laboratory report from Assured Toxicology to Midwest Sports Medicine done for medication monitoring, indicated Petitioner tested positive for cocaine, an illegal drug. Montella never commented on the report, acknowledged it, or confronted Petitioner. Office visit notes of Montella, on June 15, 2016, reveal x-ray findings consistent with glenohumeral joint AC joint arthrosis and spurring. Cervical and lumbar x-rays were consistent with multisegmental degeneration. Petitioner's Exhibit 12C.

Three weeks after stating Petitioner was totally disabled for employment, June 22, 2016, Montella completed a Work Restriction Form indicating Petitioner could return to work without restriction and was cleared to resume full duty as a visual vehicle inspector, and was able to drive a State vehicle. Montella's office notes of June 22, 2016, indicate Petitioner may return to work regular duty without restrictions. Petitioner's Exhibit 12C.

Three weeks later, July 13, 2016, six weeks after stating Petitioner was totally disabled for employment, Montella completed an Authorization for Disability Leave and Return to Work stating Petitioner had no limitation of functional capacity and was capable of heavy work. He wrote that Petitioner was able to resume his duties. His remarks say full duty. He neglected to indicate any response to the extent of disability. Just a week later, July 20, 2016, Montella signed a Work Restriction Form indicating Petitioner could return to work without restriction and must have an ergonomic work station. This is inexplicable in the face of Montella's instruction in a Work Restriction Form of June 22, 2016, indicating Petitioner should ". . . not be sitting at the desk doing paperwork. . . ." Petitioner's Exhibit 12C.

At the same time, June 22, 2016, Montella was clearing Petitioner to resume full duty and drive a State vehicle, a laboratory report by Assured Toxicology to Midwest Sports Medicine indicated Petitioner again tested positive for cocaine, an illegal drug. For the second time, Montella ignored the report. Petitioner's Exhibit 12C.

The depth and breadth of Petitioner's fabricated subjective complaints are laid bare in Progress Notes of ATI Physical Therapy of August 13, 2016, a scant two months after Montella stated Petitioner was totally disabled for employment. Petitioner's physical therapists wrote "Patient's subjective reports of physical pain and limitations are not consistent with patient's activity level. Patient was overheard talking about returning to jet skiing, jogging, bike riding, walking long distances, and working out at the gym. Patient's compliance with HEP has been questionable d/t inability to list exercises when asked are part of his program or frequently forgets how to perform exercises correctly." Astonishingly, Montella signed off on the notes. Just as he ignored Petitioner's cocaine use, he ignored the therapist's observations. The observations were repeated in the Discharge Summary two weeks later, August 25, 2016. Again, signed off on by Montella. Again ignored. Petitioner's Exhibit 12C.

The remainder of Montella's records are completely compromised and sprinkled with fantasy. A State Retirement Systems Temporary Disability Medical Report signed by Montella

indicates a left knee meniscus tear, intervertegral disc disorders, cervical disc disorders with radiculopathy, and left and right shoulder impingement with an onset date of September 14, 2016, four months post the alleged accident. Montella signed a Work Restriction Form September 14, 2016, placing Petitioner off work until further evaluation, less than two months after returning Petitioner to work without restrictions. Petitioner was well aware of his coming layoff as far back as early May 2016, and sought short term disability. By November 2016, Montella had referred Petitioner to Dr. Eugene Lopez for left knee surgery. An x-ray revealed an overgrowth of cartilage and bone, osteochondroma, that does not result from an injury. Lopez recommended excision of the left proximal tibial ossicle/exotosis. One of the most telling entries in Montella's records is an unsigned "To Whom It May Concern" of December 13, 2016, saying "Patient has been off work from 9/13/16-present and until further notice per Dr. Montella's discretion. . . ." As late as December 15, 2016, Montella was still misrepresenting Petitioner as a safety investigator for the Illinois Department of Traffic Safety, stating this is a work injury that happened in September 2011. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

There are no records of treatment by David Flatt to support Petitioner's testimony he was seeing Flatt after the alleged accident. What records of Flatt there are indicate that by June 3, 2019, Petitioner's complaints were chronic neck and back pain. Flatt indicated "treatment for this patient is designed to reduce pain and dysfunction of acute flareups even though the condition is degenerative and chronic in nature." Petitioner's Exhibit 8A.

Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the accident in 2016. That was untrue. The records of Dr. Chams reveal he saw Petitioner on July 24, 2017, almost a year after the alleged accident. Petitioner went to Chams claiming injury in 2014. Chams reviewed an MRI which was negative for rotator cuff pathology. He wrote "The patient was adamant about additional prescription of narcotic medication. The patient requested Percocet which was declined." Petitioner followed up with Chams September 5, 2017. He did "not proceed" with a high field MRI scan of his shoulder as ordered by Chams, nor physical therapy as ordered by Chams. The impression after examination was left shoulder bursitis, ruled out complete rotator cuff tear. Cham indicated "We have in the past declined narcotic medications for the patient." Petitioner never saw Chams again. Petitioner's Exhibit 20; Shales, August 28, 2019 at 42.

In 2017, Petitioner submitted to two independent medical examinations.

On May 1, 2017, Dr. Brian Cole, Associate Chairman and Professor in the Department of Orthopedics, Rush University Medical Center, and Chairman of the Department of Surgery, evaluated Petitioner's left knee, reviewing medical records and examining Petitioner. In his view, Petitioner's impairment and need for treatment are related to the progression of his osteoarthritis. He noted Petitioner's focus on a 2011 injury, and that the medical records do not support the notion Petitioner had persistent and consistent symptoms with consistent care through 2012 to 2014. He diagnosed Petitioner with mild to moderate osteoarthritis of the left knee. He could not state categorically whether Petitioner had a legitimate reaggravation of a preexisting condition. Respondent's Exhibit 5.

On June 29, 2917, Petitioner submitted to an independent medical examination by Dr. Frank Phillips, Director of Spine Surgery at Rush University Medical Center. Phillips performed a cervical, thoracic, and lumbar record review and medical and physical examination of Petitioner. Unlike Montella, he noted Petitioner twice tested positive for cocaine. Petitioner, in describing his treatment and injuries, never mentioned his rectal abscess. Petitioner denied an accident in 2016 aggravated his cervical or lumbar condition. Phillips noted no evidence of acute injury or disk herniation in a cervical MRI from June 22, 2016. He noted no instability or deformity in a lumbar x-ray from June 3, 2016. Dr. Phillips had no evidence of an accident provoking Petitioner's neck and low back symptoms. He did not believe Petitioner was in any current state of ill-being related to the cervical or lumbar spine as a consequence of a 2014 injury. Respondent's Exhibit 4.

Petitioner was referred to 77 year old Dr. Michael Treister for an orthopedic evaluation, by his attorney in 2018, two years after his third claim, four years after his second claim, and seven years after his first claim. Treister was in retired status from two hospitals and had sold his surgical practice four years earlier. He now does medical evaluations, largely for plaintiffs. Petitioner's Exhibit 10; Petitioner's Exhibit 11; Petitioner's Exhibit 21. His evaluation was no Section 12 examination, and he was not a treating physician of Petitioner.

Medical evidence should be treated and weighed as any other evidence. The character of the witness, his professional capacity, skill, and opportunity for observation, and state of mind of the witness himself are all proper factors to be considered in determining the weight to be given testimony. See Peabody Coal Company v. Industrial Commission, 289 Ill. 2d 449, 454 (1919). No doctor, who is not a treating physician, should be an obvious advocate or partisan in legal proceedings.

Petitioner's testimony omitted any reference to giving a history to or having an examination by Treister. Treister's testimony was taken by evidence deposition. He testified he examined Petitioner at the request of his attorney to determine whether or not there was a causal connection between his medical condition and a series of work accidents. He testified he did a report dated March 23, 2018. He got a history from Petitioner of three separate accidents. Petitioner's Exhibit 21 at 8-7. Treister's testimony is largely an uninterrupted narrative, combining speculation, irrelevant verbiage, and pure advocacy. He was seemingly able to run amok without objection, and without regard to the question. It appears he took everything that Petitioner told him as true. He became highly agitated during cross examination, when counsel asked, ". . . you've sort of editorialized throughout your IME, do you normally do that?" She was being polite, as we will see. Treister said, in answer, he was to speak at ". . . a major meeting I'm giving a lecture." He said, ". . . I'm giving a lecture at a major medical meeting about this issue." He said he puts his thoughts in italics. Such are normally used for emphasis, though rarely. He admitted he ". . . got a whole bunch of records. . . ." and did not know where he got portions of his report. He purposely and without being asked, savaged HMO Illinois, saying, "And by the way, HMO Illinois is one of the hardest ones, if there was a workman's comp they wouldn't pay." Treister was critical of Petitioner's initial treating physicians. Treister became agitated when backed into a corner regarding criticism of Dr. Phillips. Petitioner's Exhibit 21 at 65, 66, 67, 69, 70-75.

Treister's 22 page report of March 23, 2018, is repeatedly altered and highlighted, a disturbing and continuing practice by Petitioner.

He first saw Petitioner March 5, 2018, on his left knee and both shoulders. He was specifically told not to evaluate the spine. Treister called Petitioner's counsel and chastised him for not engaging him to evaluate the spine, in an extravagant statement of his purported talent, pushing counsel into expanding his evaluation. His report is based on Petitioner's telling him he had been a school bus inspector, kneeling and crawling under buses, until September of 2016. That was a lie, and that lie formed the foundation of Treister's report. Treister falsely wrote that Dr. Elstrom recommended arthroscopic surgery. That is nowhere in the records. Those records strongly suggest Petitioner told Elstrom he wanted surgery. Petitioner continued his attempted manipulation of Treister by insisting his course of conversation with his doctors no matter the difference in the doctors' records. Treister misrepresented when Petitioner had knee surgery, and misrepresented Dr. Cannestra's conclusions. Petitioner's Exhibit 11 at 1-6.

In his narrative about Petitioner's alleged second accident, all of Treister's information came from Petitioner. Incredibly, Treister wrote "I made no attempt at detailed review of [Petitioner's chiropractic care] records [through April 2, 2018]. If Treister had made even a cursory review of Flatt's records, he would have seen Petitioner denied a trauma, and never mentioned a motor vehicle accident. Treister is woefully misinformed and willfully ignorant of Petitioner's history. Treister admitted he did not have Petitioner's rectal abscess records, but wasted no time relying on Petitioner's medical expertise in connecting his rectal surgery to an accident. No doubt Treister neglected to review Petitioner's Workers' Compensation Medical Report, where he indicated not a sacro-cocygeal injury as Treister noted, but one of his tailbone. Treister is consistently wrong. He relies on Petitioner's story that he received over 50 massage therapy treatments recommended by Montella, at X-Sport Gym. There are no records to support this. Petitioner's Exhibit 11 at 6-8.

Treister continued to base his narrative on what Petitioner tells him over the reports of IME doctors. He questioned the ethics of those doctors and thought Dr. Phillips not fair or reasonable, devolving his examination into an argumentative lecture. Treister consistently falls for Petitioner's description of his job. Petitioner's Exhibit 11 at 10-16.

That is enough time spent on Treister's report. The rest is chatter without reason, facts, or support, highly speculative and designed to justify the 22 page "examination." It isn't an examination at all. Read closely in conjunction with the other exhibits offered and Petitioner's testimony, it is a shocking, empty screed.

There are so many examples of nonsense from Treister, that to catalog them all would push the length of this decision to 100 pages. Suffice it to list these examples of his medical professionalism: Petitioner was " . . . forced to use his private health insurance." As to alleged discrepancy in the medical records, "Was the date wrong so that MRI facility could get paid? Who knows." Then, there's "Mr. Shales continued to have significant discomfort, but since ongoing treatment was declined by Workers' Compensation, he went back to his work and did the best he could with his painful left knee under the circumstances." Shattering the myth of any impartiality--that this was an honest medical evaluation of Petitioner--there is this, ". . . Workers'

Compensation had over and over refused to approve or administer any rational medical care to Mr. Shales, and that as a result he was seeking out the most reasonable symptom relieving treatments that he could arrange and afford. That appears to have been an honorable attempt at symptom relief on his part, and it was not his fault that he could not go elsewhere or perhaps receive more appropriate care." Treister, ever the professional, wrote, "This appears to be a true medical tragedy." His "evaluation" crosses the bounds of medical evaluation into exaggerated testimonial advocacy, at best puffery, at worst deliberate distortion. Treister couldn't even get the date of Petitioner's knee surgery correct, bought the deception of what work Petitioner did before and after the alleged accidents, and concocted a connection between the second alleged accident and rectal surgery.

I give no weight to Treister.

Conclusions of Law

12 WC 017815, alleged date of accident September 19, 2011

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury.

A claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. First Cash Financial Services v. Industrial Commission, 367 Ill. App. 3d 102, 105 (2006). In the course of employment refers to the time, place, and circumstances of the injury. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980). Arising out of the employment pertains to the origin or cause of a claimant's injury. First Cash, supra at 105.

The credibility of a witness is always an issue and relevant. That determination involves the consideration of a witness' ability and opportunity to observe; their memory; manner while testifying; interest; bias; and previous inconsistent statements or actions. See e.g. Illinois Pattern Jury Instructions – Civil No. 1.01[5]. In all of these cases, Petitioner's credibility was repeatedly compromised. These will be discussed *ad seriatim*. There is a pattern that runs through Petitioner's medical records and statements made to examining doctors and medical providers that show he attempted to manipulate his medical treatment. There are glaring omissions in evidence and testimony on subjects that would add clarity and corroboration to the events of these claims. Together these cast a dark cloud over consideration of these claims.

In this claim, I find as a conclusion of law, Petitioner has failed to prove an injury arose out of and in the course of employment, or that his current condition of ill-being is causally connected to a workplace injury.

Petitioner testified that as he was unloading bags and clothes from his personal vehicle into a State vehicle and he ". . . slipped approximately maybe five yards, hyperextended my knee, heard a pop and a lot of pain behind the knee." Five yards. Fifteen feet. Petitioner's claim

of a hyperextension is his repeated creation of his alleged injury. It finds no support in medical records. Petitioner told five versions of his unsubstantiated slip: slipped in a puddle; in an icy [in September] parking lot stepped into a hole and slipped; slipped at work; slipped while running; stepped in a hole. Shales August 28, 2019; Respondent's Exhibit 5; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Petitioner's Exhibit 11. In his Notice of Injury, he completely omits any detail of how the injury occurred. This is also true, although it is required by Rule, in his Application for Adjustment of Claim. Petitioner's Exhibit 1; Arbitrator's Exhibit 5; 50 Il. Admin. Code 9020.20(c) (a description of how the accident occurred). The date of the unwitnessed five yard slip is not even consistently set in the exhibits tendered by Petitioner. Petitioner's Exhibit 5 (November 2011), Petitioner's Exhibit 3A (November 10, 2011); Petitioner's Exhibit 22 (Oct/Nov). The Initial Evaluation of Petitioner by Accelerated Rehabilitation Centers, of May 8, 2012, in its history indicates "Oct/Nov left knee began to bother him." That evaluation, in the history, notes it is not a Worker's Compensation claim. Petitioner's Exhibit 22.

Petitioner did not report any incident for two months. Petitioner's Exhibit 1. He sought no medical treatment for four months. There is no corroboration of Petitioner's story and much to suggest it never happened. Respondent's Exhibit 6.

Petitioner had arthritis in his knee and that is not causally connected to any workplace injury. Respondent's Exhibit 6; Petitioner's Exhibit 3A; Petitioner's Exhibit 4.

Disputed issue **G** is what was Petitioner's average weekly wage. The claimant bears the burden of establishing his average weekly wage under 820 ILCS 305/10. Ricketts v. Industrial Commission, 251 Ill. App. 3d 809, 810 (1983). The evidence presented was less than clear or comprehensive. No pay stubs. No W-2. No documentation of any kind. The sum total of the evidence on this issue was Petitioner's testimony that when he was hired in August 2011, his salary was ". . . approximately $5000 a month, gross." He said it was roughly ". . . 58,000-60,000" a year. Shales, August 28, 2019 at 17. Liability under the Act cannot rest upon imagination, speculation, or conjecture, but out of facts established by a preponderance of the evidence. Lyons v. Michigan Blvd. Bldg. Co. Inc., 331 Ill. App. 482, 501 (1947).

The Act details the calculation of average weekly wage in Section 10. There are four methods to do so. Petitioner chose none of them to calculate his average weekly wage on the date he claimed as the date of accident, September 19, 2011. There is no concrete evidence of his actual earnings. Because I find Petitioner has failed to meet his burden of proof as to earnings and average weekly wage, no calculation can be made under Section 10. Any attempted scenario would be pure speculation.

Because Petitioner failed to prove an accident arose out of and in the course of employment or that his current condition of ill-being was causally connected to a workplace injury, Respondent is not responsible for medical charges; Petitioner is not entitled to a period of temporary total disability or permanent partial disability. Disputed issues **J**, **K**, and **L** are moot.

14 WC 18638, alleged date of Accident March 19, 2014

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and his employment. Navistar International Transportation Corporation v. Industrial Commission, 315 Ill. App. 3d 1197, 1202-1205 (2002). Here Petitioner claims his condition of ill-being involves his head, neck, and back. He testified he sought treatment for his back, neck, both arms, and left knee. Arbitrator's Exhibit 6; Shales, August 28, 2019 at 35.

I find as a conclusion of law, Petitioner has failed to prove that his current condition of ill-being is causally connected to a workplace injury.

Petitioner claimed date of accident is wildly inconsistent, with a month discrepancy. He offered no real mechanism of injury. He didn't report the accident for two days. He sought no emergency medical treatment, or even required it. He did not testify to any immediate pain or discomfort. He saw his primary care physician three weeks after he claimed he drove into a hole, and never told him he was in a vehicle accident. Petitioner misrepresented his job duties to Dr. Gindorf.

In the defining "mic drop" to this issue, when Petitioner saw his chiropractor on March 19, 2014, whom he had been seeing for 20 years, he "denies antecedent trauma." He never told David Flatt about a motor vehicle accident, and specifically denied having an accident. Petitioner told Dr. Montella the onset of his pain was a month before he claims to have driven into a hole.

As to disputed issues **J**, **K**, and **L**, because Petitioner failed to establish the existence of a causal connection between him and his employment, Respondent is not responsible to pay any medical expenses incurred by Petitioner. Petitioner is not entitled to temporary total disability benefits or permanent partial disability benefits.

16 WC 16860, alleged date of Accident May 23, 2016

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. As discussed earlier, a claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. In the course of employment refers to the time, place, and circumstances of the injury. Arising out of the employment pertains to the origin or cause of a claimant's injury. An injured employee bears the burden of proof that there is a causal connection between his condition of ill-being and his employment.

Here Petitioner testified a vehicle struck his State van at "50-60" miles per hour, causing his left shoulder to hit the windshield, jamming his right shoulder under the steering wheel, banging his left knee and whiplashing his neck and back.

In this claim, I find as a conclusion of law, Petitioner was not in a motor vehicle accident and whatever Petitioner's condition, it is not related to his employment.

Petitioner's claimed accident, being hit by a silver Mercedes going "50-60" miles per hour, that jerked his vehicle to the left and caused a loud boom, was unwitnessed and uncorroborated. He misrepresented it being witnessed. No one at Respondent's facility heard a loud boom. There was no damage to his vehicle caused by a silver Mercedes going "50-60" miles per hour. There was no debris or skid marks in or on the roadway. Petitioner fabricated hearing tires screeching. The condition of the State vehicle Petitioner claims to have been in while struck at "50-60" miles per hour was not in any way consistent with being struck. Notably, there was red paint, not silver, transfer where Petitioner vaguely alluded to being hit, and his vehicle had only common motor pool dents.

Petitioner did not report the accident to his supervisor, and misrepresented his conversation with the manager of the motor pool. He sought to deceive investigators about his job duties and sought to mislead a claims adjustor about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle.

Petitioner sought no emergency medical treatment, declined an ambulance, and first saw a doctor long after he claims he was hit. He was not truthful in testifying he followed up with David Flatt. What medical records there are in evidence show Petitioner fabricated complaints of pain and physical limitations.

Because of this finding, Respondent is not responsible for charges for medical services, and Petitioner is not entitled to any period of temporary total disability.

Howard L. Ohr
Arbitrator

4-10-2020
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0150

vs.

No. 14 WC 024705

Radiac Abrasives, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical treatment, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the §19(b) Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. Although the Order portion of the Arbitrator's Decision specifies an award of 68-3/7 weeks of temporary total disability at the rate of $536.05/week, the Conclusion portion of the Decision indicates that the total award equals 73 weeks at $535.99/week. The Commission finds that the correct TTD rate is $536.05/week and the correct duration is 71-4/7 weeks for the periods covered by the Arbitrator's award.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

21IWCC0150

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is modified to reflect the award of $536.05 per week for 71-4/7 weeks for the periods between June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

No monetary award is made in this matter, so no appeal bond is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

o-2/4/21
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **14WC024705**

18WC004741

21IWCC0150

RADIAC ABRASIVES INC
Employer/Respondent

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0150

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **14** WC **24705**

Consolidated cases: **18 WC 4741**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **April 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**536.05** per week for **68-3/7**, commencing **June 17, 2014** through **September 7, 2015**, **February 11, 2017** through **March 14, 2017**, and **September 6, 2017** through **September 26, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Dr. Markarian, and to Dr. Fernandez, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS: 21IWCC0150

The petitioner testified that on May 27, 2014 he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Subsequent to May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner stated that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continues to have swelling and difficulty moving his hands and he indicated that he "can't do much" because activities bother his hands.

In March of 2018, the petitioner was terminated from his employment with Respondent. He was not under any active medical care at the time of his termination.

Following his termination, the petitioner filed an Application for Adjustment of Claim alleging that an injury to his right arm occurred on January 12, 2018. In April of 2018, the petitioner sought treatment for his right arm complaints with Dr. Markarian. That claim is the subject of the Arbitrator's Decision rendered in case number 18 WC 4741.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Respondent did not dispute that an accident arising out of and in the course of the petitioner's employment occurred on May 27, 2014. The Petitioner was first seen for medical care at the Rush Copley Medical Center on April 28, 2014 at which time he was diagnosed with bilateral carpal tunnel syndrome due to an overuse at work.

The petitioner then came under the care of Dr. Markarian who, likewise, diagnosed the petitioner with bilateral carpal tunnel caused by repetitive work activities. Dr. Markarian eventually performed bilateral carpal tunnel surgeries on the petitioner. Dr. Markarian performed the right carpal tunnel release on October 9, 2014 and the left carpal tunnel release on February 5, 2015.

When the petitioner continued to voice complaints, he was seen for a second opinion with Dr. John Fernandez. Dr. Fernandez performed bilateral trigger finger surgery on three of Petitioner's right fingers and three of Petitioner's left fingers. The left hand surgery was performed by Dr. Fernandez

on September 6, 2017 and the right hand surgery was performed by Dr. Fernandez on March 1, 2017.

Dr. Fernandez opined that the petitioner's condition of trigger digits (bilateral thumb index and middle fingers) should definitely be treated as work related. Dr. Fernandez reasoned that if the carpal tunnel syndrome and its surgery were treated as work related the same causative factors would be at stake, i.e. exposure, repetition, or frequency with gripping and grasping particularly of a more forceful nature in the operation of machinery and use of tools, with regard to the trigger digits.

Dr. Patari, Respondent's Section 12 examiner, opined that Petitioner's bilateral carpal tunnel was causally related to his work for the Respondent but he opined that the bilateral trigger fingers were not causally related. Dr. Patari did not find permanent restrictions were warranted.

The Arbitrator finds the opinions of Dr. Fernandez regarding causation and permanent restrictions to be credible and persuasive and to be more persuasive than those of Dr. Patari. Dr. Fernandez reiterated in his evidence deposition that Petitioner's bilateral, "carpal tunnel syndrome as well as trigger digits should be treated as work related reasoning that the petitioner had "reasonable causal factors including exposure to frequent gripping and grasping, including use of machinery and tools which is a very well-known and valid risk factor in the development of both carpal tunnel and trigger fingers." Dr. Fernandez also took issue with Dr. Patari's opinions concerning causation to be strange and wrong because the same causative factors that effect carpal tunnel effect trigger fingers.

Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. With regard to the petitioner's permanent restrictions, Dr. Fernandez opined that the petitioner's condition had not completely resolved. Dr. Fernandez opined that if the petitioner returned back to the activities that caused the problem, his condition could get worse, and at that his prognosis of doing well and returning back to that line of work was relatively poor. Dr. Fernandez felt these restrictions were permanent.

The Arbitrator notes Dr. Fernandez's credentials as an upper extremity specialist and finds his opinions to be credible, reliable, and persuasive. As such, the Arbitrator finds Petitioner's bilateral carpal tunnel and bilateral trigger finger conditions to be casually related to his work activities. The Arbitrator also finds the permanent restrictions imposed by Dr. Fernandez upon the Petitioner to be causally related. The Arbitrator further finds that the petitioner reached maximum medical improvement on January 4, 2018 and that his condition of ill-being as of that date is causally related to the injury of May 27, 2014.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

There was no dispute concerning the bilateral carpal tunnel surgeries and as such the medical expenses related to the petitioner's treatment for those conditions are awarded. While there was a

dispute concerning the trigger fingers treatment that Dr. Fernandez rendered to the petitioner, Dr. Fernandez testified that all of his treatment from May 25, 2016 through January 1, 2018 was reasonable and necessary and causally related. The Arbitrator has found the opinions of Dr. Fernandez to be credible and persuasive and to be more persuasive than those of Dr. Patari. As such, the Arbitrator finds that all the medical care and treatment rendered to the petitioner by Dr. John Fernandez, and the expenses related thereto, are reasonable, necessary, and casually related to the petitioner's accident of May 27, 2014.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The petitioner remained off work from June 17, 2014 through September 7, 2015, while undergoing treatment for his carpal tunnel syndrome. He again was off work from February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, while undergoing treatment for his bilateral trigger fingers. The petitioner was determined to be at maximum medical improvement with regard to these conditions in January of 2018. Petitioner has not received any further treatment in relation to the carpal tunnel syndrome or the trigger finger condition since January of 2018. Although there are disputes with regard to Petitioner's restrictions, it is noted that Petitioner had returned to an accommodated position.

The petitioner has alleged entitlement to additional Temporary Total Disability benefits from March 13, 2018 through the date of hearing. It is noted that the petitioner also claims entitlement to Temporary Total Disability benefits for the same period in the companion filing for the alleged accident of January 12, 2018. (Case No. 18 WC 4741) The Arbitrator notes that the petitioner had reached maximum medical improvement with regard to the bilateral hand conditions prior to January of 2018. As such, Petitioner would not be entitled to Temporary Total Disability benefits thereafter. The Arbitrator finds that the petitioner is not entitled to any Temporary Total Disability benefits after September 26, 2017, relative to the April 27, 2014 accident. As such, the Arbitrator finds that Petitioner is entitled to Temporary Total Disability from June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017.

The Arbitrator finds Petitioner to have been temporarily and totally disabled from June 17, 2014 through September 7, 2015 and from February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017, a total period of 73 weeks, at $535.99 per week.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that Petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2018 companion case. With regard to the 2014 case, Petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of TTD benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr.

Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to Petitioner, Respondent clearly had a good faith basis from which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claim for benefits through that date. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0151

vs.

No. 18 WC 004741

Radiac Abrasives,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability, and penalties and fees, and being advised of the facts and law, modifies the Section 19(b) Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. At arbitration, Petitioner alleged that he was entitled to temporary total disability benefits from March 13, 2018, the date Respondent terminated him, through the date of hearing, March 13, 2019. At the time of his termination, Petitioner was not actively treating for his work injuries, and Respondent was accommodating his restrictions by providing a sedentary position based upon the restrictions ordered by Petitioner's treating physician. Because the Arbitrator found that Petitioner was always capable of performing his sedentary job with Respondent, he declined to award any temporary total disability benefits for Petitioner's right elbow and right shoulder injuries.

On review, the Commission finds that Petitioner was entitled to TTD as a result of his 2018 injuries. However, it finds that the period of total disability did not begin on the date of his

21IWCC0151

termination by Respondent but on the date his treating physician took him off work for his shoulder and elbow injuries, March 21, 2018. From that date onward through the date of hearing, March 13, 2019, first Dr. Kalina and then Dr. Markarian kept Petitioner off work completely. The Commission finds the opinions of Petitioner's treating physicians more persuasive than those of the Respondent's expert and modifies the Arbitrator's Decision by awarding Petitioner TTD from March 21, 2018 through March 13, 2019, a period of 51-1/7 weeks. The Commission further finds that Respondent paid TTD in excess of the award for Petitioner's 2014 injury, which was modified by the Commission in 14 WC 024705, in the amount of $13,139.42, to be applied toward the total TTD awarded herein.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability benefits is reversed. Respondent shall pay Petitioner temporary total disability benefits of $536.05 per week for 51-1/7 weeks, or $27,415.13. for the period commencing on March 21, 2018 through March 13, 2019, as provided by §8(b) of the Act. Respondent is to receive credit for TTD payments totaling $13,139.42, the amount paid in excess of the TTD awarded in the consolidated matter, 14 WC 024705.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

21IWCC0151

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

Marc Parker

Barbara N. Flores

o-2/4/21
mp/dak
68

Dissent

I respectfully dissent from the Decision of the Majority. In his decision, the Arbitrator denied Petitioner's request for TTD benefits. The Majority reversed the Decision of the Arbitrator on that issue and awarded Petitioner 51&1/7 weeks of TTD. I would have affirmed and adopted the Decision of the Arbitrator including his denial of TTD benefits.

While Petitioner was on significant work restrictions, Respondent accommodated his restrictions and placed him in a sedentary position. Petitioner testified that he had no difficulty performing his light duty responsibilities and there was no evidence that Petitioner ever complained to Respondent that he was in any way unable to perform his duties. In addition, Petitioner did not demand vocational rehabilitation from Respondent in order to possibly help himself find a more suitable long-term occupation. The Majority appears to rely exclusively on the fact that doctors put Petitioner on no-work status on March 21, 2018 and had not released him from that status until the date of Arbitration, March 13, 2019. However, even though Petitioner was technically taken off work, he actually continued to work. To obtain TTD benefits, a claimant has the burden of proving that he is unable to work his normal job, due to his work-related disability, or that his employer has not been able to accommodate his restrictions. In addition, the Majority reasoning allows the possibility that a claimant could receive both his salary and TTD benefits simultaneously. This result would amount to unjust enrichment for claimants, and not contemplated in the Act. Because Petitioner was clearly able to work, and actually did work, during that period despite any alleged impairment, in my opinion, he is not entitled to TTD for that period.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator. Therefore, I respectfully dissent.

Deborah L. Simpson

DLS/dw
O-

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **18WC004741**

14WC024705

RADIAC ABRASIVES INC
Employer/Respondent

21IWCC0151

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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21IWCC0151

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **18** WC **4741**

Consolidated cases: **14 WC 24705**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **January 12, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** (paid in companion case) for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28** (between both claims).

ORDER

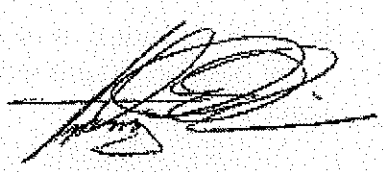
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Physicians Immediate Care, to Presence Mercy Medical, and to Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for reasonable and necessary medical services as prescribed for the petitioner by Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS:

The petitioner testified that he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Following a work related injury of May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. That injury is the subject of the Arbitration Decision issued in case number 14 WC 24705.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner testified that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continued to have swelling and difficulty moving his hands and he indicated that he couldn't "do much" because activities bother his hands.

The petitioner testified that on January 12, 2018, he sustained an injury to his right arm at work when he was withdrawing a mold from a press. The petitioner described that he reached in to the press to free a shim that was stuck, and he burned his right arm. The petitioner testified that he pulled his arm back quickly and felt a sharp "pull" in his right elbow. He testified that he then noticed that his right arm began to swell. The petitioner testified that he reported the work injury to his supervisor "Mike" the next day. On cross-examination, the petitioner testified that no supervisor was present on the day his injury occurred and that he reported the injury on the day that an accident report was completed.

A copy of the accident report that was completed was admitted into the record as Petitioner's Exhibit 12A. The accident report was signed by both the petitioner and his supervisor "Mike" and is dated January 16, 2018. The report describes that, "On January 12, 2018, the employee was completing a wheel and had the mold out of P15 press. The employee then noticed that the shim was still stuck on his upper side of the plate. The employee noted that this is a normal thing that occurs when working in the area. The employee while wearing gloves, reached into the press and placed his hand on the shim when he burned his right arm on the top plate. (350 degrees maximum during process). When the employee turned his arm, he jerked it away quickly from the press. The employee then noted that he had pain from his right thumb and right pinky finger, all the way up to his elbow on both sides of his arm."

The petitioner testified that following the last surgery by Dr. Fernandez, and prior to his injury on January 12, 2018, he did what was asked of him at work. The petitioner testified that on January 16, 2018, his job was changed to that of a production planning clerk.

The petitioner testified that after the accident report was completed, he was sent to Physicians Immediate Care. The records of Physicians Immediate Care demonstrate that the petitioner was seen there on January 16, 2018 and gave a history of injury to his left arm on January 12, 2018 when he was

pulling out a mold and touched the oven causing him to pull his arm away. The diagnoses included a burn of the left forearm, pain in the left forearm, pain in the left wrist, and pain in the left shoulder. It was noted that the forearm burn had healed and that the degree of pain in the left upper arm was not consistent with the mechanism of injury. The petitioner was released to return to work with no restrictions.

The petitioner testified that he then sought treatment at Presence Mercy Medical Center in Aurora and then began treating with Dr. Markarian.

The records of the Emergency Department of Presence Mercy Medical Center demonstrate that the petitioner was seen there on January 20, 2018 and reported pain in the right arm after heavy lifting at work. Examination reportedly revealed pain over the lateral epicondyles into the forearm. The petitioner was diagnosed with a right elbow strain/tendonitis and he was released with restrictions of no lifting over 25 Lbs. with the right arm. The petitioner was directed to follow-up with an orthopedic specialist for further evaluation of right arm pain. (PX 2A)

On March 12, 2018, the petitioner was terminated from his employment with Respondent following a verbal altercation with a supervisor.

The records of Dr. Gregory Markarian demonstrate that the petitioner was seen by Dr. Markarian on April 10, 2018. Dr. Markarian noted an alleged injury from "eccentrically" loading the elbow and shoulder when taking a mold out. Physical exam reportedly showed positive O'Brien Test in the right shoulder and pain with tenderness over the biceps. Dr. Markarian also reported positive Tinel's sign in the right elbow and positive elbow flexion test. Dr. Markarian recommended a CT scan to evaluate an osteochondroma and recommended an EMG for potential ulnar neuritis. On May 29 and June 26, 2018, Dr. Markarian stated that Petitioner had rotator cuff tendonitis and biceps tendonitis and recommended conservative management. On September 6, 2018, Dr. Markarian stated Petitioner was post right elbow lateral epicondylitis and right shoulder rotator cuff tendonitis and also stated that Petitioner had a C7 nerve root issue. At that time, Dr. Markarian injected the shoulder and elbow. The diagnoses remained tendonitis and AC joint arthritis. On October 4, 2018, Dr. Markarian indicated that he would put in a request for right elbow and right shoulder surgery. He described the proposed surgery as right shoulder arthroscopy, biceps tenotomy, arthroscopic distal claviculectomy, sub acromial decompression, possible rotator cuff repair and open sub pectoral biceps tenodesis. He states the right elbow would involve a lateral release, debridement and reattachment. (PX 3A)

Records from Imaging Centers of America demonstrate that MRIs of the petitioner's right elbow, right shoulder and cervical spine were completed on March 28, 2018. The MRI of the elbow reported increased fluid, sensitive hyper-intensity of normal caliber ulnar nerve that may be artefactual and clinical correlation with potential ulnar neuropathy was recommended. The shoulder was interpreted as showing articular sided fraying of the infraspinatus tendon and sessile osteochondroma off the medial aspect of the proximal humerus without cartilage cap. The cervical MRI was interpreted as showing mild spondylosis and mild narrowing of the right foramen at C3-4 without significant stenosis. (PX 4A)

An MRI arthrogram of the right shoulder was completed on April 27, 2018, at Niles MRI. The same was interpreted as showing tendinosis of the supraspinatus and subscapularis tendons, osteochondroma, mild changes of the osteoarthritis in the glenohumeral joint and mild degenerative changes in the acromioclavicular joint. An x-ray of the right shoulder reported an area of hypertrophic

bone at the level of the proximal humerus medially. (Dr. Markarian's interpretation of the imaging is reflected in Exhibit 3 was that the osteochondroma was benign). (PX 5A)

Records from Sage Medical Management reflect that Petitioner saw Dr. Kalina on March 21, 2018, at which time he reported neck and shoulder pain following the alleged injury of January 12. Petitioner alleges that he suffered a sudden onset of right forearm, shoulder and neck pain after the burn to the forearm on January 12. Dr. Kalina diagnosed cervicalgia, pain in the right elbow and pain in the right shoulder. Dr. Kalina prescribed the MRIs and provided work restrictions. Petitioner saw Dr. Lotfi, a chiropractor, on March 29. At that time, Petitioner again reported that he had suffered pain in the shoulder and neck area. Petitioner advised Dr. Lotfi that he had been working his regular duties without problem until the alleged injury of January 12. Dr. Lotfi diagnosed occipital cervico-occipital neuralgia, pain in the right forearm and pain in the right shoulder and recommended chiropractic treatment. Petitioner returned to Dr. Kalina on April 4 at which time he recommended orthopedic treatment. It was noted that Petitioner underwent an EMG on May 2, 2018, which was interpreted as showing very mild right sided C7 radiculopathy with no axonal loss which was also noted to be a sign of a good prognosis for complete and timely recovery. (PX 6A)

Records from Dr. Eugene Lipov reflect that the petitioner was seen on September 21, 2018 at which time it was noted that a cervical injection had been recommended. The petitioner reported that therapy was not helping and Dr. Lipov recommended ending the same. In the initial visit with Dr. Lipov on August 29, 2018, he states, "His complaint is essentially right neck pain radiating to the right shoulder as well as mild radiation to the right elbow." Dr. Lipov diagnosed cervical facet arthropathy. (PX 7A)

At the request of the respondent, the petitioner was examined by Dr. Kenneth Sanders on May 7, 2018. The May 7, 2018 report of Dr. Sanders was admitted into the record as Petitioner's Exhibit 8A and Respondent's Exhibit 2. Dr. Sanders noted normal range of motion in the neck and good range of motion in the shoulder with pain and some limitation in abduction and flexion. The exam was noted to be otherwise relatively normal. Dr. Sanders also noted tenderness over the medial epicondyle. Dr. Sanders diagnosed lateral epicondylitis at the right elbow, medial epicondylitis at the right elbow and mild right rotator cuff tendonitis. Dr. Sanders opined that there was a causal relationship between the alleged injury and Petitioner's symptoms and he recommended an injection to assist in defining the definitive pain generator. Dr. Sanders opined that any restrictions due to any work injury would be temporary. Dr. Sanders stated that Petitioner should avoid use of the right arm until a more definitive diagnosis has been delineated.

The petitioner was examined on September 9, 2018 by Dr. Peter Hopefner also at the request of the respondent. Dr. Hopefner's September 20, 2018 report was admitted into the record as Petitioner's Exhibit 9A and Respondent's Exhibit Number 3. Dr. Hoepfner noted diagnoses of right lateral epicondylitis and myofascial trigger points about the right shoulder without pathology and no positive proactive test involving the right glenohumeral or acromioclavicular joint. Dr. Hoepfner noted inconsistencies in testing Petitioner's grip strength. Dr. Hoepfner stated that there was no specific anatomic abnormality appreciated with regard to the right shoulder that would warrant additional treatment. With regard to the elbow, Dr. Hoepfner indicated that the epicondylitis was self-limited and would gradually subside with time. Dr. Hoepfner indicated that "judicious use" of cortisone injections could be considered. Dr. Hoepfner noted the cervical complaints but further noted that this was outside his area of expertise. Dr. Hoepfner confirmed that Petitioner was able to return to full duty employment.

Alejandra Alarcon, the respondent's human resources manager, testified that on January 16, 2018 the petitioner was moved from a lead role on the shop floor into Respondent's office in an administrative capacity in order to comply with Dr. Fernandez's permanent restrictions. Ms. Alarcon testified that when the petitioner was told on January 16, 2018 about his new light duty position, he reported the January 12, 2018 work injury. Ms. Alarcon also testified that the petitioner thereafter expressed his dislike for his new position. Ms. Alarcon testified that on March 12, 2018 the petitioner was terminated for insubordination. Ms. Alarcon also testified that she believed the petitioner to have been a reliable employee and that she believes that the January 12, 2018 accident described by the petitioner did occur.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

Petitioner testified that he suffered an injury to his right arm when he burned his forearm when removing a mold from an oven and pulled his arm back. This incident was unwitnessed but the petitioner did report the incident four days later. The accident report dated January 16, 2018, which was signed by both the Petitioner and his supervisor "Mike", describes how the accident occurred. The description contained in the accident report is substantially consistent with the petitioner's testimony and the histories of injury provided to the petitioner's treating physicians.

Alejandra Alarcon, the respondent's human resources manager, testified that the petitioner reported the accident to her on January 16, 2018 and that she had no reason to doubt that the January 12, 2018 accident occurred.

In light of the foregoing, the Arbitrator finds Petitioner to have sustained an accident that arose out of and in the course of his employment on January 12, 2018.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner testified that he experienced pain in his right arm following the occurrence. When the petitioner was sent for treatment on January 16, 2018 he reported pain in the upper arm and elbow and forearm beginning January 12. In a follow-up visit of January 20, 2018, Petitioner again reported pain in the right arm that appeared to be localized about the proximal forearm. However, after his termination, Petitioner also alleged cervical complaints. Considering that Petitioner's own testimony and the medical records confirm that Petitioner did not have any complaints involving the cervical spine until after his termination, and in the absence of a credible, persuasive, medical opinion which specifically relates any cervical condition to the January 12, 2018 work injury, the Arbitrator finds that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged occurrence.

With regard to the right shoulder and right elbow conditions, it is noted that the physicians at Physicians Immediate Care Center stated at the initial evaluation that Petitioner's symptoms were not consistent with the mechanism of injury. Dr. Markarian noted that imaging of the shoulder showed an osteochondroma, that Dr. Markarian opined was benign. The imaging also referenced findings suggestive of some tendonitis in the shoulder. The medical opinions are all consistent with a diagnosis of epicondylitis in the right elbow. As such, the Arbitrator finds that Petitioner suffered tendonitis in the right shoulder and epicondylitis in the right elbow as a result of the alleged occurrence.

The Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally relates the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes both Section 12 examiners causally relate both the shoulder and elbow injuries. Also, both Section 12 examiners believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner's current condition of ill being is causally related to the injury of January 12, 2018.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As noted above, the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident. Moreover, the petitioner's diagnosis is limited to shoulder tendonitis and epicondylitis in the elbow. A review of the records and billing submitted show that the treatment from Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute primarily involves the cervical spine. As such, the Arbitrator finds that the treatment rendered to the petitioner by Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute is not causally related to the January 12, 2018 work injury and is not awarded herein. The Arbitrator finds that the treatment rendered to the petitioner at Physicians Immediate Care, Presence Mercy Medical and by Dr. Markarian is reasonable, necessary and causally related to the January 12, 2018 work injury. The respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

As the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident, no prospective medical treatment for the petitioner's alleged cervical condition is awarded herein.

With regard to the proposed surgical treatment for the petitioner's right arm and shoulder, the Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally related the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes that both of the respondent's examining physicians believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner by way of surgery. While the Arbitrator questions the prudence of performing the recommended surgeries on the petitioner, the Arbitrator notes that the petitioner's treating physician is a physician in good standing, licensed to practice medicine in the State of Illinois, and defers to his recommendation.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Petitioner alleges entitlement to Temporary Total Disability benefits from March 13, 2018 through the date of hearing and continuing. It is noted that Petitioner was terminated on March 12, 2018 after a verbal altercation with a supervisor. Although there are conflicting allegations regarding the altercation, the Arbitrator is not charged with assessing the merits of the termination but is simply considering the same in the context of Petitioner's lost time.

Petitioner testified that, at the time of his termination, he was receiving treatment from Dr. Fernandez and Dr. Markarian. However, Dr. Fernandez had determined that the Petitioner was at maximum medical improvement and subject to permanent restrictions as of January 4, 2018. Moreover, Petitioner had last seen Dr. Markarian in December of 2015 after which he pursued treatment with Dr. Fernandez. The evidence demonstrates that the petitioner was not under any active medical treatment at the time of his termination. The evidence further demonstrates that the respondent was accommodating the permanent work restrictions placed on the petitioner by Dr. Fernandez, and there is no evidence that the petitioner was having any difficulty performing any aspect of his job at the time of his termination.

It is noted that Petitioner's job changed to a sedentary position on January 16, 2018 based upon the permanent work restrictions placed on the petitioner by Dr. Fernandez. After being notified of

this change in position, Petitioner then reported his alleged accident from four days prior. The incident itself was relatively minor as Petitioner alleges pulling his arm back after suffering a burn. Petitioner continued working his sedentary position without any apparent difficulty. On January 20, 2018, Petitioner received treatment at Presence Mercy Medical Center and the diagnosis remained right arm pain and tendonitis, and the petitioner continued to work without difficulty until his termination. After his termination, the petitioner's complaints increased, and the Petitioner sought treatment for cervical complaints as well as the right arm complaints. It is noted that while Dr. Sanders suggested that the petitioner refrain from using his arm, Dr. Sanders also noted that a more definitive diagnosis was needed. Additional testing was completed after Dr. Sanders' evaluation and the petitioner was then sent to Dr. Hoepfner as Dr. Sanders had retired. Dr. Hoepfner reviewed all of the notes, including the updated testing, and he noted inconsistencies in the petitioner's examination. Dr. Hoepfner indicated that the petitioner was able to perform his regular work activities with regard to his arm diagnoses. Based upon the above, the Arbitrator finds that the petitioner was always capable of returning to his sedentary position as a production clerk.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that the petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2014 companion case. (14 WC 24705). With regard to the 2014 case, the petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of Temporary Total Disability benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr. Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to the petitioner, the respondent had a good faith basis upon which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claimed benefits through that date. Additionally, the Arbitrator has found that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy D. Little,

Petitioner,

21IWCC0152

vs.

NO: 14 WC 35730 and
16 WC 36913

ADT Home Security,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitration Decision Form, and corrects a scrivener's error. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct one clerical error on the Arbitration Decision Form. In the Order, the Arbitrator mistakenly wrote that Respondent shall pay temporary total disability benefits from September 21, **2104**, through July 1, 2015. This is clearly a scrivener's error. The Commission thus modifies the above-referenced sentence to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of $744.00/week for 40-4/7 weeks, commencing **September 21, 2014,** through **July 1, 2015**, as provided in Section 8(b) of the Act.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

21IWCC0152

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $55,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

d: 2/23/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, RANDY D
Employee/Petitioner

Case# **14WC035730**

16WC036913

ADT HOME SECURITY
Employer/Respondent

21IWCC0152

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1357 RATHBUN CSEVENVAK & KOZOL
LUIS MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60431

2542 BRYCE DOWNEY & LENKOV LLC
JESSE LANSHE
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

21IWCC0152

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Randy D. Little
Employee/Petitioner

v.

ADT Home Security
Employer/Respondent

Case # **14** WC **35730**

Consolidated cases: **16 WC 36913**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 6, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **August 12, 2014 and September 20, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accidents.

In the year preceding the injury, Petitioner earned $**58,032.00**; the average weekly wage was $**1,116.00**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**24,279.32** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**24,279.32**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**744.00**/week for **40 4/7** weeks, commencing **September 21, 2104** through **July 1, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**24,279.32** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.60**/week for **50** weeks, because the injuries sustained caused the **10%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 - 2019

FACTS:

Petitioner, testified that he worked for the Respondent, from 2009 to 2016 installing security products at residential and commercial properties. He would travel to different locations in a truck that contained all necessary installation materials. Prior to 2014, he had not missed any work because of a back injury and had never treated for a back injury. In approximately August, 2014, or shortly before, Petitioner indicated that he began noticing lower back pain that he associated with the work van he was driving. He indicated that his van had been switched from a normal van to a small van shortly before he started noticing problems. He described the new van as, "very tight, cramped, couldn't put the seat back due to the racks in there. They were extremely overloaded with lots of wire. It was kind of like riding in a covered wagon." Petitioner testified that he believed there was a problem with the suspension and indicated driving the van was very rough riding. Petitioner testified that at that time, he was driving about 75 to 125 miles per day doing installations. Petitioner testified that on August 12, 2014, given his ongoing problems with his back and truck, he notified his immediate supervisor, Ms. Rita Last, of his issues. On that date, in a series of text messages, Petitioner stated, "I'm gonna need to see a chiropractor all these hours in this uncomfortable truck" and "my lower back feels like I'm getting hit w a bat daily bc this seat is so uncomfortable and I'm spending 3 he's (sic) a day driving." At hearing, Ms. Last testified that Petitioner made her aware of back pain related to his truck on August 12, 2014.

Petitioner testified that he sought medical treatment for his back pain with a chiropractor, Dr. Van Til on September 8, 2014. At that appointment, Petitioner indicated that he had back pain interfering with his sleep and aggravated by driving a work van for about two months. Petitioner testified he had never noticed lower back pain and symptoms prior to his work truck change. Despite his symptoms, Petitioner continued working until September 20, 2014. On that date, Petitioner testified after a long drive on a very bumpy road, which aggravated his back pain, he lifted a ladder off of the top of his truck and felt a major pinch and a pop in his lower back that caused him to fall over because of pain. Petitioner indicated his lower back symptoms were significantly worse after this incident and he contacted Ms. Last. Ms. Last confirmed that Petitioner texted her on the date of accident complaining about back pain on the way to the job site and then, about 10 minutes later, called her to tell her that he hurt his back getting the ladder off the top of his ADT vehicle.

Following September 20, 2014, Petitioner sought treatment at Silver Cross Emergency Room and then followed up with Dr. Harris Waheed on September 22, 2014. At that examination, Petitioner indicated that the van he travels in is very uncomfortable and he drives a lot causing him lower back pain and numbness. After an examination, Dr. Waheed referred him to a neurosurgeon and give him a referral for physical therapy. Petitioner sought therapy at River Valley Physical Therapy on October 2, 2014. On that date, the therapist, Katelin Fane, indicated that Petitioner was referred from Dr. Waheed, and she recorded a history from the Petitioner. In her history, Ms. Fane documents that Petitioner was suffering from, among other complaints, low back pain that he associated to a change to different work vans and driving for long periods of time. Ms. Fane also documented Petitioner reported lifting his ladder and his back giving out. Petitioner then began a course of physical therapy.

Due to ongoing lower back symptoms, Petitioner testified he followed up with Dr. Anthony Rinella on October 15, 2014. On that date Petitioner gave a history both driving extensively in the newer work truck causing lower back pain and the September 20, 2014 ladder incident. After a physical examination, Dr. Rinella reviewed Petitioner's previously taken lumbar MRI and prescribed another lumbar MRI because he believed Petitioner may have a pars defect in his lumbar spine. Dr. Rinella also prescribed a Medrol Dosepak and indicated Petitioner should remain off work. Petitioner

followed up with Dr. Rinella on November 5, 2014, at which time the doctor reviewed the CT scan of his lumbar spine and confirmed that Petitioner had a bilateral pars defect in his lumbar spine. Despite additional conservative measures such as therapy and epidural steroid injections, Petitioner's lumbar complaints continued and Dr. Rinella recommended an L4-5 transforaminal lumbar interbody fusion. Petitioner underwent the fusion procedure on May 20, 2015 and returned to see Dr. Rinella's physician's assistant, Doug Stevens, on June 3, 2015 at which time he reported being pleased with the results.

Following his fusion, Petitioner testified that his lumbar symptoms decreased and by, July 1, 2015, he returned to full duty work. At hearing, Petitioner testified that after he returned to work for ADT, he began working for another employer in approximately May, 2016. Petitioner further testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, (E.), Was timely notice of the accident given to Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner's diagnosed pars fracture was aggravated by driving his company vehicle after the van was switched to a smaller model. This condition was then aggravated to the point that fusion surgery was necessary after suffering further trauma after lifting the ladder. The evidence presented demonstrates Petitioner had continuous and ongoing lower back pain only after the Respondent changed the work truck that he drove to installation sites. Respondent verified Petitioner's testimony through the testimony of Ms. Last. Ms. Last confirmed Petitioner contacted her about his back pain after he began driving the new truck. Further, Respondent submitted an email between Ms. Last and ADT's area general manager, Mr. Travis Miller that substantiates Petitioner's complaints. In Respondent's Exhibit 5, Mr. Miller wrote, in part, "The tech claimed that his back has bothering (sic) him due to driving the ADT transit vehicle. He has made multiple requests to his manager to be transferred into a full-size van which have been denied due to full size vans no longer being available at ADT." (R5) Additionally, Respondent offered no rebuttal to Petitioner's testimony that the new van was uncomfortable and rode very hard. It appears clear that the breakdown date of accident is August 12, 2014, the date on which Petitioner directly texted his immediate supervisor, Ms. Last, of his back pain that he indicated would necessitate medical care. Petitioner reported to Dr. Van Til that his back hurt when he drove his ADT truck. Although he continued to attempt to work through the pain, Petitioner suffered the second accident on September 20, 2014, when lifting a ladder. Again, this accident was confirmed by Ms. Last and an accident report was filed by Respondent. (R4) In fact, on that day, Petitioner reported both to Ms. Last that his back hurt from driving to the location of the ladder incident and, shortly thereafter, he lifted the ladder that had substantially increased his lower back pain. This incident exacerbated Petitioner's condition to the point that surgery became necessary.

Dr. Rinella discussed both accidents in his testimony taken on August 3, 2016. On that date, he indicated that a pars fracture is a fracture of the bone between, in Petitioner's case, L4 and L5

and that Petitioner had the pars fracture for a period of time. Dr. Rinella testified that, although the pars fracture was present for a long time, it was aggravated by the work injury, specifically, the ladder incident on September 20, 2014. Further, Dr. Rinella considered that that Petitioner was having back pain while driving the ADT truck and stated, "he may have had periodic pain related to these pars fractures; but obviously, he didn't even know he had them, so they never required any specific diagnosis previously" and that the acute mechanism of accident got it to a point of surgical intervention.

The evidence presented supports Dr. Rinella's opinions. It is not disputed that Petitioner had continuous back complaints while driving his new ADT truck but that he continued to work until after the September 20, 2014 ladder incident. It is clear Petitioner had back pain caused by his work truck and the second accident involving the ladder aggravated his pars fracture symptoms to the point that surgery was necessary. Additionally, despite Respondent's contention, Petitioner reported the ladder incident. Ms. Last testified that Petitioner called her about the ladder incident on the day of accident and an accident report was created. Further, the ladder incident was recorded by Petitioner's therapist at River Valley Therapy even prior to Petitioner seeing Dr. Rinella.

Respondent relies on the testimony of Dr. Steven Mather who saw Petitioner for the purposes on an independent medical examination on March 25, 2013. Dr. Mather also offered opinions in an addendum report dated January 23, 2018. Dr. Mather opined that Petitioner's condition was pre-existing and not caused by the ladder incident or riding uncomfortably in his van. Dr. Mather further indicated that Petitioner's accident had no relation to the need for surgery. Dr. Mather's testimony ignores the facts of the evidence presented. Petitioner clearly had lumbar spine complaints that began only after driving his smaller ADT truck. There is no evidence that Petitioner had any low back complaints of any kind predating this. These symptoms got worse after he lifted the ladder on September 20, 2014. As discussed, Ms. Last confirmed that Petitioner called her immediately and reported that he hurt his back again after lifting the ladder off the roof of his truck. Petitioner then goes on a course of treatment that resulted in fusion surgery. Dr. Mather offers no explanation why Petitioner's symptoms only began with the change in his work truck and were worse after lifting the ladder on September 20, 2014. It is not simply coincidence that Petitioner's preexisting pars fracture was asymptomatic his entire life prior to the truck change and ladder accident.

Based on the greater weight of the evidence, the Arbitrator finds that both Petitioner's August 12, 2014 and September 20, 2014 work accidents arose out of and in the course of his employment with the Respondent.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's condition of ill being regarding his lumbar spine is causally related to both his August 12, 2014 and September 20, 2014 work accidents. The Arbitrator finds the testimony of Dr. Rinella sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner gave proper notice of both his August 12, 2014 and September 20, 2014 work accident. This was confirmed by the testimony of Ms. Last.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for payment of reasonable and necessary medical bills. During his deposition, Dr. Rinella was asked if he believed Petitioner's lumbar spine including surgery was reasonable and necessary based on the symptoms indicated. To this, Dr. Rinella responded, "I think all treatment for cervical, thoracic and lumbar was very reasonable and necessary." Respondent offered no evidence to the contrary.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's treatment was reasonable and necessary. The Arbitrator awards Petitioner unpaid medical bills as outlined in Petitioner's Medical Bills Exhibit submitted as exhibit 1, pursuant to the fee schedule.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for temporary total disability. Petitioner was given an off work notes from Silver Cross emergency room on September 20, 2014, then by Dr. Waheed on September 22, 2014 and finally from Dr. Rinella when treatment began on October 15, 2014.) Petitioner was continuously off work by Dr. Rinella's order until he returned to Respondent to work on July 1, 2015.

Based on the greater weight of the evidence, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 21, 2014 until July 1, 2015, a period of 40 4/7 weeks. The Arbitrator awards Respondent credit of $24,279.32 for paid Temporary Total Disability benefits.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered an aggravation of his pre-existing back condition which led to the necessity of an L4-5 transforaminal lumbar interbody fusion. The Petitioner testified that he currently continues to experience occasional muscle pain and stiffness in his lower back and has difficulty bending over. Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and

* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a residential alarm installer, and that the Petitioner has returned to that same type of work without much apparent difficulty. The Arbitrator therefore gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 30 years old at the time of the accident. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less likely to fully recover from his injuries. The Arbitrator therefore gives significant weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work with earnings that are the same. Because there is no evidence of any impairment to future earnings, the Arbitrator gives significant weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over. The Arbitrator notes that the Petitioner's current complaints are relatively minimal and evidence a good result from the treatment rendered to him. These complaints are corroborated in the medical records of the Petitioner's treating physicians. The Petitioner's complaints as supported by the medical records, evidence some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), and the Petitioner's relatively minimal current complaints, the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 10% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse: Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANATOLY DAVYDOV,

Petitioner,

21IWCC0153

vs.

NO: 16 WC 23007

SUPERIOR BROKERAGE SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner sustained his burden of proving he sustained a work-related accident on April 28, 2016 which caused his current condition of ill-being in the right shoulder and awards benefits.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner worked for Respondent as a truck driver for eight years and had been a truck driver his entire life. During his employment with Respondent, the medical records reflect that Petitioner previously suffered a work-related injury to his left foot and ankle while working for Respondent on September 16, 2015. Petitioner underwent treatment with Dr. Sergey Kachar and Dr. Thomas Tingle, who are in the same practice, for that injury.

Petitioner then saw Dr. Kachar at Northwest Orthopedic Surgery for evaluation of the right shoulder on November 3, 2015. He reported some mild intermittent pain for many months, maybe up to a year. About three months previously, Petitioner reported that he was swatting a bee and felt a sharp pain in the shoulder and had been having some increasing pain recently. Petitioner had some pain with reaching, lifting, overhead activities as well as pain with activities of daily living. Dr. Kachar ordered x-rays, which showed mild degenerative changes of the

glenohumeral joint. Dr. Kachar diagnosed Petitioner with a right shoulder injury, pain, and impingement. He administered an injection, prescribed physical therapy, and ordered an MRI.

Petitioner acknowledged that he had shoulder pain prior to his first visit to Dr. Kachar in November of 2015. He first reported shoulder pain while on light duty for his ankle and in physical therapy for his ankle. Petitioner did not recall reporting the mechanism of injury or all of the symptoms identified in Dr. Kachar's record because it was long ago, but testified that he would not dispute the medical records indicating that he made those statements. Petitioner testified that the cortisone injection decreased his pain and he was feeling pretty good, working his job until the time of the injury.

Petitioner underwent the recommended MRI on November 5, 2015. The interpreting radiologist found a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant muscle atrophy. More specifically, the radiologist noted a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. He also found that a majority of the tendon is increased in signal and thickened likely related to fraying and tendinosis, and there is also tendinosis of the infraspinatus tendon. The radiologist further noted findings of external impingement and degenerative changes at the glenohumeral joint space with abnormal appearance of the majority of the labrum likely degenerative in origin.

Petitioner also underwent an initial physical therapy evaluation on November 5, 2015 for his right shoulder. The evaluating therapist, Dorota Kus, P.T. (PT Kus), noted an onset of right shoulder pain on August 21, 2015 while sleeping and driving his truck. He reported that he was swatting a fly with his right arm and that it hurt a lot and had been more sore now. Petitioner also underwent his continued physical therapy for the left ankle.

Petitioner returned to Dr. Kachar the following day reporting persistent right shoulder pain and 30% relief from the injection. Dr. Kachar noted that Petitioner had the MRI and recommended continued conservative treatment including physical therapy. Dr. Kachar diagnosed Petitioner with a superior glenoid labrum lesion of the right shoulder and a rotator cuff tear. He indicated that they would consider arthroscopic surgery if he was not improving.

On November 19, 2015, Dr. Kachar noted that Petitioner was doing well with improvement of his right shoulder symptoms. He recommended continued physical therapy. On December 28, 2015, Petitioner was discharged from physical therapy after deciding to go to a facility closer to home. PT Kus noted that Petitioner felt minimal soreness after exercises and no pain.

The following day, December 29, 2015, Dr. Kachar noted that Petitioner was improving overall and functionally better, but he still had some persistent pain. Dr. Kachar continued physical therapy for another six weeks.

On February 25, 2016, Dr. Kachar noted Petitioner's "follow up for work-related injury, right shoulder rotator cuff tear." Petitioner reported that his pain was worse, describing pain at night, and he reported difficulty lifting heavy objects. Petitioner denied any recent traumatic

21IWCC0153

injuries. On physical examination, Dr. Kachar noted positive impingement signs. He administered another injection and referred Petitioner to Dr. Tingle for evaluation of right shoulder rotator cuff tear and released him from treatment to follow up as needed.

Petitioner testified that he continued to work through this treatment and that his shoulder felt "better, much, much better" after the injection. He was able to do some home therapy and exercise. Petitioner testified that he did not believe that he needed to see Dr. Tingle and continued to work.

Then, on April 28, 2016, Petitioner testified that he sustained an accident affecting his right shoulder at work, which Respondent disputes. While decoupling a trailer from the cab and pulling on the handle with his right arm he hurt himself and almost fell down when he pulled on the handle. Petitioner testified that "[i]t's really pain, like almost crying, you know, it's so painful." He explained that the pain was worse, "20 times more[,]" than the pain he had previously.

B. Medical Treatment

Petitioner was sent for treatment that day and presented to Dr. Reese at Alexian Brothers' Medical Group. The medical records reflect Petitioner's report of right shoulder pain while pulling on a trailer hitch earlier that day. He reported some shoulder pain a year ago, physical therapy, and improved symptoms. Dr. Reese noted that Petitioner now complained of pain over the side of the shoulder. On physical examination, Petitioner had tenderness of the right deltoid, full range of motion, and normal sensation. Dr. Reese diagnosed a right shoulder sprain, especially over the right deltoid. An ice pack was applied and Dr. Reese prescribed Naproxen and restricted Petitioner from lifting/pushing/pulling over 10 pounds. Petitioner was instructed to follow up on May 4, 2016.

On April 29, 2016, Petitioner presented to Dr. Tingle for an initial orthopedic consultation for right shoulder pain status post work-related injury. The following history was noted:

> The patient is a 68-year-old right-hand-dominant male presents today for an orthopedic consultation regarding right shoulder injury sustained yesterday on 04/28/2016. He works as a truck driver. Apparently, he was pulling on a trailer when he developed a sharp pulling tearing sensation over the anterior aspect of his shoulder. He developed immediate pain. He reported the injury to work, was seen by an occupational medicine physician. He was given work restrictions, placed on naproxen and recommended ice his shoulder. He describes pain and weakness with reaching, lifting and overhead activity. Pain localized primarily over the anterior aspect of his shoulder, but some discomfort feels deep inside, has some clicking or popping sensation with motion of his shoulder. He denies any neck pain, numbness and tingling and radicular symptoms. Symptoms are worse with activity, improved with rest. The pain was initially severe. Now, it is mild to moderate with treatment and rest.

On physical examination, Dr. Tingle noted nearly full passive range of motion with discomfort at end ranges, 4/5 strength in scaption, and positive Neer and Hawkins impingement signs. He diagnosed Petitioner with right shoulder pain, placed him on light duty work restrictions, and ordered an MRI.

The MRI was performed the same day. The interpreting radiologist's impression was of a large full-thickness rotator cuff tear and degenerative arthritis. Specifically, he found the following:

> There is mild to moderate glenohumeral and acromioclavicular degenerative arthritis. There is marginal spurring from the inferomedial humeral head. There is thinning of the glenoid labral cartilage.
>
> There is a large full-thickness rotator cuff tear involving the supraspinatus tendon with portions of the tendon retracted over a length of 3.5 cm. The tear extends to the most anterior band of the infraspinatus tendon. There is considerable coexistent supraspinatus and infraspinatus tendinopathy.
>
> The teres minor and subscapularis tendons are intact. The superior labrum is not ideally visualized probably due to chronic degeneration although a SLAP tear cannot be completely excluded. Visualized portions of the labrum otherwise unremarkable.
>
> Minimal joint effusion. Small to moderate subacromial bursal effusion.

On May 3, 2016, Petitioner returned to Dr. Tingle reporting some improvement in his overall comfort level, with some pain with overhead-type motion, and some continued weakness. Dr. Tingle noted the MRI results and diagnosed Petitioner with a massive rotator cuff tear as well as probable superior labral tear significantly worse after work-related activity. Dr. Tingle discussed non-operative and operative treatment options noting there did not appear to be any musculature atrophy, and the natural history of a rotator cuff-deficient shoulder and likelihood of progression of arthrosis. He recommended an arthroscopic rotator cuff repair, and restricted Petitioner from any lifting or carrying over 20 pounds but allowed him to drive a truck. Dr. Tingle noted that Petitioner was going to consider his options and report whether he wished to proceed with surgery.

Petitioner returned to Dr. Tingle on June 10, 2016 reporting difficulty lifting his arm above shoulder level, 6/10 pain, and 10/10 pain with sleep. He also reported that Respondent had not been able to accommodate his restrictions. Petitioner attended the session with his son-in-law and indicated that he wished to undergo surgery. Petitioner reported a previous shoulder problem "which was completely resolved with rehabilitation prior to his work injury." Dr. Tingle noted his review of a previous MRI dated November 5, 2015. He found that it showed a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant atrophy. The tear measured 1.5 cm with a 2 cm retraction, tendinosis of the infraspinatus tendon, findings of external impingement, and degenerative changes at the glenohumeral joint and labrum. Dr. Tingle noted that Petitioner "had a previous rotator cuff tear

managed conservatively with rehabilitation managed by another physician, which was aggravated and increased in size after work injury. The tear increased in size from 1.5 cm to 3.5 cm in length after the work injury. The rotator cuff tear now extends in[] the infraspinatus tendon when comparing MRI's." He noted that Petitioner wished to undergo the right shoulder arthroscopy with rotator cuff repair and subacromial decompression surgery, which might involve implantation of instrumentation to be determined intraoperatively. Dr. Tingle maintained Petitioner's work restrictions of no lifting with the right arm.

On August 30, 2016, Petitioner returned to Dr. Tingle who noted "some apparently insurance issue[] in regards to the approval from the Workman's Comp versus his private insurance carrier. He is here for repeat evaluation." Petitioner reported pain ranging from 3-5/10 with overhead reaching and at night, and continued discomfort with any overhead lifting or reaching as well as some weakness. Dr. Tingle noted their discussion about the large size of his tear which has enlarged after once again an occurrence at work. Dr. Tingle noted that they would proceed with surgery at Petitioner's earliest convenience and the possibility of inability to repair the tear if he waits too long. He recommended continued home exercises and no lifting or carrying over 10 pounds or overhead lifting.

Petitioner underwent a third MRI on October 4, 2016, which was compared to the April 29, 2016 MRI. The interpreting radiologist noted no significant change compared to the prior MRI. He again found a full-thickness supraspinatus tendon tear as well as moderate infraspinatus and mild subscapularis tendinopathy with small interstitial tears in both tendons. The radiologist also noted mild glenohumeral and acromioclavicular joint osteoarthritis, a small glenohumeral joint effusion, and an abnormal signal in the superior glenoid labrum, for which a tear cannot be excluded. The radiologist issued an addendum report the same day specifying that the supraspinatus tendon tear measured 2.1 cm in anteroposterior dimension and retraction of the tendon stump by 3.5 cm.

On October 6, 2016, Petitioner underwent the recommended surgery with Dr. Tingle. Pre-operatively, he diagnosed a right shoulder rotator cuff tear and impingement syndrome. Dr. Tingle performed an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, he diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome.

Petitioner returned to Dr. Tingle for post-operative follow up care beginning on October 7, 2016. Petitioner remained in an immobilizer for a time and was then referred to physical therapy, which he underwent at AthletiCo. Use of the right arm sling was discontinued on November 23, 2016. Additional physical therapy was ordered on December 20, 2016 and January 20, 2017.

By February 24, 2017, Dr. Tingle noted that Petitioner was doing extremely well and had been discharged from physical therapy. Petitioner reported that he felt very good and very pleased with his progress, and quite functional. However, Petitioner still had some occasional

mild weakness. Dr. Tingle recommended a continued home exercise program for functional strength, and Petitioner was released from treatment to follow up on an as-needed basis. Petitioner testified that he last saw Dr. Tingle on February 24, 2017, at which time he was released to full work and from treatment.

C. Deposition Testimony – Dr. Tingle (Petitioner's Orthopedic Surgeon)

Petitioner called Dr. Tingle as a witness and he gave testimony at an evidence deposition on August 29, 2018. He discussed his treatment of Petitioner and gave opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Tingle testified that he was a board-certified orthopedic surgeon and performed surgery on a regular basis. He first saw Petitioner on April 29, 2016 for severe right shoulder pain after hurting it at work. Dr. Tingle understood the mechanism of Petitioner's injury to be that he was pulling a trailer when he developed a sharp, pulling, tearing sensation over the anterior aspect of his shoulder. Dr. Tingle was aware that Petitioner had a right shoulder problem and that he had received treatment prior to seeing him from his partner [Dr. Kachar] in the same practice, and those notes were available for his review.

Dr. Tingle reviewed all of Petitioner's MRI films from his 2015 and 2016 scans. In comparing the November 2015 MRI to the April 2016 MRI, Dr. Tingle felt that it was significantly worse because the large tear was now a massive tear, the centimeter findings of retraction [changed], and there was involvement of another tendon (the infraspinatus) that was not present of the 2015 films according to the radiologist's readings, which he felt had enlarged. Dr. Tingle opined that the findings in the April 2016 MRI were consistent with Petitioner's symptoms and his exam, and also with the mechanism of injury as described.

Dr. Tingle issued a narrative report at the request of Petitioner's counsel. Therein, he referred to a report of Dr. Hennessy on behalf of the employer dated July 27, 2016. Dr. Tingle disagreed[1] with Dr. Hennessy's opinion explaining that "I don't think the literature necessarily

[1] The Commission notes that there were no express rulings made on either parties' objections or motions at either Dr. Tingle or Dr. Hennessy's depositions. Here, Respondent objected to Dr. Tingle's testimony regarding any medical literature on which he relied based on *Ghere* asserting that it had not been provided with such literature 48 hours in advance of the deposition. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). Respondent made additional objections, maintained a "standing" *Ghere* objection, and moved to strike various portions of the doctor's testimony. The Commission finds the Arbitrator implicitly overruled both parties' objections at both depositions, as well as Respondent's *Ghere* objection and explicitly overrules it here. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, *16-17 (2011) (*citing In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003)). The Court went on to specify that such opinions are "only as valid as the reasons for the opinion." *Id.* (citing *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998)). Dr. Tingle's reference to medical literature at the time of his deposition is the type of testimony that can be expected from a medical expert when explaining the reasoning for causal connection opinions particular to a patient. Moreover, Respondent suffered no harm as a result of the testimony. Respondent's Section 12 examiner, Dr. Hennessy, was later deposed and even agreed with some of the propositions set out by Dr. Tingle regarding the medical standards identified. In addition, both physicians reviewed the other's written reports and had the opportunity to explain any disagreement and the bases therefore. As such, the Commission finds no harm to

supports that that's the natural progression of a rotator cuff tear in a 69-year-old gentleman over five months. I mean there was - - I mean there's literature out there that basically had studied this and for a full thickness tear the incidence of increased retraction, about 22 percent of those full thickness tears will increase at the two-year mark, so I followed these patients for an extended period of time, and 50 percent will increase over a five-year period. And the other thing they noted, the main thing was someone had progression of a tear was that their pain increased significantly." Dr. Tingle identified this as a JBJS article by Keenan and Ken Yamaguchi from Washington University in St. Louis.

Dr. Tingle maintained his opinion that the tear in the April 2016 MRI was larger and there appeared to have some more retraction compared to the 2015 MRI. He opined that the accident aggravated Petitioner's previous condition and was a factor leading to his treatment and surgery. Dr. Tingle maintained his opinion regarding the MRIs from 2015 to 2016 explaining that he reviewed the MRIs himself, but he would defer to the radiologists that read the MRIs that are board-certified and have better software to interpret films. He also maintained his opinion, throughout his testimony, that Petitioner's pre-existing condition was aggravated by the accident.

On cross-examination, Dr. Tingle testified that Petitioner was referred to him by Dr. Kachar, another orthopedic surgeon, for a surgical consultation for the diagnosis of rotator cuff tear. He was asked about Petitioner's prior treatment with Dr. Kachar, and he acknowledged that Petitioner underwent a previous injection, physical therapy, and was taking anti-inflammatories. He agreed that Petitioner was symptomatic at that time, and he reported that he was asymptomatic when he first saw Dr. Tingle. Dr. Tingle acknowledged that Petitioner's prior symptoms were not documented in his "history of present illness" at his initial visit. However, Dr. Tingle pointed out that Petitioner's prior symptoms were "already documented in the chart."

Dr. Tingle agreed that the 2015 and 2016 MRIs both showed a large full thickness tear of the rotator cuff, degenerative joint disease in the glenohumeral joint space, and degenerative tears in the labrum. He agreed that the small to moderate bursal effusion noted in his initial note could possibly be related to degenerative changes and could be read either to indicate an acute injury or not. The November 5, 2015 MRI showed tendinosis, which are changes caused by chronic inflammation and could be a precursor to tearing of the tendon. Dr. Tingle testified that there was also some degenerative joint disease.

Dr. Tingle acknowledged that rotator cuff tears do not heal on their own. When asked whether one can employ conservative treatment to "calm it down," Dr. Tingle answered in the affirmative. He also agreed that the rotator cuff tear is always going to be there, and injections typically wear off eventually. However, he testified that not all rotator cuff tears are symptomatic and he disagreed with the proposition that a 69 year-old man with a previous rotator cuff tear and arthritis would have continued progression of the tear because he has some arthritic findings in the shoulder. With regard to the onset of Petitioner's rotator cuff tear before the November 5, 2015 MRI, Dr. Tingle believed it would have begun a year or two prior because there was not much muscle atrophy.

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either party by the Arbitrator's consideration of the testimony of the physicians in its entirety and, likewise, considers the testimony of both physicians in its entirety assigning appropriate weight, if any, to the physicians' opinions as explained in the conclusions of law.

Dr. Tingle acknowledged that patients with asymptomatic rotator cuff tears are not referred for a surgical consultation. He agreed that when he first saw Petitioner, he reported pain and difficulty with reaching, with lifting, and with overhead activities. Petitioner also reported difficulty with lifting heavy objects when he saw Dr. Kachar on February 25, 2016. Petitioner also had impingement signs both before and after the accident, as well as some weakness. However, Dr. Tingle pointed out that at Petitioner's November visit [with Dr. Kachar] Petitioner had a negative drop test, which was "significantly different from [his] exam from April 29, 2016, when [Petitioner] had difficulty with active motion above 90 degrees so basically [he] did not have full range of motion actively, his strength was four out of five which is a specific test to evaluate the rotator cuff strength" in addition to the positive Neer and Hawkins impingement signs. Dr. Tingle also acknowledged that is was possible for a degenerative SLAP tear to lead to progression of a rotator cuff tear over time absent trauma.

On redirect examination, Dr. Tingle testified that Petitioner presented to him as an emergency add-on appointment for severe shoulder pain. He explained that they get as much information as possible but may not cover every single detail of the patient's complete care. Notwithstanding, Dr. Tingle testified on direct, cross-examination, and re-direct examination that Petitioner's prior right shoulder problems and treatment were documented in the office file and he was aware of it. Dr. Tingle maintained the opinion that there was change in Petitioner's November 2015 and April 2016 MRI findings, and those findings were consistent with his opinion that the accident aggravated Petitioner's condition. Dr. Tingle testified that is was possible for Petitioner to have become asymptomatic from February to April 2016.

D. Section 12 Reports and Deposition Testimony – Dr. Hennessy (Respondent's Section 12 Examiner)

On July 27, 2016, Dr. Ryon Hennessy performed a records review and rendered various opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work. At the time, Dr. Hennessy did not have MRI films to review. In his report, he diagnosed Petitioner with a large, full thickness rotator cuff tear with 3.5 cm retraction and a supraspinatus tear likely at 1.5 cm and found the remaining pathology to be degenerative in nature. He diagnosed progression of a rotator cuff tear with regard to retraction as well as persistent tendinopathy of supraspinatus and infraspinatus and degeneration of the labrum. Dr. Hennessy opined that Petitioner's condition was degenerative, that the retraction was consistent with the natural progression of a full thickness rotator cuff tear in a nearly 69 year old man, and that the incident of pulling on a trailer at work would not cause retraction. He further opined that the alleged incident at work did not cause any new pathology. In the remainder of his report, Dr. Hennessy maintained that there was "clearly no acute injury."

On June 1, 2018, Petitioner submitted to a Section 12 examination with Dr. Hennessy at Respondent's request. Dr. Hennessy reviewed various records including Petitioner's post-accident treatment records, and examined Petitioner. He was provided with Petitioner's MRI scans, but was "unable to open the disc however on three separate computers." Dr. Hennessy stated "[b]riefly, the opinions I generated in my chart review in July 2016 remained unchanged."

He added that "[a]fter review of further records as well as interview with Mr. Davydov, my opinions were strengthened."

On June 23, 2018, Dr. Hennessy issued an addendum report in which he noted his review of November 3, 2015 x-rays, and all three of Petitioner's right shoulder MRIs. Dr. Hennessy was also provided with Dr. Tingle's narrative report. Dr. Hennessy's ultimate opinions did not change after reviewing diagnostic films. He found the November 2015 MRI to reflect a 23 mm [2.3 cm] by 36.6 mm [3.66 cm] rotator cuff retraction. He found the April 2016 MRI to be "essentially the same as the 11/5/2015 film" reflecting a 22.4 mm [2.24 cm] tear. He then found the October 2016 MRI to be "unchanged from April 2016[]" and again reflect a 22.4 mm [2.24 cm] tear with a 36 mm [3.6 cm] tear on one image and a 38 mm [3.8 cm] on another image. Dr. Hennessy believed that the radiologist had underread the films. He agreed that the treatment rendered by Dr. Tingle was appropriate, but unrelated to an accident at work.

Dr. Hennessy also disagreed with Dr. Tingle's narrative report and noted that Dr. Tingle made no comparison between the November 2015 MRI and the April 2016 MRI. He also stated that Petitioner made no mention of his prior right shoulder complaints, which were "directly refuted" by Dr. Kachar's February 2016 note. Dr. Hennessy reiterated his belief that the radiologist that read Petitioner's November 2015 MRI under-read the films, which were in his opinion "essentially identical" to the October 2016 MRI. He also indicated that "regarding retraction of rotator cuff tears over 18 months to 5 years" his "personal review of the MRI films would be consistent with the literature Dr. Tingle cited."

Respondent called Dr. Hennessy as a witness and he gave testimony at an evidence deposition on October 2, 2018. He discussed his Section 12 reports and opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Hennessy testified that he was a board-certified orthopedic surgeon. About 70% of his practice involved general orthopedics and about 30% involved treatment of the spine. He sees 80 to 90 patients, performs 4-10 surgeries, and performs about one to two Section 12 examinations a week. He reviewed Petitioner's medical records and issued three reports.

Initially, Dr. Hennessy only had the MRI reports and not the actual films. He noted that the November 5, 2015 MRI report showed a full-thickness rotator cuff tear measuring 1.5 cm with 2 cm of retraction, moderate infraspinatus and mild subcapularis tendinosis, with fluid along the supraspinatus muscle and subacromial without atrophy, moderate AC joint arthritis with anterior acromial spurring and thickened coracoacromial ligament, and labral degeneration/tearing of the superior, anterior, posterior and anterior inferior aspects. The MRI report from April 29, 2016 indicated a full-thickness rotator cuff tear with 3.5 cm retraction, supraspinatus and infraspinatus tendinopathy, degeneration of the labrum, and a small amount of subacromial fluid. Otherwise, the labrum was considered normal.

Dr. Hennessy noted that based on the November 2015 MRI report, the labrum tearing and rotator cuff tear pre-dated April 2016. The second MRI just noted labrum degeneration. However, the labrum would not have repaired itself in the interim. In interpreting the MRI reports, Dr. Hennessy the rotator cuff "tears were likely similar." While there was some

progression of the retraction, "it would have been more due to the pre-existing condition and the natural history of that pre-existing condition as full thickness rotator cuff tears could progress or can progress with further retraction." Both he and Dr. Tingle agree about Petitioner's diagnosis, however, Dr. Hennessy believed the retraction represented a natural progression of the underlying pre-existing disease. Based on the MRI reports, Dr. Hennessy opined "that it would be highly unlikely there would be a 1.5 centimeter change in retraction in just six months. That's highly unlikely." When asked why, Dr. Hennessy testified that "[i]n six months, retraction happens a little more slowly over years. It doesn't happen acutely like that. Actually it was a five-month interval. That would be highly unlikely." Dr. Hennessy explained that retraction is a generally degenerative rather than an acute process.

Dr. Hennessy found no acute findings in either of the MRI reports. There had been persistent weakness when Petitioner was discharged from physical therapy in December 2015. He did not appreciate any new rotator cuff injury in the second MRI and the pre-existing rotator cuff tear was symptomatic prior to the accident. Therefore, he found no exacerbation, acceleration, or aggravation of the pre-existing condition. Dr. Hennessy believed that all treatment provided to Petitioner was appropriate, though he believed the need for surgery was the underlying condition and not the work injury.

Two years after his initial records review, Dr. Hennessy examined Petitioner, reviewed additional records, including records from before the accident, and issued another report. It was noted that on November 3, 2015, Petitioner reported to Dr. Kachar that he had shoulder pain for up to a year with associated difficulty lifting heavy objects, and positive impingement signs. Petitioner also reported that the pain increased when he swatted at a bee three months earlier. Petitioner treated with Dr. Kachar through February 25, 2016, at which time he referred Petitioner to Dr. Tingle for a surgical consultation.

Dr. Hennessy reviewed the operative report. Dr. Tingle noted that the rotator cuff tear was 3.4 cm by 3 cm, which he agreed was massive. Dr. Tingle also noted that the tendon was mobile and therefore, in Dr. Tingle's opinion, more consistent with an acute, rather than chronic, injury. Dr. Tingle also noted some granulation, which he posited was more consistent with an acute injury than a chronic one. He also debrided an old biceps rupture injury. When asked whether he agreed with Dr. Tingle's assessment that the injury appeared acute, Dr. Hennessy responded that the biceps injury was clearly an old one and he was "not sure the granulation would necessarily tell us acute versus chronic;" he really hadn't seen that. "But as far as the size of the tear, [it] would be documented by [Dr. Tingle's intraoperative] pictures. He said it was 3.4 by 3. That's probably what it was."

When asked whether he would "agree or disagree that these were acute injuries as opposed to chronic injuries[,]" Dr. Hennessy responded that "[w]ithout seeing the actual pictures I have to take [Dr. Tingle's] report on its face value. Pictures of the surgery, except for the biceps which everyone seems to say which was old." Nevertheless, he concluded that the rotator cuff injury was chronic and not an acute injury. Petitioner had an uneventful postop recovery and was released from treatment within five months.

At the time of Dr. Hennessy's physical examination of Petitioner, he reported to Dr. Hennessy that he did not remember his February 2016 visit to Dr. Tingle and therefore could not relate whether he had pain at that time, but reported that his right shoulder was pain free at some point. At the time of his exam, Petitioner had returned to work driving a truck with a manual transmission but did have to load/unload the truck. He had stopped that about 10 years earlier, though he still had to pull the pin of the trailer and operate the fifth wheel of the trailer. Petitioner complained of 1-3/10 shoulder pain with occasional tingling in right fingers.

On examination, Dr. Hennessy found that Petitioner was pleasant and cooperative the entire visit, and never gave any undue behaviors. Petitioner had full strength in his rotator cuff but showed some reduced range of motion and mildly positive impingement signs on the right shoulder. He had very little decreased motion considering the size of the tear. In Dr. Hennessy's opinion, Petitioner had a good surgical result.

Dr. Hennessy was eventually able to read the actual MRI films. His examination of Petitioner and his review of the additional medical records did not change his original opinions. Dr. Hennessy noted that the infraspinatus remained intact and it would be highly unlikely that the rotator cuff tear could widen that much without also affecting the infraspinatus. There just is not that much width of the supraspinatus, and it would be highly unlikely for such worsening to occur in that time frame. Petitioner also had a long history of right shoulder pain. In February 2016, Dr. Hennessy noted that Petitioner was being actively treated for his right shoulder, had another cortisone injection, and was assessed as having failed conservative treatment and had been referred for a surgical option. In his opinion, it was very common to see rotator cuff tears in patients of Petitioner's age (70-71) and the probability of developing rotator cuff tears increases with age. The rotator cuff would not have healed between February 2016 and the work accident.

Dr. Hennessy also thought it was significant that the April 2016 MRI report did not include a comparison to the November 2015 MRI. "You had two markedly different measurements of films, and yet it would have been nice at the onset of all this had they just looked at the two films and made a direct comparison contemporaneously." Dr. Hennessy ascribed "some of the difference in terms of the width to me could just be observer error."

Dr. Hennessy diagnosed symptomatic large full-thickness rotator cuff tear documented in a November 2015 MRI with long-standing rupture of the long-head biceps tendon both of which predated April 2016. Dr. Hennessy testified that surgery had been "recommended" just over a month prior to his accident. Petitioner was at maximum medical improvement and did not need any additional medical treatment.

Dr. Hennessy testified that June 23, 2018 was the first time he was able to see the actual MRI films, and he testified consistent with the measurements and opinions rendered in his addendum report. To him, the MRI from April 2016 was almost identical to the November 2015 film; he "did not appreciate any significant progression or retraction." The three films were all almost identical.

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Dr. Hennessy also reviewed the statement of Dr. Tingle, in which he opined that prior to the instant accident Petitioner was essentially pain free, had full functionality of his right shoulder, and the accident caused permanent aggravation of his condition and made it symptomatic again. He disagreed with Dr. Tingle's opinion that Petitioner suffered increased retraction. Initially, Dr. Hennessy opined that it would be extremely unlikely that Petitioner would show such increased retraction in such a short time span. After he saw the films, he found there was no retraction. He also questioned Dr. Tingle's conclusion that Petitioner was pain free in February 2016, because he administered an injection at that time.

On cross examination, Dr. Hennessy agreed that he saw no treatment records between February 25, 2016 and April 28, 2016. He acknowledged that, while Petitioner told him he could not remember the February 2016 visit to Dr. Tingle, he reported that at some point he was pain free. Dr. Hennessy also admitted that while the condition itself would not cure itself, [the patient] could be asymptomatic.

On cross-examination, when asked whether he disagreed with the opinions of the radiologists, Dr. Hennessy testified that "I would say in terms of magnitude and the size of the tears on the different films, I think we all, Dr. Tingle, myself, and the radiologist all agreed on the basic premises that he had a full thickness rotator cuff tear and biceps tendon rupture from 2015 and as well as the two MRI's that he had in '16. So my disagreement was more in the magnitude … and the fatty atrophy being present in 2015." He had no reason to question Dr. Tingle's intraoperative measurements, but he added that they were consistent with his reading of the MRI. He did not agree that the tear went from large to massive.

On redirect examination, Dr. Hennessy agreed that the cortisone injection administered on February 25, 2016 was intended to relieve pain and their lasting effects are highly variable ranging from very little relief to sometimes relief for months.

E. Additional Information

Petitioner testified that he had no other accidents affecting his shoulder other than the one on April 28, 2016.

Regarding temporary disability related to this accident, Petitioner testified that he worked light duty until May 18, 2016 and was then off work until he was released back to full duty work on February 24, 2017.

Regarding his current condition of ill-being, Petitioner testified that currently he had pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects. Sometimes he takes over-the-counter pain medication, which helps a bit.

Regarding his medical bills, Petitioner testified that they were paid by Medicare and through a Medicare supplemental insurance policy, which Petitioner paid for.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner proved he sustained a work-related accident on April 28, 2016. The Commission agrees.

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Moreover, the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828 further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment. *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny and found that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner gave uncontroverted testimony that on April 28, 2016 he sustained an accident affecting his right shoulder at work while decoupling a trailer from the cab and pulling on the handle with his right arm. He explained that the pain he experienced was 20 times worse than the pain he had previously experienced in his shoulder. Respondent sent him for treatment at an occupational health clinic that day. The records of the examining physician, Dr. Reese, at Respondent's designated occupational health clinic corroborate Petitioner's testimony about the acute mechanism of injury and severity of his symptoms following the traumatic incident earlier that day. It is plausible that Petitioner, a truck driver, would decouple a trailer from his truck. No evidence was presented that he was precluded from doing so. Regardless, it was an act that Petitioner might reasonably be expected to perform incident to his assigned duties as a truck driver. *McAllister*, 2020 IL 124828, ¶ 46. Moreover, Petitioner's reported mechanism of injury and immediate onset of symptoms were clinically correlated by the most contemporaneous medical evaluation performed at the occupational health clinic.

Thus, the Commission affirms the Arbitrator's conclusion that Petitioner has met his burden of proof and established that he suffered a compensable accident at work on April 28, 2016 as claimed.

B. Causal Connection

While finding that Petitioner had suffered an accident at work, the Arbitrator found that Petitioner did not sustain his burden of proving that the accident caused his current condition of ill-being of his right shoulder. Accordingly, the Arbitrator denied compensation and, in so doing, gave greater weight to the opinions of Dr. Hennessy over those of Dr. Tingle. In reviewing the record, the Commission is not similarly persuaded.

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also *a* causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981). A claimant may rely on the "chain of events" in his or her case to demonstrate the aggravation or acceleration of a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC, ¶¶ 25-29.

In this case, Petitioner was an older, long-time truck driver that suffered an acute accident causing a breakdown in his condition due to an occupational cause when he pulled a pin to decouple his truck from a trailer. There is no question that Petitioner had a pre-existing right shoulder condition. Indeed, he was receiving treatment from Dr. Kachar after an onset of symptoms prior to November 2015 affecting his right shoulder. He first sought treatment for a right shoulder condition with Dr. Kachar, the physician treating him for an unrelated left ankle and foot injury, on November 3, 2015. He underwent a right shoulder MRI two days later that confirmed a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. Dr. Kachar treated Petitioner's right shoulder condition conservatively with injections and physical therapy thereafter noting that surgery might be an option if his condition did not improve. Petitioner continued physical therapy through January 6, 2016. Petitioner returned to Dr. Kachar on February 25, 2016 at which point he was released from care and referred to his colleague, Dr. Tingle, for a surgical consultation. Petitioner did not undergo treatment after February 25, 2016 until the date of accident or see Dr. Tingle. He testified that he was able to work and did not feel that he needed to see Dr. Tingle at that time.

Respondent asserts that "[w]hile there was *some* controversy about the size and magnitude of the tear (i.e.[,] a large tear versus a massive tear), all doctors agree [P]etitioner had a rotator cuff tear that was objectively sympto[ma]tic and present on radiographs several months before the work accident." (Emphasis added). In sum, Respondent urges the Commission to find that the presence of an objectively symptomatic rotator cuff tear prior to the accident at work with a surgical consultation referral should preclude recovery of benefits, finding the opinions of its Section 12 examiner to be persuasive. The Commission cannot so find given the objective medical evidence in this case.

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The pre-accident MRI and post-accident MRIs were read by three different radiologists who measured the size and extent of Petitioner's rotator cuff tear and retraction. The radiologists' measurements indicate a significant increase in tear size from 1.5 cm to 3.5 cm as well as significant retraction increase from 2 cm to 3.5 cm. In order to find the opinions of Dr. Hennessy persuasive in this case, the Commission would have to ignore the interpretation of three different radiologists regarding the magnitude of Petitioner's right shoulder tears as reflected in the 2015 and 2016 MRIs. Such a finding would also require the Commission to ignore Dr. Tingle's interpretation of the pre- and post-accident MRI films, which he had access to in his chart at the time of Petitioner's initial visit with him, contrary to Dr. Hennessy's assumption. Indeed, Dr. Tingle testified that Dr. Kachar's records were in his chart, so he was aware of the entirety of Petitioner's treatment with his partner and he could compare Petitioner's reports to him with the prior treatment records.

Conversely, the Commission would further have to accept Dr. Hennessy's opinion that it was "highly unlikely" that Petitioner's MRIs would show such a significant increase in retraction between November 2015 and April 2016 solely to degeneration, and the change should be attributed to human error, not only by the radiologists, but also by Dr. Tingle. The Commission finds it more likely that Dr. Hennessy refused to detach from his initial opinions regardless of any objective evidence to the contrary. Dr. Hennessy's initial records review, in which he had no access to the MRI films, resulted in the opinion that Petitioner's condition was degenerative. Years later, after overcoming technical difficulties with the initial MRI films provided, Dr. Hennessy ultimately opined that his reading of all three films only strengthened his initial opinions and that the marked differences observed by other professionals in this case were due to observer error. Dr. Hennessy's final opinion after seeing the MRI films that there was no difference whatsoever among them undercuts the reliability of all of his opinions.

In sum, the Commission does not find the opinions of Dr. Hennessy to be persuasive given the objective diagnostic findings of four different physicians, including Petitioner's orthopedic surgeon who always had access to all of Petitioner's prior treatment records and films, to the contrary. Rather, we find that the opinions of Dr. Tingle, which are corroborated by the diagnostic interpretations of three radiologists, to be persuasive and based on a complete and accurate understanding of Petitioner's presentation at his initial visit and thereafter.

In addition, the "chain of events" in this case support's Petitioner's claim of causal connection. Petitioner was able to perform his work activities prior to the accident whereas he was not after the accident. Petitioner needed no treatment from the last injection on February 25, 2016 until the instant accident, but experienced pain and symptoms that prevented him from working immediately after the accident as corroborated by Respondent's occupational health clinician immediately thereafter.

The Commission observes that in denying compensation, the Arbitrator questioned Petitioner's credibility. As noted above, the Commission finds ample objective medical evidence to corroborate Petitioner's medical condition contemporaneous to his reported accident at work and complaints to the various evaluating physicians. While Petitioner did not require a translator at the hearing, a cursory evaluation of the transcript reflects that Petitioner had

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difficulty expressing himself and understanding questions posed on direct and cross-examination. The Commission does not find Petitioner's testimony to be evasive and notes that, while he did not recall certain reports as specifically as posited on cross-examination, he readily admitted that he had a pre-existing shoulder condition, treatment for the condition, and periods of repose where he felt no debilitating symptoms. The Commission finds Petitioner to be credible overall.

Thus, the Commission finds that Petitioner's pre-existing right shoulder condition was aggravated and is causally related to the traumatic incident at work on April 28, 2016.

C. Temporary Total Disability

On the issue of temporary total disability (TTD), Petitioner seeks benefits from May 18, 2016 through February 24, 2017. Petitioner claims that Respondent was no longer able to accommodate his restrictions as of May 18, 2016 and he did not return to work until he was released to full duty as of February 24, 2017. The medical records reflect that Petitioner was either placed off work or on restrictions during the claimed period, and Dr. Tingle noted Petitioner's report in June 2016 that Respondent did not accommodate the restrictions. No evidence was presented to the contrary. Therefore, the Commission awards Petitioner TTD benefits as claimed totaling 40 and 3/7ths weeks.

D. Medical Expenses

As explained above, the record reflects that Petitioner sought immediate care and treatment of the right shoulder after his accident at work, and the Commission finds the opinions of Petitioner's treating physician, Dr. Tingle, to be persuasive in this case. On the issue of medical expenses, the evidence establishes that Petitioner's right shoulder treatment after the accident at work was reasonable and necessary to alleviate Petitioner of the effects of his occupational injury. Indeed, while finding that Petitioner's condition was wholly degenerative, Dr. Hennessy testified that all of the treatment that Petitioner received after April 2016 was appropriate. Thus, the Commission finds Respondent responsible for the payment of Petitioner's charges for reasonable and necessary medical services related to his right shoulder injury pursuant to §8(a) and §8.2 of the Act and the fee schedule.

E. Permanent Partial Disability

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i) because there is no impairment report. The Commission places some weight on factor (ii), noting that Petitioner continues to work as a

truck driver. Regarding factor (iii), the Commission places greater weight to Petitioner's age (68) at the time of his injury, given that Petitioner likely will remain in the workforce for a less prolonged period. The Commission places some weight on factor (iv) due to the lack of evidence regarding Petitioner's future earnings capacity compared to his pre-injury position.

The Commission places significant weight on factor (v). Petitioner ultimately underwent an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, Dr. Tingle diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome. Petitioner testified that he continues to experience pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects and sometimes takes over-the-counter pain medication to manage his symptoms.

Having considered all of the statutory factors, the Commission finds that Petitioner suffered a permanent partial disability representing a 10% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $574.02 per week for a period of 40 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses under the fee schedule and pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $516.62 per week for a total of 50 weeks because the injuries sustained resulted in the permanent loss of the use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 5 - 2021

Barbara N. Flores

BNF-MP/dw
O-2/4/21
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Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. The Arbitrator found that Petitioner did not prove that his alleged work-related accident caused his current condition of ill-being, his rotator cuff tear, and denied compensation. The Majority reversed the Decision of the Arbitrator, found causation, and awarded benefits. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

First, while the Arbitrator found accident, he did so "with hesitation." He found Petitioner's testimony lacked credibility because his testimony was at odds with the medical records. His skepticism of Petitioner's veracity forced him to question whether Petitioner even had an accident, despite the fact that there was no evidence specifically rebutting his testimony. The Arbitrator specified that "Petitioner's demeanor changed dramatically between direct examination and cross examination." His memory appeared selective in nature. His recollections became much more complete on direct than cross, and "almost in all instances where Petitioner did not remember [or] recall an event favored his case." Most notably, Petitioner appeared to be evasive and untruthful about the extent of his symptoms and treatment prior to the instant accident. I find no reason for the Majority to substitute its assessment of credibility for that of the Arbitrator who actually observed the Petitioner's testimony.

Prior to the instant accident, Petitioner treated with Dr. Kachar for his right shoulder condition since November 3, 2015. At that time, he reported that he had shoulder pain for at least a year and had aggravated it a couple of months earlier "swatting a bee." He reported "some pain with reaching, lifting, overhead activities as well as pain with activities of daily living." Dr. Kachar administered an injection, prescribed physical therapy, and ordered an MRI. The MRI dated November 5, 2015 showed a large, full-thickness tear of the rotator cuff. Petitioner last saw Dr. Kachar before the instant accident on February 25, 2016, only two months before the alleged accident. At that time, Dr. Kachar administered another injection and referred Petitioner for a surgical consultation.

The Arbitrator also found the opinions of Respondent's Section 12 medical examiner, Dr. Hennessey, more persuasive than those of Dr. Tingle. Contrary to the Majority, I concur with

the Arbitrator's assessment of the persuasiveness of the doctors' opinions. Dr. Tingle, one of Petitioner's treaters, based his opinion that Petitioner's condition was causally related to the accident on his assumption that Petitioner was pain free from February 25, 2016 up to the date of the accident. That assumption is not sustainable because on that date Dr. Tingle's partner, Dr. Kachar, administered an injection and referred him to surgery because he had failed conservative treatment for his large rotator cuff tear. Dr. Tingle agreed that injections are not provided, and surgery is not indicated, for patients with asymptomatic rotator cuff tears. Therefore, it is clear that Petitioner was substantially symptomatic for a large rotator cuff tear prior to the accident.

The Majority relies mostly on the radiologist's report that the rotator cuff tear grew from 2 cm to 3.5 cm from November 5, 2015 to March 29, 2016. This interpretation was at odds with that of Dr. Hennessey. He explained that retraction is degenerative in nature and he would find it difficult to believe that a rotator cuff tear could retract that much is such a short period of time, that such retraction was not consistent with the mechanism of injury reported, and explained how an error in the calculation of retraction could have happened. I agree with Dr. Hennessey that it does seem unlikely that there could have been such dramatic increase in retraction over a few months, especially because the injury Petitioner described cannot be considered extremely traumatic. Finally, Petitioner's testimony about the accident itself was sketchy. He did not testify as the amount of force necessary to decouple the trailer and he simply testified that he pulled the handle and felt pain.

The Majority accepted Petitioner's questionable testimony that his symptoms resolved completely after the injection on November 3, 2015. As Dr. Hennessey explained it is extremely unusual for an injection to completely resolve rotator cuff pain. In this instance, I find it much more conceivable that Petitioner's prior symptoms returned as the effects of the injection wore off. That was why the second injection was administered. Petitioner had his first injection on November 3, 2015 and the second on February 25, 2016. The fact that Dr. Kachar referred Petitioner to a surgeon on February 25, 2016 shows that he did not believe Petitioner's treatment for Petitioner's shoulder condition was completed and that surgery was indicated. In addition, Dr. Hennessey noted that the MRIs showed "fatty atrophy" which indicated the chronicity rather than acuity of Petitioner's condition.

Because the Arbitrator observed Petitioner's testimony and found him not credible, because Petitioner had extensive pre-accident treatment for the same shoulder condition prior to the accident, because Petitioner had actually been referred for a surgical consultation prior to the accident, and because Dr. Hennessey explained that the presence of fatty atrophy points to a chronic rather than acute shoulder condition I would have affirmed and adopted the Decision of the Arbitrator, found Petitioner did not sustain his burden of proving that a work-related accident caused his current condition of ill-being and denied compensation. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

DLS/dw
O-2/4/21
46

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY DAVIS,

Petitioner,

vs. NO: 18 WC 18489

TYSON FOODS,

Respondent.

21IWCC0154

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: APR 5 - 2021

Christopher A. Harris

Barbara N. Flores

Marc Parker

CAH/pm
d: 4/1/21
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DAVIS, TIMOTHY
Employee/Petitioner

Case# **18WC018489**

TYSON FOODS
Employer/Respondent

21IWCC0154

On 9/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0656 GLASS & KOREIN LLC
MICHAEL H KOREIN
7012 W MAIN ST
BELLEVILLE, IL 62223

0000 WIEDNER & McAULIFFE LTD
JUAN ARIAS
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Timothy Davis
Employee/Petitioner

v.

Tyson Foods
Employer/Respondent

Case # 18 WC 18489

Consolidated cases: n/a

21IWCC0154

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 26, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Did Petitioner exceed two choices of medical providers**

FINDINGS

On the date of accident, May 25, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $10,607.04; the average weekly wage was $505.10.

On the date of accident, Petitioner was 49 years of age, single with 0 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $33,440.07 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $33,440.07.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary partial disability benefits of $512.09, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $336.73 per week for 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, January 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the fusion surgery recommended by Dr. David Raskas.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

September 21, 2020
Date

SEP 24 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 25, 2018. According to the Application, Petitioner "slipped and fell on banana in the employee only breakroom" and sustained an injury to his "low back and right ankle" (Arbitrator's Exhibit 2). Petitioner sought an order for payment of medical bills, temporary total disability benefits and temporary partial disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. Respondent also disputed liability for a portion of Petitioner's medical expenses on the basis Petitioner had exceeded two chains of medical providers (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018; January 8, 2019, through July 21, 2020; and August 22, 2020, through August 26, 2020 (the date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits of 75 4/7 weeks, commencing June 8, 2018, through October 23, 2018; and January 8, 2019, through January 30, 2020 (Arbitrator's Exhibit 1).

In regard to temporary partial disability benefits, Petitioner claimed he was entitled to temporary partial disability benefits of 15 2/7 weeks, commencing October 24, 2018, through January 7, 2019; and July 22, 2020, through August 21, 2020. Respondent claimed Petitioner was entitled to temporary partial disability benefits of 10 6/7 weeks, commencing October 24, 2018, through January 7, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a crane operator in the shipping department. Petitioner's job duties included pulling and picking up pallets and scanning them. Petitioner was also required to lift items which weighed 15 to 50 pounds. Prior to the accident of May 25, 2018, Petitioner had no low back or leg pain.

On May 25, 2018, Petitioner was in the employee breakroom and he slipped/fell when he stepped on the skin of a banana. Petitioner testified he fell at an angle and experienced left lower back pain and pain in his right leg/ankle.

At the direction of Respondent, Petitioner was evaluated at Midwest Occupational Medicine by Dr. Bradley Breeden on May 25, 2018. When seen by Dr. Breeden, Petitioner complained of left lower back and right ankle pain. Dr. Breeden diagnosed Petitioner with a lumbar contusion and right ankle strain. He directed Petitioner to use an Ace wrap on his ankle and use over the counter medications for pain. He authorized Petitioner to return to work the following day, May 26, 2018. This was the only occasion Petitioner sought Dr. Breeden (Petitioner's Exhibit 1).

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. Dr. Stark saw Petitioner on May 29, 2018. At that time, Petitioner advised Dr. Stark that he had sustained an injury at work when he slipped on a banana. Petitioner stated he hurt his right ankle and fell on

the left side of his lower back. Dr. Stark treated Petitioner through June 18, 2018, and imposed work restrictions (Petitioner's Exhibit 2).

At trial, Petitioner testified he went to the ER of SLU Hospital on June 10, 2018, because he was having severe low back pain and pain/numbness in his right leg. According to the medical record, Petitioner sustained a work-related injury and was seen by the company's physician who "did nothing." Petitioner complained of low back pain and burning pain down the right leg. Petitioner was diagnosed with low back pain with sciatica, given pain medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently seen in the ER of Touchette Regional Hospital on June 14, 2018. At trial, Petitioner testified that on June 14, 2018, he had a work restriction of doing a sit down job, but Respondent assigned him to work duties inconsistent with his restriction. Petitioner said he worked for about an hour and, because his back pain became intense, he went to HR. Petitioner was informed he could leave and went directly to the ER of Touchette Regional Hospital.

The ER record of Touchette Regional Hospital noted Petitioner had sustained a work injury on May 26, 2018, and had low back and right leg pain. Petitioner was diagnosed with a lumbosacral sprain with sciatica, prescribed medication and discharged (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. David Raskas, an orthopedic surgeon, on June 19, 2018. At that time, Petitioner advised Dr. Raskas of the work-related accident of May 25, 2018, and that he had low back pain which radiated into the right lower extremity. Petitioner also complained of numbness/tingling in the right leg. Petitioner advised Dr. Raskas he was seen in an ER on June 16, 2018 because of severe low back pain (Petitioner's Exhibit 5).

Dr. Raskas authorized Petitioner to be off work and ordered an MRI scan. The MRI was performed on July 10, 2018. According to the radiologist, the MRI revealed disc bulges at multiple levels and a right paracentral protrusion at L5-S1 resulting in a mass effect on the right S-1 nerve root. Dr. Raskas saw Petitioner on July 17, 2018, and reviewed the MRI. At that time, Dr. Raskas recommended Petitioner undergo a right epidural steroid injection, but Petitioner declined to undergo same. Dr. Raskas ordered physical therapy and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Petitioner received physical therapy at Touchette Regional Hospital from July 27, 2018, through September 17, 2018. According to the physical therapy records, Petitioner was diagnosed with lumbar radiculopathy (Petitioner's Exhibit 4).

When Dr. Raskas saw Petitioner on October 16, 2018, he noted Petitioner still had complaints of low back and right leg pain. He again reviewed the MRI and opined it revealed a herniated disc at L5-S1. He referred Petitioner to Injury Specialists for an epidural steroid injection on the right at L5-S1 (Petitioner's Exhibit 5).

Petitioner was seen at Injury Specialists on December 21, 2018, and January 2, 2019. On those occasions, Dr. Tong Zhu administered epidural steroid injections on the right at L5-S1 (Petitioner's Exhibit 6).

On January 3, 2019, Petitioner was driving his car in St. Louis and his back "locked up" on him. At that time, Petitioner was a couple of blocks from Barnes-Jewish Hospital. Petitioner went to the ER of Barnes-Jewish Hospital. According to the ER record, Petitioner sustained an injury approximately six months prior and had a steroid injection about one week ago. On January 3, 2019, Petitioner experienced an "acute worsening" of his low back pain with radiation in to the right buttock/leg. Petitioner was diagnosed with an acute exacerbation of chronic low back pain and sciatica on the right side (Petitioner's Exhibit 8).

Dr. Raskas again saw Petitioner on January 8, 2019. At that time, Petitioner advised Dr. Raskas that Respondent required him to perform work duties inconsistent with his restrictions. Petitioner continued to work until the pain became so severe he sought treatment at the ER of Barnes-Jewish Hospital on January 3, 2019. Dr. Raskas ordered various lab tests and indicated that if they were abnormal, he would order a new MRI with and without contrast. He also authorized Petitioner to be off work (Petitioner's Exhibit 5).

Petitioner underwent the lab tests which were ordered by Dr. Raskas. Based upon the number of abnormal test results, Dr. Raskas ordered the MRI with and without contrast (Petitioner's Exhibit 5).

The MRI with and without contrast was performed on March 25, 2019. According to the radiologist, the MRI revealed central broad-based protrusions at L3-L4 and L4-L5 and a central focal protrusion at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on April 29, 2019. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and diagnostic studies provided to him by Respondent. Dr. deGrange opined Petitioner had a herniated disc at L5-S1 which was caused by the accident of May 25, 2018. He recommended Petitioner undergo a microdiscectomy at L5:S1; that Petitioner could work with restrictions and was not at MMI (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Raskas saw Petitioner on May 6, 2019, and Petitioner continued to complain of low back and right leg pain. Dr. Raskas reviewed the MRI and opined it revealed a protrusion at L5-S1. He opined Petitioner had a herniated lumbar disc with lumbar radiculopathy. Given the fact Petitioner had back problems for over a year and did not get improvement with injections, therapy and activity modifications, he recommended Petitioner undergo discography at L3-L4, L4-L5 and L5-S1 with a CT scan to determine if an annular tear was the cause of his pain symptoms (Petitioner's Exhibit 5).

In a narrative report dated June 10, 2019, Dr. Raskas noted Respondent had authorized a microdiscectomy for Petitioner. He opined this procedure would likely fail and renewed his recommendation Petitioner undergo discography. Dr. Raskas also opined that, in all likelihood, Petitioner would need either a fusion or disc replacement at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included the records of Dr. Raskas in which he recommended Petitioner undergo discography. In a report dated July 11, 2019, Dr. deGrange opined that there was no "reasonable medical basis" for

Petitioner undergoing the discography recommended by Dr. Raskas. Dr. deGrange referenced a number of authoritative studies/articles which concluded discography had a high error rate and increased the risk of disc problems in patients (Respondent's Exhibit 3; Deposition Exhibit E).

Dr. Raskas saw Petitioner on August 13, 2019. At that time, Petitioner informed him the "other physician" had recommended a microdiscectomy and did not believe in discography. Dr. Raskas noted there were some shortcomings of discography, but there were positive attributes in the treatment and diagnosis of chronic low back pain. Dr. Raskas specifically noted the North American Spine Society's Coverage Policy recommendations regarding discography which noted it could be used effectively in diagnosis and treatment of chronic back pain (Petitioner's Exhibit 5).

On September 16, 2019, Petitioner underwent a discogram at L3-L4, L4-L5 and L5-S1. According to the radiologist, the study was negative at L3-L4 and L4-L5, but positive at L5-S1. At L5-S1, Petitioner complained of severe central low back pain and the study revealed annular tears into the epidural space. A post discogram CT scan was performed which revealed a fissure/protrusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas subsequently saw Petitioner on November 15, 2019, and reviewed the diagnostic studies. He opined Petitioner should have surgery, either disc replacement or a fusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas again saw Petitioner on December 27, 2019. At that time, Petitioner informed him he wanted to undergo fusion surgery. Dr. Raskas noted this would be a "staged" surgical procedure which would consist of two separate surgeries. The first surgery would be a lumbar discectomy and fusion with cage/plating. The second surgery would be a facet fusion with decompression (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included reports of the discography and CT scan as well as Dr. Raskas' surgical recommendation. Dr. deGrange opined there were "confounding results" and inconsistencies in Petitioner's complaints. He opined the discography and CT scan were medically unnecessary and disagreed with the recommendation Petitioner undergo fusion surgery. Further, Dr. deGrange opined that it was not clear that any surgery would benefit Petitioner and he rescinded his prior recommendation Petitioner undergo a microdiscectomy (Respondent's Exhibit 3; Deposition Exhibit F).

Petitioner was last seen by Dr. Raskas on March 30, 2020. At that time, Dr. Raskas reviewed Dr. deGrange's report of January 30, 2020. Petitioner's complaints and findings on examination were consistent with what they had been previously. Dr. Raskas noted he disagreed with Dr. deGrange's opinion that surgery would not benefit Petitioner. He continued to impose light duty/sedentary work restrictions (Petitioner's Exhibit 5).

Dr. deGrange was deposed on June 2, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. deGrange's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. deGrange testified that when he examined Petitioner on April 29, 2019, he diagnosed Petitioner with a

herniated disc at L5-S1 and recommended Petitioner undergo a microdisectomy (Respondent's Exhibit 3; pp 16-19).

In regard to the discography and CT scan, Dr. deGrange testified these were not medically necessary. He also stated a staged fusion was not medically necessary and recanted his prior surgical recommendation (Respondent's Exhibit 3; pp 24-27, 34-37).

On cross-examination, Dr. deGrange agreed that the treatment and diagnostic studies Petitioner underwent prior to his examination of him were medically appropriate. He also agreed Petitioner's subjective complaints were consistent with the objective findings on examination and diagnostic studies. Dr. deGrange was questioned about the "inconsistencies" of Petitioner's symptoms in what he told him and what he read in the records; however, he could not specifically identify what they were. Dr. deGrange reaffirmed his opinion that surgery was not appropriate for Petitioner, but he had no treatment recommendations (Respondent's Exhibit 3; pp 70-74, 82-83).

Petitioner testified that Respondent terminated his employment on March 16, 2020. However, Respondent continued to pay Petitioner temporary total disability benefits through June 8, 2020. When Petitioner's temporary total disability benefits were terminated, he subsequently obtained a part-time job on July 22, 2020, with Hire Level, a temporary employment agency. Hire Level provided Petitioner with work which conformed to his work restrictions until August 21, 2020. At that time, Petitioner stopped working because being on his feet too long and bending aggravated his back symptoms to the point to where he could no longer work.

Petitioner testified he has had low back pain since he sustained the accident. Petitioner continues to have right leg pain as well as numbness and shock type sensations. Petitioner stated he is fallen several times because of his right leg symptoms. Petitioner wants to proceed with the fusion procedure as recommended by Dr. Raskas.

Petitioner worked for Respondent with restrictions from October 24, 2018, through January 7, 2019. Respondent did not dispute its liability for temporary partial disability benefits during this period of time; however, Respondent did not pay any temporary partial disability benefits to Petitioner. Petitioner tendered into evidence Petitioner's wage records for that period of time as well as a computation of the temporary partial disability benefits owed which were $154.77.

From July 22, 2020, through August 21, 2020, Petitioner worked for Hire Level. Petitioner tendered into evidence his paycheck stubs for that period of time as well as a computation of the temporary partial disability benefits owed to him which amounted to $357.32.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of May 25, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on May 25, 2018.

The Arbitrator acknowledges that when Petitioner initially sought medical treatment following the accident, he complained of left lower back pain. It was not until Petitioner was seen in the ER of SLU Hospital on June 20, 2018, that Petitioner complained of right leg pain.

The fact that Petitioner did not experience right leg pain immediately after or shortly after the accident, does not, in and of itself, constitute a basis to dispute causal relationship.

There was no dispute Petitioner was diagnosed with a herniated disc at L5-S1 by Dr. Raskas, Petitioner's treating physician, and Dr. deGrange, Respondent's Section 12 examiner.

Further, Dr. deGrange agreed the herniated disc at L5-S1 was causally related to the accident of May 25, 2018.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The dispute regarding the reasonableness and necessity of medical services is primarily limited to the discography and CT scan ordered by Dr. Raskas.

Dr. deGrange, Respondent's Section 12 examiner, opined that discography was not appropriate and referenced authoritative studies/articles which concluded that there was a high error rate and increased risk of disc problems in patients.

Dr. Raskas, Petitioner's treating physician, acknowledged there were some shortcomings with the use of discography, but there were positive attributes in their use for the treatment and diagnosis of chronic back pain. Dr. Raskas specifically noted the North American Spine Society Coverage Policy recommending the use of discography.

The discography at L5-S1 was positive, which was a finding consistent with the prior diagnosis of disc pathology at that level.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (K) Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment, including, but not limited to, the fusion surgery recommended by Dr. Raskas.

In support of this conclusion the Arbitrator notes the following:

Dr. Raskas has treated Petitioner for approximately two years. Dr. Raskas initially treated Petitioner conservatively with physical therapy and injections. Ultimately, Dr. Raskas recommended Petitioner undergo either disc replacement or fusion surgery. Petitioner has decided to undergo fusion surgery.

Respondent's Section 12 examiner, Dr. deGrange, opined Petitioner had a herniated disc at L5-S1 and recommended a microdiscectomy. However, Dr. deGrange subsequently recanted that recommendation and presently has no recommendation whatsoever for treatment.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (L) Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary partial disability benefits of $512.09.

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, June 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020.

In support of these conclusions the Arbitrator notes the following:

Respondent did not dispute Petitioner's entitlement to temporary partial disability benefits of 10 6/7 weeks and Petitioner's computation of temporary partial disability benefits owed was unrebutted.

Petitioner was under active medical treatment and either authorized to be off work completely or subject to work restrictions which were not accommodated by Respondent.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not exceed his two choices of chains of medical providers.

In support of this conclusion the Arbitrator notes the following:

Following the accident, Petitioner was directed by Respondent to go to Midwest Occupational Medicine where he was evaluated by Dr. Bradley Breeden. While Dr. Breeden apparently provided some treatment, he was not a medical provider chosen by Petitioner.

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. This was Petitioner's first choice of a medical provider.

As noted herein, Petitioner later sought medical treatment at three emergency rooms. At trial, Petitioner testified he sought treatment on those occasions because of his severe low back and right leg symptoms.

Section 8(a) of the Act, excludes "emergency treatment" as one of the medical providers "chosen by the employee."

In the case of *Wolfe v. Industrial Commission*, 416 N.E.2d 280 (Ill. App. 4th Dist. 1985) the Appellate Court held that Petitioner's seeking treatment at an ER constituted a choice of a medical provider. In that case, Petitioner testified he went to the ER because his treating physician was not available to see him. However, Petitioner was, in fact, seen by his treating physician the same day he went to the ER and made no effort to contact his physician prior to going to the ER. Under these circumstances, the Arbitrator ruled Petitioner's seeking treatment at the ER was a "choice" of a medical provider. This ruling was then upheld by the Commission, Circuit Court and Appellate Court. *Wolfe* at 286.

The factual circumstances in the *Wolfe* case are clearly distinguishable from the circumstances in the instant case. On all three occasions, Petitioner sought "emergency treatment" because of his severe low back and right leg pain.

None of the three ER visits made by Petitioner constituted a choice of a medical provider under Section 8(a) of the Act.

When Petitioner sought treatment from Dr. Raskas, this was the second choice of a medical provider.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse no occupational disease	☐ Second Injury Fund (§8(e)18)
X NO CC, compensation denied	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DALE BASIL,

Petitioner,

vs. NO: 16 WC 16172

PATTON MINING, LLC.,

Respondent.

21IWCC0155

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, causal connection, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner is 61 years old, married and resides in Kincaid, Illinois. After he graduated from high school, he enrolled at Lincoln Land Community College studying to become an arborist. He did not receive a degree or certificate. Petitioner testified he worked in the coal mines for 33 years, all underground. He testified that he had regularly been exposed to coal dust, silica dust and roof bolting glue fumes. (T.7-9)

Petitioner was employed as a mine shuttle car operator for Respondent since 2011. Petitioner first started working in coal mines in 1977 at Peabody Coal Company in Pawnee, Illinois. He was hired as a supply-man. This entailed loading supplies and transporting them to certain sections. In that position he went all over the mine; he did that job for a couple of years. (T.12-13)

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Petitioner also worked as a recovery-man. After the coal was mined, they went in and removed everything out of a section and transported it to the belt section. This included removing I-beams which caused it to cave in. Petitioner testified that that was a very dusty job. When they recovered the belt line, there was coal mine dust left on the fan line. They flipped it to take it somewhere else, which was a very dusty job. They had to pull the pillars and the air would hit you in the face. Petitioner performed that job for about 6-7 years. (T.13-15)

At Peabody Mine, Petitioner also performed roof bolting which involved drilling into the top and anchoring a bolt in at least a foot of rock. He would place the bolt in, secure and tighten it. In the 1980's, they just had a "cob" which spread and tightened it up. At that time, they were not using glue pins. Roof bolting was the last position he held at Peabody. (T.15-16)

Petitioner next worked at Crown III, owned by General Dynamics, starting in 2000-2001, as a shuttle car operator. In that position, he ran a ram car, a shuttle car without a cable. The car was battery operated and he would run the car up to the miner, get a load of coal, return to the belt and drop it off. He would go up to the face where they were cutting out the coal. Petitioner testified the dust level was pretty bad as the coal was coming off of the tail of the miner and coming right at him. Petitioner performed that job for 4-5 years. (T.16-17)

Petitioner then obtained a job hauling rock dust in a ram car. The dust was hauled and spread to make the coal mine white and prevent fires. When he went to the location, he would hit a lever and it paddled the dust, slinging it everywhere. Petitioner had to keep pushing the dust to the paddles until it was empty and then return for another load. Petitioner described this as driving the car in the middle of a dust storm. Petitioner held that position for 4-5 years. Petitioner also performed roof bolting when people were not there. (T.17-19)

When Petitioner performed roof bolting at Crown, it was different than at Peabody. Times changed, he testified, and they started using glue pins. Petitioner had to drill the hole and get to a foot of rock. Before he put the pin in, he put in a stick of glue and pushed and spun it. He stated that would mix the glue and tighten it for about 90 seconds. Petitioner testified the glue sticks would break open emitting a very strong odor. At times the odor would take your breath away. He had performed all 3 jobs at Crown. (T.19-20)

Petitioner next worked at mine Federal #2 in West Virginia for about 11-12 months to get his medical card. In the mine, Petitioner performed the roof bolting job. Petitioner testified the mine there was very similar to the Illinois mines. Petitioner then returned to Illinois. (T.20-21)

Petitioner started at Respondent's mine, Patton Mining or the Deer Run Mine, as a shuttle car operator in 2011. This entailed driving the machine to the miner, loading the coal and taking it to the belt. He did not perform roof bolting there because they thought he was getting too old for that job. (T.21-23) Petitioner last worked at Deer Run Mine on March 25, 2015. He was 58 at that time. Petitioner testified that he was exposed to coal mine dust on that date. On that day, they had a hot spot/fire and the mine had ceased operating. He chose not to seek other mining employment after that time. He ran a tree service, Midland Tree Service, after that with his son where he trimmed trees, took down trees and ground tree stumps. He did not climb; he worked out of a bucket. He earned between $20,000 and $50,000 annually. The decline in business was because

he did not have stamina any longer. He testified he was "getting too old or something." Petitioner has had no other jobs since that time. (T.9-12)

Petitioner testified that in the early 1990's, he started noticing breathing problems. At that time, he noticed he was not able to walk as far, and testified it was "just my stamina." When he went back into the mine, the breathing problems started to get worse. Since the time he left mining up until the Arbitration hearing, Petitioner testified, his breathing problems have gotten a little worse. (T.23-24)

Petitioner does not take any medications for breathing. With activities of daily living, he stated he likes to walk and exercise, but he is not able to go as far; he can probably walk about a mile. When asked how many stairs he is able to climb before he has to rest, Petitioner testified he does not really know, and he tries to stay away from using stairs. When asked if there were other things specifically in life that breathing affects, he responded, "No." Petitioner testified he used to be able to cut a big tree and clean it up with no problem. Petitioner stated he now tries to leave the big trees for his son to do as he does not have the energy to do it like he used to. (T.24-25)

Petitioner treated with Dr. Manson, his family doctor, until Dr. Manson's retirement. Since then, Petitioner has seen Dr. Del Valle. Petitioner testified he did not really talk to his doctors about his breathing issues. His main concern was his throat and acid reflux. Petitioner testified that his doctors were aware he was a coal mine worker. He testified that he has never been a smoker. (T.25-26)

Petitioner indicated his acid reflux began when he had problems swallowing and he had gone to West Virginia. He had his throat stretched 5 times since his return from West Virginia. He was on a pill for acid reflux and cholesterol. Aside from the breathing issues, acid reflux and throat issues, Petitioner testified that he has had no other health issues. Petitioner was still taking a cholesterol pill, but his doctor wanted to take him off it soon. Petitioner was taking no other medications. (T.26-28)

On cross examination, Petitioner testified that he was hired by Respondent around November 14, 2011. He agreed he had left Respondent's mine as a result of a mine fire. He was laid off. Had he not been laid off, Petitioner would have reported to his next shift as he had a mortgage and still needed to keep going. The mine had been sealed off around January 2016 and he was let go at that time. (T.28-29)

Petitioner agreed he had worked for Peabody and Freeman Coal or General Dynamics at Crown III. They were both UMWA mines. Petitioner did receive his pension from his mine employment. He received credit for 27 years. He testified they took 48% as he was not yet 55 years old. (T.29)

Petitioner testified he had gone to West Virginia for the medical card. With UMWA if you had 20 years you could get a medical card. When he left Farmersville mine he did not have the card so he had to go elsewhere for it. Petitioner was on the Peabody panel so he went to West Virginia and got his medical card locked in before he returned home. The medical card pays for everything less a $20 co-pay. The pension he received was for his years with UMWA. He had not

yet applied for social security but would do so in June given his age. (T.29-31)

Petitioner agreed his attorney sent him to Dr. Suhail Istanbouly for an examination. He had also gone to Methodist Hospital located in Henderson, Kentucky, for testing at Respondent's counsel's request. Other than those two sites for testing, Petitioner had not seen anyone else regarding this case. (T.31-32)

Petitioner agreed he treated with Dr. Manson and Dr. Del Valle in Taylorville, Illinois. He testified that he had been honest with the doctors about his complaints. (T.32-33)

Petitioner agreed over the years, from time to time, he had x-rays, screening by NIOSH for Black Lung. He believed he had been told the x-ray results, but it had been a long time ago and he did not recall the results. He did not bring any letters to the hearing. (T.33)

Petitioner testified the tree trimming business is a very physical job. He stated he has a 60-foot bucket truck and you start trimming trees and as you go up, taking off limbs. Then you "chunk" it as you come back down and clean up with a woodchipper and backhoe. Petitioner testified he does not have a CDL and it is not required because the bucket truck is not that big or heavy. Petitioner testified the work requires quite a bit of lifting and carrying and that is why he has a backhoe. He testified some of the logs can weigh in the tons, but he does not personally lift those. He does not lift over 50 pounds. The time it takes to take down a tree depends on the size and situation. He stated some can be 2-3-day jobs. (T.33-36)

Petitioner testified he tries to walk regularly for exercise in the summer. He used to walk 2-3 miles, but he cannot walk that far anymore. He has a small dog that he does not walk. He stated he walks and does the tree service business. He no longer has hobbies. He did some woodworking, making small things like baby rockers as his specialty. In his shop he was doing a little bit of woodworking and he watches TV when not doing tree service. (T.36-37)

Medical Records

The medical records of Springfield Clinic (RX 4) show numerous visits beginning in 1994. On January 25, 1994, Petitioner's chest x-ray showed an essentially normal chest radiograph. During 1998, Petitioner returned regarding ear problems. At that visit, a respiratory exam revealed good air bilaterally and no adventitious sounds. No complaints related to breathing were noted. Petitioner was seen on April 22, 2004, for an evaluation of a right inguinal hernia. Physical examination of the chest revealed the lungs were clear to auscultation. The chest x-ray performed on that date showed no active cardiopulmonary disease. No complaints related to breathing or cough were noted.

On February 7, 2006, Petitioner complained of purulent productive deep cough associated with sore throat. Tremendous amount of nasopharyngitis and oropharyngitis was noted. The chest was noted as clear on examination. Petitioner returned on November 8, 2008, for an elevated blood pressure issue and complaining of light headedness. Physical examination of the chest revealed lungs were noted as clear to auscultation. No rales or wheezes were noted. No complaints related to breathing or cough were noted. (RX4)

On March 25, 2012, Petitioner returned complaining of a sore throat, headache, body ache, temperature, and fatigue. He was noted to have a productive cough of brown sputum. No complaints related to breathing were noted. (RX 4)

Petitioner was seen on July 6, 2012, complaining of choking and difficulty swallowing. The assessment was dysphagia. He returned on August 16, 2012 and underwent a chest exam revealing normal findings. A review of systems revealed no pulmonary symptoms.

On November 19, 2013, Petitioner complained of fever and aches. A productive cough with yellow sputum was noted. Petitioner denied chronic respiratory illness. No shortness of breath or chest discomfort was noted. It was noted Petitioner is a non-smoker. Lungs were noted as clear. Petitioner had multiple procedures over time regarding dysphagia. (RX 4)

Petitioner returned to the Springfield Clinic on July 29, 2014, complaining of dysphagia and choking. Petitioner denied shortness of breath, chest pain or chest tightness. Petitioner was diagnosed with GERD. Petitioner had a past history of bronchitis it was noted and never smoked. Respiratory exam revealed clear to auscultation bilaterally, no wheeze. No complaints related to breathing or cough were noted. An esophagogastroduodenoscopy was performed. (RX 5)

Petitioner was seen on October 25, 2014, complaining of headache, sinus drainage, sore throat, and a productive cough for 4 days with occasional colored sputum. Petitioner had reported then that several miners had similar symptoms. The record notes Petitioner has a history of sinus infections in the past. No history of asthma or allergies. Positive history of GERD; no other chronic illnesses. No breathing complaints were noted. (RX 4) A November 12, 2014, emergency room visit was noted regarding his back. No complaints related to breathing, cough were noted. (RX 4). Petitioner returned on December 29, 2014, for unrelated stomach issues. No complaints related to breathing or cough were noted. (RX 4).

On September 18, 2015, the Springfield Clinic medical records indicate Petitioner has a long history of GERD and dysphagia. An EGD was performed on that date which showed a tremendous amount of inflammation and scarring at the gastroesophageal junction. (RX 4) In 2016, Petitioner presented at Springfield Clinic regarding an eye issue. No complaints related to breathing or cough were noted. (RX 4) Petitioner returned on May 4, 2017 and completed a new patient questionnaire. He denied lung disease, asthma and shortness of breath.

He returned on November 2, 2018, for an EGD consult reporting problems swallowing and GERD. Physical exam of the chest revealed the lungs were clear to auscultation and percussion. Review of systems revealed no shortness of breath or cough. (RX 4) An operative report dated November 12, 2018, showed Petitioner underwent esophageal dilation. The 12/18/18 record notes a history of dysphagia. Petitioner's problems were listed as Barrett's esophagus, dysphagia, pre-op GI exam, hyperlipidemia, and GERD. No history of breathing complaints was noted. (RX 4)

Petitioner was seen on May 13, 2019, for EGD. He denied shortness of breath, dyspnea on exertion or proximal nocturnal dyspnea. His review of systems showed he had good exercise tolerance. Physical examination showed the lungs were clear to auscultation bilaterally without

any wheezing. (RX 4)

Petitioner underwent an x-ray examination on May 2, 2016, which was interpreted by Dr. Smith, a B-reader. His interpretation was mild interstitial fibrosis p/p, bilateral mid to lower zones involved, profusion 1/0. No chest wall plaques or calcifications. Simple CWP with small opacities, primary p, secondary p mid to lower zones involved bilaterally. The film quality was noted to be 1. (PX 2)

Spirometry was performed for Black Lung screening on October 4, 2016 and found to be within normal limits. (RX 3)

Testimony of Dr. Istanbouly

Dr. Istanbouly is a physician specializing in pulmonary and critical care medicine. He is board certified in internal medicine, pulmonary medicine and critical care medicine. He has been in practice in southern Illinois for 11 years. His practice is mixed between inpatient and outpatient. In the course of his practice, he has had numerous occasions to treat coal miners and former coal miners. The lung diseases he treats include emphysema, COPD, chronic bronchitis, asthma, CWP, and lung cancer patients. He is affiliated with numerous hospitals and holds privileges at many others in the area. (PX 1, p. 5-7)

Dr. Istanbouly examined Petitioner on August 30, 2016, at Petitioner's attorney's request. He authored a report of his findings of that exam and he identified RX 2 as a copy of his report. He testified he obtained a detailed history from Petitioner, including occupational history. He reviewed the x-ray and spirometry testing. He did a detailed physical exam before he made his conclusions. He noted Petitioner had been a coal miner for 33 years and worked underground. He noted Petitioner had no history of smoking. Petitioner had mentioned that he had a long history of intermittent occasional coughing triggered by strenuous activity or brisk walking. Petitioner reported the cough as mild to moderate in intensity and used to produce milky, mild dark black sputum. But at the time he saw Petitioner, it was clearing up. (PX 1, p.7-9)

Dr. Istanbouly testified the cough and data qualified as chronic bronchitis. He noted Petitioner reported he had the ability to walk 3 miles without breathing problems and had not noticed any decline in respiratory capacity in the prior 6 months. Petitioner had noted wheezing and runny nose on occasion and Petitioner had reported a history of GERD, but that was apparently now under control with medication. As to a runny nose, he testified Petitioner had postnasal drip which was perennial rather than seasonal. He stated wheezing indicated bronchospasm. Chronic bronchitis (cough) is a manifestation of bronchospasm as well, so there was a correlation. The sinus drip indicated inflammation of the nasal mucosa. The mucosa was the same lining affected when you have chronic bronchitis, except further into the bronchial area. (PX 1, p.9-10)

Dr. Istanbouly agreed Petitioner had pulmonary function testing performed and it was within normal range. The FEV1 was 3.65 liters, 144% predicted. The FVC was 4.72 liters, 112% predicted. The FEV1/FVC was 78%. Dr. Istanbouly testified the x-rays revealed mild interstitial changes bilaterally consistent with mild CWP. He stated the profusion, per the B-reader, Dr. Smith, was 1/0. He had decided whether it was positive or negative before he looked at Dr. Smith's report.

He does not use the same terms as a B-reader he stated. Dr. Istanbouly testified, within a reasonable degree of medical certainty, that Petitioner has chronic bronchitis. He stated the cause in this case, or "main culprit", was the long-term coal dust inhalation. (PX 1, p.10-12)

Dr. Istanbouly testified further that per Petitioner's occupational history, chest x-ray, and symptoms, he has CWP caused by long-term coal mine dust inhalation. Dr. Istanbouly testified the Petitioner had normal spirometry, but that is not uncommon, especially with early to mild cases of CWP. Chronic bronchitis is one of the chronic obstructive pulmonary diseases. With the normal pulmonary function test, it did qualify Petitioner to have early stage COPD, which he would put under CWP. (PX 1, p.12-13)

Dr. Istanbouly testified that in light of Petitioner's diagnoses of chronic bronchitis, CWP and COPD, Petitioner should have no further exposure to that environment as it would subject Petitioner to high risk of progressive lung damage. (PX 1, p.13-14) He testified it is medically advisable for Petitioner to permanently avoid further coal dust inhalation. (PX 1, p.14)

Dr. Istanbouly testified that after 33 years of coal dust exposure, a certain percentage of the coal dust Petitioner had inhaled will stay inside his lungs permanently. He agreed the weight of a coal miner's lungs can be accounted for by the trapped coal mine dust in his lungs but was unsure if it was 50% of the weight of the lungs. He agreed the trapped coal dust would be exposed to the lung tissue for the rest of his life. There is still the coal dust trapped in Petitioner's lungs and that, though not active current exposure, could still lead to further lung damage. Lung function and lung damage keeps getting worse despite quitting the coal mining career. (PX 1, p.14-15)

Dr. Istanbouly testified that the most accurate way to diagnose CWP would be pathologic versus radiologic. He agreed that the combination of a positive x-ray for CWP along with sufficient exposure to cause CWP, was sufficient for him to diagnose CWP. He testified a negative x-ray would not necessarily rule out the existence of CWP. He would agree a recent study showed that 50% of long-term coal miners were found to have CWP on autopsy, even though it was not found on x-ray during their life. He stated the pattern of progression of CWP may vary. He agreed over decades, miners have died from advanced CWP. At some point they would have had CWP seen at a pathogenic level. It possibly would have progressed to 1/0 level, early radiologic significant CWP and possibly continued to progress to be at the life-threatening stage and eventually took their life. (PX 1, p.15-18)

On cross examination, Dr. Istanbouly agreed he had seen Petitioner one time at Petitioner's attorney's request. He does 5-7 such exams per month, for state Black Lung claims, always at the request of claimants' attorneys. He has been doing that for about 7 years. (PX 1, p.18.)

Dr. Istanbouly agreed Petitioner relayed no past history of respiratory disease. Petitioner had relayed an occasional cough that had only been triggered by strenuous activity or brisk walking, not dust, smoke or fumes. He agreed currently the cough produced little sputum. Petitioner had reported no significant dyspnea. Petitioner had suffered from a runny nose on a perennial basis; it could be associated with cough. He agreed Petitioner was not taking any medications for breathing and he had no history of ever taking breathing medications. Petitioner was taking medication for GERD and that condition is associated with cough. (PX 1, p.18-20)

Dr. Istanbouly testified that he had reviewed medical records regarding Petitioner. He reviewed the exam and narrative report of Dr. Smith, a B-reader, before he examined Petitioner. He agreed Petitioner's O2 saturation was normal at 96%. He agreed Petitioner's chest exam revealed no adventitious sounds, including wheeze. Dr. Istanbouly agreed there was no sign of disease on the physical examination of Petitioner's chest stating, "It was within normal range." He agreed Petitioner's Forced Vital Capacity, evaluated by spirometry, was 112% of predicted which was normal. He did not perform lung volumes on Petitioner which, he agreed, would be the best test. He agreed Petitioner's Forced Expiratory Volume was 114% of predicted, which was normal. He agreed FEV1/FVC ratio was 78%, which was greater than predicted, and was normal. This ruled out obstruction. (PX 1, p.20-22)

Dr. Istanbouly testified he subscribes to the GOLD (Global Initiative on Obstructive Lung Disease) standard to diagnose COPD. He agreed the GOLD standard states that spirometry is required to make a clinical diagnosis of COPD. He stated spirometry ruled out COPD per PFT criteria, but not on a clinical basis. On a clinical basis, the diagnosis was made per the history indicating long-term coal dust inhalation and a long history of intermittent coughing and wheezing. He stated it was early stage because the spirometry test was normal. The clinical diagnosis was based on what Petitioner told him, Petitioner's occupational history and the x-ray findings. (PX 1, p.22-24)

Dr. Istanbouly testified if one comes to him as a coal miner, he does not necessarily have a higher suspicion of the presence of COPD. He stated he does not diagnose COPD frequently, but he does know they have a risk factor for COPD. Dr. Istanbouly agreed Petitioner did not report he left work due to respiratory problems or symptoms. He further agreed Petitioner did not tell him he had difficulty performing the duties of his last job in the mine. (PX1, p.24)

Dr. Istanbouly testified he does not possess the standard ILO films used to interpret chest x-rays for Black Lung. He agreed he was neither an A-reader nor B-reader. Dr. Istanbouly agreed when he interprets films for Black Lung, he classifies them as early, moderate or severe and he classified Petitioner's films as early Black Lung. He agreed with Dr. Smith who noted the only opacities present in Petitioner's lungs were in the mid and lower lung zones. Dr. Istanbouly agreed he did not provide profusion ratings for the films and he could not say whether this film had a 1/0 or 0/1 profusion. (PX 1, p.24-25)

Dr. Istanbouly agreed his sole diagnosis listed in his report was coal worker's pneumoconiosis, early stage. (PX 1, p.26)

Testimony of Dr. Meyer

Dr. Meyer is a board-certified radiologist and certified B-reader, through 12/31/18. He graduated from the University of Virginia in 1983 with a BS in chemical engineering, graduated with honors, the highest distinction. He attended Washington University School of Medicine in St. Louis and obtained his M.D. in 1987; he is a member of Alpha Omega Alpha the medical honor fraternity. He did an internship from July 1987 to June 1988 at Tripler Army Medical Center in Honolulu and he completed his residency in diagnostic radiology at Walter Reed Army Medical

Center in D.C. (RX 1, p.4-8)

Dr. Meyer was Chief Resident at Walter Reed from 1991 to 1992. He became board certified in radiology and has been certified since 1992. He became Chief of Thoracic Imaging at Madigan Medical Center in Tacoma in 1992. There he was in charge of all imaging procedures related to the chest, which included chest x-rays, CT scans and all biopsy procedures. He was also in charge of training Army residents in thoracic imaging and preparing them for their boards. He remained at Madigan until 1996 when he became an Assistant Professor of Radiology at the University of Maryland Medical System in Baltimore. (RX 1, p.8-10)

Dr. Meyer testified that at the University of Maryland, the subjects were fairly diverse in chest imaging, including interpretation of conventional chest radiograph, interpretation of films in the intensive care unit, high resolution CT of the chest, and some subspecialty in high resolution CT, like small airways. He was also the primary interventional chest radiologist, teaching residents how to perform biopsy procedures. There, he often reviewed articles and manuscripts for various professional journals for possible publication. He served and continues to serve on several journals as a manuscript reviewer with his expertise in thoracic imaging. (RX 1, p.10-11)

Dr. Meyer became an Associate Professor of Radiology at University Hospital in Cincinnati in 1998. His area of subspecialty was thoracic imaging. He taught interventional chest radiology, interpretation of chest x-rays, CT scans, and high-resolution CT scans. He had received the Spitz award for excellence in teaching residents. (RX 1, p.11-12)

Dr. Meyer became an Associate Professor of Radiology at Indiana University Hospital in Indianapolis in 2000. He also taught at Indiana University. He returned to Cincinnati in 2003 and for a time was in private practice and then joined University Hospital. (RX 1, p.12-14)

Dr. Meyer remained there until 2010 when he accepted his current position as Vice Chair of Finance and Business Development and Professor of Diagnostic Radiology at the University of Wisconsin Hospital in Madison. He had been contacted by Wisconsin University and recruited to join them in his current position. He works in clinical radiology about 50% of the time, interpreting x-rays and CT scans 2-3 times per week. About 20% of his time is academic and he also performs administrative work. He reviews 200-250 chest x-rays per week and 20-40 chest CT scans per week. (RX 1, p.14-18)

Dr. Meyer agreed when he was in Cincinnati in 2008-2009, he was recognized with the Benjamin Felson Medical Student Teaching award, an honor for teaching medical students. He noted Dr. Felson was considered the father of chest radiology and one of the originators of the B-reading classification system. (RX 1, p.19-20)

Dr. Meyer stated B-reading is an epidemiologic evaluation of the chest x-ray. He stated there is a very specific form developed to evaluate the chest x-ray for the presence or absence of occupational lung disease. They describe the quality, limitations of the x-ray and the classifications of the abnormalities. They describe any small nodular opacities or linear opacities and based on size and appearance of the small opacities, assign them a letter score. He stated P, Q, R are nodular opacities; S, T, U are linear opacities. They describe the distribution of the findings. Different

pneumoconiosis are seen in different regions of the lung. He stated it was important as CWP is typically predominantly an upper zone process and other idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. It is very important to show small opacities and their distribution on the form. (RX 1, p.23-24)

Dr. Meyer stated the last component of the lung involvement piece for small opacities is the extent of lung involvement, the so-called profusion. That is the most difficult component of the classification system for most radiologists and varies from 0/0 (normal) to 3/+ which is the most abnormal. The large opacities are separate categories for pleural disease. There are also miscellaneous findings like atherosclerotic calcifications (granulomas). (RX 1, p.24-25)

Dr. Meyer indicated the P, Q, R opacities are for progression of size. The S, T, U opacities are for progression of the linear. He agreed the film must be graded first. He indicated on a regular camera it is easy to over or under expose and the same was true for analog x-ray. If underexposed, they are extremely white and have a tendency to artificially increase the look of opacities in the lung parenchymal. If overexposed, it is too dark and this can artificially make the small opacities disappear. If there is mottle on the x-ray, the film may look grainy and that can simulate small opacities. When underexposed it tends to accentuate pulmonary vasculature and you have to be careful not to mistake that for a nodule or opacity. If a film is graded as UR, or unreadable, they do not complete the rest of the form. (RX 1, p.26-29)

Dr. Meyer indicated it was important to identify opacities as specific opacity types. Silicosis and CWP are characteristically small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, are described by small linear or small irregular opacities. The B-reader describes primary and secondary, to decide which the predominant shape is. Often they are mixed. You can see 2 different sizes of round opacities. Sometimes a primary could be Q and secondary R. (RX 1, p.29-30)

Dr. Meyer testified the distribution of dust exposure depends on the particles involved. Small particles like silica and coal are upper zone processes. He stated they expect CWP and silicosis early in disease to be upper zone predominant. (RX 1, p.30-31)

Dr. Meyer agreed profusion is the hardest definition. It is trying to define density of the small opacities in the lung. If normal, it is profusion "0". The most abnormal would be 3. Threshold implies mild amount of disease. A "2" would be medium profusion and "3", severe involvement of the lung. He indicated 0/1 he would say normal, but may be a little abnormal. He indicated a 1/0 would be borderline between abnormal and normal. (RX 1, p.31-32)

Dr. Meyer stated it was important to be able to recognize simple variations between normal and abnormal. Radiologists who are used to chest x-rays can compensate for over or underexposure on x-rays. (RX 1, p.36-37)

Dr. Meyer reviewed the digital PA chest radiograph from Harrisburg Medical Center, dated 5/2/16. He stated the film was quality 1. He stated the film revealed the lungs were clear. There were no small or large opacities. There were some mild degenerative changes in the thoracic spine, but the exam was essentially normal. Dr. Meyer testified there was no evidence of CWP on

Petitioner's chest x-ray. (RX 1, p.41-42)

On cross examination, Dr. Meyer agreed that, notwithstanding Petitioner having a negative reading, he could still have CWP. He agreed CT scans have not been accepted by NIOSH for purposes of B-reading. They do not need contrast CT scan to evaluate interstitial lung disease like CWP. (RX 1, p.42-45)

Dr. Meyer agreed most B-readers prefer not to know anything about the patient, they just want to look at the films for anything consistent with abnormalities of CWP. He assumes when asked to interpret a chest x-ray for B-reading that there was appropriate exposure history and he looks for evidence of CWP. He agreed two B-readers can disagree whether they're seeing small opacities or not. He stated distinguishing between 1/0 and 0/1 opacities is one of the most difficult processes for a B-reader. He stated the issue is making sure the person interpreting the exam has ample experience reading them and can sort out what is a normal variation. Dr. Meyer testified you have to recognize the spectrum of normal. He spent his career as a chest radiologist looking at chest x-rays all day to establish a spectrum of normal. (RX 1, p.47-50)

Dr. Meyer agreed it is possible for one to appreciate the existence of CWP on a CT scan that may have been missed on an analog x-ray. CT scans have a high opportunity to identify abnormalities. He stated symptomatic disease should be evidenced on analog chest x-rays. Dr. Meyer testified pulmonary function testing would not change his opinion of what he read on x-ray, nor would patient complaints of shortness of breath. He testified he treats the x-rays as a piece of hard data and symptoms can vary by individual. (RX 1, p.51-52)

Dr. Meyer agreed long-time coal miners are going to come out with some dust deposits in the lungs; the majority will not have changes in the lungs that qualify for CWP. He stated the manifestation of CWP is based on the body's ability to clear the dust. Dr. Meyer stated there is actually very little inflammation reaction to pure coal dust. He stated what occurs is there is a buildup of dust over time to the point, depending on level of exposure, the amount of dust can be as much as half the total weight of the lungs. A large component is the dust that fails to clear. He stated the presence of coal macule is the pathologic lesion that defines CWP. The coal macule is a conglomerate of white blood cells with the coal dust in it. It may be emphysema on the edges. He stated there may be some mild fibrosis around the coal macule. He stated the lung reacts to coal dust because the dust is typically fairly inert. He stated you see an immunologic response and collection of the white blood cells, some associated with mild fibrosis, adjacent to the macule. (RX 1, p.53-56)

Dr. Meyer agreed whether measurable or not there would be some change in the function of the lung. He agreed that with mixed dust exposure (i.e., coal and silica dust), there may be more toxicity to lung tissue. The macules then may be different shapes, sizes and locations in the lungs. It is called coal workers pneumoconiosis (not coal pneumoconiosis) as there are mixed dusts in the mine, not just coal dust. (RX 1, p.56-57)

Dr. Meyer agreed the macule of CWP is a permanent abnormality. It can progress depending on the individual macule or more dust. He testified that to his knowledge, there is no medication to stop or reverse the progression; however, it may improve by removing the exposure.

He agreed CWP can be considered a chronic progressive disease in some coal miners, and it can progress after leaving the mine exposure. Dr. Meyer agreed if a miner had CWP in their lifetime, they probably had it at some level when they left the mine. He agreed a susceptible host can progress to progressive massive fibrosis; it can impair pulmonary function. It can progress to involve the heart with cor pulmonale, which can be life threatening if significant enough. (RX 1, p.57-59)

Dr. Meyer agreed x-rays can be interpreted as demonstrating findings of emphysema or COPD. On chest x-ray they often look for secondary signs of emphysema, often directly seeing the lung destruction on CT scan. A finding of COPD or emphysema can be consistent with hyperinflation. Often the diaphragm will flatten. CWP may first appear radiographically and then become more significant, affecting pulmonary function. (RX 1, p.59-61)

Dr. Meyer agreed CWP is a chronic, slowly progressive disease; not acute, sudden onset. Not all coal miners develop a tissue reaction to the dust. Some may be sensitive and have extreme reaction; it depends on composition of the dust itself. Dr. Meyer agreed it was possible for a miner to work 30-40 years and develop radiographically significant CWP after they leave the mine. (RX 1, p.73-76) Dr. Meyer agreed it is possible for a miner to have CWP determined by pathology and not appreciated radiographically. It is possible a miner can have differing radiograph B-reader opinions and found CWP on autopsy/biopsy. He stated it shows radiograph has limitations relative to looking at tissue samples. (RX 1, p.86-87)

On re-direct examination, Dr. Meyer agreed pathologic basis would mean looking at lung tissue under a microscope. Dr. Meyer stated typically simple CWP will not progress once exposure ceases. He testified that Petitioner has neither progressive massive fibrosis nor cor pulmonale. He testified the films did not show evidence of bulla or hyperinflation. (RX 1, p.89-90)

Dr. Meyer's 11/9/16 B-reader report noted film quality 1. He noted no radiographic findings of CWP. He disagreed with Dr. Smith's interpretation. (Dep. Exhibit 3)

Testimony of Dr. Castle

Dr. Castle is a pulmonologist. He is board certified in internal medicine and his subspecialty is in pulmonary disease. He graduated from West Virginia School of Medicine in 1969. He completed his first-year internship at Charlotte Memorial Hospital and later attended University of Florida for internal medicine. He completed his residency in 1972. He joined the Navy Reserve in medical school and deferred entry to the military until finishing school. He went in the Navy as a pulmonary physician at Naval Regional Medical Center in Philadelphia and then Roanoke and opened his practice in 1977. He had been in practice there for 30 years. (RX 2, p.4-7)

Dr. Castle stated his practice is limited to pulmonary disease and chest disease, including critical care medicine, and he later became involved in sleep medicine. He saw usual things like COPD, asthma, pneumonia, interstitial lung disease, and occupational lung disease. He had some patients who had CWP, some simple, some complicated CWP. The biggest group of occupational disease cases were asbestos exposure cases from a railroad engine company. He had older patients

who had significant exposure to asbestos and many had asbestosis. He also did pharmaceutical studies over the years and taught medical students regarding lung disease. (RX 2, p.7-10)

Dr. Castle stopped seeing patients in 2007 and remains semi-retired. He continues with occupational lung disease to the present time. Dr. Castle testified that he became a B-reader in 1985 was certified to 6/30/17. (RX 2, p.10-14) He started doing medicolegal work around 1985 as a minor part of his practice. He performs a complete physical with chest x-ray, spirometry, blood gas, and EKG, sometimes CT scans also. The majority of the cases are federal cases. He may perform 5-6 forensic exams per month. He has performed exams for the Department of Labor. (RX 2, p.14-19) Dr. Castle indicated his forensic reviews of records and films was done primarily for coal mines or employers rather than employees.

Dr. Castle reviewed medical records and films regarding Petitioner at Respondent's counsel's request. He reviewed records of the Springfield Clinic. He reviewed a radiographic report of 1/25/94, indicating the lungs were clear of infiltrates, negative x-ray. He noted there were a number of office notes pertaining to the cardiorespiratory system. There were records of unrelated conditions. He noted records reflected that Petitioner did not smoke and had worked in coal mining and tree trimming. Dr. Castle noted the x-ray report of 4/22/04 that noted no cardiopulmonary abnormality and lungs clear with no mass or effusion. Petitioner had other treatments for lacerations and respiratory infections. The records dated 3/25/12, noted Petitioner was seen for sudden onset of sore throat, headache, body ache, and cough producing brown sputum; lungs were noted clear. Assessment was bronchitis. Dr. Castle stated the 8/6/14 record noted various issues and there was minimal infiltrate or atelectasis in lung bases, more left. He noted various records indicating pain and symptoms of choking and Petitioner had an esophagus issue with dilation. (RX 2, p.21-25)

Dr. Castle reviewed the medical records of Dr. Istanbouly who examined Petitioner on 8/30/16. Those records noted Petitioner had worked in coal mines, underground, for 33 years to 3/15. Petitioner's last job in the coal mine was noted as roof bolting machine operator. Petitioner never smoked. Petitioner's wife smoked, but outside. He had no history of asthma. Petitioner reported cough occasionally and his cough was triggered by strenuous activity or brisk walking. Petitioner had some sputum but recently started to clear. He had nocturnal dyspnea but denied exertional dyspnea. The record noted Petitioner was able to walk three miles without breathing problems and he had not noticed any decline of respiratory capacity in the prior six months. Petitioner did wheeze occasionally. He had frequent heartburn and Petitioner had a normal spirometry test. (RX 2, p.25-26)

Dr. Castle noted Dr. Istanbouly had reviewed a chest x-ray of 5/2/16 and said it indicated interstitial changes bilaterally consistent with simple CWP, profusion 1/0, per Dr. Smith a B-reader. The chest exam revealed normal respiratory effort and lungs clear to auscultation. Dr. Castle noted Dr. Istanbouly's assessment was CWP early stage related to long history of coal dust exposure and had noted spirometry was valid and normal. The record included Dr. Smith's report that indicated p/p opacities in mid to lower lung zones with 1/0 profusion. Diffusing capacity was noted as valid, normal. (RX 2, p.26-28)

Dr. Castle reviewed the records of Dr. Meyer. This included the report of Dr. Meyer on

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the 5/2/16 film indicating no parenchymal abnormalities consistent with CWP, lung fields clear. Dr. Castle testified that cough is not considered to be an objective determinant of pulmonary impairment. He stated chronic bronchitis is a chronic cough productive of sputum, on most days, for 3 consecutive months for 2 years per the definition of the American Thoracic Society. Dr. Castle testified that chronic bronchitis does not appear anywhere in the treatment records he reviewed. (RX 2, p.28)

Dr. Castle agreed Petitioner was diagnosed with GERD and dysphasia with choking. He stated that is associated with a cough, particularly with GERD. Dr. Castle stated it does not have to get up into the lungs or laryngeal area, but it can stimulate the lower esophagus and cause a cough. The same would be true with sinus congestion and drainage. Dr. Castle testified that pulmonary function testing was normal. He stated there was no evidence of obstructive or restriction whatsoever. Dr. Castle agreed the gold standard on obstructive lung disease requires FEV1/FVC to be below 70% to make a clinical diagnosis of COPD. He questioned how you can have chronic obstructive pulmonary disease if there is no obstruction. (RX 2, p.28-30)

Dr. Castle testified, within a reasonable degree of medical certainty, that Petitioner does not have COPD. That diagnosis was nowhere in treating records. He agreed diffusing capacity was 103%, which is normal. Dr. Castle testified there was no evidence of impairment in gas exchange. (RX 2, p.30)

Dr. Castle is familiar with the AMA Guidelines to the Evaluation of Impairment, 6th edition. He indicated that applying table 5-4 of the guides to results obtained in pulmonary function, Petitioner would fall in a class "0". Dr. Castle testified that, in his opinion, Petitioner was capable of heavy manual labor. (RX 2, p.30-31)

Dr. Castle agreed he stated that he had reviewed the chest x-ray, dated 5/2/16, on CD-ROM from Harrisburg Medical Center. Dr. Castle stated that in his opinion there was no parenchymal abnormalities consistent with CWP. In his opinion Petitioner did not have radiographic evidence indicating the presence of CWP or any coal mine dust induced lung disease. (RX 2, p.31-34)

Dr. Castle testified there was no lung pathology in the medical he reviewed. He found no clinical significance to sub radiographic pneumoconiosis stating, "The term simply means that you have an individual that may have pathological evidence of pneumoconiosis but the x-ray doesn't show anything." He stated there was no clinical significance of any scarring in the lung based on Petitioner's diffusion capacity. (RX 2, p.34-35)

Dr. Castle stated it was unlikely for simple CWP to progress once exposure has ceased. (RX 2, p.35-36).

Dr. Castle testified that, within a reasonable degree of medical certainty, based on a thorough review of all the data, including medical history, physical exams, radiographic evaluation, physiologic testing, hospital records and other data, that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust while working in the mining industry. Dr. Castle stated Petitioner certainly did work in the coal mining environment for a sufficient amount of time to have developed CWP, if he was a

susceptible host. (RX 2, p.36-37)

Dr. Castle testified that Petitioner did not demonstrate any consistent physical findings indicating the presence of interstitial pulmonary process. He did not have any consistent findings of rales, crackles or crepitation. Dr. Castle stated the majority of radiographic reports indicated no findings of CWP. Dr. Castle stated only Dr. Smith noted the minimal changes consistent with CWP and had described the film showing p type opacities in middle and lower lung zones with 1/0 profusion. He stated that would seem to mean Dr. Smith also considered the film as negative. (RX 2, p.37)

Dr. Castle stated Dr. Meyer, a radiologist and B-reader, found no parenchymal abnormalities consistent with CWP. Dr. Castle stated that he had personally reviewed the same film and, in his opinion, within a reasonable degree of medical certainty, there were no changes indicating presence of CWP. He had only reviewed one spirometry test and that study was entirely normal. His function was exactly what would be expected for his age, height, race, and sex. Dr. Castle stated Petitioner's diffusion capacity was also entirely normal. Dr. Castle opined Petitioner had no evidence of respiratory impairment occurring as a result of his occupational exposure to coal mine dust. In his opinion, Petitioner does not suffer from any pulmonary disease or impairment occurring as result of his occupational coal mining exposure during his employment. (RX 2, p.37-39)

Dr. Castle agreed no matter what he saw or did not see on an x-ray, it did not rule out the possibility Petitioner could have CWP pathologically or on autopsy. He agreed recent studies indicate as many as 50%+ of autopsies performed on long term coal miners found pathology significant for CWP that was not appreciated on x-ray exams during their life. (RX 2, p.44-45)

Dr. Castle agreed if a person has CWP they would have impairment of the function of the lung at the site of scarring and emphysema. He stated the scar tissue can restrict or obstruct causing measurable pulmonary impairment. He testified the onset is slow and insidious. (RX 2, T.50)

On re-direct examination, Dr. Castle agreed he had opportunity to review records of Dr. Istanbouly. He agreed Dr. Istanbouly took a history of Petitioner regarding cough and sputum and he did take that into consideration as to whether Petitioner suffered from chronic bronchitis. Dr. Castle testified that Petitioner did not suffer from asthma, hyper airways disease, or emphysema. Dr. Castle testified none of the B-readers interpreted Petitioner's films to find evidence of emphysema. (RX 2, p.80-81)

Dr. Castle testified that Petitioner does not suffer from progressive massive fibrosis nor cor pulmonale. He stated it would be extremely unlikely Petitioner would develop those conditions.

Conclusions of Law

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 999 N.E.2d 382, 389, 376 Ill. Dec. 499, 506 (5th Dist. 2013); citing *Anderson v. Industrial Comm'n*, 321 Ill. App.

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3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Where conflicting medical testimony is presented, it is for the Commission to determine which testimony is to be accepted. *Martin v. Industrial Comm'n*, 91 Ill. 2d 288, 294, 437 N.E.2d 650, 63 Ill. Dec. 1 (1982).

§1(d) of the Occupational Diseases Act ("ODA") states, in pertinent part:

> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists... If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

§1(e) of the ODA states, in pertinent part:

> "Disablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body.

§ 1(f) of the ODA states, in pertinent part:

> No compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease.

In the present case, the experts differed as to whether chest x-rays performed on 5/2/16 proved the presence of coal worker's pneumoconiosis ("CWP"). While it is true that Dr. Meyer agreed that a negative x-ray does not necessarily rule out CWP, that is not the same as saying that Petitioner in fact suffers from the disease. Instead, Petitioner bears the burden of proving by a preponderance of the credible evidence all the elements of his claim, including the threshold consideration of whether he has an occupational disease, including CWP.

Furthermore, while it is true that Petitioner worked as a coal miner for 33 years, the provisions set forth in Section 1(d) of the Occupational Diseases Act – wherein a rebuttable presumption exists that a coal miner's pneumoconiosis arose out of such employment if he or she was employed for 10 years or more in one or more coal mines -- does not apply, by a plain reading of the statute, unless and until it is shown that the claimant has CWP.

The evidence shows Petitioner last worked in the mine on 5/25/15. Petitioner is a non-smoker, but his wife does smoke, albeit outside. Petitioner testified that in about the early 1990's he started noticing breathing problems. At that time, he testified, he noticed he was not able to walk too far; he had a lack of stamina. Petitioner testified when he went back into the mine his breathing problems started to get worse. Petitioner testified from that time on, his breathing problems had gotten a little worse. (T.23-24)

Petitioner testified he does not take any medications for breathing. He testified he liked to walk and exercise, but he could no longer go as far, and he tried to stay away from stairs. He could not say other things in life it affected. Petitioner was able to cut big trees and clean up with no problem before and now he leaves the big trees for his son stating he did not have energy as he did before. However, a review of the record of primary care physician Dr. Manson who retired and then Dr. Del Valle during the period leading up to Petitioner's last day of work in the mines (5/25/15), reveals no references to any breathing complaints, other than to several episodes of GERD and having dilation of his throat several times because of swallowing issues.

It is noted there were some complaints with headaches, sinus drainage, sore throat, and a productive cough on a few occasions, as well as some fatigue. However, in 1998, his respiratory exam was normal. An exam in 2008 found no rales or wheeze and Petitioner presented no complaints related to breathing or cough. No history of any allergies or asthma was noted. Petitioner denied any chronic respiratory illness, there was no shortness of breath, and no chest discomfort in November 2013. Other than complaints of sinus drainage and productive cough for 4 days in October 2014, there were no complaints noted regarding breathing issues or cough through December 18, 2018. A November 6, 2018 visit regarding his esophageal condition exam noted as lungs clear to auscultation bilaterally, non-labored respiration.

The Commission finds significant that Petitioner stopped working for Respondent after a mine fire that closed the mine. Petitioner did not cease mining work because of any respiratory issues but he ceased because he was laid off. Petitioner opted to pursue his tree trimming business rather than seek further mining work.

Petitioner also claims that his breathing has gotten worse since he left Respondent's employ and that it affects his daily activities. The medical records fail to reflect any ongoing complaints relative to a diagnosis of CWP or any other chronic respiratory ailments during this period, and, in fact, much of his current complaints voiced at Arbitration could just as easily be explained by the limitations with fatigue, his chronic esophageal condition and GERD.

Dr. Istanbouly, a pulmonology and critical care doctor, not a B-reader, testified Petitioner's chest exam was within normal range. His Forced Vital Capacity, tested by spirometry, was normal. Petitioner's Forced Expiratory Volume was likewise normal. His FEV1/FVC ratio was also normal, ruling out obstruction. Dr. Istanbouly did not perform lung volumes testing on Petitioner which he admitted would be the best test. He indicated Petitioner's cough and the data he reviewed qualified as chronic bronchitis. Dr. Istanbouly indicated it was not uncommon with early CWP to have normal spirometry and he also indicated the pulmonary function test qualified Petitioner to have early stage COPD, related to long-term coal dust inhalation. He opined Petitioner had CWP,

early stage, but, as he was not a B-reader, he stated profusion was 1/0 per the B-reading of Dr. Smith (5/20/15). Dr. Istanbouly and Dr. Smith both believed Petitioner had simple CWP.

Dr. Smith, board certified radiologist and B-reader, interpreted the May 2, 2016 chest x-ray as positive for pneumoconiosis, profusion 1/0 with p/p opacities in bilateral mid to lower zones involved. No chest wall plaques or calcifications were noted.

In contrast, Dr. Meyer and Dr. Castle both read the 5/2/16 chest x-ray as normal, finding no evidence of CWP or other pulmonary condition. They had also noted that with CWP, the opacities would be found in the upper lung zones which was not the case here. Also, a profusion finding of 1/0 is considered open for interpretation by equally qualified B-readers. Petitioner had had normal chest exams over the years and did not report breathing issues from 1998 through 2018 at Springfield Clinic.

Furthermore, Petitioner has failed to prove he suffers from any obstructive respiratory disease given his normal pulmonary function test with which all doctors agree.

Therefore, upon a thorough review of the evidence, including the deposition testimony of the Drs. Meyer, Castle and Istanbouly, the Commission finds the opinions of Respondent's §12 physicians, Drs. Meyer and Castle, to be more persuasive and worthy of greater weight than those offered by Petitioner's §12 physicians, Drs. Istanbouly and Smith.

Based on the above, and the record taken as a whole, particularly the opinions of Drs. Meyer and Castle, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffers from an occupational disease that arose out of and in the course of his employment on or about 3/25/15, and failed to prove that said condition was causally related to his employment.

The Commission further notes that even if Petitioner had proven the presence of an occupational disease, he failed to prove disablement within two years of the date of last exposure, as required by the Act. More to the point, while Dr. Istanbouly agreed that patients with CWP should avoid the coal mining environment, there is no evidence that any physician specifically restricted Petitioner from returning to work due to an occupational disease. In fact, Petitioner chose not to seek other mining employment and operated his own tree trimming service. Indeed, Dr. Castle opined that from a respiratory standpoint, Petitioner was capable of heavy manual labor. Thus, disablement has not been shown to have occurred within two years of the date of last exposure, and as a result Petitioner's claim would likewise be denied.

Accordingly, Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated 5/5/20 is vacated and Petitioner's claim for compensation is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

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DATED: APR 5 - 2021
o-2/9/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BASIL DALE
Employee/Petitioner

Case# **16WC016172**

PATTON MINING LLC
Employer/Respondent

21IWCC0155

On 5/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
JULIE A WEBB
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

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STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

DALE BASIL
Employee/Petitioner

Case # **16** WC **16172**

v.

Consolidated cases_____

PATTON MINING, LLC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **February 20, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Disease/Exposure, Causation and Sections 1(d)-f of the Occupational Disease Act**

FINDINGS

On **03/25/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$57,551.52**; the average weekly wage was **$1,106.76**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**N/A** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

- The respondent shall pay the petitioner the sum of $664.05/week for a further period of 30 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 6% MAW.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/29/20
Date

MAY 5 - 2020

STATEMENT OF FACTS

Petitioner, Dale Basil of Kincaid Illinois was 61 years old at the date of arbitration with the birth date of June 18, 1958. He is married to Debra Basil. He graduated high school from South Fork Community high school in Kincaid Illinois. After high school he took a couple years of schooling at Land of Lincoln College to become an arborist. He did not obtain a certificate or a degree. He worked 33 years in the coalmine industry all of which were underground. In addition to coal dust he was regularly exposed to and breathed silica dust and roof bolting glue fumes.

His last day of employment in the coalmines was March 25, 2015. He was working for Patton Mining at the Deer Run mine in Hillsboro, Illinois. He was 58 years old with the job classification of a shuttle car operator. He was exposed to coal dust on that day. That was his last day of employment because there was a fire in the mine and the mine was shut down. Since leaving the mine he has continued employment running his own tree trimming service that is called Midland Tree Service. Petitioner indicated that he had made as much as $50,000 a year in the tree trimming business but now is down to under $20,000 a year. The reason for this is that he just does not have the stamina that he once did to do the job. That is the only job he has had since he left the mine.

Petitioner began his mining career in 1977 working in Peabody Coal Company. This mine is located in Pawnee, Illinois. He was hired in as a supply man. Petitioner describes this job as taking supplies to all of the sections of the mine. He then became a recovery man. A recovery man takes the equipment and things that are left in a section that has been mined out and move it to another section of the mine. Petitioner describes this as a very dusty job. When you recover the belt line all the coal dust that was left on the line falls off it when you flip the belt. Petitioner did this job for about six or seven years. Petitioner also roof bolted at Peabody. Roof bolting is when you drill into the top of the mine until you hit one foot of rock then a bolt is placed in and anchored to help secure the ceiling. Petitioner next worked at Crown III and that would have been around 2000 or 2001. He was hired in as a shuttle car operator. A shuttle car operator operates the shuttle that takes the coal from the face of the mine and runs it back to the belt and dumps it off. Petitioner described how the coal dust coming off the tail of the continuous miner would come right into the ram car and create quite a bit of dust. Petitioner did this job for four or five years. Petitioner then began hauling rock dust in the ram car and taking it to all the sections in the mine. While he would haul the dust there would be paddles on it that would sling the dust everywhere so that it would cover the mine. This was done to prevent fires. Petitioner did this job for around four or five years. Petitioner also roof bolted for Crown III. He described the process as being somewhat different than the previous roof bolting, that they used glue pins to secure the bolts into the roof. Petitioner described these glue pins breaking and admitting a very strong odor that at times would take your breath away. Petitioner then went out and took a job at a coalmine in West Virginia for approximately a year. This mine was called Federal Number 2, which was close to Morgantown, West Virginia. Petitioner roof bolted for this mine and did this for approximately twelve months before moving back to Illinois. Petitioner took a job at Patton Mining in Hillsboro he was hired back into the shuttle car operator and stayed in that position until he retired.

Petitioner first started noticing breathing problems back in the early 1990's. He noticed that he just wasn't able to walk as far and his stamina wasn't the same as it use to be. From the first time he noticed breathing problems in the mine until he left the mine his breathing seemed to get worse. Since the time he left mining up to the time of this trail his breathing has continued to get a little worse. He does not take any breathing medication Petitioner describes not being able to walk as far for exercise as he once did. He testified that he can walk probably about a mile before becoming short of breath. He also testified that he tries to stay away from climbing stairs Petitioner also described how his breathing has slowed down his tree trimming business.

Petitioner's family doctor is now Dr. DelValle. It was Dr. Manson before his retirement. Petitioner was never a smoker. In addition to his breathing difficulties Petitioner has described how he has had to have his throat stretched several times because he has trouble swallowing. He also suffers from acid reflux. Petitioner also described breaking his jaw in the 1980s and having hernia surgery in the 1990s. He also takes a cholesterol pill.

Deposition of Dr. Suhail Istanbouly

At Petitioner's attorney request Petitioner was examined by Dr. Suhail Istanbouly Dr. Istanbouly is board certified in internal medicine, pulmonary medicine, and critical care medicine. (rx1, p5) He is currently affiliated with SIH hospitals including Herrin Hospital, Memorial Hospital of Carbondale, and St. Joseph Hospital (rx1, p6) Petitioner gave a history of no smoking. He mentioned a long history of intermittent occasional coughing triggered by strenuous activities or brisk walking and according to Petitioner, the cough is mild to moderate in intensity and used to be productive of milk duct – mild dark black sputum, but recently, close to the time that he was seen by Dr. Istanbouly it was clearing up. (rx1, p8-9) Petitioner also mentioned a history of occasional wheezing. He does have history of acid reflux disease, but apparently that was well controlled by taking pantoprazole. Petitioner mentioned a history of runny nose, postnasal drip, which was perennial rather than seasonal. (rx1, p9-10) Dr. Istanbouly testified that Petitioner's wheezing indicates bronchospasm. And chronic bronchitis, which means chronic cough, is a manifestation of bronchospasm as well. (rx1, p10) Petitioner's pulmonary function testing is within a normal range. FEV1 365 liters, 114% predicted. FVC 4.72 liters, 112% predicted. FEV1/FVC 78% (rx1, p10-11) Dr. Istanbouly testified that the x-ray he reviewed did reveal mild interstitial changes bilaterally consistent with simple coal worker's pneumoconiosis. Dr. Istanbouly testified to reasonable degree of medical certainty that Petitioner has chronic bronchitis with the main culprit being long-term coal dust inhalation. (rx1, p11) Dr. Istanbouly went on to testify to a reasonable degree of medical certainty that he feels Petitioner has coal worker's pneumoconiosis, which was caused by long-term coal dust inhalation. (rx1, p12) In light of his diagnosis of chronic bronchitis and coal worker's pneumoconiosis Dr. Istanbouly testified that the Petitioner could no longer have any further exposure to the environment of a coal mine without endangering his health. (rx1, p13) That would be permanent medical preclusion (rx1, p14)

Dr. Henry Smith

At Petitioners request, B-Reader, Dr. Henry Smith, who reviewed a grade one chest x-ray dated May 2, 2016. Dr. Smith found an interstitial fibrosis of classification p/p, bilateral mid to lower zones involved, or a profusion 1/0. There are no chest wall plaques or calcifications. His impression was finding a simple coal-worker's pneumoconiosis with small opacities, primary p, secondary p, mid to lower zones involved bilaterally, profusion 1/0.

Charges of Dr. Castle

Petitioners exhibit 3 shows the charges for Dr. Castle are $3,850.00.

Deposition of Dr. Castle

At Respondents request Dr. James Castle did a records review of Petitioners case. Dr. Castle testified within a reasonable degree of medical certainty, the Petitioner has no evidence of any respiratory impairment occurring as a result of his occupational exposure to coal mine dust in the mining industry. (rx1, p38-39) On cross examination Dr. Castle acknowledge that recent studies have shown that as many as 50% of long-term coal miners have pathological coal workers pneumoconiosis that was not appreciated by a radiographic study during their life. (rx1, p45) Dr. Castle admitted that to have the most accurate assessment of a patient he would always want to do his own examination if possible. (rx1, p47) Coal workers pneumoconiosis is basically a trapped coal dust in a part of the lung, which ends up wrapped in scar tissue and can be accompanied by emphysema around it. (rx1, p49) Dr. Castle confirmed that the affected tissues there of the scar and the emphysema, that tissue itself cannot perform the function of healthy normal lung tissue. (rx1, p49-50) Therefore by definition of a person who has coal worker's pneumoconiosis, they would have an impairment in the function of the lung at the sights of the scarring and emphysema. (rx1, p50) Dr. Castle also answered affirmatively to the fact that a person can have radiographically significant coal worker's pneumoconiosis yet have normal spirometry, normal pulmonary function in all areas, normal blood gases, normal physical exam of the chest, and maybe even no complaints. (rx1, p50-51) If they do have complaints shortness of breath is the most likely one. (rx1, p51) A person can have mixed dust pneumoconiosis from coal mining, which could include silica. Silica is toxic to the surrounding lung tissues. (rx1, p55) Dr. Castle testified that the coal dust that is trapped within the lungs is always going to be there for the rest of the coal miners life. (rx1, p55-56) The only treatment for coal worker's pneumoconiosis is to remove the miner from any further exposure. (rx1, p56) Dr. Castle agreed that the scarring of coal worker's pneumoconiosis does not return to normal healthy lung tissue. (rx1, p57)

Deposition of Dr. Christopher Meyer

At Respondents request Dr. Christopher A. Meyer read a PA Chest Radiograph from Harrisburg Medical Center dated May 2, 2016. (rx1, p41) Dr. Meyer testified that it was a quality 1. The lungs were clear. There was no small or large opacities. There was some mild degenerative changes of the thoracic spine. The examination was essentially normal. (rx1, p41-42) Dr. Meyer did not find any pneumoconiosis. (rx1, p42) On Cross-examination Dr. Meyer

testified that to his knowledge there is no medicine or anything modern medical science can do to stop or reverse the progression of coal workers pneumoconiosis. Removing the worker from the exposure is the best response. (rx1, p57) Dr. Meyer testified affirmatively under cross-examination that coal worker's pneumoconiosis can be considered a progressive chronic disease that can progress even after the coal miner leaves the exposure. (rx1, p58) If a person has coal workers pneumoconiosis at any time in their life it would be true that they probably had coal worker's pneumoconiosis at some level when they left the coal mine. (rx1, p58) Dr. Meyer testified that it is true that when a coal worker has coal workers pneumoconiosis the rate of progression would vary from miner to miner rather than be exactly the same in all miners. (rx1, p62) The silica in the coal mine generally comes from the rock that's associated or intermixed with the coal that's being mined. (rx1, p63-64) It is Dr. Meyer's understanding that certain occupations in the mines such as roof bolting or drilling or shooting where you disturb the coal and where there may be rock involvement those occupations in the coal mine would tend have greater silica exposure. (rx1, p64) Dr. Meyer agreed that it would be fair to say that a miner who has 1/0 pneumoconiosis probably won't even know he has it, probably won't complain to his doctors until he gets a B-reading that tells him he has it, he probably just won't know. (rx1, p66) It is possible that a coal miner would find the first manifestations of coal workers pneumoconiosis toward the end of his career or even the first year after. (rx1, p75-76) Dr. Meyer agreed that there are studies that show autopsy as much as 50 percent of coal miners are found to have abnormalities of coal workers pneumoconiosis when they might not have been apparent radiographically during their life. (rx1, p88)

Medical records of Methodist Hospital

This is a pulmonary function report dated 10/4/2016.

Springfield Clinic records

Medical records of Springfield Clinic dated June 23, 2017. He has history of bronchitis. (rx1, p50) On an office note dated October 25, 2014, under chief complaint patient presents with headaches, sinus drainage, sore throat, productive cough x 4 days. Under subjective Dale is a 56 year old coal miner who presents to Prompt Care with complaints of a headache and sinus congestion and drainage, sore throat and cough, occasional productive colored sputum. He has had symptoms for about 4 days. … Dale has had a history of sinus infections in the past. (rx1, p108) Office note dated March 25, 2012, under subjective a 53 year old white male presents with sudden onset of illness a day and a half ago. He has had sore throat, headache, body aches. He has had cough productive of brown sputum. He has mild sinus congestion. He is not a smoker he does wok in a coalmine. (rx1, p156) An office note dated February 7, 2006, patient presents complaining of a purulent productive deep cough associated with a sore throat. (rx1,p186)

Updated Springfield Clinic records

Medical records of Springfield Clinic dated November 7, 2019, these medical records pertain to an esophagogastroduodenoscopy procedure that was done on May 13, 2019.

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), which was caused by his exposures as a coal miner. He worked as a coal miner for 33 years, all of which were underground. He is a lifelong never smoker of cigarettes. The Arbitrator found Petitioner to be a candid and credible witness.

At Petitioner's request, he was examined by Dr. Istanbouly on 8/30/16. Dr. Istanbouly reported that Petitioner coughs occasionally and intermittently, and that his cough is triggered by strenuous activity or walking. It is mild to moderate in intensity. It was formerly productive of mild, dark black sputum but recently had begun to clear up. Dr. Istanbouly reported that Petitioner denied significant exertional dyspnea, and is able to walk three miles without breathing problems. Petitioner wheezes occasionally and complains of a runny nose and postnasal drip, which is perennial rather than seasonal. Petitioner's spirometry was within the range of normal. Dr. Istanbouly reviewed Petitioner's chest x-ray, and found it to reveal mild interstitial changes bilaterally, consist with simple CWP. He reported that the same film was read as 1/0 by Dr. Smith. Dr. Istanbouly found that Petitioner's long-term coal dust exposure is a significant contributor to his current respiratory symptoms of intermittent and exertional-related cough, wheezing and occasional nocturnal dyspnea. From a medical standpoint, he advised Petitioner to avoid any further coal dust exposure to prevent progression of his pneumoconiosis. The Arbitrator assigns significant weight to Dr. Istanbouly's complete examination and conclusions.

Dr. Castle did not examine Petitioner, but performed a records review at the request of Respondent. The evidence reviewed consisted of medical records from the Springfield Clinic and evidence developed for this claim as well as the reports of Dr. Istanbouly, Dr. Meyer, and a diffusion capacity study performed at Methodist Hospital on 10/4/16 at Respondent's request. Dr. Castle also read Petitioner's chest x-ray of 5/2/16. The Arbitrator notes that the Springfield Clinic records apparently contained three radiographic studies; two chest x-rays from 1/25/94 and one from 4/22/04, and one CT scan of the abdomen and pelvis dated 8/6/14. While the x-rays from 1994 and 2004 were not apparently read by any expert witness, Petitioner continued to work as an underground coal miner for 21 years following the 1994 x-ray and 11 years following the 2004 x-ray. As such, they are given no weight in resolving the question of whether Petitioner suffered from CWP by 2017, within two years of his date of last exposure. It is not clear whether or not Dr. Castle reviewed the CT scan of the abdomen and pelvis of 2014; however, the Arbitrator notes that the report in the medical records indicates there were abnormalities in the lung bases. Neither Dr. Meyer nor Dr. Castle noted any abnormalities in the lower lungs; however, both Dr. Smith and Dr. Istanbouly did find abnormities which they assigned to CWP. The Arbitrator considers this significant in assigning greater weight to the readings of Dr. Smith and Dr. Istanbouly than to those of Dr. Meyer and Dr. Castle. In addition, while Dr. Castle did not find that Petitioner suffered from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust, he did report that Petitioner's 33 years of coal

mining was sufficient exposure to cause CWP in a susceptible host. He also confirmed that Petitioner is a lifelong never smoker.

Dr. Castle reported that Dr. Smith found minimal changes of p-type opacities in the middle and lower lung zones in a profusion of 1/0. He surmised that Dr. Smith's description of the CWP abnormalities meant that Dr. Smith also considered that the x-ray may be negative. He further confirmed that Dr. Meyer found no parenchymal abnormalities consistent with pneumoconiosis. The Arbitrator believes that a competent reader who finds an x-ray to be positive at the threshold level of 1/0 also considered the possibility that it might not be negative. The Arbitrator also believes that a competent reader who finds an x-ray to be negative would consider that it could possibly be positive before arriving at a final conclusion that it is negative. Such would only be prudent and thorough in making such determination of positive versus negative. Regarding the testimony or reporting of either Dr. Meyer or Dr. Castle that they disagree with contrary conclusions of other witnesses to be self-serving and unnecessary. The conflicting reports speak for themselves.

Dr. Castle also reported that Petitioner's pulmonary function testing was within the range of normal; however, the Arbitrator notes that it is the unrebutted testimony that with simple CWP, it is expected that the pulmonary function testing will be normal, as will the physical examination of the chest. It is also not necessary that there be respiratory complaints for there to be CWP.

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of treatment records and the other medical data developed by the parties for this claim. Dr. Castle, who performed the records review, has been retired for a number of years, and his practice consists of records reviews and depositions such as he did here. He did not examine, speak to, nor see Petitioner. In addition, Respondent sent Petitioner to Methodist Hospital in Kentucky for a diffusing capacity measurement on 3-24-16, but did not have any other pulmonary function testing administered. The Arbitrator considers the fact that Respondent limited the scope of the evidence it developed to be significant.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. He cited studies that show that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. And there are older studies that show a much higher incidence than that. The Arbitrator notes that Petitioner worked as an underground coal miner for 33 years. This qualifies him as a long-term coal miner. Based on the studies cited by Dr. Meyer, having no medical evidence at all, it could still be likely that Petitioner could have CWP. The Arbitrator is not speculating that Petitioner would be one of the miners found to have

CWP if an autopsy were taken at his death. However, this evidence regarding the nature of CWP and the likelihood of its existence is a significant fact to be considered along with the rest of the evidence regarding CWP, particularly since it was offered by Respondent's witness.

According to Dr. Meyer, it is possible for a miner to work 30 to 40 years in a mine, develop radiographically-significant CWP, but not have it manifest itself until the last year or even the first year after he leaves the mine. Further, when a miner has CWP that progresses, the rate of that progression could vary from miner to miner, as could the exact shape, size, and location of the macule. These things could also vary within an individual miner.

Dr. Meyer defined the difference between a positive x-ray and a negative x-ray when looking for CWP. He testified that if he has read an x-ray to be positive and the miner has a sufficient history of exposure to cause CWP, such would warrant a diagnosis of CWP; however, if he finds the x-ray to be negative, such could never rule out the possibility that the miner has CWP. Further, regarding the nature of pathologic CWP, he testified that the abnormalities found pathologically, which were not found radiographically, would have the same constitution as the macules or nodules that would be apparent on x-ray, just perhaps smaller. They would still be subject to potential progression as any other CWP abnormality might be. He added that not all miners have the same reaction to coal mine dust.

In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He compared it to prostate cancer or colon cancer: most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lungs of a miner can be as much as one-half the total weight of the lung itself. He said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle did not disagree with Dr. Meyer.

The Arbitrator notes that while none of the above-mentioned evidence may determine the outcome by themselves, each adds weight to Petitioner's case and is significant. In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. Petitioner has met his burden.

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court.

Issue (L): What is the nature and extent of the injury?

The Arbitrator finds Petitioner to be disabled to the extent of 6% MAW. In arriving at this conclusion, the following factors were taken into consideration:

(i) Impairment rating. Petitioner's pulmonary function testing was within the range of normal. As per the universal testimony, such does not rule out CWP. No weight is given to this factor.

(ii) Occupation of Injured Employee. The Arbitrator notes that coal mining involves daily exposure to coal mine dust, and that the unrebutted testimony of Petitioner was that he was also regularly exposed to silica dust. The clear preponderance of the evidence, as well as a ruling of the Appellate Court establish that when a miner has CWP, he has an impairment in the function of his lungs whether such can be measured or not. It also establishes that there is no safe level of coal mine exposure for a miner who has been diagnosed with CWP. Based on the evidence in this case, the coal mine environment contains many exposures in addition to just coal dust, which present a significant risk to the miner's pulmonary health. The Arbitrator finds this to be significant.

(iii) Petitioner's age. Petitioner was in his mid-50's when he ended his coal mine employment with Respondent. The Arbitrator considers it significant that he was not precluded from further coal mine work because of his age.

(iv) Petitioner's future earning capacity. Petitioner's determination to end his coal mine employment has caused a reduction of his earning capacity. By the universal testimony, a miner with CWP is medically precluded from further coal mine work, and such was the only type work Petitioner engaged in since his early 20's. The Arbitrator finds this to be significant.

(v) Evidence of disability. The Arbitrator concludes that Petitioner's CWP provides sufficient evidence of disability to result in the award of 6% person as a whole as described above.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Ratfield,

Petitioner,

21IWCC0156

vs.

NO. 17WC002176

Ventra Plastics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical, permanent disability, temporary disability being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2021

Stephen J. Mathis

Thomas Tyrrell

SJM/sj
o-3/3/21
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0156

RATFIELD, JERRY
Employee/Petitioner

Case# **17WC002176**

VENTRA PLASTICS
Employer/Respondent

On 6/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0522 THOMAS MAMER & HAUGHEY LLP
ERIC CHOVANEC
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

21IWCC0156

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD
Employee/Petitioner

v.

VENTRA PLASTICS
Employer/Respondent

Case # **17** WC **2176**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **1/14/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0156

FINDINGS

On **2/2/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,968.00**; the average weekly wage was $**634.00**.

On the date of accident, Petitioner was **57** years of age, ***single*** with dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act. Respondent is entitled to credit for all bills paid by its group health care plan.

ORDER

Arbitrator finds that Petitioner did not sustain and accident that arose out of the course of his employment for the Respondent. All compensation is hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Jason C. Myatt

Signature of Arbitrator

6/10/19
Date

JUN 14 2019

STATE OF ILLINOIS)
)ss
COUNTY OF WINNEBAGO)

21IWCC0156

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD, Employee/Petitioner)
)
v.)
)
VENTRA PLASTICS, Employer/Respondent)

Case # 17-WC-2176

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified he began working for Respondent in 2012, having worked there for approximately 4-5 years as a full-time material handler and forklift driver, working 10-15 hours a day, 4 days a week. He testified his duties included operating a standing forklift, pulling boxes of parts from bins in the stock room and transporting the boxed parts to the assembly line. The parts were for the assembly of bumpers and cars for Chrysler. Petitioner testified he loaded the boxes onto a pallet, transported them to the assembly line and then removed the boxes from the pallet on the forklift and placed them into racks on the assembly line. The boxes weighed about 60 pounds. On the assembly line, the materials were placed waist height or slightly higher than waist height. He testified that he did that all day long as the assembly line constantly needed more material to continue. (Trans. 6-9)

Petitioner's application for adjustment of claim alleges a work accident that took place on 2/2/2016. Petitioner testified that at some point he started having problems doing his job. He woke up one morning with a sore back and he don't know what had happened. He didn't remember the exact date. (Id.,12).

Petitioner was asked by his attorney, "Were you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id., 14).

Petitioner testified that he went to work and talked to his supervisor, Jason Funkman, about it and was told to try to work through the day. He continued working that day, then had two days off work, and sought treatment the day after his days off.

Petitioner testified he did have some back treatment prior to 2016. In 2013, he had undergone physical therapy and returned to work without restrictions as of May 2013. Petitioner testified that he did not experience any back problems between May of 2013 when he returned to work without restrictions and February of 2016. He was able to do his regular job, on a full-time basis, without pain or limitations.

On 2/6/16, Petitioner presented to his primary care provider, Dr. Shobha Iyengar, who noted a history of pain in the right lateral lower back and right anterior area groin area for the last 2 weeks. The doctor further noted Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night". (PX.1, p. 22). Dr. Iyengar referred Petitioner to Dr. Borchard. (Id.).

On 2/16/16, Dr. Iyengar noted Petitioner's complaints of persistent lower back pain. X-ray was significant for wedge compression deformity and osteopenia in L4 with and L5 S1 lumbar disc changes and facet arthritis.

(Id., p. 20). Dr. Iyengar noted she would try to obtain MRI results from "a few years ago" . (Id.) . Petitioner was referred to Dr. Borchard. (Id.)

On 3/23/16 Petitioner presented to Dr. Robin Borchard at OrthoIllinois with a history of back pain since around January of 2016. (PX.2) Additionally, the doctor noted Petitioner has had lower back pain for the last couple of years. Dr. Borchard reviewed a 2013 MRI and recommended Petitioner obtain further imaging. (*Id.).*

On 3/30/2016 Petitioner presented for MRI which was reviewed by Dr. Borchardt on 4/6, 2016 at which time the doctor noted a large disk herniation at L4-5 that was a "new finding" not present on the 2013 MRI. (Px. 2)

Dr. Borchard recommended an epidural steroid injection which Petitioner underwent approximately a week a later. (*Id.).* Petitioner returned to see Dr. Borchard on 4/20/16 reporting that although his pain level had improved, he was still experiencing symptoms. (*Id.).* At this point, Petitioner was working without restrictions. Petitioner underwent one additional epidural steroid injection on 6/1/2016. (*Id.).*

On 8/9/16 Dr. Richard Broderick at OthoIllinois noted Petitioner presented with a history of low back pain beginning in 2/16. Petitioner reported low back, bilateral radiating pain aggravated by any movement. He was taking Gabapentin, Mobic/Meloxicam, and Norco. (Id.).

Dr. Broderick reviewed lumbar MRI from 2013, noting herniated nucleus pulposus ("HNP") right L/5 S1 with degenerative disc disease ("DDD") at L4/5. (Id., 144). The doctor compared the 2013 MRI to one taken on 3/30/2016 noting, a large herniation at L4/5 with central stenosis. (Id., p. 145). Regarding the mechanism of injury, the doctor noted "unknown". It was noted Petitioner was still working without restrictions for Respondent and had undergone 2 injections by Dr. Mackenzie, the last injection had improved his pain according to the medical records. (*Id.).* Dr. Broderick recommended a trial of physical therapy ("PT") noting Petitioner's past PT had been very effective. (Id). If PT proved to be ineffective surgery would be considered. (Id.).

On 8/18/16, Petitioner presented for initial evaluation at Belvidere Physical Therapy with Tim Seppelt PT, DPT, who noted a history of low back pain beginning in February of 2016. (PX 2, p. 184) Petitioner reported being a "stand up forklift driver at Ventra Plastics in Belvedere, IL." The therapist further noted Petitioner "is required to stand for 2 hours at a time without a rest break. His work duties include lifting 10-20# from floor to waist frequently and pushing/pulling 40-50 pounds occasionally." (Id.). Petitioner reportedly could not perform his work duties without pain. He noted 5/10 resting low back pain although at the end of his work shift, his pain increased to 8/10. (Id.). Petitioner reported his pain was aggravated by standing, walking, ascending stairs, and work activities." (Id.). Petitioner reportedly was unable to stand or walk for more than 15 minutes without pain. A one month, three times per week PT plan was proposed. (Id.).

On 10/4/16, Dr. Broderick again reviewed MRI imaging of Petitioner's lumbar back noting "a large central herniated disc with superior extrusion at the L4-5 level causing sever central stenosis and bilateral lateral recess stenosis." (Id., p. 139). Dr. Broderick recommended a microscectomy left L4/5, "possibly bilateral". (Id.).

Following some additional conservative treatment, Petitioner underwent surgery consisting of right L4-5 hemilaminotomy, microdiscectomy, and foramenotomy on 10/20/2016. (Px. 2). Petitioner ceased working for Respondent as of the date of surgery. Petitioner testified that the surgery did decrease his pain, but did not resolve it. He underwent physical therapy postoperatively from 12/20/2016 through 12/30/2016. On December 28, 2016, it was noted he had slipped going up the steps and was experiencing left hip pain. (Px. 2). He went to the emergency room on January 2, 2017 due to low back and left leg symptoms after slipping and catching himself on the railing of the stairs. (Px. 4). Dr. Broderick recommended additional injections on January 18, 2017 due to Petitioner's ongoing symptoms, which were provided on January 24, 2017, February 7, 2017, and February 14, 2017. (Px. 2). Due to ongoing symptoms, another surgery was recommended. (Px. 2).

On March 16, 2017, Petitioner underwent a lumbar fusion from L4-S1. (Px. 2). Petitioner testified that the fusion relieved some of the numbness in his leg. Physical therapy was started on June 9, 2017 and performed through July 21, 2017. On September 19, 2017, Dr. Broderick recommended a Functional Capacity Evaluation to assess his ability to return to work. (Px. 2).

On 10/16/2017 Petitioner saw Dr. Broderick reporting pain and numbness. Petitioner noted a history of being on the floor "cleaning some tile on his hands and knees and had difficulty getting back up." (*Id.)*.

On 10/19/17 Petitioner saw Dr. Broderick who told him to follow up in approximately 6 months. (*Id.)*. On 4/3/2018 Dr. Broderick noted Petitioner was ambulating without difficulty. An x-ray showed a stable fusion. (*Id.)*. Petitioner was told to return in one year. No discussion of work restrictions are contained in this note. (*Id.)*.

Petitioner consulted with Dr. Jeffrey Coe, board certified in occupational medicine who rendered an expert opinion in this case. Dr. Coe is a Pediatrician and practices occupational medicine. Petitioner saw Dr. Coe on 10/10/2017. (PX.5) It was Dr. Coe's opinion that a causal relationship existed between Petitioner's repetitive work activities and his current lower back and lower extremity symptoms. Dr. Coe noted the repetitive strain injuries were a factor aggravating or accelerating pre-existent degenerative disc disease and degenerative arthritis and causing break down of the L4-5 disc. (*Id.)*. It was Dr. Coe's understanding that Petitioner was a forklift operator who used a forklift described as poorly sprung. (*Id.)*. Petitioner reported he frequently lifted weights of 50 pounds or more and occasionally lifted 100- pound weights while working for Ventra Plastics. Petitioner noted his job was fast paced and required twisting and bending. (*Id.)*.

Dr. Coe agreed that it was a possibility that Petitioner's back condition may have simply progressed to this point as a result of age and not in connection to his work for Respondent. (*Id.)*.

Respondent sent Petitioner to Dr. Carl Graf for an Independent Medical Examination on June 13, 2018 and he testified via deposition on October 15, 2018. (RX. 1) Dr. Graf is a board certified Orthopedic Spinal Surgeon.

Dr. Graf noted Petitioner claimed a single traumatic accident on February 2, 2016 when he was moving some empty totes by hand, indicating they had to be done in order to get them for the standup forklift. Petitioner noted that he twisted and felt a stabbing pain in the low back on that date. Petitioner denied any previous back pain to Dr. Graf. (*Id.)*.

It was Dr. Graf's opinion that Petitioner's current condition of ill-being was not causally related to his alleged work accident. Dr. Graf opined that while Petitioner claimed and described a specific injury to him, the medical records did not reflect that specific injury. (*Id.)*. Dr. Graf stated that until Dr. Coe's independent medical examination, there was no comment regarding a work-related injury in any of the medical records. In addition, Dr. Graf opined that further there was no evidence of a repetitive injury, according to the medical records, and no scientific basis for any repetitive type injury causing this lumbar disk herniation. Dr. Graf stated that, regardless of causation, he believed Petitioner was at MMI as he had essentially been released by his treating physicians and wasn't undergoing any care at that time. Lastly, Dr. Graf stated that based upon his physical examination, he believed Petitioner could return to work with no restrictions. (*Id.)*.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner has failed to sustain his burden with respect to the issues of accident and causal connection.

According to Petitioner's application for adjustment of claim. He is alleging a work accident that took place on 2/2/2016. During his testimony Petitioner's description regarding his injury was extremely brief:

Q. At some point you started having problems doing the job?
A. Yes.
Q. What kind of problems were you having?
A. I woke up in the morning, and my back was really sore, and I don't know what had happened.
Q. Do you recall around when that was?
A. No, I don't remember the exact date. (Trans.12).

Additionally, he testified that he wasn't having any problems doing his actual job. (*Id.).* Petitioner was asked by his attorney, "[W]ere you having any problems doing your actual job?" to which he replied "No". (Id.,13-14).

Petitioner was also asked by his attorney "[W]ere you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id.,14). That is all the information Petitioner provided during his testimony to support his alleged claim.

Petitioner gave the Arbitrator insufficient information during his testimony as to what caused his back condition.

Dr. Iyengar's records from the alleged accident date, 2/6/2016 note a history of right lower back and groin pain for 2 weeks. It was noted that Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night", however, Petitioner does not report he believes his pain was caused by his work duties. (PX1

A careful review of Petitioner's medical records shows that Petitioner routinely denied any known injury. Every report from Dr. Borchard and Dr. Broderick state that Petitioner's pain began in January or February of 2016 with no known injury. (PX2,3)

Contrary to the history reported in his treating medical records, Petitioner told Respondent's IME doctor that he did have a specific and concrete accident on February 2, 2016 which is the alleged accident date from Petitioner's Application for Adjustment of Claim. (RX1) This statement to Dr. Graf puts Petitioner's testimony in doubt as he told two different stories about how his back condition and its relation to work. During this visit, Dr. Graf notes Petitioner denied that he had experienced a previous back condition which was clearly false based upon his treatment with Dr. Borchardt prior to the accident. (RX3)

During all of Petitioner's treatment, including two different surgeries over the course of two and half years, he repeatedly denies any work injury which is documented in note after note. Petitioner doesn't obtain a causal opinion from either of his treating doctors and instead, consults Dr. Coe, a pediatrician and occupational medicine doctor. He then sees Dr. Graf at the request of the Respondent and reports a specific injury on the alleged accident date.

While Petitioner described the duties of his job, he gave the Arbitrator scant information as to how those duties bothered his back or whether anything he did at work actually gave him discomfort while he was working. Petitioner testified that he woke up in the morning and his back was sore and he had no idea of when that happened. (*Id.).*

The evidence contained in the record with respect to an alleged accident is inconsistent and unreliable. The Arbitrator finds Petitioner has failed to sustain his burden with respect to this issue.

Assuming Petitioner did prevail on the issue of accident, the Arbitrator would find that he failed to prove his current condition of ill-being was causally related to his alleged work injury, adopting the opinion of Dr. Graf.

In conclusion, all claims for compensation are denied based upon both a failure to prove a compensable accident and failure to prove his current condition was causally related to the alleged accident.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the arbitrator's decision issue J. is herby denied.

K. Is Petitioner entitled to any prospective medical care?

Based upon the arbitrator's decision issue K. is hereby denied.

L. What temporary benefits are in dispute?

Based upon the arbitrator's decision issue L. is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IVETTE PEREZ RODRIGUEZ,

Petitioner,

21IWCC0157

vs.

NO: 18 WC 17917 18 WC 17792

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitioner for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

On June 10, 2018 Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right hand and thumb with a manifestation date of April 16, 2018. On June 15, 2018 Petitioner filed an application for benefits asserting that she sustained injury to her left thumb on November 13, 2017 that occurred while carrying GPS equipment. The matters were consolidated for trial.

Petitioner had been employed by IDOT as a land surveyor for 18 eighteen years and is 53 years of age. She testified that in her work she utilizes a device known as a controller. This is a GPS device attached to a pole which combine to weigh 10-15 lbs. and is carried from one

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location to another over the course of her workday. Petitioner uses both hands to type and rotates her wrists continually while recording data which measure roads, buildings, sidewalks and trees on the controller.

On November 13, 2017 Petitioner consulted Dr. Michael Birman for symptoms of numbness, tingling and pain in both hands. Dr. Birman diagnosed Petitioner with left carpal tunnel syndrome, trigger finger in the left thumb and right de Quervain's tenosynovitis. Dr. Birman administered a steroid injection in Petitioner's left thumb.

Petitioner returned to Dr. Birman in follow up on December 20, 2017 at which time a recommendation was made for surgery on Petitioner's left hand. On April 16, 2018 Petitioner underwent a bilateral EMG of the upper extremities which revealed moderate to severe bilateral median neuropathies at the wrist. The left wrist was more symptomatic. Petitioner elected to proceed with surgery. Throughout this time Petitioner continued to work full duty.

On May 1, 2018 Dr. Birman performed a left carpal tunnel release and left trigger finger release. Post-operatively Petitioner had work restrictions which included no forceful grip and no lifting, pushing or pulling. On June 12, 2018 Petitioner had surgery on her right hand which included trigger thumb release, carpal tunnel release, and first extensor tunnel release. Petitioner was off work and undergoing occupational therapy. She returned to full-duty work on August 27, 2018 and was discharged from care by Dr. Birman in September 2018.

Petitioner testified that she continues to experience occasional numbness and pain in both thumbs which she treats with Tylenol. She also experiences a loss of hand strength overall which is more pronounced on the right.

Dr. Birman, Petitioner's treating physician authored a report on August 5, 2019 which was received in evidence (PX4) which expressed the opinion that her described work activities "could have" aggravated the condition in her hands. He notes that an EMG performed on April 16, 2018 which was diagnostic for bilateral carpal tunnel syndrome. He additionally diagnosed right and left trigger thumbs, right de Quervain's tenosynovitis, and right and left thumb carpometacarpal joint arthritis.

In his report Dr. Birman comments that Petitioner's description of her work activities which include forceful and sustained use of her thumbs could be aggravating factors in her symptomatology. Petitioner's testimony at hearing describes work activities that would support causal connection.

Respondent retained Dr. Andrew Zelby as a Section 12 expert who examined Petitioner on May 22, 2019. Dr. Zelby characterized the EMG study as "equivocal" and did not believe that her subjective complaints could be ascribed to any kind of neurological condition of her neck or upper extremities. He maintained that Petitioner had undergone bilateral carpal tunnel releases

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and had "essentially normal motor and sensory exams of both hands" and failed to demonstrate causal connection. The Commission finds it notable that Dr. Zelby did not offer any opinion concerning Petitioner's de Quervain's tenosynovitis or trigger fingers.

The Arbitrator denied Petitioner's claims on both hands finding that the medical opinion on causal connection stated by Dr. Birman was equivocal and ambiguous. He found the opinions expressed by Dr. Zelby to be persuasive. The Commission views the evidence differently and finds that the causation opinion expressed by Dr. Birman concerning Petitioner's condition of ill-being in her right and left thumbs supports the claim. Petitioner has met her burden of proof and the Commission hereby reverses the Arbitrator's Decision on the causal connection concerning injury to Petitioner's thumbs and affirms all else.

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as he considered the issue of nature and extent moot. The Commission having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner 30% loss of the use of the right thumb and 30% loss of the use of the left thumb.

(i) Impairment rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of the Injured Employee:
(iii) Petitioner's Age:
(iv) Petitioner's Future Earning Capacity:
(v) Evidence of Disability:

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards 30% loss of the use of the right thumb and 30% loss of the use of the left thumb for Petitioner's bilateral hand condition.

For the foregoing reasons the Commission reverses the Decision of the Arbitrator filed on January 28, 2020 in claim numbers 18 WC 17792 and 18 WC 17917 with regard to the condition of ill being in Petitioner's right and left thumbs and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is reversed in part for the reasons stated above, as to the causal

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connection of the condition of ill-being in Petitioner's right and left thumbs and is affirmed in all else.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 17 weeks, commencing May 1, 2018 through August 27, 2018, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses detailed in Petitioner's Exhibits 1 & 2, namely the bill from Alexian Brothers Medical Center totaling $11,685.43, and Hand to Shoulder Medical Associates totaling $4,696.00, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for amounts paid on behalf of Petitioner on account of said accidental injuries under its group health plan pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8 (e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the right thumb. Respondent shall also pay Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the left thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

DATED: APR 6 - 2021
SJM/msb
D: 2-26-21
44

Stephen J. Mathis
Stephen Mathis

Marc Parker
Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs. NO: 12 WC 25446

Elgin Police Department and
City of Elgin,

21IWCC0158

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
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Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **12WC025446**
15WC021342

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0158

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0158

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **12** WC **25446**

Consolidated cases: **15 WC 21342**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **December 17, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,516.20**; the average weekly wage was $**1,586.85**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BLOOD ON DECEMBER 17, 2011, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 – 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 15 WC 21342 (DOA: August 12, 2012). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Rick Demierre testified that he has worked for Respondent Elgin Police Department for 18 years. He is currently a sergeant and supervisor of the Community Initiative Division which coordinates community events for officers to attend.

On December 17, 2011, he was working as a patrol police officer in the gang crime unit. He was wearing plain clothes. He and three other officers responded to a male subject with a weapon on E. Chicago Street. The subject was in the middle of the roadway, covered in blood, and pretty much naked. The subject was aggressive and resisted arrest. The officers took him to the ground as he struggled for several minutes. Petitioner was exposed to a significant amount of blood on his hands, arms, and legs while restraining the subject. Petitioner had no open cuts or sores. Petitioner completed an employee's injury report stating he was exposed to a large amount of blood on his legs and hands. The subject's name was Marvin Finklea (PX 2). Petitioner testified that the subject died about a week after December 17, 2011. Petitioner did not know if Respondent tested him for HIV or Hepatitis. Respondent completed an exposure report documenting a December 17, 2017 exposure to blood on intact skin. Petitioner was wearing leather gloves and blue jeans as protective barriers. He removed the leather gloves and blue jeans, and placed them in a bio hazard bag at the police department jail (PX 3).

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). He reported that he was involved with an individual who was extremely bloody. He was wearing gloves at that time, but he got some blood on his pants and on his wrist areas just proximal to the gloves. He had no open areas at the time. He had no symptoms since the exposure. Physical examination noted no physical findings. The handwritten exam notes small healing abrasions on his wrists which were not there when exposed. The impression was body fluid exposure 15 days ago. Blood was drawn for testing for hepatitis B, C, and HIV. Petitioner could continue with regular work. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination. Petitioner testified he believes he was vaccinated for Hepatitis B. He does not recall if he had or was vaccinated for Hepatitis A.

Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner testified that he had an additional exposure to the saliva of an infant, as more fully detailed in the decision in the consolidated case 15 WC 21342 decided in conjunction with this matter.

Petitioner underwent additional blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner

appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr. John J. Koehler, performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on December 17, 2011 when he was required to restrain a subject. Petitioner admits he suffered no physical injury in doing so, but came in contact with the subject's blood. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to blood from the subject on December 17, 2011. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. Petitioner presented no evidence that the subject tested positive for a blood borne disease such as HIV or Hepatitis. He does not know if the subject had an infectious disease.

Petitioner's blood tests performed at Sherman Health on January 11, 2012, February 6, 2012, August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding

Hepatitis C testing. Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the blood exposure on December 17, 2011. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of December 17, 2011.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), our supreme court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related incident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any documented exposure and the negative blood testing, the

Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to blood on December 17, 2011.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the December 17, 2011 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs.

NO: 15 WC 21342

21IWCC0159

Elgin Police Department and
City of Elgin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0159

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **15WC021342**

12WC025446

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0159

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0159

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **15** WC **21342**

Consolidated cases: **12 WC 25446**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **August 12, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,149.99**; the average weekly wage was $**1,618.25**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BODILY FLUIDS ON AUGUST 12, 2012, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 - 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 12 WC 25446 (DOA: December 17, 2011). A single transcript was prepared although the Arbitrator is entering separate decisions.

is currently a sergeant and supervisor of the Community Initiative Division which coordinated community events for officers to attend.

On December 17, 2011, Petitioner was involved in an incident that resulted in exposure to blood as more fully described in the decision in the consolidated case 12 WC 25446 decided in conjunction with this matter.

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). Blood was drawn for testing for Hepatitis B, C, and HIV. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner had an additional exposure as an initial responder for an infant in cardiopulmonary arrest. He initiated CPR before the paramedics came. He was an emergency medical technician and CPR EEG instructor licensed in the State of Illinois. He opened the infant's mouth with his hands to check for an impeding airway and for resuscitation. His fingers were exposed to the infant's saliva. He was not exposed to the infant's blood. He performed chest compressions. The postmortem autopsy for the infant was positive for HIV and Hepatitis A (PX 4, PX 5, RX 20). The Petitioner testified that Respondent contacted him and advised him to undergo blood testing because the infant had diseases. Petitioner did not know if the infant had HIV.

Petitioner was seen at Sherman Health on August 21, 2012. He had no fevers, chills, sweating, weaknesses, fatigue. He had no recent illnesses, sore throat, chest pain, shortness of breath, cough, abdominal pain, nausea, vomiting. He had no jaundice or scleral icterus. He had no loose stools, numbness, tingling, or focal weakness. His physical exam revealed a well-developed, nourished male, in no acute distress. His skin was without any lesions and he had no rashes or ulcers. The assessment was bodily fluid exposure. The doctor ordered tests for Hepatitis C and B, and HIV 1 and 2. Petitioner was returned to work without restrictions. Petitioner underwent blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months.

Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr John J. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on August 12, 2012 when he initiated CPR and opened the infant's mouth with his hands to check for an impeding airway and for resuscitation, exposing his fingers to the infant's saliva. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to the infant's saliva on August 12, 2012. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. While the infant did test positive for HIV, Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. Petitioner's blood tests performed at Sherman Health on August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3--4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing. Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed Petitioner to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the fluid exposure on August 12, 2012. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of August 12, 2012.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), the Supreme Court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related accident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any likely exposure and the Petitioner's negative blood testing, the Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to bodily fluids on August 12, 2012.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the August 12, 2012 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYLVIA MORALES,

Petitioner,

vs. NO: 12 WC 37862

STAFFMARK,

Respondent.

21IWCC0160

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, medical, temporary total disability, permanent partial disability, penalties and fees and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed March 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back, and right elbow. All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she also proved, in part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner failed to establish her condition of ill-being after January 2013 is causally related to work incident. Further medical benefits and TTD benefits are denied.

21IWCC0160

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 5% loss of use of the person-as-a-whole..

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties and attorney's fees is denied. The Commission finds no basis to award any attorney's fees to the Vrydolyak Law Group.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury including a credit of $3,960.00 for temporary total disability benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 1.19.21

43

Stephen Mathis

Thomas J. Tyrrell

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on January 19, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

21IWCC0160

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MORALES, SILVIA
Employee/Petitioner

Case# **12WC037862**

STAFFMARK
Employer/Respondent

21IWCC0160

On 3/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
30 N LASALLE ST SUITE 1750
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
LILIA Y PICAZO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21IWCC0160

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
****CORRECTED****
ARBITRATION DECISION

SYLVIA MORALES
Employee/Petitioner

v.

STAFFMARK
Employer/Respondent

Case # **12** WC **37862**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JANUARY 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other: **Former attorney's fee petition**

FINDINGS:

On **OCTOBER 9, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**18,720.00**; the average weekly wage was $**360.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**3,960.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**11,019.89** for other benefits, for a total credit of $**14,979.89**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER:

ACCIDENT/CAUSATION:
Based upon the evidence considered in its entirely in this matter, the Arbitrator finds Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back and right elbow because All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

ACCIDENT/CAUSATION: MID-BACK
Petitioner has proven by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she has also proven in-part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner has failed to establish her condition of ill-being after January 2013 is causally related to the work incident. Further medical benefits and TTD benefits are denied.

Respondent shall pay Petitioner the sum of **$220.00 per week** for a further period of **25 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a **5% loss of use of the person-as-a-whole**.

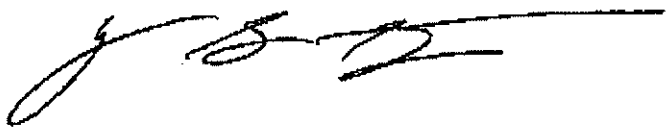
Respondent is entitled to a credit of $3,960.00 for TTD benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Petitioner's claim for penalties and attorney's fees is denied.

The Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

March 13, 2019
Date

MAR 14 2019

SILVIA MORALES v. STAFFMARK

12 WC 37862

****CORRECTED DECISION****

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on January 29, 2019. The issues in dispute were accident, causal connection, medical bills, TTD, penalties and attorney's fees, attorney's fees for the Petitioner's former attorney, and the nature and extent of the injury, if any. Arbitrator's Exhibit 1. The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. Arbitrator's Exhibit (*hereinafter*, AX) 1.

FINDINGS OF FACT

Petitioner testified she began working for Staffmark on August 25, 2012. Tx at 15. Petitioner first started working as a trimmer and later worked in quality control. Id. at 15-16. Petitioner testified she was required to pull a cart with uniform-filled boxes and place it near a desk. Id. She then would place the boxes on a desk. Id. Petitioner testified the heaviest box she would lift on her own weighed between 30-35 pounds. Id. at 17. Petitioner testified the carts were heavy and taller than her. Id. at 17-18.

On October 9, 2012, Petitioner testified she was getting ready to take her break and leave her cart between two desks when a co-worker threw her cart to make it go in place. Id. at 20. Petitioner testified the cart came back and she felt impact in her back. Id. She testified the cart was empty. Petitioner testified she was not able to breathe but managed to grab onto a desk. Id. at 21, 23. Petitioner testified she felt pain throughout her back. Id. at 25. She was transported to the company clinic and MacNeal Hospital by taxi. Id. at 25-26.

The medical records indicate Petitioner was seen at MacNeal Hospital on October 10, 2012. An interpreter was present, and a good history was taken from Petitioner. She stated she was bumped in the back with a metal cart. She complained of generalized midback pain as well midback pain upon moving her left shoulder. She reported the cart did not touch her shoulder. She did not fall, hit her head or lose consciousness. She denied numbness and tingling

throughout her body, headaches and neck pain. X-rays taken of the lumbar and thoracic spine revealed very mild degenerative changes. X-rays of the left shoulder revealed unremarkable findings. Petitioner was diagnosed with a backache and contusion of the back. She was prescribed hydrocodone. PX 3.

On October 11, 2012, Petitioner presented to Rehab Dynamix by referral from MedLegal. Tx. at 30. She was seen by chiropractor Krysten Kuk. Petitioner reported she was struck in her back by a heavy metal cart weighing 300 pounds and approximately five feet tall and three feet wide. Petitioner testified she reported pain in her entire back. Tx. at 30 She complained of mid back pain, low back pain without radiation, and left shoulder pain. On a symptom survey sheet, Petitioner checked approximately 50 of the 76 symptom boxes listed on the survey, stating she was also feeling nervous, irritable, depressed, fatigued, and generally run down. She was diagnosed with lumbar intervertebral disc syndrome without radiation, thoracic strain, internal derangement of the left shoulder, and muscle spasms. PX 2.

On October 18, 2012, Petitioner presented to Dr. Paul Marsiglia of Chicago Pain and Orthopedic Institute. Petitioner reported she was pushing a cart full of uniforms with a height of 6ft and boxes of 50 pounds each when she noticed she was struck from behind by another cart being pushed by another employee. Petitioner stated she was almost sandwiched in between the two carts and noticed immediate back pain. She did not report falling forward or hitting a table. She reported she was undergoing physical therapy, but she was unsure if she made any significant gains. She complained of pain in the cervical, thoracic and lumbar spine with radiation down the left lower extremity over the left lateral calf. Straight leg raise was positive bilaterally. No significant radicular components were noted. She was diagnosed with cervicalgia, lumbar radiculopathy, and myofascial pain syndrome. A lumbar MRI was recommended, and continued physical therapy was prescribed. PX 5.

Petitioner continued to undergo treatment with Rehab Dynamix. She reported consistent improvement with exercises. On November 8, 2012, Petitioner stated she temporarily discontinued therapy due to personal issues. She stated she was seen in the hospital where she was worked up and discharged with unremarkable findings.

On November 8, 2012, Petitioner returned to MacNeal Hospital complaining of back and neck pain. Pain was rated 1 out of 10. She testified she was transported by ambulance due to her panic attacks. Tx. at 33. Her son served as an interpreter. The report indicates a good history was obtained from Petitioner. Petitioner gave a history of left-sided neck pain from a prior work accident where a box fell on her back. Petitioner denied the statement at trial. Tx. at 35. On exam, Petitioner denied significant complaints of low back pain. She denied symptoms of radicular numbness in the lower and upper extremities. X-rays taken of the cervical spine revealed normal findings. Petitioner was diagnosed with a trapezius strain and torticollis. PX 3.

She testified she was given a pill which made her feel out of this world and was discharged for the day. Tx. at 35.

On November 12, 2012, Petitioner underwent an MRI of the lumbar spine. The radiologist discerned diffuse lumbar spondylosis and multilevel degenerative disc disease along with a small focal superimposed left lateral recess disc protrusion at L5-S1. PX 8.

On November 16, 2012, Petitioner underwent an MRI of the left shoulder. The radiologist discerned a full thickness tear involving the supraspinatus insertion, a one-centimeter ganglion cyst adjacent to the superior aspect of the distal clavicle and acromioclavicular joint, mild subacromial/subdeltoid bursitis, and diffuse osteoarthritic changes.

On November 19, 2012, Petitioner presented to Dr. Jain. She reported worsening pain. She complained of severe left-sided neck pain extending into the left upper extremity with numbness and tingling along the left upper extremity. She also complained of pain down the thoracic and lumbar spine with radiation and paresthesias into the left lower extremity. She reported ongoing panic attacked requiring a recent trip to the emergency room where she was diagnosed with benign positional vertigo. Dr. Jain diagnosed cervical facet syndrome, lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. A left L5-S1 facet injection and cervical MRI was recommended. Petitioner was prescribed Prozac for her anxiety, and tramadol. PX 5. Then, on November 24, 2012, Petitioner underwent an MRI of the cervical spine. The radiologist discerned disc bulges at C3-5 and left foraminal narrowing along with bulges at C5-T1. PX 8.

On November 26, 2012, Petitioner returned to Rehab Dynamix. She reported 40% improvement with overall activities. On December 4, 2012, the chiropractor indicated continued improvement overall. Petitioner was able to handle new exercises. Petitioner reported she was recommended shoulder surgery. On December 19, Petitioner reported a palpable mass along the lower ribs on the left. X-rays findings were unremarkable. On January 7, 2013, Petitioner reported pain over the weekend due household chores such as washing and sweeping. On January 30, Petitioner reported 50% improvement with exercises. She was discharged from care pending left shoulder surgery. PX 2.

On December 3, 2012, Petitioner presented to Dr. Steven Sclamberg. She reported she was struck in the back, left side, and left shoulder by a metal pallet while at work on October 9, 2012. She complained of pain in her shoulder radiating down her deltoid without numbness or tingling. On exam, she exhibited mild lateral deltoid tenderness. Left shoulder was negative for SC clavicular or AC tenderness. She was able to forward flex with extension to 140 degrees.

Passive range of motion was near full. Dr. Sclamberg noted a left full-thickness supraspinatus tear. PX 5.

On December 7, 2012, Petitioner underwent an x-ray of the left shoulder which revealed unremarkable findings. PX 8. Petitioner then returned to Dr. Sclamberg and Dr. Jain from December 10, 2012 to February 13, 2013. Petitioner complained of ongoing left lumbar and leg pain, neck pain and left upper extremity pain. On February 13, 2013, she complained of new onset of right chest wall pain with spasms in her neck. Her diagnosis remained unchanged. Cervical and lumbar injections were recommended along with continued physical therapy. PX 5.

A Section 12 examination with Dr. Zelby was scheduled for December 19, 2012. Petitioner failed to attend the appointment. RX 10.

On March 1, 2013, Petitioner underwent arthroscopic left shoulder rotator cuff repair, subacromial decompression, and synovectomy with debridement. PX 5 and 6. Subsequently, on March 20, 2013, Petitioner returned to Rehab Dynamix for post-surgical chiropractic care. On April 9, Petitioner stated she was in a lot of pain due to activities performed over the weekend. On April 11, Petitioner was seen by Alix Crone, DC. She reported severe pain was causing extreme anxiety. Alix Crone noted psychosomatic manifestations of pain. On May 8, 2013, active flexion of the left shoulder was 150 degrees. On June 3, 2013, abduction was at 160 degrees. PX 2.

Petitioner also continued to undergo treatment with Dr. Jain and Dr. Sclamberg. Petitioner complained of worsening pain, dizziness and shortness of breath to Dr. Jain. She was continuously recommended cervical and lumbar epidural injections and to follow-up with her primary care physician. She reported improved pain in her left shoulder to Dr. Sclamberg. Exams revealed good range of motion and she was able to walk with ease. On May 13, 2013, Petitioner began complaining of right shoulder mild motion restriction. On June 21, 2013, Petitioner complained of significant pain in the right shoulder and down the deltoid. On exam she exhibited positive impingement signs on the right. Dr. Sclamberg diagnosed right shoulder impingement syndrome and gave her an injection. PX 5.

On May 31, 2013, Petitioner saw Dr. Axel Vargas. She complained of cervical axial pain, low back pain, and bilateral upper extremity and lower radicular pain. On exam, Petitioner walked with a limp favoring her left lower extremity. Dr. Vargas diagnosed cervical discogenic radiculopathy, cervical facet syndrome, lumbar discogenic radiculopathy, lumbar discogenic pain syndrome, lumbar facet syndrome, and right shoulder derangement. On June 28, 2013, Dr. Vargas reviewed and disagreed with IME opinions of Dr. Zelby. PX 5.

Petitioner continued chiropractic care at Rehab Dynamix from June 4, 2013 to July 3, 2013. Petitioner reported continued improvement of left shoulder symptoms. She did not

complain of right shoulder symptoms. On July 3, 2013, Petitioner reported 60% improvement. She was released to Dr. Sclamberg. PX 2.

On July 23, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6. Petitioner then continued treatment with Dr. Vargas and Dr. Sclamberg. On August 5, 2013, Petitioner stated both her left and right shoulders were improving. On August 9, 2013, Petitioner reported improvement following the previous injection, but she continued to complain of distal lower back pain with intermittent left-sided L5-S1 radiculopathy, neck pain, upper extremity radiculopathy, and right shoulder pain. PX 5. Thereafter, on August 27, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6.

On September 13, 2013, Petitioner returned to Dr. Vargas. She stated there was no improvement after the second injection, and her symptoms worsened. At trial, she testified she heard a buzzing sound after the injection. Tx. at 39. The doctor recommended a provocative lumbar functional discogram with post CT prior to a neurosurgical evaluation for surgical decompression and possible fusion of the lumbar spine. Dr. Vargas also recommended a neurosurgical evaluation for cervical spine surgery. PX 5.

On September 20, 2013, Petitioner followed up with Dr. Sclamberg. She complained of left shoulder and right elbow pain. Dr. Sclamberg diagnosed right medial epicondylitis, and he administered an injection in each area. PX 5.

On December 13, 2013, Petitioner returned to Dr. Sclamberg. She noted she had not been doing any physical therapy, was awaiting neurosurgical evaluation, and had been to the County clinic. On exam, Petitioner had negative impingement signs. Dr. Sclamberg recommended starting physical therapy again for the left shoulder. PX 5.

On December 20, 2013, Petitioner returned to Dr. Vargas. The doctor noted Petitioner presented previously with clear signs of congestive heart failure and he had recommended she seek treatment before moving forward with any procedures. Petitioner was instructed to follow up with Dr. Sclamberg and a neurologist at Cook County Hospital to discuss a cyst visualized on a November 2012 cervical spine MRI. PX 5.

On January 15, 2014, Petitioner presented to Cook County Health and Hospital Systems. She was diagnosed with low back pain, migraines, obstructive sleep apnea and obesity. On January 29, 2014, she returned complaining of headaches, only. On April 8, 2014, Petitioner was diagnosed with depressive disorder, low back pain and obesity. PX 9. However, prior to that diagnosis, on March 7, 2014, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg placed Petitioner at MMI for the left shoulder with no mention of right shoulder symptoms. PX 5.

On April 25, 2014, Petitioner returned to Dr. Vargas. Dr. Vargas noted Petitioner saw an internist at Cook County Hospital for congestive heart failure. Dr. Vargas also recommended Petitioner see a neurologist for her persistent headaches. Petitioner reported she saw one, but the neurologist dismissed the findings as emotional in origin. Petitioner also noted this doctor told her she had nothing going on and should return to work, but then referred her to the Cook County pain clinic for further evaluation and injections. Dr. Vargas again recommended a lumbar discogenic provocative functional discogram before referring her to neurosurgery. PX 5.

Petitioner did not return for care from April 25, 2014 to October 10, 2014 when she presented to Dr. Amish Patel. She complained of neck pain left greater than right, occipital headaches, thoracolumbar pain, and lower extremity radicular pain left greater than right. She stated she tried going back to work but her pain was too significant. Petitioner also stated she saw her primary care physician in July of 2014. No issues arose at that time. Diagnosis remained unchanged from prior visits. Dr. Patel noted Petitioner showed symptoms of possible autoimmune disease and recommended follow up with her primary care physician. PX 5.

On October 14, 2014, Petitioner presented to Dr. Amit Mehta who performed bilateral L5-S1 transforaminal epidural steroid injections and trigger point injections at the bilateral trapezius, splenius capitus, and paracervical erector spinae muscles. PX 6.

On November 10, 2014, Petitioner was examined by Dr. Thomas Pontinen. She reported the injections provided some relief, but she was experiencing increased left leg pain. Petitioner was diagnosed with lumbago, radicular low back pain, neck pain and cervical radiculopathy. PX 5.

On December 15, 2014, Petitioner returned to Dr. Pontinen. She reported she was recently told by a GI doctor and rheumatologist that had gastritis and osteoarthritis. Petitioner did not provide the names of the GI doctor or rheumatologist. On exam, she exhibited a positive left straight leg exam, but she had a normal gait and no sensory deficits. Dr. Pontinen recommended bilateral L3-S1 medial branch nerve blocks followed by bilateral L3-S1 radiofrequency ablation for her back pain. He also recommended a surgical consult. Petitioner underwent the procedures on February 10, 2015 and March 24, 2015. PX 5 and 6.

On April 20, 2015, Petitioner followed up with Dr. Pontinen. She complained of neck pain and continued radicular pain down the left leg. The doctor recommended repeat cervical and lumbar MRIs and referred Petitioner to neurosurgery. PX 5. Shortly thereafter, on April 22, 2015, Petitioner underwent an MRI of the lumbar spine. The MRI revealed chronic and very minor L3-L4 disc bulge narrowing the right foramen, and chronic very minor L4-L5 disc bulge minimally narrowing the foramina. PX 8.

Petitioner also underwent an MRI of the cervical spine. The MRI revealed progressive mild diffuse C4-C5 disc bulge and chronic C3-C4 minimal disc bulge with disc-osteophyte complexes narrowing the left-side foramina; and chronic minimal bulging of the C6-C7 and C7-T1 discs, with residual C5-C6 disc bulge. Facet joints were unremarkable throughout with no significant foraminal narrowing. PX 8.

Petitioner did not return for care from April 22, 2015 to September 14, 2016 when she presented to Dr. Ignas Labanauskas at Holy Cross Hospital. Petitioner complained of low back pain and neck pain. She reported she had not worked since 2012 because of her pain. Petitioner reported her left shoulder was recovered. She complained of right shoulder pain. Dr. Labanauskas recommended and Petitioner MRI of the right shoulder on September 16, 2016. PX 10.

On September 21, 2016, Petitioner returned to Dr. Labanauskas. Petitioner reported right shoulder symptoms beginning three years prior, but she was told the right shoulder was not related to her work injury. Petitioner was recommended right shoulder surgery, which she underwent on March 16, 2017. Petitioner last presented for follow up on June 20, 2017. She was 70-80% improved in her right shoulder. PX 10.

Section 12 examinations with Dr. Arbindi and Dr. Zelby

On March 20, 2013, Petitioner was examined by Dr. Ram Aribindi at Respondent's request pursuant to Section 12 of the Act. Dr. Aribindi performed a physical exam, took a history and reviewed Petitioner's medical records. Dr. Aribindi diagnosed a back contusion. He opined Petitioner did not need any further medical and placed Petitioner at MMI as it related to the neck and back. He also opined Petitioner's left rotator cuff condition not related to the October 9, 2012 work injury. Dr. Aribindi specifically opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. He recommended left shoulder surgery if the MRI showed a full thickness tear. He opined the surgery was unrelated to the work injury. RX 2.

Petitioner returned to Dr. Aribindi for a second IME exam on January 6, 2016. Petitioner reported she was not working due to her back and right shoulder pain. Petitioner denied specific injury to her right shoulder. Dr. Aribindi opined Petitioner reached MMI for the unrelated left shoulder condition on March 7, 2014. She could return to work without restrictions. Dr Aribindi assigned a 0% impairment rating. RX 3.

On May 22, 2013, Petitioner was examined by Dr. Andrew Zelby at Respondent's request. Dr. Zelby took a history from Petitioner, performed a physical exam, and reviewed medical records. Dr. Zelby opined Petitioner sustained a soft tissue spinal strain or contusion at

most. He noted mild degenerative spondylosis in the cervical and lumbar spine but opined there was no evidence the conditions were caused, aggravated, exacerbated, accelerated, or even made symptomatic because of Petitioner's reported injury. Dr. Zelby opined Petitioner did not require any further treatment including narcotics, medications, or injections. He opined Petitioner was able to work full duty without restrictions and reached MMI by January 2013 at the latest and required no more than 3-4 weeks of physical therapy. RX 4.

Petitioner returned to Dr. Zelby for a second IME on January 11, 2016. Petitioner complained of pain from the top of her head to the tip of her toes. She stated her symptoms were exacerbated by anything and nothing gave her relief. Dr. Zelby diagnosed mild cervical spondylosis without radiculopathy, mild lumbar spondylosis without radiculopathy, and spinal strain. Dr. Zelby noted Petitioner's complaints did not follow any neurologic or dermatomal distribution. The complaints inconsistent with a condition of the spine or the nervous system. Dr. Zelby opined Petitioner's subjective complaints were unrelated to the October 2012 work injury. He maintained medical treatment was unreasonable, irrespective of cause, and Petitioner could have returned to full duty work by January 2013. PX 5.

At trial, Petitioner testified she felt initial pain throughout her entire back. She testified she reported pain in her back to MacNeal Hospital and Rehab Dynamix. Tx. at 27. Petitioner testified she was recommended a discogram by her providers, but it was never performed because the procedure was too dangerous. Id. at 40. She testified she was never advised of heart concerns. Id. Petitioner recalled left shoulder pain upon questioning from her attorney.

Petitioner also testified she worked as her son's caregiver and was paid by the State of Illinois from January 2015 to August 2015. Tx. at 43. She testified she would assist him with taking medication, assist him getting into a bath, washing clothes and cooking. Id at 43-44. Petitioner testified she also worked for Ron's Staffing packing boxes of Jell-O. Id. at 45. She testified she was unable to complete her work because of pain in spine and left leg. Id. Petitioner testified she was offered a job as a dishwasher during St. Joseph's carnival. Id. She testified she was required to wash plastic containers. Id. Petitioner testified she did not have the strength to continue performing the job. Id. at 46. As of the date of trial, Petitioner testified to continued pain in her spine, hands and below her bilateral legs. She also complained of swelling in her left shoulder. Id. at 50-51.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue C: *Accident*

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, ***Edward Don v Industrial Commission,*** (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** 44 Ill.2d 207. When an employee has a pre-existing condition, he must "show that a work-related accident injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connect to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition. ***Sisbro Inc. v Industrial Comm'n,*** 207 Ill. 2d at 205, 797 N.E.2d at 7473.

Petitioner testified a co-worker threw a cart, which hit her back and caused pain throughout. She testified she reported back pain to her company clinic and MacNeal Hospital. In review of medical records entered into evidence, initial medical records from MacNeal Hospital corroborate Petitioner was hit in the mid-back area by a cart. The cart did not hit her left or right shoulder, lower back, neck or right elbow. PX #3. The Arbitrator notes Petitioner did not testify to left shoulder pain until led by her attorney. Further, Petitioner did not complain of right shoulder or right elbow pain until after she underwent left shoulder surgery in 2013. An Application for Adjustment of Claim and Employee Incident Report signed by Petitioner further support a mid-back injury.

After carefully considering Petitioner's testimony and medical records entered into evidence, the Arbitrator finds Petitioner sustained a minor mid-back injury which arose out of and in the course of her employment with Respondent.

The Arbitrator finds Petitioner's testimony as it relates to the left shoulder, right shoulder, low back, neck and right elbow not supported by initial accounts of Petitioner's work incident. As such, Petitioner's injuries as it relates to the left shoulder, right shoulder, low back, neck and right elbow did not arise out of her employment and her claim for compensation is denied. All other issues relating to these body parts are therefore moot.

Issue F: *Causal connection*

The Arbitrator finds Petitioner's current condition of ill-being as it relates to the mid-back causally related through January 30, 2013. Petitioner's condition of ill-being after January 30, 2013 is not causally related to the work incident of October 9, 2012. In so finding, the Arbitrator relies on the Application for Adjustment of Claim signed on October 10, 2012 and filed on October 31, 2012, Employee Incident Report signed on October 12, 2012, the unrebutted medical records of MacNeal Hospital from October 10, 2012, as well as the opinions of Dr. Aribindi and Dr. Zelby. Further, Petitioner lacks credibility. Accordingly, her claim for benefits is denied and all other issues are moot.

As discussed above, Petitioner testified she was hit by a cart that was thrown forward by a co-worker. The cart came back and hit her back due to the speed of the cart. Petitioner caught herself on a desk. While the Arbitrator does not question a cart bumped into Petitioner's back, the Arbitrator notes inconsistencies.

First, the Arbitrator notes Petitioner reported the metal cart was heavy. Medical records entered into evidence suggest the cart may have weighed 300 pounds. The Arbitrator cannot reason a 300-pound metal cart could be thrown so easily and return back to hit her. Additionally, Petitioner testified she was placing her cart in an aisle near her work station desk when she was hit from behind. Petitioner did not testify she turned her body to the side to catch herself from falling or losing her balance. Petitioner reported she "noticed" a cart had hit her.

Second, Petitioner indicated injury to her mid-back, only, in an Application for Adjustment of Claim. RX 6. She also claimed injury to her back in an Employee Incident Report. RX 8. The documents were in English. During direct examination, Petitioner affirmed she was able to read and speak some English. Tx. at 49.

At trial, it was stipulated, and Petitioner testified she signed the Application for Adjustment of Claim on October 10, 2012. Tx. at 55-56. Petitioner also testified she completed and signed an Employee Incident Report. She testified she signed the document on October 12, 2012. The incident report indicates Petitioner was placing a metal cart back in place when she felt something hit her back. Petitioner did not indicate pain or injury to her shoulders, head, neck or right elbow. She did not indicate she caught herself on a desk. RX 6.

Contrary to her prior testimony during direct examination, Petitioner was no longer able to recall the contents of the Application for Adjustment of Claim or Employee Incident Report despite previously confirming her signature. Tx. at 58. Petitioner reasoned she was unable to understand the English statements. Id.

Third, Petitioner testified she was sent to MacNeal Hospital on October 9, 2012. The medical records entered into evidence affirm she was seen on October 10, 2012. Petitioner complained of pain in her back. While Petitioner complained of some arm pain, Petitioner specifically denied the cart hit her shoulders. She did not lose consciousness or report injury to her neck or head. During direct examination, Petitioner was only able to recall left shoulder pain upon direction from her attorney. Petitioner did not question the validity of the history provided in the MacNeal Hospital records until she was questioned regarding her specific denial of a cart hitting her shoulders during cross examination. Tx. at 59. The record indicates Petitioner was diagnosed with a contusion of the back, only. She returned to MacNeal Hospital on November 8, 2012 complaining of panic attacks. She denied any specific pain to her low back. Again, the note is absent any indication of left or right shoulder pain or injury. Petitioner was diagnosed with a trapezius strain and wry neck.

Fourth, the Arbitrator notes inconsistent histories of pain amongst the various providers from Rehab Dynamix, and Chicago Pain and Orthopedic Institute. Specifically, chiropractic notes from Rehab Dynamix indicate continued improvement, while records from Chicago Pain & Orthopedic Institute indicate severe complaints of pain to the left shoulder, low back and neck. Electric stimulation and hot packs were further administered to the low back throughout chiropractic care, despite Petitioner complaining of pain mostly in her upper back. The Arbitrator notes MRIs of the lumbar spine and cervical spine revealed normal degenerative findings. On December 3, 2012, near full passive range of motion of the left shoulder was noted; however, Dr. Sclamberg maintained a surgical recommendation. PX 5.

The Arbitrator also notes medical records from Alix Crone, DC indicate psychosomatic manifestations of pain. PX 2. Medical records from Dr. Vargas indicate Petitioner had seen a neurologist and was advised her complaints were emotional in origin. PX 5 Medical records from Dr. Patel indicate Petitioner showed signs of an autoimmune disease. PX 5. Medical records from Dr. Pontinen indicate Petitioner was seen by a rheumatologist in 2014 and

possibly diagnosed with osteoarthritis. PX 5. The Arbitrator finds it difficult to understand how a cart hitting Petitioner's mid-back area could result in bilateral rotator cuff tears, cervicalgia, lumbar radiculopathy, myofascial pain syndrome and epicondylitis.

Lastly, the Arbitrator notes Petitioner did not complain of any right shoulder or right elbow pain until seven months after the October 9, 2012 work incident. Petitioner specifically stated she did not have any pain complaints until after the left shoulder surgery in March 2013. Petitioner's statements are corroborated by normal right shoulder exams in 2012.

The Arbitrator ultimately finds the causation opinions of Dr. Vargas, Dr. Jain, Dr. Sclamberg, Dr. Patel and Dr. Pontinen were based on questionable statements and material misrepresentations made by Petitioner. The Arbitrator places greater weight on the IME opinions of Dr. Aribindi and Dr. Zelby

Specifically, Petitioner inconsistently reported pain complaints to her treating providers. Petitioner also reported she was unable to work since October 9, 2012. However, she testified she obtained employment with Ron's Staffing and at a pizzeria. She also testified she applied and was approved by the State of Illinois to work as a caregiver for her adult son over a period of nine months in 2015. Tx. at 62. Petitioner's son was 25-26 years old at the time and weighed around 170 pounds. Tx. at 63-64. While employed by Staffmark, Petitioner testified the heaviest box she lifted on her own weighed 30-35 pounds. She was assisted by co-workers if the boxes weighed greater than 30-35 pounds. She did not testify to any assistance while serving as her son's state-appointed caregiver.

Dr. Aribindi and Dr. Zelby opined Petitioner sustained a contusion to her back. Dr. Zelby opined Petitioner required no more than 3-4 weeks of directed physical therapy. Dr. Zelby opined Petitioner could return to full duty work without restrictions by January 2013. Dr. Aribindi also opined Petitioner reached MMI for her back condition in 2013. He opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. The Arbitrator notes Petitioner was able to recall attending the IMEs with Dr. Aribindi and Dr. Zelby when questioned by her attorney during direct exam. Tx. at 50. During cross examination, Petitioner was no longer able to recall seeing either doctor. Tx. at 61.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being as it relates to the mid-back is causally related in part to the accidental injury of October 9, 2012 up to January 30, 2013.

The Arbitrator finds Petitioner's condition of ill-being as it relates to the mid-back after January 30, 2013 is not causally related to the accidental injury of October 9, 2012. The Arbitrator also finds Petitioner has not proven by a preponderance of the evidence that her

condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow are not relates to the accidental injury of October 9, 2012. As such, all other issues as it relates to these body parts are moot.

Issue J: *Medical bills*

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and are determined to be required to diagnose, relieve or cure the effect of a Petitioner's injury. The Petitioner has the burden of providing that the medical services were necessary, and the expenses incurred were reasonable. ***City of Chicago v. Illinois Workers' Compensation Commission, 409 Ill. App. 3d 258, 267 (1st Dist., 2011).*** In determining the reasonableness and necessity of medical treatment, the Commission also considers whether the records demonstrate subjective or objective improvement or whether the treatment undertaken failed to provide a benefit. ***Hugo Alvarez v AMI Bearings, 16 IWCC 0408***.

Petitioner in this case has presented unpaid medical bills from Soma Rehab totaling $2,563.65 (PX 11); Gray Medical totaling $29,395.48 (PX 12); La Grange Memorial Hospital totaling $2,179.41 (PX 13), IWP for $3,391.98 (PX 14); Rx Development totaling $6,052.02 (PX 15); Rehab Dynamix totaling $31,593.47 (PX 16); Preferred Open MRI totaling $8,520.00 (PX 17); Accredited Ambulatory Care totaling $103,146.02 (PX 18); Chicago Pain and Orthopedic Institute totaling $33,608.32 (PX 19); Dr. Ignas Labanauskas totaling $12,950.00 (PX 21); Prescription Partners totaling $6,129.01 (PX 22); Essential Testing totaling $311.28 (PX 23); Metropolitan Advanced Radiological totaling $944.92 (PX 24); and Walgreens Out-of-Pocket Expenses totaling $84.23 (PX 26). *See also* AX 2.

As discussed above, Petitioner's current condition of ill-being as it relates to the mid-back is causally related in part through January 30, 2013. The Arbitrator agrees a maximum of 3-4 weeks of physical therapy would have been appropriate to treat Petitioner's condition. The Arbitrator notes Respondent paid $11,019.89 in medical expenses through April 2013. RX 7.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, as well as her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds Respondent has paid all reasonable and necessary medical treatment pursuant to Section 8(a) and 8.2 of the Act. The remaining issues of Respondent's liability of outstanding Section 8 medical benefits are moot. Accordingly, benefits are denied. Irrespective of any causation opinion, the Arbitrator further denies payment of any medical bills not presented at trial.

The Arbitrator also highlights for further discussion Petitioner's Exhibits 11, 13, 23 and 25, medical bill statements from Soma Rehab, La Grange Hospital, Walgreens and Essential Testing.

The Arbitrator notes Petitioner did not present any medical evidence aside from medical statements to support treatment undertaken at Soma Rehab or La Grange Memorial Hospital. In addition to the Arbitrator's findings regarding causation, the Arbitrator denies medical charges from Soma Rehab or La Grange Memorial as no medical record evidence was presented at trial to support this medical treatment. PX 11 and13.

With respect to Petitioner's Exhibit 23, medical bills from Essential Testing. The Arbitrator notes a description of charges indicates "quantitative" and "qualitative" procedures. The Arbitrator is unable to determine what the charges refer to. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Essential Testing as no medical record evidence was presented at trial to support medical treatment from Essential Testing.

With respect to Petitioner's Exhibit 25 prescription refills from Walgreens, the Arbitrator notes medications were dispensed to treat bacterial infections. The Arbitrator cannot reason the medications were prescribed to treat Petitioner's questionable low back, neck or bilateral shoulder pain complaints. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Walgreens as no medical record evidence was presented at trial to support the medications were prescribed to treat any of Petitioner's claimed injuries.

Issue K: *TTD*

Petitioner argues TTD benefits are owed from October 10, 2012 through December 31, 2014 and September 1, 2015 through January 29, 2019. The Arbitrator notes Respondent paid TTD benefits from October 10, 2012 to December 18, 2012. Respondent also paid TTD benefits from March 20, 2013 to May 14, 2013 totaling $3,960.00. RX 7. The Arbitrator notes TTD benefits were suspended in December 2012 after Petitioner failed to attend an IME with Dr. Zelby. RX 10.

While a job log was presented at trial, the Arbitrator notes Petitioner sought employment on five separate occasions between July 23, 2014 and August 24, 2014. PX 26. At trial, she testified she was hired by two employers, but she voluntarily quit. She also testified

she applied with the State of Illinois and was accepted to work as a caregiver for her adult son. Petitioner worked in this position for nine months and did not seek any other employment during this time. She performed this task on her own. The Arbitrator cannot reason Petitioner put in effort into finding employment. As discussed above, Petitioner testified she was required to lift boxes weighing 30-35 pounds while employed with Staffmark. She was assisted by co-workers if she was required to lift heavier items. The Arbitrator reasonably infers Petitioner's adult son weighed more than 30-35 pounds and was capable of returning to 100% of her prior job demands.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, and her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds all remaining issues of Respondent's liability of TTD benefits moot. Accordingly, further TTD benefits are denied.

Issue L: *Nature and extent of injury*

In light of the Arbitrator's determination regarding Petitioner's credibility and based on the totality of evidence entered at hearing, the Arbitrator finds there is some residual pain of back pain, only, that is part of permanent disability. The Arbitrator finds Petitioner has not provided evidence of a left shoulder, right shoulder, neck, low back or right elbow injury related to the October 9, 2012 work incident.

In determining permanency, the Arbitrator considers multiple factors. The mere existence of testimony does not require its acceptance. ***Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983).*** To argue to the contrary would require that an award be entered or affirmed whenever Petitioner testified to an injury no matter how much testimony might be contradicted by the evidence, or how evident it might be that a story is fabricated afterthought. ***U.S Steel v. Industrial Commission, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).***

First, under subsection (i) of Section 8.1b(b), an impairment rating considers loss of range of motion, loss of strength, measured atrophy of tissue mass consistent with the injury, and any other measures that establish the nature and extent of the impairment. No impairment rating was assigned as it relates to the mid-back. There is no impact on the permanency based upon this factor.

As it relates to the left shoulder, Dr. Arbindi opined Petitioner's condition off ill-being was not causally related to the October 9, 2012 work incident. Regardless of his causation opinion, Dr. Aribindi provided an impairment rating as Petitioner had reached MMI. RX #3. Based on AMA guides to the Evaluation of Permanent Impairment 6th Edition, given a resolved rotator cuff tear with no significant objective findings status-post surgical intervention, a final impairment of 0% whole person impairment was given. Petitioner corroborated fully resolved left shoulder symptoms in September 2016 when she presented to Dr. Labanauskas. The Arbitrator finds the opinions of Dr. Aribindi credible and agrees Petitioner's left shoulder condition is not causally related to the October 9, 2012 work incident.

Second, with regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, Petitioner testified she worked in quality control for Respondent since August 2012. Her job required her to check orders, places boxes in carts and then onto a desk. Petitioner lifted no more than 30-35 pounds on her own. Petitioner was released to return to work at 100% of her job demands by IME experts, Dr. Aribindi and Dr. Zelby. RX #2-5. Petitioner testified she found employment with two companies, but voluntarily left after 1-2 days because she was unable to perform her work. However, she was able to work as a caregiver for her adult son for a period of nine months. Her position was approved by the State of Illinois. Petitioner's ability to work as a caregiver with approval by the State of Illinois lowers any impact on the permanency based upon this factor.

Third, under subsection (iii) of Section 8.1b(b), Petitioner was 56 on the date of accident. Petitioner complained of pain throughout her body and reported to her providers that she had not worked since 2012. As discussed above, Petitioner was fully capable of finding employment during July-August of 2014 when she was hired by two companies. Petitioner was also capable of working as a caregiver for nine months in 2015. While Petitioner obtained the position to care for her son, the caregiver position allows for greater future earning potential for other employers. This again lowers any impact on the permanency based upon factor (iii).

Fourth, under subsection (iv) of Section 8.1b(b), evidence regarding any impact to future earning capacity, Petitioner presented wages earned from January 2015 to September 2015 while working as a caregiver for the State of Illinois. PX 27. Petitioner was earning almost identical pay while employed by Staffmark. Petitioner's capability to work was corroborated by IME experts Dr. Aribindi and Dr. Zelby. Petitioner was and is capable of returning to 100% of her job demands. This again lower any impact on the permanency based upon this factor.

Fifth, with regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the medical records, Petitioner has continued with pain complaints throughout her entire back and body. However, initial medical records, incident reports and an Application for Adjustment of Claim indicate mid-back pain, only with a contusion diagnosis. Petitioner

testified to pain in her back and did not claim any other pain until directed by her attorney. Further, chiropractic medical records indicate reports of improvement and negative sensory deficits despite undergoing various injections, medial branch blocks and ablations. Dr. Aribindi and Dr. Zelby also opined Petitioner's back condition had resolved. RX 2-5. Petitioner did not seek any medical care from 2015 to 2016 when she returned complaining of severe right shoulder pain. This factor is given greater weight.

Although one of many factors may not be the sole determinant of disability, the Arbitrator notes inconsistent statements and misrepresentations of material facts to Petitioner's various medical providers and at trial. At the time of hearing, Petitioner testified to pain in her back. She did not recall any shoulder pain until directed by her attorney. Petitioner also affirmed signing an Employee Incident Statement and Application for Adjustment of Claim, though she later denied understanding the contents of the documents. The medical records from MacNeal Hospital also clearly indicate Petitioner specifically denied a cart hit her shoulders. Petitioner later disagreed with the history she provided to the hospital. She testified she was capable of returning to work in 2014 and 2015.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole at a PPD rate of $220.00 pursuant to Section 8(d)2 of the Act.

Issue M: *Penalties and attorney's fees*

As noted above, the Arbitrator has found Petitioner's current condition of ill-being as it relates to the mid-back after January 2013 is not causally related to the work incident of October 9, 2012. The Arbitrator has also found Petitioner's condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow is not causally related to the work accident of October 9, 2012. As such, further benefits are denied. As will be discussed below, Penalties and fees are also denied as provided in Section 16 of the Act; Section 19(k) of the Act; and Section 19(l) of the Act.

There is adequate evidence to validate Respondent relied upon Petitioner's own reporting of initial mid-back pain only in her Application for Adjustment of Claim, Employee Incident Report and initial medical records from MacNeal Hospital to deny payment of medical care and TTD benefits after the respective IMEs of Dr. Aribindi and Dr. Zelby in March 2013 and May 2013. Further, while Respondent did suspend TTD benefits on December 12, 2012, the Arbitrator notes TTD benefits were suspended after Petitioner failed to attend a scheduled IME

with Dr. Zelby in December 2012. Medical records into evidence support Petitioner reported her IME was being rescheduled. The Arbitrator notes TTD benefits were reinstated on March 20, 2013, when Petitioner attended the first rescheduled IME. RX #7. The language of the Act confirms a failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, ***Avon Products, Inc. v. Industrial Commission, 82 Ill.2d 302, 412 N.E.2d 470 (1980).***

Additionally, the Arbitrator notes Petitioner presented various medical bills from Soma Rehab, LaGrange Memorial Hospital, Essential Testing and Walgreens for treatment that was not presented into the record. The Arbitrator cannot reason penalties are warranted when the Arbitrator is unable to ascertain the type of treatment offered during any of the visits alleged by the providers. The Arbitrator further notes various medical bills presented at trial were addressed to Petitioner, directly. There is no indication the medical bills were issued to Respondent. As discussed above, Respondent paid $11,019.89 in medical bills to various providers through April 1, 2013.

Where Respondent's actions are consistent with the Act, Respondent's nonpayment, underpayment, or delayed payment cannot be deemed vexatious or without just cause, and Section 19(k) and 19(l) penalties must be denied. RX 9. Where Respondent has acted in accordance with the Act, it also should not be held liable for Petitioner's attorney's fees in his effort to establish otherwise, and Section 16 fees also must be denied. RX 9.

Issue N: *Respondent's credit*

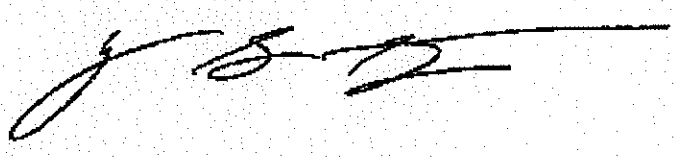
As noted above, Respondent paid $3,960.00 in TTD benefits and $11,019.89 in medical expenses. AX 1, AX 3, and RX 7. Based upon the opinions of the arbitrator regarding causal connection, the Arbitrator finds Respondent shall have a credit for all amounts paid for TTD to or on behalf of Petitioner in the amount of $3,960.00. Respondent shall also have a credit for all amounts paid towards medical treatment in the amount of $11,019.89.

Issue O: *Former attorney's fee petition*

The parties stipulated a petition for attorney's fees by a former attorney for the Petitioner was pending at the time of trial and the Petitioner's current attorney "has notified

the former attorney of the date of this hearing." AX 1 and Tx. at 7. The IWCC case file for this matter contains a September 24, 2014 order from Arbitrator Kane continuing The Vrdolyak Law Group, LLC's Petition for Fees to the disposition of this case.

However, the Petition for Fees covered by Arbitrator Kane's order does not itemize any time spent by The Vrdolyak Law Group in the prosecution of this claim. This Petition also does not list any incurred expenses and/or costs by The Vrdolyak Law Group during its representation of the Petitioner. Furthermore, no testimony or documentary evidence was entered into evidence during the January 29, 2019 hearing to support the Petition for Fees. As such, the Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.



Signature of Arbitrator

March 13, 2019
Date

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF LAKE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN DELGADO,

Petitioner,

vs.

NO: 17 WC 23580

21IWCC0161

PNR PAINTING PLUS, INC., and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, and workers' compensation insurance coverage, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.67 per week for a period of 60 2/7 weeks, representing July 16, 2017 through September 10, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $456.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 25% loss of use of the person as a whole.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General. This award is hereby entered against the IWBF to the extent permitted

21IWCC0161

and allowed under §4(d) of the Act. Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF. The award or findings in this matter in no way limit or modify the Respondent-Employer's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Stephen Mathis

mck

O: 3/3/21

Thomas J. Tyrrell

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SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JUAN
Employee/Petitioner

Case# **17WC023580**

PNR PAINTING PLUS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0161

On 9/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1361 BARRY STEWART SILVER
302 SAUNDERS RD
SUITE 200
RIVERWOODS, IL 60015

0000 PNR PAINTING PLUS, INC
22850 W ILLINOIS ROUTE 173
ANTIOCH, IL 60002

0143 ASSISTANT ATTORNEY GENERAL
KRISTIN LEASIA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Juan Delgado
Employee/Petitioner

Case # **17** WC **023580**

v.

PNR Painting Plus, Inc.; Illinois State Treasurer as *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **July 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Insurance**

FINDINGS

On **July 15, 2017**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent-Employer.
On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
Timely notice of this accident ***was*** given to Respondent-Employer.
Petitioner's current condition of ill-being ***is*** causally related to the accident.
In the year preceding the injury, Petitioner earned **$39,520.00**; the average weekly wage was **$760.00**.
On the date of accident, Petitioner was **30** years of age, ***single*** with **1** dependent children.
Respondent-Employer shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.
Respondent-Employer is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent-Employer shall pay Petitioner Temporary Total Disability benefits of $506.67/week for 60-2/7 weeks, because Petitioner remained off work due to his injuries during the period from July 16, 2017 through September 10, 2018.

Respondent-Employer shall pay Petitioner permanent partial disability benefits of $456.00/week for 125 weeks, because the injuries sustained caused the Petitioner 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

Injured Workers' Benefit Fund

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General's Office. This finding is hereby entered as to the IWBF to the extent permitted and allowed under §4(d) of the Act. No party shall seek or have a right to any recovery from the IWBF. The award or findings in this matter in no way limit or modify the Employer-Respondent's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn M. Doherty

9/23/19
Date

Signature of Arbitrator

SEP 25 2019

FINDINGS OF FACT

An Application for Adjustment of Claim was filed by Petitioner, Juan Delgado, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, PNR Painting Plus, Inc. This action sought further relief from the Illinois Workers' Benefit Fund (IWBF) because Respondent-Employer allegedly did not maintain workers' compensation insurance. A hearing was held on July 29, 2019 in Waukegan, Illinois. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio custodian* of the IWBF, and participated in the proceeding. No appearance was made by the Respondent-Employer at trial, despite proper notice.

Petitioner testified that his name is Juan Jose Delgado. In July 2017, he was 30 years old with one dependent minor child, though he currently has two minor dependent children. In May 2017, Petitioner saw an ad on Facebook for a painter, posted by PNR Painting Plus, Inc. ("Respondent-Employer"). He responded to the ad, and made arrangements to meet Rick Jones, owner of Respondent-Employer. Upon meeting Mr. Jones, Petitioner was hired as a house painter. He completed his first job for Respondent-Employer in May 2017 in Antioch, Illinois.

While working for Respondent-Employer, Petitioner made $20.00 per hour, and worked 40 hours per week. Petitioner placed into the record a copy of a paycheck, written from Respondent-Employer's business account, paying $760.00 for one week of work in June 2017 (Petitioner's Exhibit "Pet. Ex." 1). The reason the check did not reflect the full $800.00 he would be owed for a week of work is that some of the money was held over for the next paycheck.

As a painter Petitioner tracked the time he worked. He marked down the hours worked on a timesheet, which he was required to complete before leaving a specific job. Petitioner's Exhibit 2 reflects the time Petitioner clocked for the pay period ending on June 29, 2017, and shows that Petitioner worked 40 hours during that pay period. (Pet. Ex. 2).

Petitioner received his job assignments via telephone calls from Rick Jones. Jones would provide instructions for Petitioner to report to Respondent-Employer's headquarters, which were located at Jones's home in Antioch, Illinois. Once at Respondent-Employer's office, Jones informed Petitioner regarding the day's job assignment, including where Petitioner was to report and what supplies were needed. Jones transported Petitioner and anyone else working the assignment to the job site in a company van. Jones also provided the supplies and equipment needed for an assignment, including the ladders.

In June 2017, Petitioner received notice that he would be placed on a crew to paint a house in Lake Geneva, Wisconsin. Prior to beginning the job, Petitioner went with Jones to look at the site. Petitioner took photographs of the home to be painted. (Pet. Exs. 6-7). One of the photographs shows the type of extension ladder used at the job site. (Pet. Ex. 6). Petitioner took these photos on his personal cell phone about a week prior to the accident. At any job, there was a daily exchange of photographs between himself and Jones to report progress on the assignment and receive additional instructions regarding what still needed to be completed.

On July 15, 2017, Petitioner was working at the assignment in Lake Geneva with a crew of four people. He was painting a "peak" section of the home – a high point on the building requiring a ladder to access. He was standing on an extension ladder by himself, although one of his coworkers was at the bottom of the ladder holding it for stability. Around 4:00pm that evening, Petitioner was working to finish a few last spots needing more paint on the peak. He climbed the ladder to the peak; about two to three minutes later, while he was painting, the ladder gave way. Petitioner does not know if his spotter had abandoned his post and was no longer spotting at the time of the accident, but essentially the ladder began sliding down with Petitioner still on it. Petitioner fell, hitting his head and sustaining an open fracture to his right ankle. At the time that the accident occurred, Jones was at the job site. An ambulance was called. The paramedics secured Petitioner, provided him with medication and first aid treatment, and transported Petitioner to Mercy Hospital in Janesville, Wisconsin.

Upon arrival at the hospital, Petitioner's bone was exposed out of his ankle and skin, and the foot was turned 360 degrees. Petitioner did lose consciousness for a period of time while he was first being treated. They diagnosed Petitioner with a dislocated fracture of the right ankle, and fractures to the 3rd through 5th metatarsals of the right foot. Petitioner underwent ankle surgery. He was ultimately released home after five days.

Following his release from Mercy Hospital, Petitioner followed up with his primary care physician, Dr. Bains. Dr. Bains referred Petitioner to an orthopedic surgeon at Illinois Bone and Joint Institute, Dr. Weatherford. Dr. Weatherford determined that Petitioner needed further surgery to his right ankle, which was undertaken at St. Francis hospital in Evanston, Illinois. Petitioner was placed on non weightbearing restrictions for his right foot, which remained in effect for eight weeks. While recovering at home from surgery, Petitioner had to convert the first floor of his home into a bedroom. He used a knee scooter or crawled to get around.

Petitioner followed up with Dr. Weatherford for several months. He began physical therapy three weeks after the surgery. Physical therapy lasted several months, and took place in Schaumberg, Illinois, about 60 miles from Petitioner's home. Dr. Weatherford released Petitioner from care and back to work with a 10-pound carrying restriction and no standing for more than five minutes. Petitioner must be able to lift or elevate his leg at work and is not to engage in excessive climbing.

Petitioner is no longer under Dr. Weatherford's care. Dr. Weatherford referred Petitioner to a rheumatologist, Dr. Morris, due to concerns over early-onset arthritis developing in Petitioner's right ankle.

Prior to the accident, Petitioner worked as a professional painter for 15 years. Due to his permanent restrictions, Petitioner is unable to return to work in that capacity. Petitioner now works for another company, Epsco Industries, 40 hours per week and earns $15.00 per hour. Petitioner submitted several exhibits, including tax returns and Year-to-Date earnings statements from Epsco, confirming same. (Pet. Ex. 3-5). His work at Epsco is sedentary in nature.

Petitioner still feels pain in his foot and ankle from the moment he wakes up in the morning, and when completing everyday tasks. How long he can stand in a day depends on the amount of pain

he experiences. He uses a knee scooter for long distances, and also has a cane. He can drive, but has difficulty doing so. He feels pain with breaking, and cannot drive more than 10 to 15 minutes without having to stop. He cannot drive long distances. Petitioner experiences pain during most of his day-to-day activities including taking his kids to the park, grocery shopping, cooking, and picking up his kids at daycare. Petitioner testified he feels his whole life has "done a total turnaround" since his fall.

On cross exam, Petitioner testified that Jones was the co-owner of Respondent-Employer, and that Petitioner received his paychecks from Jones. When Jones hired Petitioner, he did not give Petitioner an employment contract to sign. The van used to transport crew members to job sites was a company van that had the company's name painted on the side. Petitioner clarified that the photo he submitted showing an extension ladder (Pet. Ex. 6) did not depict the actual spot where he fell, but rather the front door of the same property, and was taken a week prior to the fall. Petitioner further clarified that he called the ambulance following the fall after speaking to Jones about the accident. Petitioner testified that Mr. Jones refused to call an ambulance.

Petitioner reported to Mercy Janesville Hospital in Janesville, Wisconsin, on July 15, 2017. (Pet. Ex. 10). He reported that he fell from a ladder while working on a roof, and hit his head. Petitioner presented with an open fracture with displaced bones sticking out of his right lower extremity after a 15-foot fall. (Pet. Ex. 10). X-rays of his right ankle revealed an open subtalar fracture dislocation with medial dislocation of the right foot. The x-rays also showed a fracture of the shaft of the 5th metatarsal. X-rays taken of the right foot as a whole displayed a stable alignment with a complex fracture. (Pet. Ex. 10). CT scans taken of Petitioner's head, lumbar spine, cervical spine, and chest/abdomen/pelvis area were unremarkable and showed no signs of acute trauma. A CT scan of Petitioner's right ankle revealed a complex open fracture of the hindfoot, midfoot, and proximal forefoot, as well as an interval reduction of the previously-seen subtalar joint dislocation. (Pet. Ex. 10). Petitioner underwent laceration repair with sutures. The fracture was reduced and splinted. (Pet. Ex. 10). On July 18, 2017, Petitioner underwent irrigation of the open wound, incisional and excisional debridement of the wound with wound repair at both the ankle and subtalar region. (Pet. Ex. 10). Petitioner was discharged from Mercy Hospital on July 19, 2017 with crutches and prescriptions for ibuprofen, oxycodone, and cephalexin. He was placed on non weightbearing status along with crutches and a walker. (Pet. Ex. 10).

Petitioner saw his primary care physician, Dr. Rushin Bains, on July 20, 2017. (Pet. Ex. 11). Dr. Bains diagnosed degenerative joint disease of the ankle and foot, namely primary osteoarthritis to the right ankle and foot. (Pet. Ex. 11). He also noted the unspecified fracture to the right lower leg. Dr. Bains noted good sensation in the right foot. He opined that Petitioner needed a referral to an orthopedic surgeon, which was given. (Pet. Ex. 11).

On July 23, 2017, Petitioner presented to Northshore University Health System/Highland Park Hospital with an open nondisplaced fracture of the fourth metatarsal bone of the right foot, which displayed routine healing. (Pet. Ex. 12). Dr. Stacey Becker attended to Petitioner. X-rays of his right foot were taken, which confirmed the comminuted fracture of the 5th metatarsal, the nondisplaced fracture of the 4th metatarsal, and a suspected avulsion fracture of the cuboid. (Pet. Ex. 12). He presented for evaluation of the injury, as he reported that the posterior mold he was

given from his stay at Mercy Hospital was digging into his leg. (Pet. Ex. 12). A shorter posterior mold (splint) was applied and Petitioner was discharged home with antibiotics. (Pet. Ex. 12).

Petitioner first saw Dr. Brian Weatherford, an orthopedist at Illinois Bone and Joint Institute, on July 26, 2017. (Pet. Ex. 13). Dr. Weatherford noted with concern the presence of active drainage at the wound site and a lack of healing. He placed Petitioner in a compression wrap and a Cam boot. (Pet. Ex. 13).

Petitioner followed up with Dr. Weatherford on July 28, 2017. (Pet. Ex. 13). Dr. Weatherford confirmed a diagnosis of a right-side type 3 open subtalar dislocation with delayed wound healing and continued drainage, an intraarticular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. Dr. Weatherford opined that Petitioner should proceed to surgery to repeat debridement. (Pet. Ex. 13).

Dr. Weatherford performed repeat surgery on Petitioner on July 31, 2017. The surgery occurred at St. Francis Hospital in Evanston, Illinois. (Pet. Ex. 14). Petitioner's pre-and-post-operative diagnosis was right open subtalar dislocation, open wound with delayed healing, cuboid fracture, displaced intra-articular 5th metatarsal fracture, and equinus contracture. (Pet. Ex. 14). Petitioner underwent a right gastrocnemius recession; irrigation and debridement associated with an open fracture dislocation including skin and subcutaneous tissue, muscle, and fascia; open reduction internal fixation of the right cuboid; open reduction internal fixation of the right 5th metatarsal; and application of negative pressure wound therapy. (Pet. Ex. 14). Synthes implants including two 2mm plates with screws were used. Petitioner was placed on non weightbearing status for his right lower extremity for eight weeks, and was given compression wrapping. (Pet. Ex. 14). He was discharged on August 2, 2017 with a prescription for Norco. (Pet. Ex. 14).

Following surgery, Petitioner followed up with Dr. Weatherford on August 2, 2017; August 7, 2017; August 15, 2017; August 22, 2017; September 5, 2017; September 26, 2017; November 17, 2017; March 2, 2018; and May 5, 2018. (Pet. Ex. 13). At the August 22 appointment, Dr. Weatherford recommended that Petitioner begin physical therapy and gave him a referral. (Pet. Ex. 14). Petitioner's records indicate that he underwent physical therapy at Physical Therapy-Team Rehab under the direction of Kristin Dryden. (Pet. Ex. 16). He attended physical therapy approximately two times per week from September 27, 2017 through May 7, 2018. (Pet. Ex. 16).

At the November 17, 2017 appointment, Dr. Weatherford opined that Petitioner would likely develop activity limitations secondary to the severe nature of his injury; in particular, Dr. Weatherford stated that Petitioner would likely form subtalar arthritis due to the injury. (Pet. Ex. 13). By December 7, 2017, Petitioner could only walk for 2 hours and was unable to sit without swelling. (PX16, 12/7/17, p.2-3). A new long-term goal of improving his ability to squat and kneel to permit child care was identified but unmet at that time. By the end of January 2018, Petitioner was unable to stand or walk for more than 3-4 hours for job duties, unable to fully squat to reach and lift painting supplies, unable to travel stairs at home reciprocally or climb ladders at work, and unable to fully assist with cooking and cleaning tasks at home. (PX16, 1/29/18, p.2-3). Petitioner was still experiencing pain levels between 6 and 8 out of 10, which were caused by joint and tissue hypomobility, lower extremity weakness and decreased dynamic balance. To increase function and reduce pain, Petitioner's plan of care included manual therapy,

therapeutic exercise, neuromuscular reeducation and therapeutic modalities. Petitioner's newest round of therapy would be three times weekly for 6 weeks to yield improvements.

One month later, on February 26, 2018, Petitioner had completed 8 therapy sessions. (PX16, 2/26/18, p.1-3). His pain levels had improved to a range of 2-6/10 and had partially met the goals of squatting and kneeling and increasing standing/ambulating to unlimited time periods to permit work activities. Deficits from the functional analysis in January remained.

At the March 2 appointment, Dr. Weatherford noted Petitioner was weightbearing as tolerated in a standard shoe and continuing with physical therapy 3x/weekly. He had intermittent pain particularly along the plantar aspect of the foot which was relieved with anti-inflammatories. Petitioner was not yet able to return to his heavy labor job. Petitioner's gait still demonstrated a slight external rotation and shortened stride length on the right hand side. The slight dysesthesias in the sural nerve distribution remained as did the diminished range of motion of the right ankle though it had improved markedly since the November visit. The peroneal tendon strength also improved though the focal tenderness over the plantar fascia remained. X-rays revealed appropriate alignment on all views. Dr. Weatherford noted that Petitioner continued to do well and stated that Petitioner could make office visits as needed. (Pet. Ex. 13).

On April 11, 2018, Petitioner underwent a reevaluation at Team Rehabilitation which noted a 60-70% improvement at that time. (PX 16, 4/11/18, p.1). Petitioner noticed gains in standing, ambulation tolerances, ability to turn directions and flexibility in his foot and ankle. However, he remained hypomobile and lacked the eccentric lower extremity strength / endurance needed to perform full work duties and felt full squatting, descending stairs and prolonged standing were the most challenging. Pain levels had not improved, and Petitioner reported prolonged walking and standing on vacation exacerbated his pain levels. Dr .Weatherford ordered another 4 weeks of twice weekly physical therapy. (PX 16, 4/11/18, p.3).

By the re-evaluation on May 7, 2018, Petitioner noticed less frequent pain and was able to squat to reach the floor with minimal difficulty but when pain appeared, it completely limited his ability to stand or walk. (PX 16, 5/7/18, p.1). Most challenging was using stairs while carrying weighted objects and prolonged standing. Petitioner was relatively pleased with his overall improvement and gains in strength and range of motion, though he stated that if the pain lessened, he would be able to do a lot more on his feet. Progress towards long term goals and current deficits were the same as the previous month's evaluation. (PX 16, 5/7/18, p.2). Dr. Weatherford again recommended another month of twice weekly physical therapy. (PX 16, 5/7/18, p.3).

On May 18, Dr. Weatherford provided Petitioner with a referral to a rheumatologist in order to explore the potential for a long-term prescription for THC medication. (Pet. Ex. 13). At this appointment, Dr. Weatherford also allowed Petitioner to return to work with appropriate restrictions and limitations. (Pet. Ex. 13). In his records, Dr. Weatherford stated, "...He was also given a repeat referral to physical therapy today, which will help with assisting him with day to day walking. He is allowed to return to work from my standpoint with appropriate restrictions or limitations. I discussed with him that I would expect lifelong limitations secondary to the severity of his injury. Further surgery may even be necessary. I do suspect he will develop

progressive subtalar arthrosis. ... I would be happy to see him in the office on an as-needed basis." PX 13, p. 41.

Petitioner next treated for this injury on July 9, 2018, with Dr. Bains. (Pet. Ex. 11). Dr. Bains reported that post-surgery, Petitioner was still experiencing pain and discomfort, and had been participating in physical therapy. (Pet. Ex. 11). He gave Petitioner one final prescription for Norco, and suggested the possibility of treatment with medical THC under the care of a rheumatologist. (Pet. Ex. 11).

Petitioner followed up at the rheumatology department at Northshore University Health in Evanston, Illinois on August 3, 2018. (Pet. Ex. 15). At this time, Petitioner was still using the knee scooter, and reported having been participating in physical therapy through mid-June. (Pet. Ex. 15). He reported experiencing burning sensations in his foot and big toe that shot up his leg and into his back. Since the surgery, his right foot would turn bright red and swell, with a burning hot sensation. He reported that the pain became worse with weightbearing, and that it was sometimes so painful that he could not walk. He also reported some swelling and pain in his left foot due to having to use the scooter. (Pet. Ex. 15). An EMG was ordered to evaluate Petitioner's condition and check his A1c levels. (Pet. Ex. 15). He was given a new physical therapy referral and prescriptions for gabapentin and Naprosyn. (Pet. Ex. 15).

Petitioner followed up with rheumatology on September 6, 2018. (Pet. Ex. 15). He reported experiencing warmth, swelling, and a "weird" sensation in his right foot triggered by activity. (Pet. Ex. 15). He stated that the prescribed medications were not helping with the pain. He stated that he did not want to do the EMG, and had been performing self-trials with medical marijuana. (Pet. Ex. 15). The treating physician opined that Petitioner could have Complex Regional Pain Syndrome (CPRS), and indicated that they would refill the gabapentin. (Pet. Ex. 15). Petitioner was also certified as treating for a qualifying condition for medical THC. (Pet. Ex. 15)

On September 10, 2018, Petitioner began working for Ebsco Industries as a sales representative for Luxor furniture in the education sector. Petitioner testified this position is a phone-bank desk job where he processes incoming sales orders, makes cold calls and works a 40-hour week earning $15/hourly. (PX4B, PX5).

Petitioner's final appointment at rheumatology occurred on November 29, 2018. (Pet. Ex. 15). At this time, Petitioner was still taking gabapentin and naproxen. He reported that he had yet to send in the paperwork to qualify for medical THC treatments. (Pet. Ex. 15). He reported experiencing baseline pain in his right foot, but that "really bad" pain was not as frequent but was still debilitating when it occurs. He reported increased mobility in his right foot with his new job and that he was exercising at his stand up desk. He reported that his overall pain was better and that he did not attend the physical therapy but was doing his at home exercises. (Pet. Ex. 15). He reported wearing a compression sock on his right foot but that he felt as if the sock was cutting off his circulation. Dr. Morris renewed the opinion that Petitioner could be experiencing CPRS, and renewed his certification for medical THC as gabapentin did not help.

On December 17, 2018, Petitioner returned to Dr. Bains for follow up and medication refill. He reported continued ankle pain (PX11, 8-9). He told Dr. Bains that Dr. Morris recommended a

medical marijuana program, but was hoping for a refill on Norco prescription in case there was a delay in authorization. (PX11, 8). Dr. Bains informed Petitioner that would be the final prescription issued as he did not prescribe them chronically. (PX11, 9).

On July 15, 2019, Petitioner returned to Dr. Bains for follow up. Dr. Bains ordered Petitioner to resume physical therapy with Team Rehabilitation in Libertyville or another in-network facility. (PX11, 10-11).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent-Employer operating and subject to the Illinois Workers' Compensation Act?

Petitioner testified that Respondent-Employer, PNR Painting Plus, Inc., engaged in the work of residential home painting. As part of this operation, employees, including Petitioner, regularly used extension ladders and worked on the "peaks" of homes. The Arbitrator finds these conditions sufficient to subject Respondent-Employer to the automatic coverage provisions of Section 3 of the Illinois Workers' Compensation Act.

B. Was there an employer-employee relationship?

Petitioner testified that he met Rick Jones, owner of Respondent-Employer, in response to an employment ad placed through Facebook. After this meeting, Jones hired Petitioner as a painter. Jones assigned job sites via telephone and directed Petitioner where to report and which supplies to use. Jones would transport Petitioner and other crew members to job sites in a van marked with the company's name. Jones provided all the supplies and equipment needed to complete an assignment. Petitioner was required to complete and submit timesheets upon leaving a job site. Petitioner received his pay via checks that were written from Respondent-Employer's business account. PX 1, PX 2. The Arbitrator finds that the above conditions sufficiently establish that an employee-employer relationship existed between Petitioner and Respondent-Employer.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent-Employer?

Petitioner testified that on July 15, 2017, he was working at a job site in Lake Geneva, Wisconsin, that had been assigned to him by Rick Jones. Petitioner had climbed up on a ladder in order to finish painting spots on the home's "peak." A coworker was acting as a spotter. While Petitioner was on the ladder, it slid down, causing Petitioner to fall. Petitioner hit his head on the ground and sustained fractures to his right foot and ankle. Medical records submitted by Petitioner corroborate this mechanism of injury. The Arbitrator therefore finds that on July 15, 2017, Petitioner sustained an accident that arose out of and occurred in the course of Petitioner's employment with Respondent-Employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 15, 2017. Petitioner's testimony is supported by medical records and there is no evidence to the contrary. Thus, the Arbitrator finds the accident occurred on July 15, 2017.

E. Was timely notice of the accident given to Respondent-Employer?

Petitioner stated that Rick Jones was present at the job site at the time of the July 15, 2017 accident. Petitioner testified that after the fall, he asked Jones to call an ambulance, to which Jones refused. Petitioner called an ambulance, and was transported to the hospital from the job site. As such, the Arbitrator finds that Respondent-Employer had timely notice of the accident.

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he fell from a ladder while working to paint a house. The fall caused Petitioner to sustain a right-side type 3 open subtalar dislocation, an intra-articular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. There is no evidence that Petitioner's right foot or ankle were fractured prior to the fall. Petitioner's medical care was immediate and continuous. The Arbitrator finds that Petitioner's current condition of ill-being is casually related to the July 15, 2017 accident.

G. What Were Petitioner's Earnings?

Petitioner testified that while employed with Respondent-Employer, he earned $20.00 per hour for 40 hours of work during a week. In support thereof, Petitioner tendered into evidence a copy of a paycheck issued to him by Respondent-Employer, showing a week's pay of $760.00 (Pet. Ex. 1). Petitioner explained that a portion of his weekly pay would be held over to the next paycheck/pay period. The Arbitrator therefore finds that Petitioner's average weekly pay while employed with Respondent-Employer was $760.00.

H. What Was Petitioner's Age at the Time of Accident?

Petitioner testified that he was born on August 12, 1986. Medical records submitted by Petitioner corroborate this testimony. As such, the Arbitrator finds that on July 15, 2017, Petitioner was 30 years old.

I. What Was Petitioner's Marital Status at the Time of Accident?

Petitioner testified that at the time of the accident, he was not married. Petitioner's testimony remains unrebutted, and is supported by information contained in Petitioner's medical records. As such, the Arbitrator finds that on July 15, 2017, Petitioner's marital status was "single." Petitioner has one dependent. ARB EX 1.

J. Were Medical Services Received by Petitioner Reasonable and Necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical care received by Petitioner following this injury was reasonable, necessary and causally related to the injury sustained as a result of the work accident on July 15, 2017. The Arbitrator notes that Petitioner is not requesting an award of any medical expenses, paid or unpaid. ARB EX 1. Accordingly, no finding that Respondent shall pay for or reimburse for paid medical expenses is made by the Arbitrator. To the extent Petitioner requests a finding of a specific prospective medical treatment, the Arbitrator notes that no such finding was requested by Petitioner on the stipulation sheet and the nature and extent of Petitioner's injuries was placed at issue at trial. Thus, no specific award of prospective medical is made under Section 8(a).

K. Temporary Total Disability

Following the accident on July 16, 2017, Petitioner was placed off work and in a non weightbearing status for eight weeks. Throughout his treatment for the injury, Petitioner remained off work. His work restrictions are permanent. On September 10, 2018, Petitioner returned to work for Epsco industries in a sedentary capacity within his work restrictions. Therefore, the Arbitrator finds that Petitioner is entitled to 60-2/7 weeks of Temporary Total Disability at the applicable rate of $506.67 per week.

L. What Is the Nature and Extent of Petitioner's Injury?

Pursuant to Section 8.1(b) of the Illinois Workers' Compensation Act, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b). The criteria to be considered include: (i) the reported level of impairment pursuant to the physician's findings per the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Regarding criterion (i), no AMA Impairment Rating was rendered, and therefore, this factor is given no weight in determining the nature and extent of Petitioner's disability.

Regarding criterion (ii), Petitioner testified that he was a professional house painter at the time of the accident. Petitioner testified that he had operated in this occupation for 15 years prior to the date of accident. Petitioner is not able to return to this profession due to his physical disabilities resulting from the work related accident. The Arbitrator gives this factor great weight.

Regarding criterion (iii), Petitioner was 30 years old at the time of the injury. The Arbitrator gives this factor great weight given that Petitioner has many years left in the work force to contend with his injury which limits his abilities in certain physical labor work fields.

Regarding criterion (iv), Petitioner testified that following the accident, he was unable to return to work as a painter due to the permanent restrictions placed on him by his treating physician. Petitioner testified that he was able to successfully secure work in sales at Epsco Industries beginning about September 2018. Petitioner works in a sedentary capacity, and earns $15.00 per hour. In support thereof, Petitioner submitted 2017 and 2018 tax returns (Pet. Exs. 3-4), as well as 2019 Year-to-Date earnings (Pet. Ex. 5). There is no additional evidence to indicate the range or type of job pay available to Petitioner to evaluate Petitioner's future earning capacity. However, based on his current job in a different work arena and the demonstrated decrease in pay, the Arbitrator gives this factor great weight.

Regarding criterion (v), Petitioner testified that he still feels pain in his foot and ankle when he wakes up in the morning and when completing everyday tasks. Post-surgical follow up visits and x-rays revealed Petitioner was healing and his internal fixation was well-aligned. (PX13). Nevertheless, his pain, stiffness and deficits persisted. (PX13, PX16). On May 18, 2018, ten months after the injury and eight months after surgery, Dr. Weatherford released Petitioner from his care, and told him he could return to work with permanent restrictions. (PX13, 40-42). Petitioner testified that orthopedically, there was nothing more that could be done for him at that time. (PX11, 7). Dr. Weatherford believed Petitioner would eventually develop subtalar arthrosis given the shear nature of the injury and the intraoperative damages noted to the subtalar joint, particularly the posterior facet of the calcaneus. He warned Petitioner might need subtalar joint injection under fluoroscopy in the future. (PX13, 37).

Petitioner testified he was told not to carry anything over 10 pounds, no standing for more than 5 minutes, no climbing ladders or stairs and to elevate his leg at work. Petitioner testified that based on these restrictions, he was unable to return to painting, which had been his profession for 15 years. Petitioner found a sedentary job within his restrictions. The Arbitrator notes that Petitioner request an award under Section 8(d)(2) of the Act and is not requesting an award under Section 8(d)(1) for wage differential.

Petitioner testified as to the daily pain and stiffness he still experiences, now over two years after his injury. He testified that he cannot drive more than 10-15 minutes, struggles to perform daily tasks including playing with his children and regular household chores. Petitioner requires the use of a scooter or cane for walking longer distances. The Arbitrator gives this factor great weight.

Upon consideration of all factors as noted above, the Arbitrator finds that Petitioner has sustained a loss of his trade as a painter based on and in addition to his severe and permanent injury to his right foot and ankle. Accordingly, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

M. Other: Insurance and Liability of the IWBF

The Arbitrator finds that the evidence submitted by Petitioner is sufficient to establish that Respondent-Employer did not maintain active workers' compensation insurance on July 15, 2017. Petitioner submitted a "Request for Information on Employer's Insurance Coverage," (Pet.

Ex. 18), which Petitioner's counsel stated he received from the Illinois Workers' Compensation Commission. The exhibit contains a hand written notation dated 2/6/18 stating "no insurance coverage found on NCCI database." While noting that the NCCI search may have been conducted under the incorrect name of "PN Painting Plus," the search was also performed using the correct address of P N R Painting Plus which was the same address listed on the paycheck given to Petitioner admitted as PX 1. The search using the correct address also revealed no insurance for a business at the address. The Arbitrator's findings are not dissuaded by the disclaimer placed on the address search option, presumably by NCCI. Taken as a whole, the Arbitrator finds these records provide a sufficient basis on which to find the Respondent failed to maintain the appropriate Workers' Compensation insurance.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES GOMEZ,

Petitioner,

vs. NO: 18 WC 32003

ADVANCED DISPOSAL SERVICES,

Respondent.

21IWCC0162

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, prospective medical, and temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification below.

The Arbitrator incorrectly stated that the first mention of Petitioner's shoulder pain was three days after the accident on October 19, 2018. The Arbitrator noted that the record states only "pain in unspecified shoulder." *Arbitration Decision* at p. 6. The Commission's review of the record shows that the note referenced by the Arbitrator appears in records for an office visit on November 1, 2018, which is more than two weeks after the accident at bar. PX5 at 20-24.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8(a) of the Act with credit to be given for any payment made directly by respondent or pursuant to §8(j) of the Act. All medical expenses incurred, or to be incurred, after February 28, 2019 are denied.

21IWCC0162

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of $1,062.37 per week for 21-2/7 weeks, for the period from October 17, 2018 through March 14, 2019 per the stipulation, and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 3.3.21

43

Stephen Mathis

Thomas J. Tyrrell

21IWCC0162

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 11, 2021, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GOMEZ, JAMES
Employee/Petitioner

Case# **18WC032003**

ADVANCED DISPOSAL SERVICES
Employer/Respondent

21IWCC0162

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5094 SKLARE LAW GROUP LYD
MICHAEL R TRYBALSKI
20 N CLARK ST SUITE 1450
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

21IWCC0162

21IWCC0162

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

James Gomez
Employee/Petitioner

v.

Advanced Disposal Services
Employer/Respondent

Case # **18** WC **32003**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of Wheaton on **December 18, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident **October 16, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$82,880.20;** the average weekly wage was **$1,593.35.**

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$22,754.76** for TTD, **$0** for TPD, $**0** for maintenance, and **$4,069.35** (PPD Advanced) for other benefits, for a total credit of **$26,824.11**

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act. All medical expense incurred, or to be incurred, after February 28, 2019 is denied.

Temporary Total Disability

Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of **$1,062.37 per week for 21-2/7weeks**, for the period from **October 17, 2018 to March 14, 2019** per the stipulation.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Christine M Ory

Signature of Arbitrator

January 26, 2020

Date

IC ArbDec19(b) p. 2

JAN 28 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Gomez	)	
Petitioner,	)	21 IWCC0162
vs.	)	**No. 18 WC 32003**
Advanced Disposal Services	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Geneva on December 18, 2019. The parties agree that on October 16, 2018, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent. They agree that in the year predating the accident, petitioner earned $82,880.20 and his average weekly wage calculated pursuant to §10, was $1,593.35.

At issue in this hearing is:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills
3. Whether petitioner is entitled to payment for prospective medical treatment.
4. Whether petitioner is due temporary total disability

FINDINGS OF FACT

Petitioner testified that he had worked for respondent for 5 years as a rolloff driver. He started work at 4:00 AM on October 16, 2018. While on his route later that day at about 2:45 PM, his truck was pulled over to the side of the road, and he was outside of it tarping a rolloff container when he was struck by the passenger-side mirror of a passing vehicle.

Petitioner testified that the mirror hit his left shoulder blade and spun him around. The driver pulled over and petitioner went up to talk with him, then petitioner called his supervisor and reported the incident.

Paramedics were dispatched to the scene, and the history they took from petitioner was that he was in the process of securing his load "when he felt a side mirror of a vehicle hit him in his back." Petitioner confirmed that he was ambulatory the entire time and did not fall down. He also reported that the vehicle tire grazed his boot, but did not run over his foot. "Crew noted no redness, bruising, or swelling to the pt's back or foot." (PX1, p.6).

Petitioner was transported to Alexian Brothers Hospital and was seen in the emergency room. There, petitioner reported that a vehicle going 10 to 15 miles per hour struck his left side and ran "over the edge of his left foot slightly." He was wearing steel toed boots and denied pain and swelling to the toes or the foot. He did complain of pain radiating to the neck and left lateral ribs on a level of 8/10 associated with a slight headache. He confirmed that he did not fall from the occurrence. (PX3, p.13).

The physical examination showed diffuse tenderness to palpation in the neck with no vertebral tenderness, normal range of motion and no bruising or swelling. He had mild diffuse thoracic and lumbar vertebral pain, likewise with no edema or hematoma. His extremities all had normal range of motion with no swelling, open wounds or bruising. (PX3, p.14)

X-rays were taken of the ribs and all levels of the spine, but not the shoulder or the foot. The rib x-rays showed no fractures or deformities. Findings in the cervical, thoracic and lumbar spine studies showed no evidence of acute fracture or malalignment, along with "interval progression of arthritic changes since previous x-rays" at all three levels, with the cervical spine studies specifically noting "multilevel arthritic changes." (PX3, pp.15, 27-30).

Petitioner was discharged in stable condition, with noted improvement in his pain complaints. The "Impression and Plan" section upon discharge actually only noted "Acute pain of the left foot," though petitioner was also provided education materials on back pain. He was provided pain medications and instructed to follow up with Dr. Scholl in two days (PX3, p.16).

According to Petitioner's Exhibit 5, records from Alexian Brothers Medical Group, petitioner reported being hit by a car mirror on the left side "a few days ago." His emergency room visit was recorded, as were his current complaints of headaches, neck pain and pain in his left foot. The physical examination noted that petitioner was ambulating with a mild limp from discomfort on his left hip, he had left side of paraspinal muscle tightness in his back and pain with external rotation of the left hip and on palpation of the joint. No specific examination of the upper extremities is noted, and the cervical spine showed normal flexion and extension, but with spasms on the left side of the posterior cervical region.

The assessment included cervicalgia, pain in the left hip for which an MRI was ordered and pain in the left foot, which was to continue to be monitored. There is also an indication of "pain in unspecified shoulder." (PX 5, p. 25). The MRI of the left hip was performed on November 16, 2018, and showed no obvious tear of the acetabular labrum, no evidence of joint effusion or avascular necrosis of the femoral head. All hip muscles appeared normal and the joint spaces were maintained bilaterally. (PX 5, p.29).

There is then record of a November 1 visit and a history that petitioner reported no improvement since his work accident. Petitioner had undergone two physical therapy sessions at that point, which only helped him temporarily. His primary complaint again was left hip pain, which he felt was aggravated during therapy. He also reported left upper back and neck pain with no numbness or tingling in the left arm, and he was able to move all of his extremities. (PX 5, p.24).

By November 15, 2018, petitioner had improvement in his headaches but no significant improvement in neck pain or hip pain despite additional therapy sessions. The summary of the work accident again notes only that petitioner was "hit by a car mirror on the left side." The physical examination findings with regard to the neck, left hip and cervical spine were all similar to the November 1 visit, once again with no indication of any specific examination on either shoulder. The assessment following this visit is only of neck pain and left hip pain. (PX 5, pp. 17-21).

At his follow-up visit on November 27, petitioner brought in the CD of the hip MRI, and noted that he was told that there was nothing wrong in the hip, though he still complained of pain. He also complained of a knot in his neck. The assessment again included only neck pain and left hip joint pain. Dr. Scholl referred petitioner to Dr. Odell due to petitioner's lack of subjective improvement. (PX 5, pp.13–17).

Petitioner was last seen by Dr. Scholl on January 22, 2019 for what appears to be a general checkup. His only subjective complaint on this date was "back pain." The examination of the neck showed full range of motion, the musculoskeletal examination was negative as to motor strength, tone, joints, bones and muscles, and normal movement was noted of all extremities. Petitioner had a normal gait and his pulses were normal as well. The assessment at this time was an examination without abnormal findings, along with uncontrolled type II diabetes, which had been noted on petitioner's prior medical history. He was scheduled for a follow-up examination in three months. (PX 5, p.13).

According to the records of Midwest Sports Medicine, Dr. Odell first saw petitioner on December 11, 2018. (PX 11, p.7). Petitioner's history at that time was that he was standing outside next to his work truck when he was hit by the mirror of the car, "which spun him and he then hit the quarter panel of the car. He states his left foot was run over by the car," though petitioner confirmed that he was wearing steel toed shoes. Petitioner complained of pain in his left hip, left shoulder and cervical spine. Following his examination and review of the diagnostic studies, Dr. Odell's impression was left hip pain, exacerbation of cervical spondylosis, C4–C7 disc herniations and left shoulder pain and biceps tendon injury. (PX 11, pp.12–15).

Dr. Odell saw petitioner on three more occasions through February 12, 2019, and petitioner's complaints, examination findings and assessments were essentially the same. He ordered MRIs of the left shoulder and the lumbar spine, and kept him off of work (PX 11, pp.26-55).

At that point, respondent scheduled an IME with Dr. Michael Lewis at Illinois Bone & Joint. According to his history to Dr. Lewis, petitioner was outside of his truck on October 16, 2018 when a passenger mirror hit him on his left shoulder while the car was moving. This is the first indication of the vehicle mirror striking petitioner's shoulder, as opposed to his left side or the left side of his back. The impact resulted in a twisting motion to his lower back and the car running over his left foot.

Petitioner reported no pain in the foot, but did have pain in the low back area with radiation into the left thigh. He also complained of pain in the posterior cervical spine with radiation to the left shoulder. Petitioner noted a prior injury to his low back in 2008, for which he had received an injection into his sacroiliac joint.

Examination showed petitioner walking with a normal gait, and normal range of motion of the cervical spine. Range of motion of the shoulders was equal bilaterally as was strength, sensation and reflexes. Examination of the left shoulder was negative for apprehension and impingement signs.

The examination of the lumbar spine showed no spasm in the paravertebral muscles with equal range of motion bilaterally, and normal muscle strength sensation and reflexes in the lower extremities bilaterally. (RX 2, pp.1-2).

Dr. Lewis reviewed the ER records, the October 19, 2018 examination note as well as the MRIs of the left hip, cervical spine, left shoulder and lumbar spine. He also had the off work notes from Dr. Odell and petitioner's physical therapy records.

Following his examination of petitioner and review of the records, Dr. Lewis concluded that there was no objective evidence of orthopedic pathology in regard to the left foot, left hip, cervical spine, lumbar spine or left shoulder. This was confirmed by his review of the diagnostic studies, including all of the MRI films. He specifically stated that there was no evidence of acute pathology on any of those studies, nor objective evidence of orthopedic pathology from his

examination. Therefore, he found that petitioner did not sustain even an aggravation of any underlying conditions.

He did state that the treatment rendered to date, including that by Dr. Odell had been appropriate and causally related to the conditions from the work accident, but that no further treatment was necessary. He felt that petitioner could resume working with no restrictions. (RX 2, pp.3-5).

Petitioner returned to Dr. Odell on March 12, 2019 and according to his work restriction form of that date, the list of diagnoses now takes up nine lines, ranges from the cervical to the lumbar spine and includes the left shoulder and left hip conditions. He was already contemplating surgery to address petitioner's left shoulder complaints, but referred him to Dr. DiGianfilippo for exploration of possible cervical spine surgery. (PX 11, pp.57-60).

Petitioner saw Dr. DiGianfilippo on April 3, 2019. Petitioner's history is recorded almost simultaneously as "he was hit on the left side of his hip" and "He was hit with car mirror behind left shoulder blade." He complained of pain on the left side of his neck and shoulder, but noted that the knot in his neck had improved. "He apparently also developed a rotator cuff tear, along with tingling down his left arm to his last two fingers." (PX 13, p. 9).

Following physical examination findings that are alternately noted as "no neck pain or swelling in the extremities" followed almost immediately by "neck pain, back pain, arm pain, and leg pain," along with buttock and groin pain radiating down the left leg to the knee, the assessment is "significant cervical spinal canal stenosis with spinal cord compression" along with indications of a spinal cord injury and low back pain with mild L4–5 stenosis. He also includes cervicalgia and headache in his diagnoses. (PX 13, p.10).

His proposed treatment was a C3–C6 decompressive laminectomy due to what he deemed a tight canal and cord compression with possible spinal cord injury. Dr. DiGianfilippo was told that the IME doctor had suggested petitioner could go back to work, but he disagreed with that (PX 13, p.11).

Four weeks later, on May 2, 2019, Dr. DiGianfilippo performed a decompressive laminectomy from C3 to C6. He was seen on two occasions through May 22, at which time he was still authorized off of work. (PX 13, pp.12–15). There is no indication petitioner has returned to Dr. DiGianfilippo since May.

Petitioner has continued to follow-up with Dr. Odell, however. Through his visit on August 6, 2019, Dr. Odell took petitioner off of work and charted his complaints regarding his left hip and his left shoulder. The examination noted tenderness to palpation over the subacromial area of the left shoulder, but range of motion to 150°. Positive impingement signs were also noted. The examination of the left hip revealed mild trochanteric tenderness. (PX 11. Pp.82-101).

The assessment and plan were a left shoulder partial thickness rotator cuff tear and biceps tendinitis versus partial tear and impingement, along with left leg lumbar radiculopathy and "disc bulges/herniations" from L2 through S1. Petitioner was released to light duty as of August 12, 2019 with a 20-pound lifting restriction. It was noted that he would continue following up with Dr. DiGianfilippo (PX 11, pp.98-99), though there are no further records from that physician in evidence.

Based on the ongoing complaints and treatment petitioner was undergoing, and particularly after the cervical spine surgery, respondent forwarded petitioner's updated records to Dr. Lewis for an addendum opinion. Specifically, the initial paramedic and emergency room records were provided, along with additional notes of examination from Dr. Scholl, Dr. Odell and Dr. DiGianfilippo, including his operative report of May 5, 2019.

Following his review of these additional records, Dr. Lewis stated in an August 31, 2019 report that while petitioner may have had continued subjective complaints, there was no objective evidence of orthopedic pathology as of the IME on February 28, 2019. Therefore, his opinions as to the need for treatment after that date, the diagnosis of strains and contusions that had resolved, and petitioner's ability to work after that date were unchanged. He acknowledged that petitioner may have made subjective complaints to the other doctors that he did not make during his IME, but this did not impact his opinion with regard to Petitioner's objective physical condition, either as of February, 2019, or thereafter. (RX 3, pp.1-2).

Consistent with this opinion, and despite the most recent diagnosis of multiple herniated lumbar discs by Dr. Odell, a repeat MRI of the lumbar spine dated August 12, 2019 revealed diffuse disc bulges, not herniations, with no resulting spinal stenosis at L2-3, L3-4 and L4-5, and specifically "no disc herniation or spinal stenosis" at L5-S1. The report further notes normal alignment of the lumbar spine without evidence of subluxation, and normal vertebral body heights and disc spaces. (PX 11, pp.102–103).

Petitioner returned to Dr. Odell on September 5, 2019 and the listed diagnoses were now left bicipital tendinitis, osteoarthritis of the left shoulder, and muscle and tendon strains in the rotator cuff of the left shoulder, along with pain in the left hip. These were essentially maintained following his October 5, 2019 visit, at which time, petitioner agreed to proceed with a left shoulder arthroscopy with subacromial decompression, rotator cuff repair, open distal clavicle excision and open biceps tenodesis.

That surgery took place on November 6, 2019, and the postoperative diagnoses were right [sic] shoulder traumatic partial thickness rotator cuff tear, partial-thickness long head biceps tendon rupture, impingement syndrome, anterior superior labral tear and AC joint osteoarthritis. (PX 11, pp.141–143). He followed up on a couple of occasions through November 19, 2019, which was the last examination before trial. Petitioner was authorized off of work and was undergoing therapy at the time.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The petitioner bears the burden of proving every element of his claim by a preponderance of the evidence. Arbuckle v. Industrial Commission, 32 Ill.2d 581 (1965). The arbitrator is asked herein to determine whether petitioner met his burden of proving by a preponderance of the credible evidence that he required treatment from the effects of the October, 16, 2018 work injury following the February, 28, 2019 examination with Dr. Lewis, whether he was unable to return to work without restrictions after that date and at the time of trial, and whether the two surgeries that followed were in fact medically necessary and causally related to the injuries from the October 16, 2018 work accident.

Shoulder surgery

The arbitrator addresses the shoulder surgery first, as this was most recent in time, and the issue of causal connection, or lack thereof, is perhaps more obvious. The extensively recorded summary of the accident histories above that petitioner provided to the paramedics, to the emergency room and to Dr. Scholl early on in the case, and even to Dr. Odell and Dr. DiGianfilippo, establish by overwhelming evidence that the passenger side mirror of the vehicle

that struck petitioner did not strike him in the left shoulder, contrary to his trial testimony. Every history petitioner provided until his IME with Dr. Lewis and his trial testimony referenced only being struck in the back or on the left side of the back. The history to Dr. DiGianfilippo actually records being struck both in the hip and the shoulder.

Corroboration of the absence of a direct impact on petitioner's left shoulder in the accident is further found by the fact that x-rays were done of every area of the body that petitioner reported being injured in the accident, and every area of concern to the emergency room doctors, yet no x-rays were taken of either shoulder.

Likewise, there are no directed examinations of the left shoulder, and to the extent that there is reference to musculoskeletal examinations of petitioner's extremities at all in the early records, no positive objective findings are recorded. There is thus no contemporaneous, objective evidence that petitioner was struck in the left shoulder blade at the time of the accident, or that he in any other way injured his left shoulder in the accident.

Although the first reference to shoulder pain appears three days later at petitioner's follow-up examination on October 19, 2018, that record is devoid of any complaints of pain or injury to either shoulder, or evidence of examination to the upper extremities. In addition, the assessment does not specify which shoulder is involved as it literally states, "pain in unspecified shoulder." (PX 5, p.25).

The focus of petitioner's complaints, examination, findings and treatment thereafter were to the cervical spine on the left side and the left hip. By January 22, 2019, petitioner's only subjective complaints were unspecified back pain, he had full range of motion in the neck, and the musculoskeletal examination was negative. (PX 5, p.13).

The MRI of the left shoulder revealed tendinopathy with a partial-thickness articulating undersurface tear, along with hypertrophic spurring and possibly some mild impingement (RX 2, p.3). None of petitioner's treating doctors have indicated that any of these findings were either acute or represented an aggravation of the underlying findings by the work accident.

Neither Dr. Odell nor Dr. DiGianfilippo have explained or implied in their records how a rotator cuff tear arose from the described accident of petitioner being struck in the back by the rearview mirror of a vehicle passing him at about 10 miles an hour. Dr. Lewis specifically found no evidence of any acute pathology on the shoulder MRI, or any of the other MRIs. (RX 3, p.4).

As a result, the Arbitrator adopts the opinion of Dr. Lewis in his February 28, 2019 report (RX 2), as amplified in his August 31, 2019 report (RX 3), that petitioner was not in need of any further treatment to any body part, much less the left shoulder, after that date as the more credible medical opinion on this issue.

Thus, whether petitioner actually needed the shoulder surgery that Dr. Odell performed on November 6, 2019 or not, the record is devoid of credible, objective evidence that the need for that procedure had anything to do with the October 16, 2018 work injury.

Based on the above, the arbitrator finds that petitioner failed to prove that his medical treatment after February 28, 2019, his lost time beginning with the November 6, 2019 left shoulder surgery, the medical bills for the surgery itself, any prospective treatment, as well as any disability that may later be found to result from the left shoulder surgery, were causally related to or necessitated by the October 16, 2018 work injury.

Cervical spine surgery

The issue of causal connection between the cervical surgery petitioner underwent and the work accident is less obvious than with regard to causal connection between the shoulder surgery and the work accident. As it remains petitioner's burden to prove by a preponderance of the credible

evidence, however, that the cervical spine surgery was causally related to the work accident, the arbitrator finds that petitioner likewise failed to meet his burden of proof on this issue.

Once again, the diagnostic studies, specifically the cervical spine MRI and x-rays, along with petitioner's initial presentation to the paramedics, emergency room and Dr. Scholl all point to a soft tissue contusion/strain injury, and point away from a traumatic injury or aggravation of an underlying condition necessitating surgery.

Although petitioner did have neck and cervical spine complaints, and diagnostic studies were undertaken of the neck and cervical spine (unlike with regard to the left shoulder) in the emergency room, it is significant that the x-ray findings of all three areas of petitioner's spine all noted merely "interval progression of arthritic changes since previous x-rays," with the additional, and significant, detail in the report of the cervical spine x-rays noting "*multilevel* arthritic changes." (PX 3, pp. 27–30).

The arbitrator thus finds that the objective evidence from the diagnostic studies as well as the examination findings in the emergency room and by Dr. Scholl thereafter fail to support any reasonable conclusion that petitioner was a) actually in need of multilevel repairs in his cervical spine or b) that such a procedure, even if medically necessary, was at all causally related to the October 16, 2018 work accident.

Dr. Lewis' reports substantiate this finding, (RX 2,3) and are more credible on the issue than Dr. Odell or the one visit and quick surgery performed by Dr. DiGianfilippo.

In further support of the arbitrator's decision that petitioner failed to meet his burden of proving that the cervical spine surgery was causally related to the work accident, petitioner testified at trial of ongoing stabbing pain from his neck into his left arm, despite the fact that both his neck and his shoulder have undergone surgical procedures, allegedly to alleviate his symptoms. The fact that petitioner has not had any resolution of his symptoms now after two surgeries supports the opinion of Dr. Lewis that petitioner was actually not in need of any further treatment to any body part as of February 28, 2019.

While a surgical result is not always a reliable indicator of medical necessity or causal connection, both surgeries were clearly fueled by petitioner's subjective complaints rather than the objective diagnostic and examination findings. The fact that Dr. Odell references four levels of *herniated* discs in petitioner's lumbar spine as late as August, 2019 (PX 11, pp.98-99), and only backtracks from that diagnosis after yet a second lumbar MRI fails to substantiate this, provides a further basis for the Arbitrator to find his opinions, and those of Dr. DiGianfilippo, less credible on this issue than Dr. Lewis'.

Lastly, the arbitrator notes that a history of being struck by a moving vehicle as a pedestrian, the history relied upon by Drs. Odell and DiGianfilippo, suggests that significant injuries can result. There is no doubt that while working on the side of his truck in the road on October 16, 2018, petitioner was struck by the rearview mirror of a vehicle going about 10 miles per hour or so. The potential severity of that impact, however, is diminished in this case by the factual evidence that petitioner was not knocked down, and walked on his own power over to the offending car, which had pulled over to the side of the road, to advise the driver.

Petitioner then called his supervisor, and when the paramedics showed up, they noted that petitioner was ambulatory the entire time, and their initial examination showed no redness, bruising or swelling to the petitioner's back and foot (PX 1, p.6).

This, of course, does not impact the compensability of the claim, but does confirm the relatively minor nature of the impact on petitioner's body. The resulting absence of findings in the

emergency room records and the initial visits to Dr. Scholl of any swelling in any of the body areas petitioner complained of lends further credence to this conclusion.

In short, petitioner was injured in a work-related accident on October 16, 2018, but fortunately for him, the nature of the resulting injuries was essentially strains that took a couple of months of follow-up visits and physical therapy to resolve. Thereafter, petitioner's subjective complaints led to his ongoing treatment, and eventually surgeries, performed by Dr. Odell and Dr. DiGianfilippo, but the objective evidence and credible opinions in the record do not establish that any of that was causally related to injuries sustained on October 16, 2018.

For the foregoing reasons, the arbitrator finds that petitioner failed to prove that respondent is liable for the costs of the petitioner's cervical spine surgery and its follow-up since July 6, 2019, failed to prove that petitioner was both in need of medical treatment and incapable of working after February 28, 2019, and has failed to prove that any disability that is found to be related to the cervical spine surgery is causally related to the work injury.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator determined petitioner's extensive treatment after February 28, 2019 was not causally related to the work accident of October 16, 2018. Furthermore, based upon the lack of objective findings, the Arbitrator finds all treatment after February 28, 2019 was not reasonable or necessary as required in §8 of the Act and denies petitioner's claim for all medical treatment incurred after February 28, 2019

Specifically, the Arbitrator awards payment to Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act.

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

As the Arbitrator determined no further treatment was causally related, or reasonable and necessary, after February 28, 2019, the Arbitrator denies the claim for prospective medical treatment.

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner was temporarily totally disabled from October 17, 2018 only to March 14, 2019 as stipulated by respondent, based upon the opinion of Dr. Michael Lewis. Petitioner is awarded TTD from October 17, 2018 to March 14, 2019, which is 21-2/7 weeks at the rate of $1,062.57 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICKI MITCHANER,

Petitioner,

vs. NO: 11 WC 5574

SYNGENTA SEEDS, INC,

Respondent.

21IWCC0163

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident, notice, causal connection, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification noted below.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $439.80 per week for a period of 200 1/7 weeks, representing August 19, 2010 through Juy 1, 2013 and August 11, 2015 through July 28, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the amount of $439.80 per week for a period of 75 6/7 weeks, representing April 3, 2017 through June 30, 2018 and April 15, 2019 through June 30, 2019, as provided in §8(a) of the Act

21IWCC0163

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the vocational service expenses of Bob Hammond, CRC, in the amount of $7,649.73, pursuant to section 8(a) of the Act. PX18.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $466.13 per week for life, representing the minimal permanent total disability rate for Petitioner's date of accident, commencing on July 16, 2019, as provided in §8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses pursuant to the fee schedule, relating to the treatment Petitioner underwent for bilateral carpal tunnel syndrome. Respondent is not liable for medical expenses for treatment of Petitioner's left cubital tunnel syndrome.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Commencing on the second July 15th after the entry of the Arbitrators award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 2.16.21

43

Stephen J. Mathis

Stephen Mathis

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MITCHANER, VICKI
Employee/Petitioner

Case# **11WC005574**

SYNGENTA SEEDS INC
Employer/Respondent

21IWCC0163

On 12/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0874 FREDERICK & HAGLE
JEFFREY D FREDERICK
129 W MAIN ST
URBANA, IL 61801

0000 RUSIN & MACIOROWSKI LTD
TERRY SCHROEDER
2506 GALEN D SUITE 102
CHAMPAIGN, IL 61821-7047

21IWCC0163

STATE OF ILLINOIS)
)SS.
COUNTY OF **CHAMPAIGN**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [x] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VICKI MITCHANER
Employee/Petitioner

v.

SYNGENTA SEEDS, INC.
Employer/Respondent

Case # **11** WC **5574**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, former Arbitrator of the Commission, in the city of **Urbana**, on **July 16, 2019**. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the case to Arbitrator Mason for the purpose of reviewing the transcript and exhibits and issuing a decision. The parties agreed to proceed in this fashion. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. xx Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. xx Was timely notice of the accident given to Respondent?
F. x Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. xx Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. x What temporary benefits are in dispute?
   [ ] TPD x Maintenance xTTD
L. x What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **June 14, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to her current post-operative bilateral carpal tunnel syndrome condition of ill-being but did not establish causation as to her claimed left cubital tunnel syndrome.

In the year preceding the injury, Petitioner earned $**57,078.44**; the average weekly wage was $**659.70**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**10,920.21** under Section 8(j) of the Act for payments made under Respondent's short-term disability policy. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against her by reason of having received such payments, pursuant to Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $439.80 PER WEEK DURING TWO INTERVALS, FROM 8/19/10 THROUGH 7/1/13 (THE DATE DR. OAKEY RELEASED PETITIONER TO FULL DUTY) AND FROM AUGUST 11, 2015 (THE DATE OF THE RIGHT CARPAL TUNNEL RELEASE) THROUGH 7/28/16, AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $439.80 PER WEEK FROM 4/3/17 (THE DATE OF PETITIONER'S FIRST RECORDED JOB CONTACT, PX 20) THROUGH 6/30/18 AND FROM 4/15/19 THROUGH 6/30/19, AS PROVIDED IN SECTION 8(A) OF THE ACT. IN ADDITION, RESPONDENT SHALL PAY VOCATIONAL EXPENSES OF BOB HAMMOND, CRC, IN THE AMOUNT OF $7,649.73, PURSUANT TO SECTION 8(A) OF THE ACT. PX 18.

RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $466.13 PER WEEK FOR LIFE, REPRESENTING THE MINIMUM PERMANENT TOTAL DISABILITY RATE IN EFFECT AT THE TIME OF PETITIONER'S INJURY, COMMENCING 7/16/19, AS PROVIDED IN SECTION 8(F) OF THE ACT.

PETITIONER CLAIMS THE MEDICAL EXPENSES ENUMERATED IN PX 21. SOME OF THESE EXPENSES RELATE TO TREATMENT PETITIONER UNDERWENT FOR LEFT CUBITAL TUNNEL SYNDROME. THE ARBITRATOR DID NOT FIND CAUSATION AS TO THIS CONDITION. RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL EXPENSES, PURSUANT TO THE FEE SCHEDULE, RELATING TO THE TREATMENT PETITIONER UNDERWENT FOR HER LEFT AND RIGHT CARPAL TUNNEL SYNDROME.

COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(G) OF THE ACT.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason

Signature of Arbitrator

12/23/19
Date

DEC 23 2019

Vicki Mitchaner v. Syngenta Seeds, Inc.
11 WC 5574

21IWCC0163

Procedural History

Former Arbitrator Hemenway conducted a hearing in this case on July 16, 2019. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the matter to Arbitrator Mason for the purpose of reviewing the transcript, exhibits and proposed findings and issuing a decision. The parties agreed to proceed in this manner.

Summary of Disputed Issues

Petitioner, a longtime "supply tech" who worked in Respondent's lab, claims left carpal tunnel syndrome manifesting on August 18, 2010 secondary to repetitive trauma. She also claims left cubital tunnel syndrome, secondary to the left carpal tunnel surgery, and right carpal tunnel syndrome secondary to overuse. [At the beginning of the hearing, Petitioner amended her Application to clarify she is not alleging injuries to her neck, back or shoulder. T. 7.]

The disputed issues include accident, notice, causal connection, medical expenses, temporary total disability from August 19, 2010 through July 28, 2016, maintenance from March 13, 2017 through the hearing of July 16, 2019 and nature and extent. The parties agree that Respondent paid $10,920.21 in non-occupational benefits. They also agree that, as of the hearing, Petitioner would be earning $22.95 per hour if she still worked for Respondent. Arb Exh 1. T. 5.

Arbitrator's Findings of Fact

Petitioner testified she was born on August 26, 1954. She is right-handed. She graduated from high school in 1972. She did not attend college. Her first job out of high school was for a maid service. She then worked as a stock clerk for Colwell Systems and in the office at United Waste Systems. T. 21-22.

Petitioner testified she began working as a supply tech for Respondent in 1990. She was 37 years old at that time. She continued to work as a supply tech, on a full-time basis, through August 18, 2010. She typically worked overtime from September through January. She testified that overtime was required. Her employment at Respondent ended in February 2011. At that point, her hourly rate was $15.57. T. 22-23.

Petitioner identified PX 16 as a description of the various tasks she performed as a supply tech. She created PX 16 and provided it to Dr. Fletcher. She provided a verbal, less complete description to Dr. Kohlmann, an examining physician she saw at Respondent's direction. She testified she made an unsuccessful attempt to provide Dr. Kohlmann with a more complete description. T. 26-28.

Petitioner testified that Respondent operates a soybean production plant. Respondent contracted with soybean growers. After a harvest, the growers brought their seeds to the plant. She worked in Respondent's lab, performing quality assurance testing on these seeds.

Petitioner testified she initially tested "bin samples." Co-workers placed these samples on a pallet outside the lab. The samples were in white bags. Each bag weighed 5 pounds. Petitioner testified she would carry 5 or 6 bags at a time into the lab. She untied the bags, poured the seeds into trays, performed a two-minute visual inspection and then poured the seeds into metal pans. The pans were 11 x 20 inches in size. Each pan had a hole in the end. She then had to pour the seeds back into the bags. She testified she put her hands over the end of the hole to avoid spillage. She estimated she tied and untied each bag 4 to 6 times during the testing process.

Petitioner also described the "purity checks" she performed. She had to ensure that the seeds were all the same variety. T. 33. She would place a seed on a rough wooden board that was 20 x 20 in size. The surface of the board was carpeted so that the seeds would not roll too quickly. She poured seeds onto this surface and inspected them, using a magnifying glass that lit up. She testified she rested her wrists at an angle on the wooden part of the board as she pulled the magnifying glass down and inspected the seeds. She then used a pencil to roll 500 seeds slowly, while checking their size, shape and coat. She held the pencil in her right hand. She used her index finger and thumb to remove any seeds that seemed questionable. Some seeds were pea-sized while others were smaller. T. 36-37. It took her 10 to 15 minutes to inspect 500 seeds. She rested her wrists against the wooden board during this time period. T. 38.

Petitioner also described a process known as "rag dolls." She started this process by retrieving a 50-pound box of paper from a warehouse, carrying it 200 feet to the lab and using a utility knife to cut it open. The box contained 2000 sheets of paper. She used both hands to remove about three inches of paper at a time. She placed the paper on a baker's sheet and then wet the paper, using water from a plastic container. She then used both hands to flip the paper over and wet the other side. The paper swelled as she wet it. She placed the wet paper into storage containers that had snap-close lids. If the sample was classified as a "round up," she used "round up" solution, rather than water, to wet it down. She made this solution. She then took a sheet of wet paper and folded it halfway down. She then poured seeds into a 10-inch triangular plastic pan and, from there, into a "planting board" that was about 4 x 22 inches in size. She held the "planting board" in both hands and rolled it around until the seeds filled 50 holes. She then poured off the excess seeds into the pan. She then set the "planting board" onto a wet piece of paper and released the seeds, using her thumb. She then used both hands to flip the folded half sheet of paper up onto the seeds. She then used her fingers and thumbs to roll the paper from left end to right end until she "had that rag doll rolled." T. 41. Once it was rolled, she folded it into two, put a rubber band around it and put it into a wired bucket that had holes in it. Her goal was to plant 400 seeds. She repeated the process eight times, put plastic over the bucket and affixed it with a rubber band. In the busiest part of the year, she

might do "300 a day in rag dolls." T. 42. During "bin sampling", she might stand there for five hours in a row, "just doing rag dolls." T. 43.

Petitioner identified PX 22 as a photograph of a gallon jug that co-workers would bring to her. The jugs were referred to as "truck samples." They would be filled with five pounds of seed. There would be a ticket at the top, identifying the grower. She would hold the lid with her left hand and try to twist the lid off, using her right hand. She would alternate if she was not able to untwist the lid on the first try. The lid was 4 inches in diameter. The jug was made of plastic but was sometimes slick due to being covered with bean dust. T. 45. After she removed the lid, she would write out an envelope, using the information from the ticket. She would then grasp the lip of the jug, using her left hand, use both hands to lift the jug to the height of her head and pour the contents into a copper divider. She then put the lid back on the jug and threw the jug into a box. She would have to unscrew and screw jug lids between 20 and 50 times per shift, depending on the number of truckloads that arrived. T. 48.

Petitioner then described the screening process. She handled three types of screens: 12 slotted, 11 ½ slotted and 11. After she poured the seeds into the copper divider, they went down into two brass pans. The pans had 4-inch handles at the top. She would pour 250 grams out of one, using her right hand, and 250 grams out of the other, using her left hand. She poured the seeds onto screens and then started shaking down the seed. She had to use her thumbs and forefingers to pick out all foreign material, including pods, bugs and mice, "whatever the grower picked up in the seed." She used both hands to rub over the screens to get any spilt seeds to fall down through the screens. The screening process could take between 10 and 30 minutes, depending on how dirty the seeds were. T. 51.

Petitioner explained that she did not work one seed sample through all of the stages because it "wasn't productive." Instead, she would take a stack and do the two-minute check, take a stack and do the test weights, take a stack and do the testing and then do the planting and screening. She would never have been able to keep up the pace if she had taken one sample and run it through. T. 52-53.

Petitioner testified that, in May or June, she also performed tasks in locations other than the lab. Out in the field, she would take a post and put a sign on it, indicating the variety of seed that was planted in that area. She would then take a two-handled post hole driver and "slam that down over the top of the post to drive the post into the ground." T. 54. She placed one hand on each handle. She had to slam three or four times to drive the post down. She also put out plastic signs. This involved placing plastic rivets and clips in the signs. In the warehouse, she and a co-worker would sort through old pallets that were stacked 100 feet long. She would be on one side and her co-worker on the other. Together, they would flip each pallet to see whether it needed to be repaired. If they encountered a pallet that needed to be worked on, they would throw it off to the side. T. 56. The "good" pallets had to be "slip sheeted." This involved grabbing stacks of cardboard and using a heavy stapler to "slap" the cardboard onto the pallet. Petitioner testified she had to "slap" pretty hard to get the staple to go through the pallets because the pallets were made of oak or other hard material. T. 56-57.

She used a crowbar to "bust up" the broken boards on pallets that required repair. She then used a pry bar to "pop" the broken boards off so that new boards could be put on. A pneumatic tool was used to affix the new boards but she did not use this tool. T. 57. She also used a push broom in the warehouse to clean the area where the pallets were sorted. This area was 100 x 100 feet in size. She also used a "scoop shovel" while cleaning up. She would put the debris into a wheelbarrow, maneuver the wheelbarrow out to the dumpster and pour the contents into the dumpster. T. 58-59.

Petitioner testified she sometimes worked with sand during the "rag doll" process. If she planted "rag dolls" and they did not meet the germ requirements, she had to replant on sand. Co-workers would bring in sand, using wheelbarrows. She had a bucket that held 50 pounds of sand. The sand could be wet or dry. She used her right hand to scoop the sand from the wheelbarrow into the bucket. She used her left arm to "hoist" the bucket and carry it to her work station. She would typically fill the bucket about ¾ full so that it weighed between 30 and 40 pounds. Once she got the bucket to her work station, she pushed it onto the counter. She would take 600 milliliters of water from her water container and pour that onto special "Kinpack" paper that resembled the lining of a plastic diaper. She then used her hands to flatten the paper. She then poured seed into a pan and then onto a planting board. She would roll it around until she got 100 seed in the holes. She would then pour off the excess and lay that down on each corner of the Kinpack paper. She would release the spring load, press it down and pour sand over the seeds, using the scoop, until the seeds were covered. She then used her hands to "smooth that out" and carried it over to the germ room. She would slide the planted board into racks in that room. T. 60-62.

Petitioner testified that each task she performed throughout each shift required her to use her hands. T. 62.

Petitioner denied performing any hand-intensive activities outside of work. She does not knit. T. 63-64. She does not have any problems with her thyroid. She is 5 feet, 9 inches tall. T. 64.

Petitioner denied having any problems with either of her hands before she started working at Respondent. She first noticed problems with her hands in the spring of 2010. She noticed problems with grip and strength. She also noticed that her hands would shake when she lifted things. She began dropping objects. T. 65.

Petitioner testified she had experienced problems with her neck for several years before the spring of 2010. T. 65.

Petitioner testified she first saw a doctor for left hand and wrist problems on June 14, 2010. She went to the office of her primary care physician and saw that physician's assistant, Bill Kilpatrick. She informed Kilpatrick that she was experiencing pain, tingling and numbness in her left hand. She also told Kilpatrick that she had noticed a knot on the top of her wrist. T. 66.

She discussed her job duties with Kilpatrick. He provided her with a cock-up splint for her left hand and wrist.

Records in PX 1 and RX 5 reflect that Petitioner saw William Kilpatrick, a nurse practitioner, at Christie Clinic on June 14, 2010. Kilpatrick noted a complaint of left wrist and hand pain that had worsened over the previous three days. He also noted a knot on the posterior aspect of Petitioner's left hand near the wrist. Petitioner denied having anything similar in the past. Petitioner reported being "busier at work" and doing "a lot of repetitive movement with her arms and hands on a daily basis." She also reported taking one Aleve daily for ongoing neck discomfort. She denied any specific injury but reported doing a lot of lifting throughout the day. Kilpatrick described her as right-handed.

In addition to the knot, Kilpatrick noted mildly positive Tinel's and Phalen's testing to the left wrist. His impression was: 1) ganglion cyst; 2) wrist strain; and 3) early carpal tunnel syndrome. He placed Petitioner in a left wrist cock-up splint. He recommended that Petitioner take Aleve twice daily for four to five days. He directed Petitioner to return in two to three weeks if she did not improve. RX 5, p. 24/113.

Petitioner testified that, as of her visit to Kilpatrick, she understood that she had left carpal tunnel syndrome that was due to her repetitive work duties. T. 68. She returned to work the same day she saw Kilpatrick. T. 68. She was wearing the splint. The splint was visible. It was dark blue with white trim. She went to the office of Kevin Kaiser, the plant manager, and spoke with Kaiser that day. [She identified Kaiser in the hearing room. T. 69-70.] Kaiser was her supervisor. From where she was standing, the splint was within Kaiser's view. Kaiser asked her what the splint was for. She told him she was having issues with her hand. She also told him she had just come from the doctor's office, where she had learned she had carpal tunnel syndrome. Kaiser then asked her whether she had any work restrictions. She said "not at this time." Kaiser replied, "okay, keep me posted." T. 70-71. During this same conversation, she told Kaiser that she understood the carpal tunnel syndrome was related to her job duties. T. 71.

Petitioner testified she performed full duty at Respondent during the following two weeks and then returned to Kilpatrick. She wore the splint during this time. When she saw Kilpatrick, he sent her to Dr. Freeman, an orthopedic surgeon affiliated with Christie Clinic. T. 71-72.

Records in PX 1 reflect that Petitioner saw David Freeman, PA-C, a certified physician's assistant affiliated with the Christie Clinic, on July 2, 2010. Freeman noted that Petitioner complained of dull, achy left wrist pain of several months' duration that increased with usage of "overuse while at work." He also noted that Petitioner complained of numbness and tingling in all of her fingers, worse on the left. On left wrist examination, he noted a palpable cyst to the dorsal aspect, positive Phalen's testing, negative Tinel's testing, 5-/5 strength and some thenar eminence atrophy. He obtained left wrist X-rays which showed no bony abnormalities. He

diagnosed a left wrist dorsal ganglion cyst and bilateral carpal tunnel syndrome. He referred Petitioner to Dr. Thatcher for bilateral upper extremity EMG/NCV testing. PX 1, pp. 7-8.

Dr. Thatcher performed the prescribed EMG/NCV testing on July 14, 2010. He found the results to be consistent with mild to moderate left carpal tunnel syndrome and mild bilateral cervical radiculopathy. He found no evidence of right carpal tunnel syndrome or ulnar neuropathy. PX 1, pp. 9-11.

Petitioner testified she returned to Dr. Freeman on July 21, 2010. The doctor referred her to Dr. Love, a surgeon. T. 72-73. PX 1, p. 12.

Petitioner testified she went to work the following day, July 22, 2010, and spoke with Kevin Kaiser in his office. Two of her co-workers, Tom Condron and Mike Thomas, were present when she spoke with Kaiser. She told Kaiser that her doctor had referred her to a surgeon and so "more than likely [she] was going to be having a carpal tunnel release." Kaiser then asked her whether she was going to file this under workers' compensation. She told him no, that she was going to file it under her own insurance and take short-term disability. He asked whether she was sure about this. She replied yes. He then said, "well, let me know when you find out the date of the surgery so I can start the paperwork." T. 74.

Petitioner testified she told Kaiser she was going to use her health insurance rather than workers' compensation based on interaction she had had with her previous supervisor, Lou Rhodes, around 1996, in connection with a work-related injury involving her right shoulder. She had gone to Rhodes after seeing her doctor and had told him her doctor had prescribed medication. While she was in Rhodes' office, he called her doctor and asked whether Petitioner could take Ibuprofen instead of prescription medication so he could avoid having to file a recordable accident. T. 75. Based on Rhodes' reaction, she knew how Respondent was about work accidents so she concluded it would be easier to use her health insurance to cover the carpal tunnel surgery and file for short-term disability. T. 76. It was her understanding that the carpal tunnel surgery took only 15 to 20 minutes to perform, that she would need some physical therapy afterward and that she would be back to work within two to three weeks, in time for Respondent's busy season. T. 76.

Petitioner testified that, when she spoke with Kaiser on July 22, 2010, she again told him that her work duties had caused the carpal tunnel. T. 76-77.

Petitioner first saw Dr. Love on August 3, 2010. The doctor described Petitioner as a "55-year-old right-handed woman who has worked for 20 years doing repetitive work with her hands." She noted that Petitioner worked as a lab technician at a seed company. She noted complaints of left hand numbness and tingling, along with pain that increased with lifting, gripping, grasping and twisting. After examining Petitioner and reviewing the X-rays and EMG/NCV results, Dr. Love diagnosed left carpal tunnel syndrome and "double crush" syndrome. She recommended a left carpal tunnel release but cautioned Petitioner that the results would be "tempered by her double crush with the cervical radiculopathy." PX 1, p. 13.

Petitioner testified she underwent carpal tunnel surgery with Dr. Love. [This surgery took place on August 19, 2010. PX 1, pp. 21-22. RX 5, pp. 102-103, 113.] She described the results as "horrible." Her left hand ended up being much worse than it was before the surgery. Her hand was totally numb and the pain was worse. [At the first post-operative visit, Dr. Love noted that Petitioner complained of significant numbness and an inability to grip. PX 1, p. 23.] The pain went up her entire arm and she was not able to use her hand because it was so swollen. At Dr. Love's direction, she underwent physical therapy at Champion Fitness following the surgery. [The therapy records reflect consistent left hand and left elbow complaints that worsened with various household activities. PX 2. RX 5, pp. 75-77, 113.] Petitioner testified that the therapy "helped somewhat" but she was still experiencing excruciating pain. The therapists used ultrasound but this sent pain shooting up her arm. She said "something is not right" and the therapists agreed. T. 78. She returned to her primary care physician and he referred her to Dr. Lee at Bonutti Clinic. Dr. Lee prescribed a Medrol Dosepak to try to reduce the swelling. He felt some of her problems could be neck-related so he sent her for a cervical spine MRI and X-rays that day. T. 78-79.

Dr. Lee's note of November 15, 2010 reflects that Petitioner underwent a left open carpal tunnel release by Dr. Love on August 19, 2010 and described her symptoms as dramatically worsening after this surgery. Dr. Lee noted that Petitioner complained of constant numbness in the index finger, partial numbness in the middle finger, swelling of the hand, difficulty gripping and grasping and worse symptoms at night. Petitioner reported being unable to perform her job as a seed lab technician because she could not feel her fingertips. Dr. Lee reviewed the EMG. On examination, he noted a standard, well-healed incision at the base of the palm and no thenar atrophy. He found Petitioner's symptoms to be "compatible with cervical pathology." He also felt Petitioner could have a double crush injury syndrome. He prescribed cervical spine X-rays and a cervical spine MRI. He prescribed a Medrol Dosepak. RX 5, pp. 91-92/113.

On February 16, 2011, Petitioner filed an Application for Adjustment of Claim alleging repetitive trauma injuries and an accident date of June 14, 2010. Arb Exh 2.

Petitioner testified she later sought another opinion from Dr. Li at Safeworks. Dr. Li's office was closer to her home. It was his belief that Dr. Love did not release the median nerve far enough. At his direction, Dr. Thatcher performed EMG/NCV testing of the left upper extremity on June 30, 2011. This testing revealed mild to moderate left carpal tunnel syndrome. PX 1, pp. 36-37. Following this testing, Dr. Li recommended a release and revision. He performed revision surgery on July 29, 2011. Petitioner testified this surgery helped in the sense that her hand numbness lessened but she was still experiencing tingling and pain shooting up her arm. T. 79. She was still unable to use her left hand. Dr. Li referred her to Dr. Atwater. He concluded her symptoms were neck-related so he prescribed neck treatment. She ended up undergoing a cervical fusion at C4-C5 and C6-C7. This surgery did not alleviate her left hand or arm problems. Repeat EMG/NCV testing performed on October 16, 2012 showed mild left carpal tunnel syndrome, moderate right carpal tunnel syndrome and mild left cubital tunnel syndrome. Dr. Thatcher described these conditions as having progressed since January

2012. PX 1, pp. 41-43. Dr. Atwater was concerned. He referred her to Dr. Oakey, who recommended a carpal tunnel release with a "fat flap revision." Dr. Oakey explained he was going to remove fat from her hand and wrap it around the median nerve so that the nerve would not collapse again. He performed this surgery along with an ulnar nerve transposition. T. 81.

Records in PX 6 reflect that, on November 5, 2012, following repeat EMG/NCV testing performed by Dr. Thatcher, Dr. Oakey noted that Petitioner's left carpal tunnel syndrome had "actually progressed" since her last surgery and that Petitioner also had left cubital syndrome and right carpal tunnel syndrome. He discussed the possibility of revision surgery and injected the left carpal tunnel. PX 6, pp. 46-47. On December 17, 2012, he noted that the injection provided no relief. He again discussed revision surgery, noting that the results were "unpredictable." PX 6, p. 45. He performed a left subcutaneous ulnar nerve transposition and left revision carpal tunnel release with hypothenar fat pad flap on February 12, 2013. At the first post-operative visit, on February 25, 2013, he provided Petitioner with a "boomerang" splint for her left elbow. He prescribed a cock-up splint for the left wrist. He directed Petitioner to return in one month. On April 3, 2013, he described Petitioner as doing well. He removed the braces and indicated Petitioner was "still" subject to a 10-pound lifting restriction. PX 6, p. 40.

Petitioner testified she felt "much better" after Dr. Oakey operated on her. The surgery relieved the shooting pain in her arm. The pain, numbness and tingling in her hand also improved. She still had issues but they were not as severe as prior to the surgery.

Petitioner testified that, as of Dr. Oakey's surgery, she started experiencing right carpal tunnel symptoms which she attributed to overusing her left hand. She underwent additional EMG/NCV testing which confirmed she had right carpal tunnel syndrome. [Dr. Trudeau performed EMG/NCV testing on May 28, 2015, following Dr. Fletcher's evaluation. He found the results to be indicative of severe median neuropathy at the right wrist, moderately severe median neuropathy at the left wrist, moderately severe ulnar neuropathy at the left elbow and mild left C5 radiculopathy. PX 6, pp. 21-30.]

On July 1, 2013, Dr. Oakey noted that Petitioner's left-sided complaints were continuing to improve but that she had a "small amount of loss of her left thenar muscle." He also noted that Petitioner reported experiencing burning pain in both hands with tasks requiring dexterity. He indicated that Petitioner would "ultimately require" a right carpal tunnel release but that she wanted to defer this due to her husband's upcoming surgery. He released Petitioner to full duty "at this point with the understanding that we will be doing a carpal tunnel surgery which will take her out of work activities in the fall." He directed Petitioner to return in two months. PX 6, p. 19.

On September 4, 2013, Petitioner returned to Dr. Oakey and reported increased pain in both hands secondary to placing TED hose on her husband's leg after his knee replacement. The doctor described the right-sided symptoms as "stable," noting "good APB strength. He

indicated that Petitioner planned to contact him when she wanted to proceed with the right carpal tunnel release. PX 6, pp. 15-17.

At Respondent's request, Dr. Kohlmann, an orthopedic surgeon, examined Petitioner on March 6, 2014. See further below.

Dr. Fletcher, an occupational medicine physician, evaluated Petitioner on April 16, 2015, at the request of Petitioner's attorney. See further below.

Petitioner returned to Dr. Oakey on July 15, 2015. The doctor noted ongoing bilateral symptoms. On re-examination, he noted 4/5 right thumb abduction and 4/5 left thumb opposition. He discussed right carpal tunnel surgery with Petitioner. PX 6, pp. 14-15.

Dr. Oakey performed a right carpal tunnel release on August 11, 2015. PX 6, pp. 7-8. On August 26, 2015, he described Petitioner as "thrilled" with the results of this surgery and "doing well with ROM exercises." He imposed a 10-pound lifting restriction. PX 6, pp. 11-13.

On September 28, 2015, Dr. Oakey noted that Petitioner was still experiencing "some sporadic issues in the small and ring fingers" following the right-sided release. He indicated it was "unclear" whether this was coming from a "more proximal etiology." He noted that Petitioner planned to pursue more care for her neck and would return to him as needed. PX 6, pp. 6-7.

Petitioner testified that, in July 2016, she came to understand that she had reached maximum medical improvement. At no point thereafter did Respondent offer her work. She requested vocational rehabilitation services but Respondent did not offer them to her. T. 85.

Dr. Fletcher testified by way of evidence deposition on November 18, 2016. PX 24. Dr. Fletcher identified Fletcher Dep Exh 1 as an accurate copy of his CV. He testified he is board certified in occupational and preventive medicine. Occupational medicine involves performing ergonomic assessments and making determinations as to factors causing or contributing to injuries and illnesses in the workplace. PX 24, p. 6. It also involves making determinations about individuals' capacity to work. PX 24, p. 7.

Dr. Fletcher testified he performs jobsite analyses to determine the frequency of a task, forcefulness, posture, exposure to vibration and awkwardness of positions. PX 24, p. 8.

Dr. Fletcher testified that Governor Rauner appointed him to the Commission's Medical Fee Advisory Board in January 2016. The board advises the Chairman about medical fees and access to care issues. PX 24, pp. 8-9.

Dr. Fletcher opined that Petitioner's claims involves a cumulative rather than acute injury. Before he first examined Petitioner, in April 2015, he reviewed voluminous medical records dating back to the early 2000s. He also reviewed Dr. Kohlmann's report and job

descriptions provided by both Petitioner and Respondent. He knows Dr. Kohlmann very well. Dr. Kohlmann is a surgeon, not an occupational medicine specialist. PX 24, pp. 10-11. Dr. Kohlmann is an "older mode" orthopedic surgeon who performed spine and extremity surgery. PX 24, p. 12.

Dr. Fletcher testified he disagrees with Dr. Kohlmann's report. He sees this claim as presenting a unique situation in that he "had a claimant who provided [him] a significant rebuttal to" Dr. Kohlmann's report.

Dr. Fletcher testified he first saw Petitioner on April 16, 2015. Petitioner is the spouse of one of his patients. He took care of Petitioner's husband for a long time. He saw Petitioner a second time on July 28, 2016. PX 24, pp. 13-14.

Dr. Fletcher identified Fletcher Dep Exh 4 as the job description Petitioner wrote. He has encountered only a few other individuals who have provided similarly detailed job descriptions. The description allowed him to have a better understanding of the tasks Petitioner performed. PX 24, p. 15. Petitioner performed her job for 20 years. In his opinion, her description provided a better sense of clarity than Respondent's "generic" description. Petitioner also provided some photographs. These photographs show a "poor ergonomic setup." The photographs of the task involving a magnifying glass also showed "sustained volar pressure on the wrist," which is a factor identified by the National Institute of Occupational Safety and Health [NIOSH] as a risk factor for developing carpal tunnel syndrome. PX 24, p. 17.

Dr. Fletcher testified that Petitioner did not originally allege right carpal tunnel syndrome. She underwent three left carpal tunnel procedures plus left cubital tunnel surgery and later, in 2015, underwent right carpal tunnel surgery by Dr. Oakey. Dr. Fletcher opined that the right carpal tunnel syndrome was a "complication of the treatment [Petitioner] underwent for her left hand." He has probably seen easily 5,000 cases of carpal tunnel syndrome in his career. With respect to her left hand, Petitioner had one of the worst surgical results he has ever seen. PX 24, p. 19. Petitioner's left hand was "basically butchered." He has photographs showing the scarring in that hand. Petitioner also has "horrible thenar atrophy present." Because she obtained such a poor surgical result, she started overusing her right arm. That is the basis of his causation opinion vis-à-vis the right carpal tunnel syndrome. PX 24, p. 19. It is not unusual for a person to start out with unilateral carpal tunnel syndrome and develop bilateral carpal tunnel syndrome secondary to overuse. PX 24, p. 20. The right carpal tunnel syndrome causally relates back to the June 14, 2010 accident because it is a complication of Petitioner's treatment. PX 24, p. 20. Fletcher Dep Exh 5 is a photograph he took of Petitioner's hands at the time of her initial examination. The photograph shows that Petitioner "has no thenar muscle eminence whatsoever." It also shows extensive scarring in the left lower wrist. Petitioner also has thenar atrophy in her right wrist but it is less severe. PX 24, pp. 20-21.

Dr. Fletcher opined that there is a causal relationship between the job duties Petitioner performed for 20 years and the development of her left carpal tunnel syndrome. The subsequent complications caused her to develop right carpal tunnel syndrome. Petitioner had

"no independent risk factor" for the development of carpal tunnel syndrome. Petitioner does not pursue hobbies that could have contributed. Nor is she diabetic. She does not have thyroid problems, does not smoke and is not obese. PX 24, p. 22. The only physical factor that lowered her threshold for developing left carpal tunnel syndrome was the fact that she had some proximal nerve compression in her neck. That is called "double crush syndrome." Petitioner had this prior to June 2010 but it was not recognized until she saw Dr. Lee. Eventually, Dr. Atwater performed a two-level cervical fusion in 2012. PX 24, pp. 21-22.

Dr. Fletcher did not find a causal relationship between Petitioner's repetitive work duties and her cervical spine condition. He views the cervical spine condition as degenerative. PX 24, p. 23.

Dr. Fletcher distinguished the jobsite analysis performed by Dr. Kohlmann from the kind of analysis he would perform as a board certified occupational medicine physician. In his view, it is critical to have the claimant present at the time of the analysis to determine factors unique to that person, such as height and wrist ratios. There is no evidence as to how much time Dr. Kohlmann spent at Respondent's facility. Nor is there evidence that he used tools Dr. Fletcher would typically use, such as strain gauges. PX 24, p. 24. Dr. Fletcher testified he is not sure whether Dr. Kohlmann, an orthopedic surgeon, is qualified to perform a jobsite analysis. During his career, he has seen orthopedic surgeons perform such analyses on only one or two occasions. PX 24, p. 24.

Dr. Fletcher testified he performs work for insurance carriers and defense firms. He also sees patients. Both sides call him to testify. He tries to be truthful. PX 24, p. 25. Respondent's firm has retained him in the past. PX 24, p. 25.

Dr. Fletcher did not find a clear causal relationship between Petitioner's repetitive work duties and her left cubital tunnel syndrome. The tasks Petitioner performed are not the typical tasks associated with cubital tunnel. PX 24, p. 27. If a person's wrist usage is limited, that could potentially put additional pressure on the rest of the arm. PX 24, p. 28. That Petitioner's cubital tunnel could have been a byproduct of the bad results she obtained from her first two carpal tunnel releases is a "reasonable theory." PX 24, p. 28. It is "probably" more than 50% likely that the poor surgical result caused the cubital tunnel. PX 24, p. 29.

Dr. Fletcher testified that, in late 1989, NIOSH came out with a list of factors playing into the development of carpal tunnel: forcefulness, pressure on the volar surface of the wrist, awkward positioning and vibration. "You don't necessarily have to have forcefulness if you have the other factors present." PX 24, p. 30. Petitioner's tasks were not only repetitive. They also involved "very abnormal awkward hand postures with radial and ulnar deviations" and "pressure on the volar surface of the wrist." PX 24, p. 30. Petitioner's work involved very fine detail, using a magnifying glass to look at seeds. This involved pressure on the volar surface of the wrist. He is relying on Petitioner's account of her job since he did not have an opportunity to visit Respondent's facility. PX 24, p. 31. Petitioner rebutted Dr. Kohlmann. Dr. Fletcher

testified he does not believe Dr. Kohlmann addressed all of the important risk factors. PX 24, pp. 31-32.

Dr. Fletcher opined that all of Petitioner's upper extremity surgeries are causally related to her injury of June 14, 2010. He further opined that the surgeries, therapy and EMG studies were reasonable and necessary. PX 24, pp. 32-33. Petitioner has not worked since the injury. Dr. Fletcher opined that Petitioner was disabled from work due to the severity of her condition up until the time he examined her. At that time, she still had impairment with respect to activities of daily life. Petitioner's Quick Dash score improved between April 2015 and July 2016, due to her right carpal tunnel release, but she still had atrophy and pain as of July 2016. PX 24, p. 34. Petitioner's hand dexterity is "very, very poor." She could not resume the kind of fine, intricate work she performed at Respondent. PX 24, p. 34. In his opinion, Petitioner is permanently and totally disabled. PX 24, p. 36.

Dr. Fletcher testified he has seen employees of Respondent but has never been in Respondent's facility. Respondent has sent employees to him. PX 24, p. 37.

Under cross-examination, Dr. Fletcher testified he is not an orthopedic surgeon, neurologist or neurosurgeon. He frequently refers patients to orthopedic surgeons. PX 24, pp. 38-39. He uses orthopedic surgeons who are tenants and he uses outside doctors as well. PX 24, p. 39.

Dr. Fletcher acknowledged that a note dated October 31, 2000 identifies Petitioner's employer as Norvat Seeds, not Respondent. PX 24, p. 40.

Dr. Fletcher testified he was not asked to address causation vis-à-vis the lumbar spine. Petitioner has degenerative disc disease at the cervical and lumbar levels. PX 24, p. 41. Aging and other factors, including microrepetitive trauma, excessive standing, vibratory exposure, smoking and trauma can contribute to degenerative disc disease. PX 24, p. 42.

Dr. Fletcher acknowledged that Petitioner is invested in her claim and is trying to present her side of the story. He is operating on the assumption she is being truthful. Dr. Kohlmann described her as reliable. PX 24, p. 43. If Petitioner misrepresented her job duties, that could affect his opinions. PX 24, p. 43.

Dr. Fletcher testified that early records from Dr. Love show Petitioner had a ganglion cyst in her wrist. Such cysts can develop spontaneously. They are potentially related to repetitive trauma but there is no good hard epidemiological evidence of that. PX 24, pp. 43-44. There is no relationship between Petitioner's ganglion cyst and her carpal tunnel syndrome. PX 24, p. 44. A ganglion cyst in the volar aspect could potentially cause compression but Petitioner's cyst was more in the dorsal area. PX 24, p. 44. Ganglion cysts can cause pain and swelling. The symptoms wax and wane. PX 24, p. 45.

Dr. Fletcher reiterated that Petitioner has no systemic risk factors for carpal tunnel, such as diabetes, smoking, thyroid issues or rheumatoid arthritis. She is female but gender is not as strong a risk factor as smoking, diabetes or thyroid problems. PX 24, pp. 45-46. Petitioner, like all people, uses her hands outside of work but her job involved unusual tasks, such as looking at and manipulating thousands of seeds. In terms of outside activities, Petitioner cared for her husband and a brother-in-law who had a stroke. He is unaware of Petitioner pursuing any hobbies such as knitting. Petitioner's husband had three surgeries while he was under Dr. Fletcher's care so Petitioner had to take him to the doctor. Petitioner's husband was never in a wheelchair. He was ambulatory but he could not drive. PX 24, pp. 47-48. Petitioner is actually older than most people who develop carpal tunnel. PX 24, p. 48. Petitioner had neck and back issues dating back to 2000. Petitioner's longstanding proximal nerve compression made her more susceptible to developing problems secondary to her work activities. Petitioner's non-work activities would not necessarily have had the same kind of impact, unless she was performing forceful or repetitive non-work activities. PX 24, p. 49. If Petitioner developed carpal tunnel as a homemaker, he would have asked her about her specific home activities. PX 24, p. 50. He asked Petitioner about these activities. PX 24, p. 50. He does not believe that those activities had any bearing on the development of her carpal tunnel. PX 24, p. 51.

Dr. Fletcher testified that the AMA Guides, Sixth Edition, are part of Illinois law since 2011. He considers the Guides authoritative. He used to give seminars on impairment ratings. He did this for the Illinois State Medical Society. After a couple of years, most people had learned what they needed to know. There wasn't much demand after that point. PX 24, p. 52. He performs about 40 to 50 impairment ratings per years. PX 24, p. 52.

Dr. Fletcher testified that some of the orthopedic surgeons who treated Petitioner felt there was a connection between her cervical spine issues and her left arm issues. PX 24, pp. 54-55.

Dr. Kohlmann testified by way of evidence deposition on January 27, 2017. Dr. Kohlmann testified he is a board certified orthopedic surgeon. He has been in practice since 1992. RX 8, p. 5. He is a general orthopedist. RX 8, p. 5. He has treated patients who have carpal tunnel syndrome. He has performed many carpal tunnel surgeries. An open carpal tunnel release involves making an incision at the base of the palm and releasing the transverse carpal and volar retinacular ligaments. He prefers to perform open releases but could perform an arthroscopic release. RX 8, p. 7. Some people have large carpal tunnels and others have small ones. The size is an "anatomical variation." RX 8, p. 8. Most commonly, people need releases because they develop flexor tenosynovitis. Carpal tunnel syndrome can also result from crush injuries or wrist fractures. Females develop carpal tunnel syndrome more frequently than men. RX 8, pp. 9-10. Some work activities would predictably result in carpal tunnel syndrome. Such activities would include using a screwdriver all day or repeatedly pinching hard with your thumb and index finger or thumb and middle finger. RX 8, p. 10. Use of vibratory tools could also cause the syndrome. Typing all day is repetitious but is not considered a cause. RX 8, p. 11.

Dr. Kohlmann testified he examined Petitioner on March 6, 2014, at Respondent's request. He needed to refer to his report (Kohlmann Dep Exh 2) while testifying. RX 8, pp. 11-12. Petitioner told him she worked for Respondent for 20 years and began having problems with numbness in her left thumb, index finger and middle finger sometime in 2010. Petitioner also told him that, after she underwent a left carpal tunnel release by Dr. Love, she woke up with terrible hand pain and numbness. Her symptoms did not resolve with physical therapy. RX 8, p. 11. She was off work so long she lost her job. Dr. Li ordered additional testing and then performed a repeat release but only some of her symptoms improved. Petitioner related she then underwent a cervical spine work-up and injections that "did not agree with her." RX 8, p. 14. After Dr. Atwater performed a two-level cervical spine fusion, her neck and radiating shoulder/trapezius pain improved but she continued to have pain in her arm, wrist and hand. She then saw Dr. Oakey, who performed an anterior subcutaneous ulnar nerve transposition and a revision left carpal tunnel release. RX 8, p. 14. Dr. Kohlmann testified that Petitioner remained symptomatic as of his examination. Petitioner told him she was still experiencing occasional left hand numbness, decreased bilateral hand grip strength, dizziness when looking up, loss of muscle mass in her forearm and weakness in both hands, to the point where she is unable to peel potatoes without experiencing bad pain and numbness in her right hand. She had been told she needed a right carpal tunnel release but was unsure whether she wanted to undergo that surgery. She also complained of longstanding low back pain and migraine headaches. RX 8, p. 15. She attributed her upper extremity problems to overuse at work. RX 8, p. 16.

Dr. Kohlmann testified that Petitioner described most but probably not all of the duties she performed at Respondent over the 20 years she worked there. RX 8, p. 17.

Dr. Kohlmann testified that Petitioner is right-handed. He testified that carpal tunnel syndrome usually develops in a person's dominant hand but can develop in the non-dominant hand. RX 8, p. 18. To him, it seems as if the dominant hand should be affected first. RX 8, pp. 18-19. Dr. Kohlmann testified that a ganglion cyst is fluid-filled. It can be found in the tendon sheath or the joint. He is not sure exactly why such cysts develop. RX 8, p. 19.

Dr. Kohlmann testified that cervical spine problems can cause symptoms that are similar to those caused by carpal tunnel syndrome. A person who undergoes carpal tunnel surgery could require revision surgery. RX 8, p. 21.

Dr. Kohlmann testified he went to Respondent's facility and saw the area where Petitioner worked. He saw various pieces of equipment and work stations. He was "walked through" the tasks Petitioner performed. He was allowed to perform the same tasks. RX 8, p. 22. He took instructions first. He was only in the lab. He did not go into the warehouse. RX 8, p. 23. In his opinion, the tasks Petitioner performed were "all very low force." He had to use his hands but the tasks did not require strenuous gripping, the use of vibratory tools or any unusual wrist positions. RX 8, p. 24.

Dr. Kohlmann then looked at the photographs that were made an exhibit at the time of Dr. Fletcher's deposition. He performed the function shown in the photograph at the 3:00 position. He did not have any sense that this task put stress on his hands, wrists or arms or required awkward positioning. RX 8, pp. 25-26. At no point during his site visit did he perform any tasks that were conducive to causing or aggravating carpal tunnel syndrome. He would reach the same conclusion even if the tasks were being performed during the busy season. RX 8, p. 27. Respondent did not hire him to perform a complete workplace evaluation. He does not perform such evaluations. RX 8, p. 28.

Dr. Kohlmann opined, to a reasonable degree of orthopedic certainty, that Petitioner's job duties, as he understood them, did not cause or aggravate her carpal tunnel syndrome. RX 8, p. 28.

Under cross-examination, Dr. Kohlmann acknowledged he saw Petitioner only once. Petitioner was never his patient. RX 8, pp. 28-29. He has no reason to dispute that Petitioner has carpal tunnel syndrome. RX 8, p. 29. He is familiar with the term "double crush." The theory goes that a person who has a cervical spine condition may be more likely to also development symptomatic peripheral nerve entrapment. RX 8, p. 30. He knows Dr. Love. She is no longer practicing medicine. RX 8, pp. 30-31. He never performed many independent medical examinations. He performs maybe one per month. RX 8, p. 31. He primarily performs examinations for insurance companies but some claimants' attorneys send examinees to him also. RX 8, p. 31. He has performed other examinations for Respondent's counsel's firm. RX 8, p. 32. He does not have any social relationship with Respondent's counsel or Mark Cosimini, another member of his firm. RX 8, p. 32. He is not friends with any of the owners or stockholders of Respondent. Before his site visit, he never went to Respondent's facility. RX 8, p. 33. He cannot recall when he made the site visit but he thinks it was after he examined Petitioner. RX 8, p. 33. He believes that, when he saw Petitioner, he did not know he would be visiting Respondent's facility. He reviewed records when he saw Petitioner but he does not have his file with him. RX 8, p. 34. He reviewed various X-ray images, an EMG/NCV study performed by Dr. Thatcher, Dr. Love's operative report and cervical spine MRI scans. He does not recall exactly how much time he spent with Petitioner. RX 8, p. 35. He spent time obtaining a history from Petitioner. He tries to write down exactly what the examinee tells him. RX 8, p. 36. He does not know where his notes are. It is possible he scanned the notes into the electronic health record. RX 8, p. 37. He does not know how much he charged for his report. His fee typically ranges from $800 to $2,300. He believes the hospital charges $1,000 per hour for his deposition time. RX 8, p. 38. His orthopedic practice is "very general" so it is "hard to say" how many carpal tunnel surgeries he performed in 2016. "It could be 5%" of the surgeries he performed. RX 8, p. 39. Respondent's counsel was present when he visited Respondent's facility. He cannot recall whether he prepared his examination report before he made this visit. RX 8, p. 39. He cannot recall whether he knew he would be making this visit when he examined Petitioner. RX 8, pp. 40-41. He does not know how much time he spent in total on Petitioner's claim. RX 8, p. 41. When he went to Respondent's facility, he met Respondent's counsel there. RX 8, p. 43. He spent half an hour to an hour at the facility. Petitioner was not present. A female employee was there and she was familiar with Petitioner's job. RX 8, p. 44.

He is not trained in occupational medicine. RX 8, p. 45. He has visited various workplaces, to help make adjustments, depending on what the employee's problem was, but he does not do this for a living unless asked. RX 8, p. 46. In the past, he saw patients at Dr. Fletcher's facility. RX 8, p. 46. He left the issue of work restrictions up to Dr. Fletcher. RX 8, p. 47. Dr. Fletcher is a well-qualified occupational medicine physician. He "knows what he's doing." RX 8, p. 47. He did not take any photographs at Respondent's facility. RX 8, pp. 47-48. The available photographs are still shots. The woman who guided them at Respondent's facility did not take them through every task that is listed in the job description attached to his report. RX 8, p. 48. She showed them some seed-related tasks and activities involving five-gallon jugs that had screw tops. There were "maybe certain parts that [he] didn't do." RX 8, p. 49. He never performed any task for an hour. He did not stay there eight hours or work there fifty weeks out of the year. RX 8, p. 49. He found no causal relationship between Petitioner's job and her carpal tunnel syndrome. He has been wrong at times during his career. RX 8, p. 50. Different physicians can render different opinions in matter such as this. RX 8, p. 50.

On redirect, Dr. Kohlmann testified it is possible he went to Respondent's facility before he examined Petitioner. He has no independent recollection of the timeline. RX 8, p. 51.

Petitioner testified she last worked for Respondent on August 18, 2010. She requested but never received workers' compensation benefits. She did receive short-term disability. Her employment by Respondent ended in February 2011. She had not planned to retire at that point. T. 93. She received a letter informing her that she had been terminated. If a Respondent employee is unable to resume working after receiving 26 weeks of short-term disability, he is officially terminated. T. 87. Since her termination, Respondent has not offered her work. T. 87.

Petitioner testified she has difficulty with intricate activities such as buttoning a button, zipping a zipper and tying shoes. When she takes a blouse off to wash it, she leaves it buttoned so she will not have to button it again. She now buys more leggings and pants that do not have have to be zipped up. She also buys slip-on shoes. She has learned to do things differently. She cannot cut meat or a steak because she lacks strength to put sufficient pressure on her hands to accomplish this. She continues to drive but travels less because gripping the steering wheel causes pain in her hands and wrists. T. 89. If she performs simple tasks such as this she can be up all night due to pain in her hands. She takes Gabapentin for her pain. T. 90. She can talk to someone via cell phone but usually uses the speaker function. She cannot hold a cell phone to her ear for more than two to three minutes because her hand goes numb. T. 90. She still does some gardening but not to the extent she did in the past. Her husband does a lot of the gardening now. T. 90-91. She can use pruners to snip plants with thin stems, such as roses, but lacks sufficient strength to grip the pruners hard enough to cut a plant that has diameter to it. She can pick vegetables but cannot carry a bucket. She cannot carry anything that is dangling from her hands. When she goes grocery shopping, she usually takes her husband or nephew along because she cannot carry bags that hang down from her hands. She can carry a gallon of milk only if she carries it up in her arms. T. 91. If she uses a computer for 10 or 15 minutes, her hands go numb from the typing. T. 92.

Petitioner testified she is currently receiving Social Security disability benefits. Her short-term disability carrier filed a claim on her behalf in October 2011 and Social Security awarded her benefits retroactively, finding that her disability began on August 17, 2010. T. 92.

Petitioner testified she was not present at Respondent when Dr. Kohlmann performed a job analysis. The doctor never observed her performing tasks at Respondent. To her knowledge, she never gave Dr. Kohlmann a complete description of her job duties.

Petitioner testified she continues to experience pain in her palms and wrists, along with numbness and tingling. Her symptoms vary in intensity depending on her activity level. When she performs yard work or cleans her house, she has to stop after 15 or 20 minutes to take a break and rest her hands. If she tries to perform any activity requiring gripping, such as mopping or sweeping, she has to stop because it causes a lot of pain in her hands. T. 94.

Petitioner testified she first met with Bob Hammond, a vocational counselor, in March 2017. Hammond discussed the job search process with her. She understood that she was supposed to contact prospective employers by making calls, visiting businesses and going online. She also understood she was supposed to present a positive outlook. She was supposed to tell employers what she could do with her hands rather than stress what she could not do. She was instructed to give Respondent as a reference and identify Kevin Kaiser as a contact person. T. 96.

Petitioner testified she believes she started looking for work in May 2017. She met with Bob Hammond on five or six occasions, over time, and also talked with him by phone. At one point, Hammond sent his assistant Kelly over to meet with her. She kept detailed records of the job contacts she made. She identified PX 20 as records she created to memorialize her job search between April 3, 2017 and June 24, 2019. T. 97. The records are complete and accurate. T. 97-98. While she was looking for work, she "applied for anything and everything," from clerical jobs to retail jobs to warehouse jobs. She participated in interviews but did not receive any job offers. She was either not qualified to perform the job or the job involved activities beyond her restrictions. T. 98-99.

Under cross-examination, Petitioner testified it would be difficult for someone to understand how complicated her job was if he did not perform it. During bin sampling, she might have to carry groups of small white bags weighing 30 pounds three or four times per day. T. 103. She frequently worked overtime. It was not unusual for her shifts to last 10 or 12 hours. T. 103. During bin sampling, she had to meet a quota each day. The seed handling and rolling involved fine dexterity but not forceful gripping. The seeds are small. T. 104. She had to forcefully grip to twist lids off jugs. T. 104-105. When she put the lids back on, she did not tighten them excessively because she would have to remove them again. T. 106. During a busy period of a month or a month and a half, she had one to two helpers. Otherwise, she worked alone in the lab. T. 106-107. During the period that she had helpers, the helpers performed the same tasks she performed. T. 107. She continued performing the pallet-related activities all

the way up until the time she stopped working for Respondent. T. 107. She has been married for 30 years. She owns a home. She cleans the home and performs all of the other household tasks, including laundry, dishes and vacuuming. She has a vegetable garden in the summer. She sometimes does canning. Her husband, an IDOT employee, was involved in a serious motor vehicle accident in approximately 2013. He had to undergo back surgery and have both knees replaced. T. 111-112. She helped care for him while he was recuperating. During that time, she hired people to perform yardwork because she could not do it all. T. 112. Before she underwent the first carpal tunnel release, she saw Dr. Hemmer at Tuscola Wellness. T. 113. Dr. Hemmer treated her neck and back. T. 114. RX 5. She kept track of all of the job contacts she made. She typed up those contacts each week. T. 115. She talked with Kevin on June 14, after she received the cock-up splint. She does not recall Bobbi being present during this conversation. She told Kevin she was having wrist problems due to her job duties. She worked for Respondent for 20 years and was familiar with Respondent's policies concerning accident reporting. Respondent required an injured employee to report the injury to a supervisor. Paperwork is usually completed but she did not complete any when she reported her injury to Kevin. T. 116. She initially chose not to turn in a claim to workers' compensation. She made this decision based on a prior experience years earlier. She later decided to pursue a workers' compensation claim. T. 117. When she met with Kevin a second time, in July, she again told him her condition was work-related. She did not contact anyone at Respondent at that point to complete paperwork for a workers' compensation claim. She has reviewed Hammond's reports. They are accurate. T. 119. Lou Rhodes, the person with whom she interacted in the past, was Respondent's plant manager. T. 122. Rhodes was not her supervisor as of the day she received the splint from Kilpatrick. T. 123.

On redirect, Petitioner testified the seeds she tested arrived at the lab in one-gallon jugs as well as bags. At the present time, her husband does most of the cooking because she has trouble lifting pots and pans and pouring things out of containers. Her husband also opens most of the jars and helps her seal lids during the canning process. T. 124. She does the dusting and lighter work while her husband helps with vacuuming and mopping. Before June 14, 2010, Respondent had an incentive-based safety program. If an employee did not have any recordable accidents, Respondent would take that employee out for a meal or give him a safety bonus. T. 125. When she made the decision to apply for short-term disability rather than workers' compensation, she feared that her job would be negatively affected if she pursued a workers' compensation claim. T. 129.

Under re-cross, Petitioner testified that, as of June 2010, she was sure her complaints were related to her job duties. Kilpatrick confirmed that belief. She told Kaiser she had a work-related injury but she chose to apply for short-term disability. T. 130-131.

Bob Hammond, a 67-year-old vocational consultant, testified on behalf of Petitioner. He obtained a master's degree in counseling from the University of Illinois. There are two major certifications available in the United States right now: CRC and ABVE. He was a member of the CRC for five years but let that lapse when he became a member of the American Board of

Vocational Experts, or ABVE. You have to undergo testing, obtain references and have a certain number of experiences to be certified as ABVE. T. 133-134.

Hammond testified his business is called Hammond Vocational Consultants. Most of the work he does involves Illinois workers' compensation cases. He has testified on prior occasions. He has been doing this kind of work for 31 years. T. 135. He has given over 300 evidence depositions. T. 136. He is familiar with the Act. T. 136. About 60% of the work he does is for respondents. He has done work for Respondent's law firm in the past. He is very familiar with Respondent's counsel, Terry Schroeder. Schroeder has hired him in the past. T. 137. In connection with his evaluation of Petitioner, he reviewed treatment records along with the depositions of Drs. Fletcher and Kohlmann. He issued four reports. T. 138-139. He met with Petitioner before preparing his initial report of March 27, 2017. After he submitted this report to Petitioner's counsel, Petitioner's counsel asked whether it would benefit Petitioner to look for work. He said yes. Dr. Fletcher opined that Petitioner is unable to return to work in the general labor market due to significant issues with dexterity. T. 142. Dr. Kohlmann, in contrast, did not discuss Petitioner's restrictions or capabilities in his reports or deposition. Dr. Kohlmann did not express the belief that Petitioner could resume her former occupation. T. 143-144.

Hammond testified he expressed some concerns about Dr. Kohlmann's opinions in his initial report. Dr. Kohlmann reached conclusions about Petitioner's job duties without addressing the issue of whether he and Petitioner are the same height and weight. T. 146. If he had only been presented with Dr. Kohlmann's opinions, he would have asked his referral source whether the doctor had reached conclusions about Petitioner's restrictions or whether the doctor was saying Petitioner was not subject to any restrictions. T. 147. Dr. Kohlmann is a general orthopedist while Dr. Fletcher is an occupational medicine specialist. He has interacted with Dr. Fletcher on numerous occasions. Dr. Fletcher has been at many jobsites and has an understanding of occupational requirements. T. 148.

Hammond opined that Petitioner is "severely limited in the ability to use her hands to do fine manipulations." Petitioner can make some gross motor movements but those are also limited because of the articulation of the fingers and wrists. T. 149. Petitioner is considered to be an individual of advanced or retirement age. From a vocational standpoint, she would have few, if any, transferable skills. T. 150. In his first report, he indicated that, if you follow Dr. Fletcher's restrictions and limitations, Petitioner is not employable in the labor market. T. 150.

Hammond testified he communicated with Petitioner a second time and instructed her how to go about performing a job search. He advised Petitioner what to say to prospective employers, in accordance with the Americans with Disabilities Act. He had Petitioner set up an E-mail account that was specific to her job search so he could access it and review her progress. T. 151. At their first meeting, Petitioner told him she was in so much pain she felt she would not be able to work. After further discussion, Petitioner came around to the idea of conducting a job search. T. 152.

Hammond testified he met with Petitioner around seven times. His job developers met with her three times. He also had eleven phone contacts with Petitioner. Between March 13, 2017 and June 2019, Petitioner made just shy of 1800 job contacts. In his long experience, this is only the second time that a person has made over 1500 contacts. T. 153. It is his opinion that Petitioner made a diligent job search. He reached this opinion after accessing Petitioner's E-mail account, talking with employers to make sure they received Petitioner's resume and reviewing the records Petitioner created. Respondent never formulated a vocational rehabilitation plan. T. 155. Nor did Respondent offer her restricted work. T. 155.

Hammond testified he charges $120 per hour. To his knowledge, he is the least expensive vocational counselor in his area. T. 156.

Hammond testified that generally he looks at a year's worth of job contacts, or somewhere between 700 and 900 contacts, before determining that there is no reasonably stable labor market for a particular individual. Petitioner made substantially more than 700 or 900 contacts. T. 157.

Hammond testified he viewed Petitioner as an "entry level person." He felt that telephonic jobs would be best for her because they would require less wrist and hand usage. He anticipated that Petitioner would be able to earn between $8.50 and $9.50 per hour.

Hammond opined that there is no reasonably stable labor market for Petitioner's services. He bases this opinion on the "abnormally" high number of contacts Petitioner made and the fact she applied for jobs even when there was only a remote possibility of being hired. "Nobody would hire her, nobody considered her and nobody brought her back for a second interview." T. 159. He believes Petitioner is totally disabled based on her diligent job search and because she cannot perform any services except those for which no reasonably stable labor market exists. T. 160.

Hammond testified he generated several bills along the way. T. 160-161. The last was in the amount of $4,031.27. T. 161.

Under cross-examination, Hammond testified that insurance carriers take varying views as to what constitutes a diligent job search. He looks to see if the person is spending about 32 hours per week looking for work, applying for a minimum of 15 jobs per week on the Internet and making 3 to 7 in-person contacts and "cold calls" per week. The term "diligent" is subjective. T. 163. Given Petitioner's upper extremity limitations, he would not send her to a construction company to hang siding or a warehouse to load cargo. T. 163-164. He counsels people how to go about looking for work within their restrictions but "sometimes we fall back into the familiar." In Petitioner's case, what was familiar was warehouse work and seed testing. That's what they went after because that is what she knew. Part of that is simply advancing the goal of getting an application in to an employer. T. 164-165. Some of the jobs Petitioner applied for were not physically suitable for her. T. 165. He does not know how many of

Petitioner's job contacts fall into this category. He has reviewed Petitioner's contacts. He has no idea how many follow-up contacts Petitioner made. T. 167.

Hammond testified he has known Dr. Fletcher for over 25 years. Dr. Fletcher is a very frequent participant in workers' compensation litigation. T. 169. He has met Dr. Kohlman once and has read a number of his reports. He is much less familiar with Dr. Kohlmann than Dr. Fletcher. T. 170. Petitioner is relatively tall but he has no idea how tall Dr. Kohlmann is. T. 171. It could be that Petitioner and Dr. Kohlmann are close to the same height. T. 171. He was not present when Dr. Kohlmann went to Respondent's plant and performed activities that he detailed in his report. He (Hammond) has never been in Respondent's plant. T. 171. He is not a physician. He has not performed the job that Petitioner performed. T. 172-173. An orthopedic surgeon who performs carpal tunnel surgery would have knowledge of the force that might be required to cause or aggravate that condition. T. 173. A board certified orthopedic surgeon could gauge whether an activity he performs could cause or aggravate carpal tunnel syndrome. T. 175.

Hammond testified that, in Petitioner's case, he performed about 130 follow-ups with prospective employers. T. 176. In his report of March 21, 2019, he noted that Petitioner had stopped looking for work due to increased pain levels. Based on the information he obtained from Petitioner's E-mail account, Petitioner stopped looking for work for about a year but restarted after he met with her. He would not consider taking a year off to be a diligent job search. T. 177.

On redirect, Hammond testified he looks at the combination of effort and time spent looking for work. He believes Petitioner has no physical capabilities with her hands. Under these circumstances, "you drop off the edge of all occupations unless you have education and a degree that you can follow that up with." T. 178-179. At the time of his initial report, in March 2017, he thought Petitioner was permanently and totally disabled. To make sure of this, he had Petitioner perform a job search. He would not go so far as to say it did not matter that Petitioner, at one point, stopped looking for work. Instead, what he would say is that, during the times Petitioner did look, she performed a diligent job search. Petitioner stopped looking due to pain and difficulty concentrating. T. 180. Between April 2017 and June 2018, Petitioner consistently looked for work each week. After she restarted, she again consistently looked for work. T. 180-181. Throughout his career, he has been aware of only one other person who applied for as many jobs as Petitioner did. T. 181.

Thomas Condron testified on behalf of Petitioner. Condron testified he worked as a tech at Respondent between 2006 and 2016. He worked in the tower, processing seeds and running seeds through machinery. He worked with Petitioner and observed Petitioner doing her job. T. 183-184. He brought samples in to the area where Petitioner worked. T. 185. He is aware that Petitioner began having problems with her hands around 2010. He was present at one conversation during which Petitioner discussed these problems with Kevin Kaiser, Respondent's plant manager. T. 187. He and Mike Thomas were in Kevin's office when Petitioner came in "with her hand in some gadget." At that point, Petitioner began conversing

with Kevin. Condron testified this conversation took place sometime around July 22, 2010. He does not know the exact date. T. 186. Petitioner said she had to have a carpal tunnel operation and she would be off work for a while. Petitioner did "not exactly" say the condition was work-related but he (Condron) "kind of figured she got it somewhere working in the lab." T. 188. Kaiser did not have much to say in response. Petitioner told Kaiser she was going to put it through her insurance rather than the company. Condron testified that, when he heard this, he called Petitioner a bad name. T. 189.

Condron testified that, at that time, Respondent's employees were "very safety conscious." In his department, they talked about safety all the time because they worked around moving machinery. T. 190-191. Respondent would provide a lunch once a quarter if no accidents occurred. If an employee filed a workers' compensation claim, "we would lose our incentive." T. 191. When his department reached five years with no accidents, they received T-shirts. After seven years, they again received T-shirts. The T-shirts commemorated years of safety. T. 192-193.

Condron testified that, when Petitioner said she was going to use her health insurance rather than workers' compensation, he called her an "asshole" right there and walked out of the room. In his opinion, "it should have been a workman's comp claim" but she was willing to forego that. T. 193.

Under cross-examination, Condron acknowledged he is not a doctor. He called Petitioner a bad name because, since she had carpal tunnel, he assumed it must be work-related. T. 194. He was present on only one occasion when Petitioner discussed her condition with Kevin Kaiser. T. 194.

Kevin Kaiser testified on behalf of Respondent. Kaiser testified he is site manager at Respondent in Tuscola. He held the same job in June 2010. He has worked for Respondent for just over 28 years. T. 197. If an employee reports a work injury at Respondent, he brings in his HSE manager, Bobbi Pierce, and begins the investigation process. He also takes it to the corporate level and brings in other regional HSE employees. An accident report is typically completed. T. 197-198.

Kaiser testified he does not recall the conversation that Petitioner testified to. He recalls seeing Petitioner wearing a brace on June 14, 2010. He and Bobbi Pierce talked with Petitioner about that. They are "drilled" to ask questions if an employee shows up at work wearing a brace or other device. T. 199. There are two reasons for that: Respondent does not want to cause the condition to worsen and needs to investigate whether there was an underlying injury. T. 200. He and Bobbi confronted Petitioner about the brace. Petitioner explained that she had been to the doctor. Petitioner showed them a cyst or knot on her hand. They asked Petitioner if she was subject to any restrictions and she said no. They told Petitioner to let them know if that changed. They also discussed the issue of whether the condition was work-related. Petitioner said it was not. "It was what [Petitioner] thought was a cyst." T. 203.

Kaiser testified that, during a subsequent conversation, Petitioner told him she was "going to have an additional surgery" and "additional time off." T. 204. He helped her initiate a claim for short-term disability. He completed the application form and sent it on to corporate. After that, he was "hands off" and "kind of in the dark" because the information obtained from doctors is protected by HIPAA. T. 205.

Kaiser identified RX 2 as a notice from Petitioner's law firm and an attached Application dated February 4, 2011. Kaiser testified that, before he received this document, he had no knowledge of Petitioner pursuing a workers' compensation claim. After he received RX 2, he passed it on to corporate. T. 206.

Under cross-examination, Kaiser acknowledged he does not hear very well. T. 207. He does not recall the exact date of the conversation he had with Petitioner. Respondent asked him about a conversation occurring June 14, 2010. T. 207. He does not know the meaning of the term "repetitive." He has "no clue" when he got up on June 14, 2010 or what he did that day. T. 208. He does not recall anything that occurred on June 14, 2010. T. 209. He likes to think his hearing was better on June 14, 2010. He does not wear hearing aids. He has had his hearing checked and has been told he has "slight hearing loss." T. 209. He did not file an occupational disease claim against Respondent. In June 2010, any accident investigation would have been conducted at the corporate level. T. 210. Bobbi Pierce was in his office when Petitioner came in. Pierce's office is 10 to 15 steps away from his. As of June 4, 2010 [sic], Pierce was Health Safety Environmental [HSE] manager. T. 211. At that time, about 30 individuals worked at Respondent. T. 211. Pierce had no other assigned duties outside managing safety. T. 212. When Petitioner entered his office, he went and got Pierce to show her the device Petitioner was wearing. T. 212. As soon as he saw Petitioner, he said, "let me go get Bobbi." As to whether he conversed with Petitioner outside of Pierce's presence, he "might have [said] hi." He "can't answer that question." T. 213. He immediately went to get Pierce. T. 214. He does not recall having any conversation of substance with Petitioner outside Pierce's presence. T. 215. He typically met with Pierce six times a day. Pierce does not report directly to him. They do not have any social relationship outside of work. T. 216. He has never had a specific protocol relating to repetitive trauma injuries. He thinks of an accident as a specific event such as a fall. T. 218. He would like to think he had a pretty good idea of what a repetitive trauma injury was as of June 2010. T. 218-219.

In an offer of proof, made after Respondent's counsel voiced relevancy and "beyond the scope" objections, Kaiser testified he has undergone training relating to ergonomics in the sense of evaluating work stations to make sure everything is at the proper level. T. 219-220. He did not undergo specialized training concerning notice of a specific trauma versus notice of a repetitive trauma injury. He did not talk to Petitioner before she went to the doctor. T. 223. If a doctor told Petitioner on June 14, 2010 that her carpal tunnel was work-related, he cannot explain why Petitioner did not tell him this. T. 223. The meeting he and Pierce had with Petitioner was brief. It lasted maybe 15 minutes. T. 224. Petitioner continued working up to the point of her left hand surgery. Before June 14, 2010, he had multiple daily interactions with

Petitioner. He was constantly in and out of the lab. T. 224. He does not recall Petitioner telling him that the surgery she was going to have was simple and she would be back to work in a few weeks. T. 225. He did not tell Petitioner she had two options in the sense she could use her health insurance or go through workers' compensation. T. 225. He only vaguely recalls the events of July 22, 2010. T. 226. He did not keep notes of either meeting with Petitioner. When they saw the brace, they asked Petitioner if she had hurt herself. Petitioner told them she did not know how it had happened. T. 227.

Arbitrator's Credibility Assessment

Petitioner's very lengthy tenure with Respondent weighs in her favor, credibility-wise.

The Arbitrator finds credible Petitioner's detailed description of her job duties. The Arbitrator also finds credible Petitioner's testimony as to the extra hours she put in during the busy season and the pace at which she was required to work. It is clear to the Arbitrator that Petitioner's job was not confined to the tasks outlined in Respondent's written description. Even so, that description reflects that the job involved "gripping" and making "precise finger movements" between one and four hours per day. RX 4. The description contains no mention of the rigorous pallet-related activities Petitioner periodically performed outside of the lab.

Respondent's plant manager, Kevin Kaiser, did not take issue with any aspect of Petitioner's testimony concerning her duties or the extra work she performed during the busy season.

Petitioner's notice-related testimony was also detailed and believable. Kevin Kaiser attempted to refute some of that testimony but the Arbitrator found him unconvincing. He initially stated that Respondent's safety director, Bobbi Pierce, was in his office when Petitioner came in, wearing a brace on her hand. He subsequently testified he was alone when Petitioner arrived and that he briefly spoke with her before going to get Pierce. The transcript reflects that Bobbi Pierce was present at the hearing. T. 200, 227. The Arbitrator finds it odd that Respondent did not call her as a witness, given the inconsistencies in Kaiser's testimony.

In his report of March 6, 2014, Respondent's examiner, Dr. Kohlmann, described Petitioner as a "very nice, warm person who was very believable." RX 7, p. 6. Kohlmann Dep Exh 2. In that same report, Dr. Kohlmann indicated he "performed a site visit requested by [Respondent]" and performed several seed-related and quality control tasks. He indicated that Petitioner described other non-seed related tasks, such as painting and handling pallets, to him and that he was already familiar with such tasks since he had performed them elsewhere.

At his 2017 deposition, Dr. Kohlmann was remarkably vague about his involvement in this claim. He could not recall whether he visited Respondent's facility before or after he examined Petitioner. He also had no recollection of the amount of time he spent with Petitioner or on the claim as a whole. He acknowledged he limited his visit to Respondent's lab. He did not perform any of the rigorous tasks Petitioner performed in the warehouse. He was

evasive about his billing. While he is an orthopedic surgeon, he conceded he has a general practice and that only about 5% of the surgeries he performs involve the carpal tunnel. He also acknowledged he does not perform jobsite analyses in the way that Dr. Fletcher does.

Overall, the Arbitrator did not find Dr. Kohlmann persuasive. He did not question Petitioner's diagnoses or treatment yet concluded that she requires no restrictions of any kind. In his report, he described Petitioner as having "very good function" in both hands yet went on to state "she can't make a fist and fully extend all the fingers." RX 7, p. 7.

Arbitrator's Conclusions of Law

Did Petitioner establish repetitive trauma injuries manifesting on June 14, 2010?

The Arbitrator finds that Petitioner developed left carpal tunnel syndrome secondary to repetitive trauma, with this condition manifesting on June 14, 2010. In so finding, the Arbitrator relies in part on Petitioner's credible testimony concerning the manual tasks she performed for Respondent and the time pressure she was under. The Arbitrator recognizes that Petitioner did not perform the same task all day, every day. "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. Edward Hines Precision Components v. Industrial Commission, 356 Ill.App.3d 186, 193-194 (2nd Dist. 2005). In City of Springfield v. IWCC, 388 Ill.App.3d 297, 314 (4th Dist. 2009), the Appellate Court upheld a finding that bilateral carpal tunnel was causally related to the claimant's job where the claimant "routinely twisted wire, used pliers, handled small objects and performed frequent and repetitive hand usage throughout his work shifts." Petitioner testified along similar lines,

Did Petitioner provide Respondent with timely notice?

The statutory language relevant to the issue of notice reads: "Notice of the accident shall be given to the employer as soon as practicable but not later than 45 days after the accident." Notice may be given orally or in writing. No defect or inaccuracy of notice shall bar recovery "unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy."

The notice requirement applies to employees like Petitioner who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident from which notice must be given is the date when the repetitive trauma injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 531 (1987). The statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. The purpose of the notice requirement is to enable the employer to investigate the alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In the instant case, Petitioner alleged a manifestation date of June 14, 2010. This is the date she saw William Kilpatrick, a physician's assistant affiliated with the Christie Clinic. Kilpatrick examined her left wrist, discussed her work duties with her and placed her left wrist in a splint. Petitioner testified that, after she saw Kilpatrick, she understood she had left carpal tunnel syndrome and that this condition stemmed from the duties she performed for Respondent. T. 68. Petitioner further testified that she went to work the same day she saw Kilpatrick, showed her splint to Kevin Kaiser, Respondent's plant manager, advised Kaiser that she had been diagnosed with carpal tunnel syndrome and that this condition was work-related and indicated she was not yet subject to restrictions. Petitioner testified to having a second conversation with Kaiser on July 22, 2010, one day after receiving a referral to a surgeon. Petitioner testified she again told Kaiser her condition was work-related and that she would likely require surgery. Based on interaction she had had with a different plant manager in the past, and because she believed the surgery would not require much recovery time, she told Kaiser she intended to submit her bills to her group carrier and seek short-term disability under workers' compensation.

As indicated above, the Arbitrator finds credible Petitioner's testimony as to her interaction with Kaiser on June 14 and July 22, 2010. Both dates fall within the statutory 45-day notice period. Petitioner's testimony included two compelling details. She indicated that, after she told Kaiser she intended to pursue benefits under group rather than under workers' compensation, he asked her if she was sure, to which she replied "yes." In reviewing the transcript, one can almost hear Kaiser's sigh of relief at that moment. Additionally, it was Kaiser, and not Petitioner, who completed the paperwork. This factor differentiates the claim from White v. IWCC, 4-06-0566WC (4th Dist. 2007). White also involved repetitive trauma injuries, albeit injuries involving the shoulders and back. The claimant in that case stopped working on July 17, 2000, around the time he underwent right shoulder surgery. The following May, he completed a sickness/accident form on which a box was checked stating that his back and upper extremity conditions were not work-related. One year into his sickness and accident benefits, he received a letter from his employer indicating his benefits were running out and his job would be discontinued if he did not resume working. He retired when the benefits ran out. It was not until October 29, 2002, about two weeks after a doctor issued a written opinion linking his conditions to his laborer duties, that he filed an Application for Adjustment of Claim. In this pleading, he alleged an accident or manifestation date of July 17, 2000. The arbitrator found the claim compensable and awarded benefits. The Commission reversed on the grounds that the claimant failed to provide the employer with timely notice. The Appellate Court affirmed this result, noting that the claimant could have alleged a manifestation date of October 15, 2002, under the "flexible standard" espoused by the Supreme Court in Durand v. Industrial Commission, 224 Ill.2d 53 (2006), but failed to do so. The Court also noted that, given the manner in which the claimant completed the sickness/accident forms, the employer had no basis for knowing that an accident existed to investigate. In the instant case, in contrast, Petitioner openly characterized her condition as work-related when providing notice (on the same day she learned of the condition) but indicated her willingness to defer benefits under the Act as she knew Respondent would want her to do. Petitioner ceded control to Respondent in

that she left it to Kaiser to complete the paperwork. Respondent introduced no evidence indicating she ever asserted in writing that her condition was not work-related.

The Arbitrator finds that Petitioner provided Respondent with timely notice of her condition.

Did Petitioner establish causal connection?

As a preliminary matter, the Arbitrator notes that Petitioner is not claiming causation as to her cervical spine condition. Dr. Fletcher described this condition as degenerative in nature.

The Arbitrator finds that Petitioner established causation as to her current post-operative left carpal tunnel syndrome condition of ill-being. In so finding, the Arbitrator relies in part on the histories Petitioner provided to her treating physicians. The Arbitrator also relies on the causation opinions expressed by Dr. Fletcher. As noted above, the Arbitrator found those opinions more persuasive than those expressed by Dr. Kohlmann. Dr. Fletcher had a significantly better understanding of Petitioner's duties. Dr. Kohlmann did visit Respondent's facility, on one occasion, but his recollection of this visit was poor and he readily acknowledged he does not perform jobsite analyses in the way Dr. Fletcher does. The Arbitrator also notes the absence of other intrinsic risk factors. Petitioner is not diabetic or overweight, does not smoke, does not have rheumatoid arthritis and has no thyroid-related problems. Dr. Kohlmann never suggested that some non-work factor was the cause of her condition. The therapy records following the initial left carpal tunnel release reflect that Petitioner experienced increased symptoms when performing various household activities. That such activities might have slowed Petitioner's recovery does not bar her claim. Repetitive work activities need not be the sole causative factor, not even the primary causative factor, so long as they were a causative factor in the resulting condition. A claimant is not required to eliminate all other possible contributing factors. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

That Petitioner's underlying cervical spine condition might have predisposed her to developing carpal tunnel syndrome does not bar her from recovering benefits for that syndrome. In Illinois, it has long been held that an employer takes an employee as it finds her. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

The Arbitrator also finds that Petitioner established causation as to her current post-operative right carpal tunnel syndrome via an overuse theory. In so finding, the Arbitrator relies in part on Petitioner's credible testimony that she began experiencing carpal tunnel symptoms in her right hand around the time she came under Dr. Oakey's care, due to overusing that hand. There is really no dispute in this case that Petitioner obtained a very poor result from her initial left carpal tunnel release. Nor is there is any dispute that she required revision surgery. Her left carpal tunnel syndrome treatment was unusually protracted and she continued to experience symptoms even after Dr. Oakey performed a third procedure. It makes sense to the Arbitrator that she would rely on and overuse her dominant right hand due to her left-sided symptoms.

The Arbitrator further finds that Petitioner did not establish causation as to her claimed left cubital tunnel syndrome. Neither Dr. Thatcher nor Dr. Oakey addressed causation via this condition. On direct examination, Dr. Fletcher initially testified he did not clearly see any causal relationship between Petitioner's job and the left cubital tunnel syndrome. He indicated that the tasks Petitioner performed at Respondent were not those commonly associated with the development of this syndrome. After Petitioner's counsel pressed further, asking him whether the cubital tunnel could be linked with Petitioner's poor outcome from her initial carpal tunnel surgeries, he did not fully commit himself. He simply stated this was a "reasonable theory." The Arbitrator finds that Petitioner did not meet her burden of proof on the issue of causation vis-à-vis the claimed left cubital tunnel syndrome.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the medical expenses detailed in PX 21. These expenses relate to treatment Petitioner received for her left carpal tunnel syndrome, her left cubital tunnel syndrome and her right carpal tunnel syndrome. The Arbitrator has previously found that Petitioner established causation as to her bilateral carpal tunnel syndrome but not as to her left cubital tunnel syndrome. The Arbitrator views the carpal tunnel treatment as reasonable and necessary. Respondent's examiner, Dr. Kohlmann, did not question Petitioner's diagnosis or any aspect of her care. When he examined her, she had not yet had the right-sided release but was contemplating it. He did not suggest it was unnecessary.

The Arbitrator awards the expenses in PX 21 that relate to left and right carpal tunnel syndrome treatment, subject to the fee schedule.

Is Petitioner entitled to temporary total disability? Is Petitioner entitled to maintenance? Is Respondent liable for the cost of the vocational services provided by Bob Hammond?

Petitioner claims she was temporarily totally disabled from August 19, 2010 through July 28, 2016, when she reached maximum medical improvement. PX 24 at 33. The stipulated average weekly wage of $659.70 gives rise to a temporary total disability rate of $439.80.

The Arbitrator finds that Petitioner was temporarily totally disabled during two intervals: from August 19, 2010 through July 1, 2013 (the date Dr. Oakey released her to full duty) and from August 11, 2015 (the date of the right carpal tunnel release) through July 28, 2016. Dr. Oakey's note of July 1, 2013 reflects he was fully aware that Petitioner had ongoing bilateral hand symptoms yet he imposed no restrictions. PX 6, p. 19. Dr. Fletcher found Petitioner to be continuously disabled but it appears he was unaware of Dr. Oakey's release.

Petitioner claims she is entitled to maintenance from March 13, 2017, the date of her first meeting with Bob Hammond, through the hearing of July 16, 2019. The Arbitrator finds that Petitioner was entitled to maintenance during two periods: April 3, 2017 (the date of her first job search contacts, PX 20) through June 30, 2018 and April 15, 2019 through June 30,

2019. The Arbitrator relies on Bob Hammond's reports and testimony, along with Petitioner's very extensive job search records (PX 20), in making this finding. Hammond testified that Petitioner initially resisted the idea of looking for work, due to her pain level, and did not start looking until after he communicated with her a second time. T. 152.

In the Arbitrator's view, Respondent failed on all fronts insofar as the issue of vocational rehabilitation is concerned. Respondent did not even prepare a written vocational assessment, as required by Section 9110.10 of the Rules Governing Practice Before the Commission. In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207 (1st Dist. 2009), the Appellate Court emphasized that such assessments are required "even in circumstances where no plan or program of vocational rehabilitation is necessary." Regardless of its defenses, Respondent had an obligation to assess Petitioner's employability and vocational needs. Nevertheless, the Arbitrator declines to award maintenance between July 2018 and March 2019 based on the concession that Hammond made under cross-examination when asked about Petitioner's inactivity during this period. The Arbitrator recognizes that Respondent paid no weekly benefits under the Act at any point and that an unproductive job search can be discouraging but Hammond agreed that taking time off is not compatible with a diligent search for work.

The Arbitrator finds Respondent liable for Hammond's charges of $7,649.73 (PX 18). See W. B. Olson, Inc. v. IWCC, 2012 IL App (1st) 113129WC, 820 ILCS 305/8(a).

What is the nature and extent of the injury?

Petitioner seeks an award of permanent total disability under Section 8(f) of the Act. There are three ways for a claimant to establish entitlement to benefits under this section: "by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience and condition, no jobs are available to a person in their circumstances." ABB C-E v. Industrial Commission, 316 Ill.App.3d 745, 750 (5th Dist. 2000). The Arbitrator finds that Petitioner established both that she is medically permanently totally disabled and that she falls into the "odd lot" category by virtue of her lengthy but ultimately unsuccessful job search. As for the medical aspect, Dr. Fletcher testified that Petitioner is totally disabled because of her hand condition. He characterized her dexterity as "very, very poor." PX 24, p. 34. Dr. Kohlmann, Respondent's examiner, did not comment directly on the issue of total disability but, in his report, conceded that Petitioner is unable to make a fist or close her fingers completely. RX 7, p. 7. As for the remaining component, Petitioner, via her own testimony and that of Bob Hammond, established she conducted a diligent but unsuccessful job search. During an initial period, Petitioner applied for approximately 1500 jobs. During a second period, prior to the hearing, she applied to 300 additional jobs. PX 20. She persisted in looking despite not receiving benefits or offers to interview. Hammond testified that, in his 31 years of experience, only one other individual had applied to as many jobs as Petitioner did. He also testified that, during the two periods in question, Petitioner diligently looked for work and there was no reasonably stable labor market for her.

Once Petitioner met her burden on the job search aspect, the burden shifted to Respondent to establish that there is a reasonably stable labor market for Petitioner's services and that Petitioner is employable in that market. Respondent offered no vocational evidence of any kind.

The Arbitrator awards permanent total disability benefits under Section 8(f) of the Act at the applicable minimum rate of $466.13 per week, beginning July 16, 2019 and for the duration of Petitioner's life.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID FINK,

Petitioner,

vs.

NOS: 12 WC 003215
12 WC 11480

AC McCARTNEY FARM EQUIPMENT,

Respondent.

ORDER

This matter comes before the Illinois Workers' Compensation Commission for an order to allow Petitioner's attorney to disburse attorney's fees that were held in escrow since the approved Settlement Contract Lump Sum Petition and Order was entered by Commissioner Kathryn A. Doerries on March 11, 2021. At the time Commissioner Doerries approved the Lump Sum Settlement Contract Petition and Order on March 11, 2021, a contemporaneous Order was entered that mandated Petitioner's counsel hold the claimed attorney's fees ($140,000.00) in escrow pending an Order of the Commission for disbursement. Commissioner Doerries allowed Petitioner's counsel leave to provide an itemization of legal work performed. Upon receipt of the documents provided by Petitioner's counsel in support of the Petition for fees in excess of the statutory cap on attorney's fees for settlements pursuant to §16a(B), the matter was heard by Commissioner Kathryn A. Doerries on March 25, 2021, with both parties represented by counsel and with Petitioner present by Webex.

§16a(B) states in pertinent part:

> With respect to any and all proceedings in connection with any initial or original claim under this Act, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or his dependents, whether secured by agreement, order, award or a judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be

> allowed to the attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this Section. However, except as hereinafter provided in this Section, in death cases, total disability cases and partial disability cases, the amount of an attorney's fees shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in this Act unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees. *820 ILCS 305/16a*

In favor of the Petition, Petitioner's attorney submitted multiple documents including an Affidavit signed by Petitioner on March 1, 2021 (Comm'nXA) swearing that he was fully aware that his attorney's law firm, Ridge & Downes, is limited by statute to Attorney's fees of 20% or 364 weeks of compensation, unless a further fee shall be allowed by the Illinois Workers' Compensation Commission. In his Affidavit, Petitioner represented that he was aware of the law firm's Petition for a fee of 35%, or $140,000.00, and that based upon the time, quality of work and advice that they had given him over a period of 11 years, it was his desire that Ridge & Downes be allowed the fee. The work over the 11 years included securing an expert opinion from Vocamotive, Inc., that he was permanently and totally disabled. Petitioner's attorney then brought his case to trial before an Arbitrator on March 1, 2017, which resulted in an award for Petitioner of permanent total disability benefits. On appeal by Respondent, the Commission modified the Decision to an award of 50% loss of use of the man as a whole, or $78,000.00.

Thereafter, Petitioner's counsel sought review of the Commission Decision in the Circuit Court of Winnebago County and on July 16, 2019, was successful in having the Commission Decision reversed. The Petitioner signed an Addendum to Fee Agreement on June 29, 2020, (Comm'nXC) allowing a fee of 25% of the gross amount recovered if an appeal was taken to the Circuit Court and if an appeal was taken to the Appellate Court, then the attorneys' fees shall be 35% of the gross amount received.

Respondent sought review in the Appellate Court, which on October 13, 2020, affirmed the judgment of the Circuit Court setting aside the Decision of the Commission and reinstating the Decision of the Arbitrator finding permanent total disability in favor of Petitioner. After a number of offers had been conveyed and rejected, the Petitioner agreed to settlement of these cases for $400,000.00 plus a Medicare Set-Aside of $76,126.00. (Comm'nXA)

In further support of the Petition, Petitioner's attorney submitted, and Commissioner Doerries reviewed, the Attorney Representation Agreement, (Comm'nXB), the executed addendum to the fee agreement, (Comm'nXC), the case file notes beginning January 20, 2012, to the present, case law, the Circuit Court and Appellate Court briefs filed by the parties, the proceedings throughout the Appellate Court and the results obtained, those being an award of permanent and total disability and a lump sum settlement offer of $400,000.00 plus a Medicare Set-Aside agreement of $76,126.00. (T, 5-6, Comm'nXA)

After recitation of the documents reviewed, the Commissioner addressed the Petitioner and advised she had reviewed his signed Affidavit, and reviewed the substantive points enumerated therein, in pertinent part, that Ridge & Downes is petitioning the Commission for a fee of 35% rather than the statutory 20%, pursuant to the addendum to the Attorney Representation Agreement signed June 29, 2020. When asked if he remained in agreement that for the services rendered, his attorney should be allowed a fee of 35% or $140,000.00, Petitioner responded, "Yes, I do." (T, 6)

Based on the foregoing, the Commission is in agreement with the fee arrangement and disbursement of the attorney's fees held in escrow is allowed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's law firm, Ridge & Downes, is hereby allowed to disburse attorney's fees of $140,000.00 that have been held in escrow since the Settlement Contract Lump Sum Petition and Order pertaining to cases 12 WC 3215 and 12 WC 11480 was approved on March 11, 2021.

DATED: APR 7 - 2021

Kathryn A. Doerries

KAD/bsd
04/06/21
42

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve E. Cluck,

Petitioner,

21IWCC0164

vs. NO: 18 WC 022337

Walgreens Family of Companies,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

21IWCC0164

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CLUCK, STEVE E
Employee/Petitioner

Case# **18WC022337**

21IWCC0164

WALGREENS FAMILY COMPANIES
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4689 HASSAKIS & HASSAKIS PC
JOSHUA A HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

21IWCC0164

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Steve E. Cluck
Employee/Petitioner

v.

Walgreens Family of Companies
Employer/Respondent

Case # 18 WC 022337

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **February 14, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care? – **Total Knee Replacement by Dr. McIntosh**
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, September 21, 2016, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$27,634.34**; the average weekly wage was **$727.22 (38 weeks)**.

On the date of accident, Petitioner was **57** years of age, with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$10,527.31** in TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$10,527.31**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall have credit of $11,220.40 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall authorize and pay for the treatment recommended by Dr. McIntosh.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/22/20
Date

APR 2 - 2020

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

21IWCC0164

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

STEVE E. CLUCK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 22337
	)	
WALGREENS FAMILY OF COMPANIES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 14, 2020. The parties agree that on September 21, 2016, Petitioner was a receiver/checker when he sustained injuries to his left knee which arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection and prospective medical care. All other issues are stipulated by the parties.

MEDICAL HISTORY

Petitioner provided a history of operating a stand-up fork truck when he attempted to exit the equipment and twisted his left knee and felt a "pop." He had an immediate onset of pain. On 9/28/16, Petitioner was examined by Dr. Houle at the Orthopedic Center of Southern Illinois for increased pain with range of motion and weightbearing and swelling. Dr. Houle noted pain at the joint line medially and overlying the left MCL, with a significantly uncomfortable McMurray's test. The initial assessment was a medial meniscus tear. Dr. Houle ordered an MRI, physical therapy, and took Petitioner off work.

The MRI demonstrated a complex tear of the posterior horn of the medical meniscus with a small meniscal flap, as well as a small horizontal tear of the body of the medial meniscus. It also showed a mild sprain to Petitioner's MCL, diffuse chondromalacia of the medial compartment, and moderate chondromalacia of the patella. Petitioner participated in physical therapy from 10/21/16 through 11/10/16 that did not improve his symptoms. On 1/17/17, Dr. Houle performed a resection of Petitioner's medial meniscus tear, chondroplasty of the medial femoral condyle, and chondroplasty of the patellofemoral compartment. Dr. Houle noted an "obvious tear of the posterior horn of the medial meniscus and some areas of grade 2 to 3 chondromalacia of the medial femoral condyle."

On 1/25/17, Petitioner reported 2 out of 10 pain and reported the sharp pain in the medial aspect of his knee was gone. He participated in physical therapy from 2/2/17 through 2/13/17. On 2/24/17, Petitioner reported

0 out of 10 pain, with difficulty going from squatting to standing, and advised Dr. Houle he would like to go back to work. Dr. Houle released Petitioner to return to work the following Monday and prescribed Mobic. Petitioner returned to Dr. Houle on 3/27/17 complaining of 3 out of 10 pain, difficulty descending stairs, and feeling a locking sensation stepping off the fork truck at work. Dr. Houle assessed persistent pain secondary to some degree of osteoarthritis from the time of surgery. On 5/1/17, Dr. Houle administered a cortisone injection which provided some relief.

Petitioner continued to follow up with Dr. Houle complaining of increased pain by the end of his work day. Dr. Houle recommended medications, injections, physical therapy, bracing and potentially knee replacement surgery. On 11/13/17, Petitioner reported severe flareups for which Dr. Houle stated Petitioner may require future cortisone injections.

Petitioner sought a second opinion with Dr. Jeffrey McIntosh on 2/20/18. Petitioner was experiencing sharp pain in the medial joint line and he was walking with an antalgic gait. Dr. McIntosh noted swelling and pain at the extremes of flexion and tenderness in the medial joint line. Dr. McIntosh reviewed an x-ray of Petitioner's left knee taken in 2014 when Petitioner sustained injuries to his *right* knee, with an x-ray taken by Dr. Houle after his 9/21/16 accident. Dr. McIntosh performed left knee x-rays on 2/20/18 which revealed an almost complete loss of joint space. Dr. McIntosh opined Petitioner was suffering from degenerative joint disease which significantly progressed over the last two years as "determined by radiographic evaluation." Dr. McIntosh recommended a total knee replacement.

On 5/21/18, Petitioner presented to Dr. Jason Young for a Section 12 examination at Respondent's request. Petitioner reported he had start up pain and aching in his left knee and that he was still working full duty. Petitioner reported the steroid injections provided temporary relief. Dr. Young noted Petitioner's previous right knee surgery in 2014. Dr. Young noted Petitioner walked with a slight limp favoring the left side, with noted medial and patellofemoral compartment pain of the left knee. Dr. Young stated x-rays were performed the day of the visit of Petitioner's bilateral knees that revealed medial joint space collapse with bone-on-bone arthritic changes. Dr. Young observed moderate patellofemoral arthrosis and superior osteophyte formation of the patella of the left knee and medial joint space collapse of the right knee which was also near bone-on-bone in severity. Dr. Young assessed severe left knee osteoarthritis which he felt clearly preexisted the work incident. Dr. Young opined chondromalacia was not something that occurred acutely, but was something which occurred over many years. He felt the work injury did not accelerate the underlying disease. Dr. Young noted Petitioner's progression was one of a natural variety and there had been no significant acceleration as a result of the meniscus tear. Dr. Young noted arthritic changes in the contralateral knee which were indicative of a genetic component rather than an acute traumatic component. Petitioner's arthritic progression was typical for the type and severity of the arthritis he had. There was no acute cartilage damage or chondral flap which would have been a result of a plant and twist mechanism, but rather a degenerative process when the cartilage was globally thin indicative of normal wear and tear over the course of Petitioner's life. Dr. Young opined the need for a left knee replacement was in no way related to the 9/21/16 work incident.

On 7/24/18, Petitioner complained that his *right* knee was bothering him and Dr. McIntosh aspirated the right knee and injected same with 40 mg. of Kenalog.

Dr. McIntosh authored a narrative on the question of causation. Dr. McIntosh reviewed and compared the radiographs from 2014, 2016, and 2018 related to Petitioner's left knee. He noted that the joint space in 2014 and

2016 were very similar in appearance. However, upon comparison of the 2018 films, Dr. McIntosh noted that, "[i]n comparison views of the right knee and the left knee from February 2018, there is a significant decrease in the joint space in the left knee compared to the right, which is notable." Had the injury and subsequent surgery not contributed to the worsening of his arthritis, Dr. McIntosh would expect the changes in the joint space to be equal, especially if it was a "genetic" predisposition as suggested by Dr. Young. He attributed the progressive change in the left knee to Petitioner's left knee surgery.

TESTIMONY

Petitioner testified he has worked for Respondent for twenty years. On the date of accident, Petitioner dismounted a fork truck and his left knee twisted and popped. He felt immediate pain and reported the accident. Petitioner testified that when he saw Dr. Houle on 2/24/17 he had 0 out of 10 pain with some difficulty squatting. That he returned to work shortly following that visit and his knee pain returned. He has worked full duty since 2/25/17. He treated with Dr. Houle several times after returning to work and received cortisone injections that provided temporary relief. Petitioner testified he has never had symptoms in his left knee prior to the accident. He testified he treated with Dr. Houle prior to this accident for a meniscal surgery on the right knee in 2014. Petitioner testified he did not have any pain in his right knee at the time of arbitration. He further testified that Dr. Jason Young did not take x-rays of his knees at the Section 12 examination as indicated in the report.

Dr. Jeffrey McIntosh testified by way of deposition. Dr. McIntosh maintained that subjectively, chronologically and objectively from comparison radiographic evaluation, Petitioner's deterioration of his left knee following his 9/21/16 incident and 1/17/17 surgery accelerated the deterioration of Petitioner's left knee joint space leading to the need for a total knee replacement. Dr. McIntosh opined that it was his opinion to a reasonable degree of medical certainty that Petitioner's need for total knee replacement is causally related to his work injury and the *sequela* from the subsequent meniscal surgery and chondroplasty. He understood that Petitioner had no problems with his left knee prior to his work accident. In reviewing the comparison studies from 2014 to 2016, Dr. McIntosh noted there was slight worsening of both knees, but they maintained equal space between the medial femoral condyle and the medial tibial plateau.

In comparing the 2016 to 2018 films, Dr. McIntosh noted that the accident accelerated the arthritis in Petitioner's left knee. He stated that there was a "significant difference" in the left knee compared to the right from 2016 and 2018. Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner merely had a genetic predisposition to arthritis as Petitioner's knee progression did not occur at an equal rate, but he developed arthritis at a faster rate in the left. He noted that when you change the anatomy of the knee, you change the weight-bearing of the knee by removing part of the cartilage or if there is damage to the cartilage that lines the bone that has the capacity to accelerate the development of arthritis in the knee. Even though the meniscal resection was undertaken with chondroplasty to improve the immediate symptoms, it put Petitioner at risk to develop arthritic changes which happened at a rapid rate.

Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner was at MMI in February, 2017 in light of Petitioner's continued symptoms after returning to work. He noted that the aspiration of Petitioner's right knee in July, 2018 was secondary to Petitioner ambulating with an antalgic gait. Petitioner ambulating with an antalgic gait was documented in Dr. McIntosh's initial evaluation. Dr. McIntosh explained the torn meniscus was resected and when there is injury to the cartilage there is no real cure for that outside of replacing cartilage. The structural changes in Petitioner's left knee with his injury and repair, in combination with the accelerated rate of progression

in the left knee versus Petitioner's right knee, allowed Dr. McIntosh to opine that the incident and subsequent surgery led to the need for knee replacement surgery.

Dr. Jason Young testified by way of evidence deposition. He testified consistent with his written report. Again, he opined that Petitioner had severe left knee osteoarthritis and the work incident did not accelerate the underlying disease. Dr. Young testified arthritis can be severe in some patients yet they have no pain, and with others arthritic knee pain begins spontaneously meaning arthritis is not always associated with a particular event. He testified a knee surgery does not automatically equate to advancing of arthritic disease and many do just fine following surgery. He testified given the amount of arthritis Petitioner had, the arthritic progression was in the normal course. Dr. Young testified Petitioner reached MMI on 2/27/17 when he was returned to full duty work. He testified further treatment was related to the natural history of his underlying degenerative disease. He testified based on Petitioner's presentation and most recent radiographs, Petitioner was a candidate for a left total knee replacement. He testified he had no knowledge of any prior complaints of the left knee before 9/21/16, but stated it would not be surprising for someone to be functioning completely normal with a really degenerative advanced arthritic knee.

CONCLUSIONS OF LAW

ISSUE (F): Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator concludes that Petitioner's current condition of ill-being with regard to his left knee is causally related to his work accident of September 21, 2016. Petitioner testified credibly and the records support that prior to his accident, Petitioner did not have symptoms or receive treatment for his left knee. Petitioner sustained an acute accident on September 21, 2016 for which he felt immediate pain and symptoms resulting in a meniscal resection and chondroplasty in his left knee.

The opinions of treating physicians Dr. Houle and Dr. McIntosh are more credible than those of Dr. Jason Young. Dr. Houle and McIntosh compared and reviewed the x-rays of Petitioner's left knee from 2014, 2016, and 2018. Dr. McIntosh explained the comparison x-rays objectively show an accelerated collapse of joint space in Petitioner's left knee following his meniscal resection and chondroplasty. He noted a loss of all cushioning in Petitioner's medial joint line, which Dr. Young agreed.

Dr. Young maintained Petitioner's current state of ill-being was merely genetic; however, Dr. Young did not review Petitioner's MRI films, the arthroscopic photos from Dr. Houle's surgery, the comparison x-rays done in 2014 and 2016, or any imaging that predated the date of accident, including records from Petitioner's prior right knee surgery in 2014. Dr. young did not review Dr. McIntosh's narrative report of January, 2019 or Dr. Houle's treatment note dated March 27, 2017 when Petitioner's symptoms returned following surgery. Dr. Young agreed that in light of the fact he had not reviewed the 2014 and 2016 x-rays, he had no opinion about the interval changes demonstrated on those studies.

Further, it was Dr. Young's understanding that Petitioner's left knee was asymptomatic prior to the accident. Dr. Young could not identify, but for the September 21, 2016 incident, when Petitioner's left knee would have become symptomatic and opined it was coincidental that his underlying arthritis had become symptomatic at the time Petitioner sustained his accident. Despite Petitioner being immediately symptomatic following this accident, his meniscal injury, subsequent meniscectomy and chondroplasty, increase in symptoms immediately

upon returning to work, and the temporal relationship of his manifestation of symptoms to his injury, Dr. Young simply believed it was coincidental that his underlying arthritis was symptomatic. Dr. Young could not opine to any degree of medical certainty exactly when, but for the September 21, 2016 event, Petitioner's arthritis would have started causing him pain. In light of the above shortcomings in the foundation of Dr. Young's opinions, the Arbitrator gives little weight to his opinions on causation.

Aside from the direct opinions on the issue of causation by Dr. McIntosh and Dr. Houle, causation may also be shown by a chain of events which demonstrates a previous condition of good health, an accident and a subsequent injury resulting in disability. That scenario may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 69, 63-63 (1982). In the case at hand, Petitioner had no history of pain, treatment, disability or limitation with his left knee up until his twisting incident and subsequent meniscal resection and chondroplasty. Petitioner worked with Respondent for over 20 years. There was no medical opinion, record or testimony that Petitioner ever had difficulty ascending/descending stairs; getting up from a squatted position; standing for durations; stepping down from his forklift; or suffered from daily pain, locking and swelling. The medical records wholly support Petitioner continues to be plagued with difficulty with his left knee, which is well documented upon his return to work following his January 17, 2017 surgery. The records taken as a whole support a clear, well-documented onset of symptoms and a lack of longstanding improvement which began with the September 21, 2016 incident.

ISSUE (K): Is Petitioner entitled to any prospective medical care?

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury, and the credible opinions and/or testimony of Dr. Houle and Dr. McIntosh, the Arbitrator orders Respondent is liable for Petitioner's medical care, including a left total knee replacement as recommended by Dr. McIntosh and Dr. Young. Accordingly, Respondent shall authorize and pay for prospective medical care as recommended by Dr. McIntosh as provided in Sections 8(a) and 8.2 of the Act.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/22/20

DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Giovanni Cruz,

Petitioner,

21IWCC0166

vs.

NO: 19 WC 013786

Schilke Music,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0166

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CRUZ, GIOVANNI
Employee/Petitioner

Case# **19WC013786**

SCHILKE MUSIC
Employer/Respondent

21IWCC0166

On 11/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
ANDREW MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

21IWCC0166

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Giovanni Cruz
Employee/Petitioner
v.
Schilke Music
Employer/Respondent

Case # 19 WC 13786

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2019 and October 9, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **1/25/2019,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned ***$28,633.28***; the average weekly wage was ***$550.64***.

On the date of accident, Petitioner was ***30*** years of age, ***single,*** with ***0*** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of ***$2,065.72*** for TTD, $***N/A*** for TPD, $***N/A*** for maintenance, and ***$1,822.97*** for other benefits, for a total credit of $***3,888.69***.

Respondent is entitled to a credit of $***N/A*** under Section 8(j) of the Act.

ORDER

Because Petitioner did not sustain an accidental injury which arose out of and in the course of his employment with Respondent, and because his current condition of ill-being is not causally-connected to the alleged incident, benefits are denied.

Respondent shall be given a credit of $2,065.72 for TTD, and $1,822.97 for medical benefits that have been paid, for a total credit of $3,888.69.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-21-19
Date

ICArbDec19(b)

NOV 22 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GIOVANNI CRUZ, Petitioner,	)	
v.	)	19 WC 13786
SCHILKE MUSIC, Respondent.	)	

MEMORANDUM IN SUPPORT OF ARBITRATOR'S DECISION

Statement of Facts

On January 25, 2019, Petitioner, Giovanni Cruz, was an employee of Schilke Music. He makes parts for trumpets (Tr. p. 39). On the alleged incident date, he and an employee named Eric had to move a rack. Mr. Cruz said he had a bad hold on the rack. When he tried to reposition it, he felt a pain in his right wrist and a sort of "pop" feeling. He initially testified this occurred approximately 10:00 a.m. to 12:00 pm (Tr. p. 40). He described the rack as having a cloth wheel and a paper wheel. He said the rack was about 5 feet long. He would not be able to lift it by himself (Tr. p. 41).

When further describing the incident moving the rack, he testified "I felt it, I felt losing my balance. And when I reached – I turned my hand to grab it, that's when I -- all the weight was on my right hand and I felt it, like, a really bad pain and then, like, some kind of, like, pop vibration in my right hand" (Tr. p. 42-43). He did not yell out. The pain was on the outside of his right wrist (Tr. p. 43). When this happened, they let go of the rack and then tried to reposition to get it to move. They eventually got the rack into position. Mr. Cruz said he told Eric about what happened with his wrist but he does not think Eric heard him. He did not tell anyone else with the employer that day what had happened with his wrist. He said he did not report it because he assumed he pulled a muscle. He said this happened on a Friday and he felt maybe over the weekend he would heal and then he could just go back to work on Monday (Tr. p. 44).

Eric Zaragoza testified on behalf of the petitioner. He said that he and Mr. Cruz were moving a cloth dispensary back to its original location. He said the dispensary was 7 feet by 4 feet (Tr. pp. 12-13). Mr. Zaragoza said he was at the back of the dispensary and Mr. Cruz was in the front (Tr. p. 14). Mr. Zaragoza believes they had to move the dispensary maybe 20 feet. He said while they were carrying the dispensary it tilted forward and Mr. Cruz went to catch it. Mr. Zaragoza testified that as this was being done he saw Mr. Cruz tweak his hand or wrist. They set the rack down and eventually moved it back to its original location (Tr. pp. 14-15). Mr. Zaragoza testified that they had moved the rack 17 or 18 feet before setting it down. He said they took probably a 2 or 3 minute break before moving it the last few feet. He testified that they took the break until Mr. Cruz' wrist felt better. They then moved the dispensary the remaining 2 or 3 feet (Tr. pp. 28-29).

Video clip 1 shows the petitioner and Mr. Zaragoza first moving the rack at 6:04 am (Rx. 2). Mr. Cruz was facing and walking forward and Mr. Zaragoza was walking backwards. They slid the rack most of the way and then picked it up in order to not scratch the new floor (Tr. pp. 66-67). While watching clip 1, Mr. Cruz testified that he hurt his wrist at 6:04 am between the 13 and 19 second mark (Tr. p. 69-70). After moving the rack, Mr. Cruz tied his shoe. Mr. Cruz agreed that during the movement of the rack at 6:04 am that he and Mr. Zaragoza did not take a 2 or 3 minute break before completing the task (Tr. pp. 71-72).

Video clip 7 shows them moving the rack back at 11:21 am (Rx. 2). Again, Mr. Cruz was walking forward and Mr. Zaragoza was walking backwards. Mr. Cruz testified that while moving the rack they did not stop to take a 2 or 3 minute break, as described by Mr. Zaragoza. After moving the rack, Mr. Cruz pointed with his right to someone in the finishing room (Tr. pp. 73-75).

Mr. Cruz finished the workday, ending at 2:30 p.m. He was able to perform his duties throughout the remainder of the day as he said he took most of the load on his left hand. He said he struggled the whole day (Tr. p. 44-45).

Mr. Cruz testified he did not go to work on Monday and he called off. He believed he spoke to Chris on the phone, the manager at Schilke (Tr. p. 45). Brian Persaud, the petitioner's direct supervisor, said that Mr. Cruz arrived at work on Monday and said that he hurt his wrist and needed to see a doctor. Mr. Cruz did not say that he injured his wrist at work (Tr. pp. 104-105).

The petitioner first saw Dr. Bednar at Loyola on January 29, 2019. He told him he suffered an injury on the job. He initially told him the injury had occurred three days earlier. Petitioner clarified, saying he told him it happened a few days before. He testified that he told Dr. Bednar that it happened on Friday. According to Mr. Cruz, Dr. Bednar at the time said the date was not important (Tr. p. 45-46).

Dr. Bednar provided him with a wrist splint for his right wrist and gave him a 5-pound lifting restriction. Those restrictions were originally accommodated (Tr. p. 47). Brian Persaud testified that on February 12, Mr. Cruz told him that according to his doctor he needed complete rest. He asked Mr. Persaud if he was going to get paid for his time off-of-work because it was a work-related injury. This was the first time Mr. Persaud was aware that Mr. Cruz was claiming the injury was related to work (Tr. p. 106).

Andrew Naumann is the owner of Schilke Music. He first became aware that Mr. Cruz was claiming a work-related injury when he was notified by Brian Persaud on February 12 (Tr. p. 111-112). As Mr. Naumann was out-of-town at the time, he called the petitioner. The petitioner told him the event took place first thing in the morning on January 25 while moving a rack (Tr. pp. 112-113). Upon returning to town, he spoke with Mr. Cruz again about the

incident. At that time, the petitioner said he did not injure his wrist first thing when the rack was first moved. He injured it when he moved that rack back later in the morning (Tr. p. 114). Mr. Naumann described a surveillance system he has in the facility to observe activities in high traffic areas. He prepared Rx. 2, which is a disc that contains 25 clips of video. The clips show every time Mr. Cruz appeared on any of the cameras on January 25, 2019 (Tr. pp. 114-115).

Petitioner continued to treat with Dr. Bednar on March 5, 2019. Ever since March 6, 2016, he has not worked (Tr. p. 50). He had an MRI of the right wrist taken March 22, 2019. He had follow-up visits with Dr. Bednar on March 26, April 9 and April 30, 2019. Dr. Bednar prescribed surgery for the right wrist (Tr. p. 49).

Petitioner attended a Section 12 examination with Dr. Bryan Neal on September 5, 2019 (Tr. p. 51, Rx. 1).

Petitioner testified he was still having problems with his wrist. He cannot rotate it fully to the left. He said he wears the splint all the time. He still wants to undergo surgery (Tr. p. 55).

ARGUMENT

Findings of Arbitrator

As to Issue C, did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Petitioner did not sustain an accident that arose out of and in the course of his employment.

Petitioner testified that after the accident, he was able to work through the end of his workday because "I took most of the load on my left hand. But I struggled the whole day." (Tr. p. 45) This representation is not supported by his activity shown on surveillance video. In Respondent's Ex. 2, clip 8 (11:50 am), Petitioner is viewed vigorously moving the handle of the pallet jack up and down with two hands. He then continues this movement of the handle with only his right hand. He is then shown pulling the pallet jack with his right hand in this clip, continuing to do so in clips 9, 10, and 11 (11:51 am to 11:53 am) (Rx. 2). In clip 23 (1:56 pm), Petitioner is shown moving buckets and rolling up and carrying a rubber mat. He initially carries the rubber mat with two hands and then walks while carrying the rubber mat at his side with his right hand only (Rx. 2). Petitioner testified that the rubber mat may have weighed 5 pounds (Tr. p. 92). Andrew Naumann testified the mat was 6 foot long by 3 foot wide and it weighed at least 30-35 pounds (Tr. p. 119).

The Arbitrator notes additional activity exhibited by Petitioner after the alleged incident. In clip 12 (12:00 pm), the Petitioner is shown carrying his gloves with his right hand and moving his hands while speaking. In clip 13 (12:01 pm), he is shown gesturing with his hands. In clip 14 (12:49 pm), he is carrying a large roll of hand towels with his right hand. He is shown bending his right hand underneath the roll of towels. In clips 16 and 17 (1:13 pm), he is shown picking up a box with his right hand and breaking down the box using his right hand. In clip 22 (1:46 pm), he is shown cleaning the work area with a rag for 8 minutes and 29 seconds, often using the right

hand. In clip 24, (2:21 pm), he is shown pulling (with assistance) a 55-gallon tank. Clip 25 (2:30 pm) shows him punching out at the end of the day with the right hand (Rx. 2).

Not only do these clips fail to show him mostly taking the load with his left hand, and struggling the whole day, they fail to show any evidence of pain or problems with the right hand whatsoever.

The finding of no accident is based upon other discrepancies as well. At trial, and in discussions with Andrew Naumann, Petitioner wavered in saying whether the accident occurred when the rack was moved first thing in the morning, or when it was moved back between 10:00 a.m. and 12:00 noon. At trial, Petitioner initially testified on direct examination that the incident occurred between 10:00 am and 12 pm (Tr. p. 40). However, on cross-examination, after being shown the video clip of the rack first being moved, he testified he was injured at 6:04 am, somewhere between the 13 and 19 second marks (Tr. p. 65-70). After direct examination, Petitioner met with his attorney. On re-direct examination, he testified he injured his wrist when he was moving it back at 11:21 a.m. (Tr. p. 89).

Mr. Naumann testified that he initially spoke with Petitioner on February 12. During that conversation, Mr. Cruz told him he was hurt when he was moving the rack first thing in the morning (Tr. p. 113). After returning from out-of-town, he met with Mr. Cruz again. At that time, Mr. Cruz told him he had injured his wrist while moving the rack back, and not first thing in the morning (Tr. p. 114).

Another question is raised as to the reporting of the incident. While saying he did not remember being told that he was to immediately report any work injury regardless of how minor, he admitted there was language in the employee handbook about immediately reporting work injuries (Tr. p. 57). Brian Persaud, his direct supervisor, testified that Mr. Cruz had been instructed to immediately report any type of work injury to him (Tr. p. 104). Mr. Cruz

acknowledged at trial that he did not tell his employer that he was hurt at work on the incident date (Tr. p. 57-58). Mr. Persaud testified that he was not told by Mr. Cruz that his wrist injury was work-related until February 12, 2019 (Tr. p. 106).

Brian Persaud testified that on the January 25, 2019 alleged incident date, he observed no behavior on the part of Mr. Cruz to indicate he had injured his wrist. Mr. Cruz said nothing to him about injuring his wrist on that date.

The Arbitrator does not rely upon the testimony of Eric Zaragoza. Mr. Zaragoza said that after seeing Mr. Cruz "tweak" his hand or wrist, that they waited 2 or 3 minutes before completing the move of the cloth dispensary rack (Tr. pp.28-29). This break did not happen, as shown in the video and confirmed by Mr. Cruz (Rx. 2; Tr. pp. 71-75). While testifying he saw the "tweak" in the petitioner's face when it happened (Tr. p. 18). However, he also said that he was looking backwards as they were moving the dispensary and thus could not see where the petitioner's hands were placed on the rack (Tr. p. 28). The Arbitrator further notes that located between Mr. Zaragoza and the petitioner on the rack was a roll of cloth and a roll of paper. These rolls would have made it even more difficult to see the expression of Mr. Cruz described by Mr. Zaragoza.

For the foregoing reasons, the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent.

As to Issue F, Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

Petitioner's current condition of ill-being is not causally related to the alleged incident.

As discussed previously, the Arbitrator does not find Petitioner's testimony to be credible in many areas. The Arbitrator specifically notes the Petitioner's testimony at trial that he made it through the remainder of the workday by taking most of the load with his left hand and that he

had struggled the whole day (Tr. p. 45). This is clearly not the case, based upon the video clips submitted into evidence as Respondent's Exhibit 2.

In addition, the Arbitrator notes the report of Dr. Bryan Neal. Dr. Neal conducted an Independent Medical Examination on September 5, 2019. In addition, he had the opportunity to review the surveillance video (Rx. 2). Based on his review of the video in conjunction with his discussion with Petitioner and his examination, it was his opinion that the Petitioner's right wrist condition was not causally-connected to the alleged work incident. In discussing the video clips, Dr. Neal wrote:

> "No video clip shows the examinee or any individual pictured in any of the video to have either injured his wrist or to look like there is any injury complaint, problem or issue. Clip #1 and clip #7, the only clips where, based upon his history, the injury could have occurred, do not support any injury to the wrist as he described" (Rx. 1 p. 14).

The Arbitrator notes that the treating physician, Dr. Bednar, did not have the benefit of reviewing the surveillance video. As such, Dr. Neal is in a better position to assess the causation issue and the Arbitrator relies upon the opinion of Dr. Neal in this issue. The Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to the alleged work incident.

As to Issue J, were the medical services that were provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services; the Arbitrator finds the following:

As Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and as Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Respondent is not liable for any medical treatment charges incurred by Petitioner.

As to Issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to prospective medical care.

As to Issue L, what temporary benefits are in dispute, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to temporary total disability benefits.

As to Issue N, is Respondent due any credit, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, the Arbitrator awards a credit to Respondent for $2,065.72 for TTD paid and $1,822.97 for medical bills paid for a total credit of $3,888.69.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Demetrius Bell,

Petitioner,

21IWCC0167

vs. NO: 16 WC 019664

RJ Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, other (intoxication) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 17, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0167

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELL, DEMETRIUS
Employee/Petitioner

Case# **16WC019664**

21IWCC0167

RJ TRANSPORTATION
Employer/Respondent

On 1/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

21IWCC0167

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Demitrius Bell
Employee/Petitioner

Case # **16** WC **19664**

v.

R. J. Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 5, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **June 20, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**29,505.32**; the average weekly wage was $**567.41**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**378.27**/week for **10** weeks, commencing **June 21, 2016** through **August 30, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $753.00 to Premier Occupational Health, $6,901.26 to Elmwood Park Same Day Surgery Center, $5,520.66 to Instant Care Equipment Leasing, $1,925.00 to Windy City Anesthesia, $11,135.00 to Athletico Physical Therapy, and $749.06 to Prescription Partners, for a total of $26,983.98, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**340.45**/week for **30** weeks, because the injuries sustained caused the **6**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

January 14, 2019
Date

JAN 17 2019

FACTS:

On June 20, 2016, Petitioner was employed by the Respondent in "Quality Control" and "Replenishment", and he had been so employed for approximately one year. Petitioner testified that, on a daily basis, he was required to pick orders and take them to the correct areas in the warehouse for distribution. Petitioner testified that on June 20, 2016, he arrived at 6:30 a.m. for his regular 7:00 a.m. shift, in good health without any pain complaints. Petitioner testified that he had to pick orders that morning, which required him to maneuver pallets, some of which were empty, some weighing over 500 pounds. Petitioner testified that he needed to move a specific pallet, but was unable to do so without moving another pallet that was placed vertically on top of the pallet that he needed to move. Petitioner testified that the vertical pallet was stuck, and when pulling hard to free the pallet, he injured his low back. Petitioner testified that he immediately felt pain in his low back, with subsequent numbness and tingling in his legs. Petitioner testified that he had never felt such pain.

Petitioner testified that he reported his injury to his supervisor, and was sent to Premier Occupational Health for Medical treatment. In his "Injury Statement" that Petitioner was required to complete when arriving at Premier Occupation Health, Petitioner stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Prior to his physical examination, Petitioner willingly underwent drug and alcohol tests. Petitioner's drug screen was negative. On his alcohol test, Petitioner registered a blood alcohol content ("BAC") of .045 and .041. Petitioner testified that he was made aware of the positive test, that he was surprised of the result because he did not feel intoxicated, and that he would not have worked had he known he had alcohol in his system. Petitioner further testified that he spent the preceding day celebrating Father's Day with his family, and that he had consumed alcohol that evening.

Petitioner was examined by Dr. Gorovits, to whom Petitioner gave an identical accident description. During a physical examination, Petitioner described constant, sharp, and severe pain in his low back. Petitioner underwent an x-ray that revealed 2mm retrolisthesis at L5-S1. Petitioner was prescribed analgesic balm, naproxen, and given a lumbar brace. Dr. Gorovits returned Petitioner to work for a "[r]egular duty trial." Petitioner testified that he returned to work and sat in the breakroom until his employer informed him that he was terminated as a result of the failed alcohol test.

On June 21, 2016, Petitioner sought treatment at Elmwood Park Same Day Surgery Center, in Elmwood Park, Illinois. Petitioner was examined by Dr. Amit Mehta, and stated that he suffered a work injury the previous day. Specifically, Dr. Mehta noted that Petitioner "was pulling a pallet out of the racks which weighed approximately 30# when he felt sharp, 10/10 back pain." It was noted that Petitioner was also suffering from radicular symptoms going down the right leg that were triggered by "pulling the pallet as he was bending over pulling them out of the racks." Dr. Mehta prescribed physical therapy three times per week for four weeks, terocin cream, and disabled Petitioner from work. Dr. Mehta also opined that Petitioner's conditions and symptoms were casually connected to the mechanism of Petitioner's injury at work.

On June 23, 2016, Petitioner presented to Athletico Physical Therapy. In the initial treatment note, it is indicated that Petitioner was experiencing sharp back pain when lifting a pallet at work that radiated into his right toes and into the back of his leg.

On July 5, 2016, Petitioner returned to Elmwood Park following his sessions of physical therapy. Petitioner was experiencing low back and radicular symptoms in the right leg. During the

physical exam, Petitioner had a positive right-sided slump seat test. Petitioner was diagnosed with low back pain, myofascial pain, and lumbar radiculopathy. Petitioner's current pain medications were discontinued, and he was prescribed a trial of Mobic 7.5 mg. In addition, Petitioner was to continue physical therapy and an MRI of the lumbar spine was recommended. Petitioner was disabled from work until his next follow up in two to three weeks.

On July 14, 2016, Petitioner underwent an MRI of the lumbar spine which was reported to demonstrate a right-sided disk herniation measuring approximately 3-4mm at L5-S1 and a 2-mm posterior annular disk bulge which indented the ventral surface of the thecal sac at L4-L5.

On July 26, 2016, Petitioner was examined by Dr. Mehta at Elmwood Park following the MRI and physical therapy. Dr. Mehta reviewed the MRI findings and performed a physical examination of Petitioner, which revealed continued low back pain and radicular symptoms caused by the pathology shown on the MRI. Due to Petitioner's continued symptoms, Dr. Mehta recommended an L5-S1 epidural injection. Petitioner was disabled from work, to continue taking the Mobic as needed, and to follow up to undergo the injection.

On August 2, 2016, Dr. Mehta performed an L5-S1 interlaminar epidural injection under fluoroscopic guidance. Petitioner was prescribed a cold/compression therapy device and accompanying wrap. Petitioner testified that the injection and cold therapy device significantly improved his symptoms.

On August 19, 2016, Petitioner returned to Elmwood Park. Upon examination, it is noted that "since the injection [Petitioner's] symptoms have improved dramatically." It is also noted that Petitioner wanted to transition out of physical therapy as he felt that his home exercise program at that point was adequate, and that he was interested in returning to work. Petitioner's medications were discontinued, he was continued off work, and he was prescribed work conditioning. Petitioner was to follow up in four weeks.

On August 30, 2016, Petitioner returned to Elmwood Park, and was noted to still be doing well following the injection. It was noted that Petitioner wanted to be returned to light-duty work, and he reported that his pain was currently at a 0/10 but occasionally at 4-6/10 with certain activities, such as bending forward and lifting over ten pounds. Petitioner was returned to work with a ten pound restriction, and instructions to begin work conditioning, and to follow up in one month.

On September 8, 2016, Petitioner was examined by Dr. Kern Singh at Midwest Orthopedics at Rush at the request of the Respondent.

On September 21, 2016, Petitioner attended a work conditioning session. Petitioner met one of four job demands. Nonetheless, Petitioner indicated that he was working full-time at a new job, and despite continuing to feel right leg pain from time to time, his current job did not require lifting.

On October 11, 2016, Petitioner followed up at Elmwood Park. Dr. Mehta noted that Petitioner underwent physical therapy and an injection that provided an overall improvement of 60-70% relief. Dr. Mehta noted that Petitioner suffered from occasional soreness, but that his pain was a 0/10 at that time. Dr. Mehta found Petitioner to be at maximum medical improvement and released him from care at full duty.

Petitioner testified that he thought physical therapy and the injection, along with the medication and cold compression machine, helped to relieve his pain and enable him to return back to work. Petitioner further testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. Petitioner testified that he did have a prior back injury in 2012, but that he had no back pain in the period of time before his employment with Respondent and during his employment with Respondent prior to the injury that he sustained on June 20, 2016.

The January 10, 2018 deposition testimony of Dr. Amit Mehta was admitted into the record as Petitioner's Exhibit 6. Dr. Mehta is a board certified Anesthesiologist and Pain Management Specialist who primarily treats patients with spine-related issues. Dr. Mehta testified that, to a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner's complaints were aggravated or caused by the mechanism of injury described. Dr. Mehta testified that he recommended physical therapy because it can help with any type of back injury, and is many times the first step in treating a patient prior to more invasive treatment. Dr. Mehta testified that he prescribed Naproxen and Terocin cream because Naproxin is an anti-inflammatory that can help with pain, and topical creams such as Terocin help to reduce localized back pain without any major side effects.

Dr. Mehta testified that Petitioner's positive right-sided "Slump Test" is indicative of disc and/or nerve irritation. Dr. Mehta testified that the Petitioner's MRI report indicated a right-sided disc protrusion at L5-S1 measuring 3-4 mm and a 2 mm bulge at L4-L5, and he opined that the pathology on the MRI was the cause of Petitioner's physical and subjective complaints. As a result of the disc protrusion causing low back pain and radiculopathy, and the medications and physical therapy providing minimal relief, Dr. Mehta testified that the next step in treatment was an epidural injection for diagnostic and therapeutic purposes. Dr. Mehta testified that the Petitioner's improvement in pain and radicular symptoms indicated that the injection was successful.

On cross examination, Dr. Mehta testified that the Petitioner's positive alcohol test indicating a BAC of .041 would not affect his causation opinion as the Petitioner's clinical history, physical examination, and imaging studies correlated to his subjective complaints, and that alcohol in his system did not change the fact that he had a disc protrusion and radiculopathy. Dr. Mehta further testified that, based upon Petitioner's subjective complaints, objective symptoms, and diagnostic reports, it was his opinion that Petitioner suffered an acute injury that was casually related to the mechanism of injury described by Petitioner.

The February 28, 2018 deposition testimony of Dr. Kern Singh was admitted into the record as Respondent's Exhibit 2. Dr. Singh testified that he examined Petitioner on September 8, 2016 and that Petitioner informed him that he hurt his back while pulling a pallet. Dr. Singh further testified that Petitioner had minimal back pain, no leg pain, and that the last epidural injection provided Petitioner significant relief. Dr. Singh opined that Petitioner was negative for back pain and demonstrated no symptom magnification with negative Waddell's findings. Dr. Singh testified that his impression of the Petitioner's MRI revealed an L5-S1 disc protrusion. Regarding causation, Dr. Singh testified that he felt Petitioner's injury was sustained during "his work-related event. . .".

When asked what treatment he would recommend for someone with an L5-S1 disc protrusion, regardless of whether it was acute or degenerative, Dr. Singh testified that he thought physical therapy, anti-inflammatories, prescription meloxicam, and an MRI would be appropriate and reasonable. Dr. Singh further testified that he recommends epidural steroid injections if a patient has

radiculopathy and nerve root distribution that correlates with an MRI. Furthermore, he testified that one epidural steroid would be a reasonable course of treatment for Petitioner. Finally, Dr. Singh testified that, based upon a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner suffered an injury at work on June 20, 2016.

The March 22, 2018 deposition testimony of Dr. Jerrold Leikin was admitted into the record as Respondent's Exhibit 1. Dr. Leikin is a medical toxicologist and physician who teaches in the field of medical toxicology. He testified that in his specialty of medical toxicology, he has performed retrograde extrapolation in regards to alcohol content a person may have had in their system over a thousand times in the past 30 years. Dr. Leikin testified that he reviewed the breathalyzer test results from the day of the Petitioner's alleged accident, and that he performed a "retrograde extrapolation" of Petitioner's blood alcohol test. Dr. Leikin opined that, due to the Petitioner's blood level that was identified after the accident, the Petitioner was at increased risk from being involved in an accident at work and thus impaired due to alcohol intoxication. Dr. Leikin testified the he determined that Petitioner's blood alcohol level would have likely been between 0.056% and 0.076% at the time of the injury. When questioned further, Dr. Leikin opined that it was very possible for Petitioner's blood alcohol level to be 0.061% at the time of the injury, but could have been lower. At this level, Dr. Leikin testified that a person would be unable to concentrate or multi-task, and have problems judging time, space, and distance. Dr. Leikin opined that the neurological effects of a 0.046% or a 0.056% blood alcohol level could have contributed to Petitioner's injury.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by the preponderance of the evidence that he suffered an injury on June 20, 2016 that arose out of and in the course of his employment for Respondent.

In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Industrial Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). Petitioner must show, through a preponderance of the evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 214 (2003). If an employee's intoxication is the proximate cause of his accidental injury, or the employee was so intoxicated that the intoxication constituted a departure from employment, then no compensation is owed to the employee by the employer. 820 ILCS 305/11 (2011). If, at the time of the injury, the employee's blood alcohol level was 0.08% or above, there is a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the injury. *Id.*

In the instant case, Petitioner's tested blood alcohol levels were 0.041% and 0.045% at the time he was tested. Dr. Jerrold Leikin opined that Petitioner's blood alcohol level was likely around

0.061 at the time of the accident. Because the tested and estimated levels of Petitioner's intoxication are below 0.08%, there is no rebuttable presumption that Petitioner's intoxication was the proximate cause of his injury.

Therefore, the Arbitrator finds that Petitioner was not required to overcome the rebuttable presumption that his intoxication was the proximate cause of his injury, and that such burden is on Respondent. Respondent offered no evidence that Petitioner's intoxication was the proximate cause of his injury. Petitioner testified that he felt no pain in his lumbar spine prior to the injury, gave a consistent history throughout his medical treatment, and was subsequently released from care after undergoing treatment that was reasonable according to both Dr. Mehta and Dr. Singh. Accordingly, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by a preponderance of the evidence that his lumbar spine injury was causally related to the accident at work.

To prove this element, Petitioner must show that his injury was caused by "some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 672 (2003).
The Arbitrator finds it significant that Petitioner was working full duty and testified that he had no prior complaints or treatment to his lumbar spine prior to the accident. Here, Petitioner testified that his job was to essentially pick orders and move product around the warehouse to ensure that the correct product was in the correct location for transport. He testified that he needed to remove a pallet off of a rack that had another pallet stood up vertically on the pallet he needed. When attempting to pull out the vertical pallet, he felt a sharp pain in his back that ultimately developed into numbness and tingling in his legs.

Petitioner was immediately sent to Premier Occupational Health, where he stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Petitioner provided a nearly identical history throughout the rest of his treatment, including the independent medical examination with Dr. Singh. Furthermore, both Dr. Singh and Dr. Mehta opined that Petitioner suffered an injury at work.

Petitioner testified that he did suffer a back injury in 2012, but that he could not remember the last time he had treated for, or suffered pain from, that incident. Petitioner testified that he had worked for Respondent for approximately one year prior to the instant injury, and had no back pain prior to June 20, 2016. The Petitioner testified that he still suffers back pain as a result of the work injury, despite also having "good" days. Petitioner further testified that his back sometimes affects his sleep.

Relying on the above, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the injury that occurred on June 20, 2016.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Petitioner has met his burden of proof by a preponderance of the evidence that the medical services provided were reasonable and necessary.

Petitioner immediately sought treatment for his injury at Premier Occupation Health. Petitioner subsequently sought treatment at Elmwood Park Same Day Surgery Center. He was prescribed physical therapy, which he underwent at Athletico Physical Therapy. Petitioner testified that he felt the physical therapy did help to relieve his symptoms. Furthermore, Dr. Mehta and Dr. Singh testified that physical therapy and non-opioid medications were a reasonable course of treatment. Petitioner also underwent an epidural steroid injection at L5-S1 while under anesthesia, and was provided with a cold/compression device post-injection. Petitioner testified that the injection and cold/compression device helped to relieve his symptoms.

The Arbitrator takes note of the testimony of both Dr. Singh and Dr. Mehta, who both opined that an epidural steroid injection was reasonable in the instant case. In addition, the medical records indicate that Petitioner had significant symptom relief following the injection and returned to work not long afterward.

Regarding payment for reasonable medical treatment, the Arbitrator finds that the medical bills introduced by Petitioner show unpaid charges for medical treatment in the following amounts:

Premier Occupational Health:	$753.00
Elmwood Park Same Day Surgery Center:	$6,901.26
Instant Care Equipment Leasing:	$5,520.66
Windy City Anesthesia:	$1,925.00
Athletico Physical Therapy:	$11,135.00
Prescription Partners:	$749.06

Respondent has not paid all appropriate charges. Therefore, Respondent is ordered to pay the aforementioned medical bills, totaling $26,983.98 pursuant to Section 8(a). The parties stipulated that the Respondent is entitled to credit for any medical bills paid by the Petitioner's group insurance.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he was owed temporary total disability benefits from June 21, 2016 to August 30, 2016, while he was disabled from work.

The Arbitrator recognizes that off work status notes were provided throughout Petitioner's treatment, until he asked to be released back to work.

Therefore, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of $378.27/week for a period of 10 weeks, commencing on June 21, 2016 through August 30, 2016, as provided by Section 8(b) of the Act.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no report of impairment compliant with the provisions of of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a material handler. The Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Arbitrator therefore gives some weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 46 years old at the time of the accident. The Arbitrator considers the Petitioner to be younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less able to recover fully from such an injury. The Arbitrator therefore gives little weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. Because there is no evidence of any impairment to future earnings, the Arbitrator gives no weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Petitioner testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. These complaints are corroborated in the medical records as well as the testimonies of both Dr. Mehta and Dr. Singh. The Petitioner's complaints as supported by the

medical records, evidences some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 6% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSARIO JIMENEZ,

Petitioner,

vs.

21IWCC0168

NO: 18 WC 13761

CHICAGO MARRIOTT OAK BROOK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability benefits, medical expenses, and prospective medical treatment and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the Arbitrator's decision with the following clarification:

On April 12, 2018, Petitioner was working as a banquet server for Respondent. She testified she was working in the VIP room and that she was directed by her supervisor to go to Starbucks to find lids for the coffee cups as there were none in the VIP room or storage. (T. 10) Petitioner went to Starbucks and obtained lids and some cups. Petitioner subsequently realized they were not the correct lids so she grabbed the lids, advised her supervisor that they were not the correct lids, and went to Starbucks for a second time. (T. 11)

On this second trip to Starbucks Petitioner was carrying the cups and lids she was going to return and as she was walking, she tripped. (T. 8) Her leg went to the side, her left knee popped and Petitioner was unable to continue walking. (T. 8-9) After advising her general manager and Human Resources, she was put in a taxi cab to go to the occupational health clinic for an examination. (T. 12-13)

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On April 12, 2018 the same day the accident occurred, Petitioner was examined at Advocate Occupational Health where she was taken off work, diagnosed with a left knee sprain and instructed to follow up with an orthopedic surgeon should problems persist. (Px1) She reported that the incident occurred while she was walking rapidly and felt a pop in her knee. (Px1) Petitioner followed up with orthopedic surgeon, Kevin Tu, M.D., on May 10 2018, at which time he ordered an MRI and placed Petitioner on restricted duty. (Px2) Petitioner described her accident as quickly walking and tripping over the junction between the hard floor and carpet. (Px2) Petitioner underwent an MRI on May 15, 2018 which showed a torn meniscus. (Px3) On May 24, 2018, Petitioner returned to Dr. Tu, at which point he recommended conservative treatment consisting of physical therapy. He continued restrictions. (Px2) Petitioner returned on June 28, 2018, at which point physical therapy was discontinued and surgery was recommended. Restrictions were again continued. Petitioner returned to Dr. Tu on August 9, 2018 and September 20, 2018, and authorization for the recommended surgery was still pending. Petitioner's restrictions remained in place. (Px2)

On cross-examination, Petitioner testified that she was walking very fast at the time she hurt her knee. She wasn't walking or jogging. (T. 18) She was walking fast because of customer's complaints. (T. 23) She didn't fall, but she tripped and then her foot got stuck and she couldn't move. (T. 27) Petitioner did not testify as to any defects in the floor.

The Respondent does not dispute that the evidence establishes that at the time the Petitioner sustained her knee injury she was at work – i.e. in the course of her employment. As the parties do not dispute that Petitioner's knee injury occurred in the course of her employment, the Commission will only address the second element that must be proved to find the case compensable --whether the Petitioner's knee injury arose out of her employment.

The *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (9/24/20) case provides the proper analysis to be applied in this instance. In *McAllister* at ¶60, the court held that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 (1989), stands for the proposition that an injury arises out of a claimant's employment for purposes of the Act if, at the time of injury, the claimant was performing an act that he might reasonably be expected to perform incident to his employment or causally connected to what the claimant must do to fulfill his assigned job duties, even if the act involves an everyday activity.

In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill.2d at 58; *see also The Venture - Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18; *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 204 (2003). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro,* 207 Ill.2d

at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58) *see also Baggett v. Industrial Comm 'n*, 201 Ill.2d 187, 194 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.").

A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987). To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶31; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152115WC, ¶38; *Baldwin v. Illinois Worker 's Compensation Comm'n*, 409 Ill.App.3d 472,478 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105 (2006).

Petitioner's knee injury arose out of her employment because at the time she injured her knee while in the process of retrieving coffee cup lids for customers, she was at work performing an act her employer might reasonably expect her to perform incident to her assigned job duties as a banquet server, and in fact, was directed to perform. Therefore, the knee injury was employment related, as it was caused by retrieving coffee cup lids for the customers in the VIP concierge room — an act that was incident to and causally connected to Petitioner's job duties as a banquet server. *Caterpillar Tractor*, 129 Ill.2d at 58; *Memorial Medical Center v. Industrial Comm 'n*, 72 Ill.2d 275, 280 (1978) (" 'to come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury' " (quoting *County of Cook v. Industrial Comm 'n*, 69 Ill.2d 10, 17 (1977))).

Sisbro and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill.2d at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once she has presented proof that she was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill.2d at 58.

In addition to proving accident, Petitioner met her burden that her current condition of ill-being is causally related to her work injury. Petitioner reported directly to occupational health, wherein she was diagnosed with a "sprain of unspecified collateral ligament of left knee." (Px1) She followed up with orthopedic surgeon Dr. Tu, who ordered an MRI and ultimately diagnosed that she had a torn medial meniscus. (Px2, 5/24/18 visit) On August 9, 2018, Dr. Tu opined that Petitioner's mechanism of injury was consistent with the development of a medial meniscus tear. (Px2) Respondent did not offer any medical opinion to refute this causation opinion.

Based on the finding of accident and causation, the Arbitrator appropriately awarded medical expenses as all were in furtherance of the treatment of Petitioner's knee injury. He also appropriately awarded prospective treatment in the form of left knee arthroscopic surgery and

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attendant care, as well as temporary total disability benefits from the day following the injury through the date of trial.

In addition to the foregoing, the Commission corrects a scrivener's error contained in the Arbitration Decision in the second to last sentence of the second paragraph on page 11. The Commission replaces the word "hear" with the word "heard".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,122.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 022321
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

JIMENEZ, ROSARIO
Employee/Petitioner

Case# **18WC013761**

21IWCC0168

CHICAGO MARRIOTT OAK BROOK
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2512 THE ROMAKER LAW FIRM
JASON BRISKI
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN A RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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STATE OF ILLINOIS)
)SS.
COUNTY OF Dupage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rosario Jiminez
Employee/Petitioner

v.

Chicago Marriott Oak Brook
Employer/Respondent

Case # **18** WC **13761**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **April 12, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

On **April 12, 2018**, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On **April 12, 2018**, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent on **April 12, 2018**.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $31,092.88 and the average weekly wage was **$597.94**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

ORDER

Accident

Petitioner was injured in a work related accident on April 12, 2018, while working as assigned for Respondent when she injured her left knee. Based upon Petitioner's consistent and credible testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu, the Arbitrator holds that Petitioner had an accident that arose out of and in the course of the employment by Respondent on April 12, 2018.

Is Petitioner's Current Condition of ill-being causally related to the injury?

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability (TTD) benefits of $398.62 per week for a Petitioner 27 and 5/7th weeks, commencing April 13, 2018 to the date of trial as provided in Section 8(b) of the Act. Total TTD owed is $11,047.35.

Medical Benefits

Petitioner's medical bills were admitted as Petitioner's Exhibits 1,2,3 and 4. The Arbitrator awards the medical bills in Exhibits 1,2,3 and 4. The Respondent shall pay the reasonable and necessary medical services of **$9,974.03** to Petitioner and The Romaker Law Firm as provided in Section 8(a) and 8.2 of the Act.

Prospective Medical Care

Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. Respondent has not provided any rebuttal medical evidence or testimony. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Charles W Watts

Signature of Arbitrator

March 26, 2020
Date

APR 2 - 2020

21IWCC0168

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.
If you prefer, you may submit the front of this application form with the *Proof of Service* on a separate page.

I, **Jason Briski**, an attorney, affirm that I emailed and ☐ delivered ☐ mailed with proper postage in the city of **Chicago** a copy of this form at **5:00pm** on **November 15, 2018** to the Respondent listed on this application and to each additional party, if any, at the address listed below.

TO: Mr. Brian Rudd
Nyhan Bambrick Kinzie and Lowry
20 N. Clark Street, Suite 1000
Chicago, IL 60602
Via E-Mail to bar@nbkllaw.com

Arbitrator Charles Watts
Illinois Workers' Compensation Commission
100 W. Randolph
Chicago, IL 60601
Via E-Mail to charles.watts@illinois.gov

Signature of person completing *Proof of Service*

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosario Jimenez	)	
	)	
Petitioner,	)	
	)	
vs.	)	Nos. 18 WC 13761
	)	
Chicago Marriott Oak Brook	)	
	)	
Respondent.	)	

FINDINGS OF FACT

The parties stipulated that on April 12, 2018, the Respondent, Chicago Marriott Oak Brook, was operating under and subject to the provisions of the Act, and that an employee-employer relationship existed between Respondent and Petitioner. (*See* Request for Hearing Form, Arb. Ex. 1,). The parties also stipulated that Respondent was given notice of the accident within the time limits stated in the Act. (*See* Request for Hearing Form, Arb. Ex. 1,). Additionally, the parties stipulated that Petitioner's average weekly wage to be considered is $597.94. (*See* Request for Hearing Form, Arbitrator's Ex. 1). Further, the parties stipulated that at the time of the injury Petitioner was 61 years old, married, with zero dependent child. (*See* Request for Hearing Form, Arb. Ex. 1). The Request for Hearing Form was entered as Arbitrator's Exhibit #1. (Tr. p 5). Petitioner's list of outstanding medical bills was attached to Arbitrator's Exhibit #1. (Tr. p. 6). The Application for Adjustment of Claim for the case was entered as Arbitrator's Exhibit #2. (Tr. p. 6). An interpreter was used for the hearing named Paula Riordan. (Tr. p. 7).

On October 23, 2018, Petitioner submitted Exhibits #1 through #4 and all Petitioner's Exhibits were admitted into evidence. (Tr. pp. 79-82). Respondent withdrew Exhibits #1, #2 and #3; and submitted Exhibits #4 through #8; however, Respondent's Exhibit #8 was rejected and not admitted into evidence. (Tr. pp. 82-86). Petitioner objected to Exhibit # 6(a) and 6(b) based on lack of foundation; however, the Arbitrator over ruled the objection and allowed the exhibit to be admitted. (Tr. pp. 83-85).

On October 23, 2018, Petitioner testified that she worked at Marriott International in Oak Brook as a banquet server for approximately 14 years. (Tr. pp. 7-8). Petitioner testified that she

injured her left knee on April 12, 2018. (Tr. p. 8). Petitioner testified that the injury occurred when she was walking very fast to Starbucks in the hotel while she was carrying some cups and lids (Tr. p. 8).

Petitioner testified that she as she was walking, carrying the cups and lids, she tripped on a carpet and her leg went to the side and she heard a popping sound. (Tr. pp. 8-9). Petitioner testified that she felt a sharp pain and was not able to walk anymore. (Tr. p. 9). Petitioner testified that she tried to take two steps but she could not move. (Tr. p. 9). Petitioner testified that the carpet she tripped on was a mat to clean feet at the entrance of the hotel. (Tr. p. 9).

Petitioner testified that she was going to Starbucks to return the cups and lids because they did not match the cups in the VIP room. (Tr. p. 10). Petitioner testified that the Starbucks was within the Marriott Oak Brook Hotel. (Tr. p. 10). Petitioner testified that she was working in the concierge room for people that have a key that are VIP to go into. (Tr. p. 10).

Petitioner testified that she went to the storage room looking for lids but could not find any and she had to go to other departments to get lids for the cups (Tr. p. 10). Petitioner testified that her supervisor Megan told her to go to Starbucks. (Tr. p. 10). Petitioner testified that she went to Starbucks and got some lids and cups but did not realize that the lids did not fit until customers started complaining about it. (Tr. p. 10). Petitioner testified that she spoke to her supervisor Megan again. (Tr. p. 11) Petitioner testified that Megan directed her to go back to Starbucks. (Tr. pp. 11-12). Petitioner testified that it was her second trip going back to Starbucks when she tripped and injured herself. (Tr. p. 12).

Petitioner testified that after she tripped she could not walk so she was looking around to see who could come and help her. (Tr. p. 12). Petitioner testified that she did not fall down and the clients at Table 15 saw her trip and asked if she was ok. (Tr. p. 12). Petitioner testified that she reported the accident and they took her to tell the general manager, Christina Duncan. (Tr. p. 12). Petitioner testified that HR was called and she spoke to Diana and was told they would write an accident report and she could go to the hospital. (Tr. p. 13). Petitioner testified that she was sent in a taxi for medical treatment. (Tr. pp. 13-14).

Petitioner testified that she was seen at Advocate Occupational Health on the same day that she hurt her knee. (Tr. p. 14). Petitioner testified that the occupational clinic kept her off work and told her to follow up with an orthopedic surgeon. (Tr. p. 14). Petitioner testified that she sought care from Dr. Tu, an orthopedic surgeon, on May 10, 2018. (Tr. p. 14). Petitioner

testified that Dr. Tu ordered an MRI of her left knee, which was performed on May 15, 2018. (Tr. pp. 15). Petitioner testified that Dr. Tu gave her work restrictions and she sent the restrictions to Respondent, however, Respondent did not offer her light-duty work. (Tr. p. 15). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and she began physical therapy. (Tr. p. 15). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. p. 16).

Petitioner testified that when she saw Dr. Tu at the end of June 2018, he recommended surgery for her left knee. (Tr. p. 16). Petitioner testified that she has continued to treat with Dr. Tu, but she has not been able to have surgery for her left knee because it has not been authorized by Workers' Compensation insurance. (Tr. p. 16). Petitioner testified that she has not received any Workers' Compensation disability pay. (Tr. pp. 16-17). Petitioner testified that she wants the surgery so she can go back to work (Tr. p. 17).

On cross-examination, Petitioner testified that she was claiming an accident dated April 12, 2018, and she began her shift at six o'clock in the morning. (Tr. pp. 17-18). Petitioner testified that she was working in the restaurant area near the Starbucks and she received customer complaints that coffee lids need to be restocked. (Tr. p. 18). Petitioner testified that she was walking fast, but she was not running or jogging. (Tr. p. 19). Petitioner testified that she went to Advocate Occupational Health and spoke to Dr. Piotrowski. (Tr. p. 19). Petitioner testified that she told Dr. Piotrowski that she was walking rapidly on carpet at work and felt a pop in her left knee. (Tr. p. 19). Petitioner was asked by Respondent's counsel if she tripped on a carpet or a mat and Petitioner testified that it was a mat but she was not sure what it was called. (Tr. pp. 19-20). The interpreter explained on the record that the Spanish word Petitioner was using, "Alfombra", can be a mat or a carpet used for either. (Tr. p. 20).

On cross-examination, Petitioner testified that x-rays of her left knee were taken and she did not break any bones or have any fractures. (Tr. p. 20). Petitioner testified that she was initially diagnosed with a left knee sprain. (Tr. p. 20). Petitioner testified that she sought treatment with Dr. Tu for the first time on May 10, 2018. (Tr.21-22). Petitioner testified that she gave Dr. Tu a description of her accident and told him that she was walking quickly between the floor and the carpet when she tripped over a junction between the carpet and the hard floor. (Tr. p. 21). Petitioner testified that she told her treating doctors that she tripped when she crossed from the floor to the carpet. (Tr. p. 22).

On cross-examination petitioner testified that she had a conversation with Respondent that was recorded. (Tr. p. 23). Petitioner testified that she told Respondent that customers were complaining about coffee lids and she was walking fast because of the customer complaints. (Tr. p. 23). Petitioner testified that her foot got stuck and she could not move anymore. (Tr. p. 23). Petitioner testified that she did not remember what she told respondent and she answered what Respondent asked her while she was in a lot of pain. (Tr. p. 26). Petitioner testified that she did not say that her foot simply got stuck and when she tripped it did get stuck. (Tr. p. 27).

On cross-examination Petitioner testified that her accident took place about 10 to 15 feet from the outside of the Starbucks. (Tr. p. 27). Petitioner testified that the hostess stand and computer were near where her accident occurred and she held on to it. (Tr. pp. 27-28). Petitioner testified that the hostess stand and computer were at the entrance door and by the door going to Starbucks. (Tr. p. 28). Petitioner testified that she did not know the distance from where the accident occurred to the hotel entrance door and restaurant Table 15 was ten to fifteen feet away. (Tr. p. 29).

On cross-examination Petitioner testified that she spoke with the general manager Christina, immediately after she was hurt, who called HR and then Cathy and Megan arrived. (Tr. p. 29). Petitioner testified that she told the HR person, Diane Wnek that she tripped on a mat near the exit door. (Tr. p. 29). Petitioner testified that when she hurt her knee she stumbled but did not fall to the ground. (Tr. p. 29).

On cross-examination Petitioner said she did not remember that well if the photograph marked Respondent's Exhibit 5E showed the floor by Table 15, but it appeared so. (Tr. p. 31). Petitioner said she walked on the floor many times and it was the floor that went to the hostess stand. (Tr. p. 32). Petitioner testified that she did not know if the carpet started after the wooden dividing wall and she did not know if the floor tiles were broken. (Tr. p. 33).

On redirect examination, Petitioner testified that there was carpeting on top of the tile floor and that was away from the area of the floor shown in Respondent's Exhibit 5E. (Tr. p. 34). Petitioner further testified that that the carpeting is what she tripped on. (Tr. p. 34). Petitioner testified again that she tripped on the carpeting after re-cross and re-direct examination. (Tr. p. 36).

The Market Director for Human Resources, Diane Wnek testified for the Respondent. (Tr. p. 38). Ms. Wnek testified that she oversees recruiting, talent management, performance

development, associate issues, disciplinary actions, terminations, hiring, Workers Comp, and other human resources situations. (Tr. p. 38).

Ms. Wnek testified that she has interacted with the Petitioner. (Tr. p. 38). Ms. Wnek testified that on April 12, 2018, she was working at the Chicago Marriott Oak Brook location and received a call at about 8:00 am from the general manager regarding an associate injury. (Tr. p. 39). Ms. Wnek testified that she spoke to Petitioner in the hallway behind the restaurant concierge lounge and Petitioner was sitting on a chair with ice on her knee. (Tr. p. 39). Ms. Wnek testified that Petitioner, general manager, Kristin Duncan and herself were present for the conversation. (Tr. p. 40).

Ms. Wnek testified that Petitioner told her it was very busy that morning, she was rushing around to get lids for to-go coffee cups for guests, and that while she was walking through the restaurant her knee gave out and began hurting her, and that she had made it as far as the mat where she could not continue any farther and that was where she stayed until she got assistance to move from that spot. (Tr. p. 40).

Ms. Wnek testified that her conversation with Petitioner was in English without an interpreter and she was able to communicate with the Petitioner in English. (Tr. p. 41). Ms. Wnek testified that it was her impression that Petitioner was capable of understanding and communicating in English. (Tr. p. 41). Ms. Wnek testified that Petitioner told her she was walking through the front portion of the restaurant which would have been on tile floor that goes past the hostess stand towards Starbucks when she hurt her knee. (Tr. p. 42). Ms. Wnek testified this is near an exit door that leads to the outside just outside the Starbucks entrance. (Tr. p. 42). Ms. Wnek testified that the exit door would be probably ten to fifteen feet away from where Petitioner said she hurt her knee. Ms. Wnek testified there is not carpeting or a mat in that area. (Tr. p. 42).

Ms. Wnek testified that there are walk off mats used at the hotel at the exits particularly during the winter months. (Tr. p. 43). Ms. Wnek testified the walk off mats are flat and they take moisture off guest's shoes as they come in and out the door. (Tr. p. 43). Ms. Wnek testified there is not any transition or junction between the tile and carpet in the area where she understood that Petitioner was walking. (Tr. p. 43). Ms. Wnek testified that the area where Petitioner hurt her knee was open to the public. (Tr. p. 43).

Ms. Wnek testified that the hotel has security cameras and as an HR representative she has access to the surveillance video. (Tr. pp. 43-44). Ms. Wnek testified that she reviewed the surveillance footage dated April 12, 2018, and saw Petitioner walking to the Starbucks, then she stops and catches herself and then continues walking to the Starbucks entrance where the mat was. (Tr. p. 44). Ms. Wnek testified that based on what she saw in the video the floor where Petitioner stumbled was tile. (Tr. p. 44). Ms. Wnek testified that there were not any mats in the area. (Tr. p. 45). Ms. Wnek testified that the camera was pointed down in the Starbucks and you can see the servers through the window. (Tr. p. 47). Ms. Wnek testified that Petitioner was seen stumbling through the window. (Tr. p. 49). Ms. Wnek testified that Petitioner caught herself in the video and then goes to the mat and stayed there. (Tr. p. 49). Ms. Wnek testified that she thought she saw Petitioner leaning on the door and her co-worker took her to the back. (Tr. p. 49). Ms. Wnek testified that the co-worker that helped Petitioner was named Marco. (Tr. p. 50).

Ms. Wnek then testified that the photograph marked Exhibits 5A showed the tile floor next to Table 15 along with Table 15, as it looked on April 12, 2018. (Tr. p. 54). Ms. Wnek testified that she took the photograph marked Exhibits 5A-5F after Petitioner was hurt. (Tr. p. 55). Ms. Wnek testified that photograph 5B was an accurate representation of the floor on the date of the accident. (Tr. pp. 55-56). Ms. Wnek testified that photograph 5C was the tile floor by the hostess stand on the date of the accident and photograph 5D was a photograph of the floor next to the hostess stand and towards the Starbucks. (Tr. p. 56). Ms. Wnek testified that photographs 5E and 5F show the floor by Table 15 on the date of the accident. (Tr. p. 57).

Ms. Wnek testified that a supervisor's accident report related to Petitioner's knee injury was drafted by Megan Orr, Petitioner's supervisor. (Tr. p. 58). Ms. Wnek said the only inaccuracy in the report is that it says Rosario (Petitioner) was seen by Megan talking to Marco immediately prior to her fall and fall is erroneous because Petitioner never said she fell but stumbled. (Tr. pp. 58-59).

On cross-examination, Ms. Wnek testified that she was responsible for performance management or performance appraisals employees. (Tr. p. 60). Ms. Wnek testified that safety is not part of the performance management system, but Marriott tracks safety incidents. (Tr. p. 61). Ms. Wnek testified that all the Marriott properties are measured against each other for safety incidents, lost time and restricted duty statistics. (Tr. p. 61). Ms. Wnek testified that five OSHA

recordable injuries have occurred at the Marriot Oak Brook in 2018. (Tr. p. 62). Ms. Wnek denied that high levels in the organization would ask about injuries if the properties she was responsible for started to have more OSHA reportables than the other properties. (Tr. p. 63).

On cross-examination, Ms. Wnek testified that she would normally use a translator for meetings with Petitioner and her co-workers if it was needed. (Tr. p. 64). Ms. Wnek testified that she did not speak Spanish, however, she felt that Petitioner was able to respond accurately to her questions about the accident. (Tr. p. 64). Ms. Wnek testified that Petitioner said she was very busy rushing to get lids. (Tr. pp. 64-65).

On cross-examination, Ms. Wnek testified there is not a camera by the entrance door to the hotel and the camera in Starbucks is the only camera in that area. (Tr. p. 65). Ms. Wnek testified that the exit door for the hotel is on the edge of the video frame. (Tr. p. 66). Ms. Wnek testified that a runner mat was located at the doorway. (Tr. p. 67)

On cross examination, Ms. Wnek testified that she did not recall if she took the pictures on the day of the accident or the next day, or a couple days later. (Tr. p. 69). Ms. Wnek testified that she did not take a picture of the pathway to the Starbucks because the Petitioner did not say the accident occurred in the Starbucks. (Tr. p. 69). However, Ms. Wnek testified that Petitioner did say she was walking towards the Starbucks. (Tr. p. 69). Nevertheless, Ms. Wnek testified that she did not take any pictures in the direction of the Starbucks. (Tr. p. 70). Ms. Wnek testified that the mats at the entrance doors are used during the wet months of the year; but she did not have knowledge of who maintains the mats or if they are changed periodically. (Tr. p. 70). Ms. Wnek testified that it is possible for the mats to move. (Tr. p. 70).

On cross-examination, Ms. Wnek testified that she did not talk to the customers at Table 15 that saw Petitioner injure herself. (Tr. p. 70). Ms. Wnek testified that she did not know why Megan Orr, Petitioner's Supervisor that completed the accident report was not present for the arbitration hearing, yet Ms. Orr still works for Marriott. (Tr. p. 71).

Ms. Wnek testified that she did not know why the question on page 2 of the accident report asking, "Was the person carrying anything when injured?" was not marked. (Tr. p. 72). However, Ms. Wnek testified that Petitioner told her that she was carrying lids. (Tr. p. 72). Ms. Wnek testified that she did not know why the accident report says that Petitioner was talking to Marco prior to her fall as an "unsafe work practice", although she previous testified that was incorrect. (Tr. p. 72). Further, Ms. Wnek testified that Petitioner was not talking to Marco in the

video shown. (Tr. p. 72). Ms. Wnek testified that the supervisor's accident report was marked yes for the question, "Did a time constraint, hurrying to complete a task, contribute to the injury?" (Tr. p . 73).

On cross-examination, Ms. Wnek testified that the accident report was marked yes for the question, "Did an unsafe work practice contribute to this injury?" (Tr. p. 73). Ms. Wnek testified that it was important to capture the information for the supervisor's accident report as part of the investigation to see if there was anything out of the ordinary or something that could be prevented. (Tr. p. 73). Ms. Wnek testified that if employees engaged in hurrying to complete something, it could increase the risk of an injury occurring. (Tr. p. 74).

On re-direct, Ms. Wnek testified that she took the photographs for Respondent's Exhibits 5A-5F after she spoke to the Petitioner to show there were no defects or an unsafe condition in the area. (Tr. p. 75). Ms. Wnek testified that the mats were in the proper location. (Tr. p. 75). Ms. Wnek testified that it was recommend that Petitioner practice safe walking, but she did not know what training took place besides that listed for 2017. (Tr. p. 76).

Ms. Wnek testified that it did not appear in the video that Petitioner was working or moving in a hurried manner. (Tr. p. 78). However, on cross-examination Ms. Wnek was asked how she could tell that it didn't appear that Petitioner was hurry although she was looking through a window on the video for a brief amount of time and Ms. Wnek testified that it was her interpretation that Petitioner was walking normally. (Tr. p. 78). Ms. Wnek testified that if there were not proper lids in the VIP rooms, it was an issue that needed to be corrected quickly. (Tr. p. 78-79).

Medical Treatment

Petitioner testified that she was sent by Respondent in a taxi to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI

performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2 at 5/24/18) Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

ISSUES

Based upon the Stipulation Sheet signed by the Parties, as amended, the matters in dispute are as follows:

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
(F) Is Petitioner's current condition of ill-being causally related to the injury?
(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
(K) Is Petitioner entitled to any Prospective Medical Care?
(L) What temporary benefits are in dispute? TTD

(*See* Arbitrator's Exhibit 1, Request for Hearing form).

Regarding Issue (C)

Regarding the issue "Did an Accident Occur that Arose Out of and in the Course of the Employment by Respondent," Petitioner testified that she injured her left knee during the scope of her employment on April 12, 2018, the Arbitrator finds the following:

A. Petitioner's Testimony Was Consistent and Credible Proving That Her Employment Exposed Her To A Risk Greater Than The General Public

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The requirement under the Workers' Compensation Act that a compensable injury arise out of the employment concerns the origin or cause of the claimant's injury. Adcock vs. IWCC, 2015 Ill. App.2nd 130884WC citing Parro v. Industrial Comm'n, 167 Ill.2d 385, 393, 212 Ill.Dec. 537, 657 N.E.2d 882 (1995). Whether an injury arose out of and in the course of a claimant's employment is a question of fact to be resolved by the Workers' Compensation Commission. Adcock vs. IWCC, 2015 Ill. App.2nd

130884WC citing Illinois Institute of Technology Research Institute v. Industrial Comm'n, *314 Ill.App.3d 149, 164, 247 Ill.Dec. 22, 731 N.E.2d 795 (2000).*

For an injury to arise "out of" the employment, the injury must have occurred from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of the employment if, at the time of the incident or accident, the employee was performing acts he or she was instructed to perform by his or her employer, acts he or she had a common law or statutory duty to perform, or acts the employee might reasonably be expected to perform incident to his or her assigned duties. O'Fallon School Dist. No. 90 v. Industrial Commission, *313 Ill.App.3d 413729 N.E.2d 523246 Ill.Dec. 150 (2000).* In O'Fallon, Petitioner was a school hall guard and injured her back when she quickly twisted and turned to stop a student that ran past her. Id. Compensation was denied under the theory of common risk, but the Commission reversed its decision following a Circuit Court mandate. Id. The appellate court affirmed stating that the Petitioner was subject to enhanced risk inherent in her duties. Id.

In Nascote Indutries, compensation was awarded due to frequency of usage although there was no "defect." In that case, Petitioner was required to pick up bumpers, walk to her work station and step up onto a rack. Petitioner stepped down from the rack and her foot turned causing a fractured metatarsal. The court affirmed compensation because Petitioner's foot injury "arose out of the course of employment" based on increased risk to foot, despite employer's claim that there was nothing unusual about the premises which contributed to the injury, where claimant stepped on to floor off part of a machine or platform that she was required to load as part of her job duties, claimant's work was fast-paced and involved quick turnaround rate, and claimant had to keep pace with parts press. Nascote Industries v. Industrial Commission *353 Ill.App.3d 1056, 820 N.E.2d 531, 289 Ill.Dec. 755 (2004).*

The court addressed an unexplained fall down stairs that occurred while Petitioner was moving hastily for her job in William G. Ceas and Company v. Industrial Commission, *261 Ill. App. 3d 630, 199 Ill. Dec. 198, 633 N.E. 2nd 994 (1994).* The Commission found the claim compensable due to Petitioner's hurried departure to deposit packages at her supervisor's request. Id. However, the appellate court then reversed, but after a rehearing was allowed, the court reversed the earlier decision and opined that the employer's last minute assignment caused

her to descend the stairs in a hastily manner and therefore the risk of injury was increased as a result of her work duties. Id.

Additionally, Petitioner has the burden of proving, by a preponderance of the evidence, all the elements of her claim. O'Dette v. Industrial Commission, *79Ill. 2d 249, 253.* Preponderance is evidence which is of greater weight or more convincing that the evidence offered in opposition to it, evidence which as a whole shows the fact to be proved as more probable than not. Houck v. Nationwide Rail Service, *No. 11 I.W.C.C. 0249*, citing Kordrey Jones v. J. Rubin Co, *98 IL W.C. 7779.* Factors to consider in determining whether a Petitioner has sufficiently carried the burden is credibility. Id.

In the case before the Arbitrator, Petitioner was credible and consistent. Petitioner testified that on April 12, 2018, she was hurrying to Starbucks while carrying cups and lids, when she tripped on carpeting and twisted her left knee causing injury. (Tr. pp. 8-12). Petitioner testified that the carpet was a mat located at the entrances of the hotel. (Tr. p. 9). Petitioner testified that she was hurrying because the lids did not fit the cups for customers in the VIP room. (Tr. pp. 8-12). Petitioner testified that she had received customer complaints about the coffee lids. (Tr. p. 18). Petitioner testified that she when she tripped her leg went to the side , she hear a popping sound and she felt immediate pain and could not walk. (Tr. pp. 8-9). Further, Petitioner testified that the carpeting she was referring to was a mat used by the hotel entrances. (Tr. p. 9).

The Medical records show that Petitioner consistently gave the same mechanism for her accident and injury which was that she tripped on carpet. Petitioner gave the same history of accident to Respondent's Occupational Clinic and Dr. Tu. (PX1 and PX2) The Occupational Clinic records report the description of the accident as "walking rapidly on carpet at work when I felt a pop in my knee," and the work status form states, "severe left knee pain after tripping at work no fall reported." (PX1). The history in Dr. Tu's notes stated, "she was walking quickly in between the floor and she tripped over the junction on the hard floor and the carpet." (PX2). Respondent questioned Petitioner about the differences between the descriptions. Although the records have slight differences, the medical records were not prepared in anticipation of litigation and the differences are negligible. Both histories state that Petitioner was walking rapidly or quickly when she tripped.

In addition to Petitioner's testimony and treatment records, Respondent's Exhibit 4, the supervisor's accident report documented that Petitioner was walking in a hurried manner causing an unsafe work practice as testified to by Respondent's witness, Ms. Wnek. (Tr. pp. 72-73, RX4). Further, the report listed suggested training for Petitioner to prevent future accidents and safety concerns. (Tr. pp. 73-74, RX4). Respondent's witness acknowledged that employees that work in a hurried manner are more likely to suffer injuries. (Tr. pp. 73-74).

Respondent's witness, Ms. Wnek, was simply not credible when testifying about Petitioner's accident. First, Ms. Wnek did not witness the accident and only spoke to Petitioner following the injury occurred. (Tr. pp. 13,39). Additionally, Ms. Wnek testified that she does not speak Spanish and did not use a translator when she spoke to Petitioner about the accident (Tr. pp. 63-64). However, Ms. Wnek testified that she would use translators for important employee meeting with Petitioner and her co-workers. (Tr. pp. 63-64). Apparently Ms. Wnek did not feel that an accident investigation was important enough to have a translator for her discussion with Petitioner.

Further, Ms. Wnek testified that she did not take pictures of the walkway leading to the Starbucks submitted as Respondent's Exhibit 5, because it was not her understanding of where the Petitioner tripped. (Tr. pp. 69-70). This is not credible since the records from Respondent's Occupational Clinic list the description as walking rapidly on carpeting and Ms Wnek was listed as a company contact. Therefore, Ms. Wnek would have reviewed the Occupational Clinic records as part of the accident investigation. As the site HR Director, Ms. Wnek would have been aware after Petitioner's treatment at the Occupational Clinic on April 12, 2018, that Petitioner tripped on carpeting. However, Ms. Wnek choose to take photographs that were limited in scope, without providing a picture of the run off mat that she testified was at the entrance of the hotel. Further, Ms. Wnek could not accurately testify as to when she took the photographs, only that they might have been taken the day of, or the day after, or within a few days. (Tr. p. 69).

Additionally, Ms. Wnek's testimony regarding the surveillance video was not credible. The view was a downward angle inside Starbucks and Petitioner was only visible through a small window. On cross-examination, Ms. Wnek testified that based on her interpretation of the video, the Petitioner did not appear to be hurrying although Petitioner was only visible for a few seconds. (Tr. p. 78). The surveillance video provided a limited and brief view of the Petitioner.

In fact, the surveillance video does not even show the actual floor at the moment the Petitioner is seen tripping. (PX7). Therefore, it is impossible from the surveillance video to see whether there was a mat at the point where Petitioner tripped. (PX7).

Much of Respondent's argument against finding accident is that Petitioner gave conflicting statements about the nature of her tripping incident. Respondent is correct that all of the various accounts do not perfectly align in terms of words chosen, descriptions used, or exact location where Petitioner tripped. The Arbitrator finds, however, that this is an exercise in splitting hairs and will not let the perfect defeat what amounts to good evidence in Petitioner's favor. Petitioner claimed she was in a hurry and tripped in such a manner that she hurt her knee while going to fetch lids as part of her job. She reported the incident, was treated near in time to the injury and was in fact hurt. The vast majority of all evidence in the record aligns with Petitioner's account of what happened.

Petitioner's testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu where consistent and credible. Similar to the O'Fallon, Nascote Indutries and William G. Ceas cases discussed above, Petitioner was engaged in activity on behalf of the employer that increased her risk of injury beyond the risk to the general public. In this case, Petitioner was working in a hurried manner carrying cups and lids as was testified to by Petitioner and Respondent's witness. Moreover, Petitioner was engaged in activities directed by her supervisor. Further, Petitioner accident was documented in the Respondent's supervisor report as the result of working in a hurried manner.

Based upon all of the above, the Arbitrator finds that the Petitioner suffered a left knee injury that arose out of and in the course of her employment, as a result of the work related accident of April 12, 2018.

B. Respondent's Exhibits 6(a) and 6(b) Were Properly Admitted as Evidence By the Arbitrator As an Admission by a Party Opponent

Under the Illinois rules of evidence, proper foundation must be laid to show authentication and identification for audio recordings to be admitted as evidence. Geary & Graham's Handbook of Illinois Evidence 9th Edition. Sound recordings of voices are authenticated if a proper foundation is laid, including the identification of the speakers. Id. Further, a transcript of the sound recording may be admitted in evidence if a sufficient

foundation is presented establishing the accuracy of the transcript and the identity of the speakers. Id. Communications by telephone do not authenticate themselves; the person speaking must be identified. Id.

Relevant and material audio recordings are admissible "if a proper foundation has been laid to assure the authenticity and reliability of the recording." People v. Viramontes, *410 Ill.Dec. 221, 69 N.E.3d 446 (2017)* citing, People v. Aliwoli, *238 Ill.App.3d 602, 623, 179 Ill.Dec. 515, 606 N.E.2d 347 (1992).* A sufficient foundation is laid when "a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." Id. citing In re C.H., *398 Ill.App.3d 603, 607, 339 Ill.Dec. 139, 925 N.E.2d 1260 (2010).*

In a recent case before the commission concerning proper foundation, Dinaz Ravji v. United Airlines, Inc., *No. 05 W.C. 54051, No. 12 I.W.C.C. 0094, (2012)* the Illinois Workers Compensation Commission ruled that the Arbitrator was in error to admit still photographs from surveillance video introduced as exhibits by Respondent. In Ravji v. United Airlines, Respondent argued that the foundation was laid when Petitioner identified herself in the video; however, the commission disagreed citing People v. Flores 406 Ill.App.3d 566, 941 N.E.2d 375 (2010).

The court in Flores found that the trial court improperly admitted a video. The court opined that witness testimony was sufficient foundation for admission of the videotape for use as *demonstrative* evidence, and the court cited M. Graham, Geary & Graham's Handbook of Illinois Evidence as follows: "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time [.]" [citation omitted] Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. However, the Flores court noted that foundation for admitting the tape to be used as *substantive* evidence, however, required "something more rigorous than the witnesses' testimony that the video in evidence truly and accurately depicted that which it purported to depict." 406 Ill.App.3d at 576, 941 N.E.2d at 384. The court indicated that, "visual recordings, when treated substantively, are real evidence requiring a proper foundation, including evidence that the proposed exhibit is substantially unaltered." Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. The witness testified

that the copy he produced was altered because he omitted portions from the original tape. The court held that the trial court abused its discretion when it considered the tape as substantive evidence, and stated that "an adequate foundation must show that the original has been preserved without change, addition, or deletion and that, if a copy is introduced into evidence, there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." Flores, 406 Ill.App.3d at 577, 941 N.E.2d at 385.

In the present matter before the arbitrator, Respondent's Exhibits 6(a) and 6(b) are a recorded audio statement with a translator and a transcript. At the hearing on October 23, 2018, Respondent did not lay a proper foundation to admit the recorded statement, translation and transcript. Respondent did not provide a witness to testify to the authenticity and accuracy of the recorded statement. The speakers on the recorded statement were not identified. Respondent did not provide a witness to testify about the accuracy of the Spanish to English translation of the recorded statement or the transcript. Further, because Respondent did not have a witness, Petitioner was not afforded the opportunity to cross-examine the individuals responsible for creating the recorded statement. Additionally, Petitioner could not cross-examine the translator with respect to his or her qualifications.

Respondent argued at Arbitration that Petitioner testified that she gave a statement and therefore it was an admission by a party opponent. (Tr. p. 24) Further, Respondent's counsel argued at Arbitration that Petitioner admitted it was her on the recorded statement. (Tr. p. 84) The Arbitrator finds this admission by a party opponent sufficient to admit the recorded statement into evidence despite the lack of foundation testimony that was outlined in the discussion above.

Based upon all of the above, the Arbitrator finds that Respondent's Exhibits 6(a) and 6(b) were properly admitted at Arbitration and should not be stricken from the record.

Regarding Issue (F)

Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial

Comm'n,207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The "arising out of" component for obtaining compensation under the Workers' Compensation Act is primarily concerned with causal connection; to satisfy that requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.(Id.) Claimant need only prove some act or phase of his employment was a causative factor in the ensuing injury to recover benefits under the Act. He need not prove it was the sole causative factor, nor even that it was the principal causative factor of his injury. Republic Steel Corp. v. Industrial Comm'n, *et al.*, 26 Ill.2d at 45, 185 N.E.2d at 884 (1962).

Petitioner testified that on April 12, 2018, she was hurrying to the Starbucks in Respondent's hotel to get cups and lids for guests when she tripped on mat causing injury to her left knee. (Tr. p. 8). Petitioner testified that when she tripped, her left leg went to the side and she heard a pop followed by immediate pain. (Tr. pp. 8-9).

Petitioner testified that Respondent sent her by taxi to Advocate Occupational Health on the same day of the accident. (Tr. pp. 13-14). The records indicate that Petitioner was walking rapidly on carpet when she tripped injuring her left knee. (PX1). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18). Petitioner testified that she has not been able to have the surgery because the insurance did not authorize it. (Tr. pp. 16-17).

Respondent offered no rebuttal testimony or medical evidence regarding Petitioner's need for left knee surgery as recommended by Dr. Tu.

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury. This is supported by the medical records and opinions of Petitioner's testimony at trial, the treaters at Advocate Occupational Health and Dr. Tu.

Regarding Issue J:

Were the Medical Services Reasonable and Necessary, The arbitrator holds the following:

For all the reasons stated above, Petitioner suffered a work related injuries on April 12, 2018. As a result of those injuries, Petitioner has the following unpaid medical bills:

Provider	Dates of Service	Balance
Advocate Occupational Health	4/12/2018	$387.00
Dr. Kevin Tu	5/10/2018 to 9/20/2018	$1,820.00
Premier Imaging & Open MRI	5/15/2018	$1,626.03
Total Rehab	5/29/2018 to 6/29/2018	$6,141.00
	Total outstanding:	**$9,974.03**

Petitioner had admitted medical bills from Advocated Occupational Health (PX1) that had a balance of $387.00, Dr. Kevin Tu (PX2) with a balance of $1,820.00, Premier Imaging and Open MRI (PX3) with a balance of $1,626.03, and Total Rehab (PX4) with a balance of $6,141.00. Petitioner's treatment at Advocate Occupational Health was at the direction of and authorized by Respondent. (PX1) Respondent's clinic directed petitioner to follow up with an orthopedic doctor, which is Dr. Tu. (PX1) The MRI for her left knee was ordered, by Dr. Tu, Petitioner's treating physician. (PX2) The physical therapy at total rehab was recommended by Dr. Tu. (PX4).

In sections C and F above, the Arbitrator found that Petitioner did suffer a work related injury and her condition of ill being is causally connected to that injury. Respondent did not produce any medical opinions or testimony. Therefore, based upon the totality of the evidence, including medical opinions, and witness testimony, the Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injury

and the Arbitrator awards the $9,974.03 of the medical bills listed above, as provided in Sections 8(a) and 8.2 of the Act.

Regarding Issue K:

Is Petitioner entitled to any Prospective Medical Care?

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for. Plantation Manufacturing Co. v. Industrial Comm'n, 294 Ill.App.3d 705, 710, 229 Ill.Dec. 77, 691 N.E.2d 13 (1997).

The ability for the Commission to award and order prospective was also decided in Homebrite Ace Hardware v. Industrial Commission 351 Ill.App.3d 333, 814 N.E.2d 126 (2004), and the court relied on Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill.App.3d 650, 655–56, 239 Ill.Dec. 767, 714 N.E.2d 1064 (1999), the court held that the Commission's order directing the employer to provide written authorization for a prescribed surgery was proper.

In the current case before the Arbitrator, Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. (PX10). Respondent has not provided any rebuttal medical evidence or testimony.

The arbitrator found in sections C and F that an accident occurred on April 12, 2018, that arose out of and in the course of Petitioner's employment by Respondent and Petitioner's left knee injury and current ill-condition is causally related. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

Regarding Issue L:

What temporary benefits are in dispute? The Arbitrator finds the following:

A claimant is entitled to TTD when a "disabling condition is temporary and has not reached a permanent condition." Manis v. Industrial Comm'n, 230 Ill.App.3d 657, 660, 172 Ill.Dec. 95, 595 N.E.2d 158, 160-61 (1st Dist. 1992) The time during which a claimant is

temporarily totally disabled is a question of fact for the Commission; and to be entitled to TTD, claimant must prove not only that he did not work but that he was unable to work. City of Granite City v. Industrial Comm'n, 279 Ill.App.3d 1087, 1090, 217 Ill.Dec. 158, 666 N.E.2d 827, 828-29 (5th Dist. 1996). The dispositive test is whether the condition has stabilized, because the Commission reviews the evidence to ascertain whether claimant has reached maximum medical improvement, *i.e.,* the condition has stabilized. Beuse v. Industrial Comm'n, 299 Ill.App.3d 180, 183, 233 Ill.Dec. 453, 701 N.E.2d 96, 98 (1998).

Petitioner testified that she was sent by Respondent to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health, the treaters ordered her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3).

Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

Petitioner's medical records from Advocate Occupational Health and Dr. Tu all demonstrate that Petitioner was kept off work or on restricted duty beginning April 12, 2018. (PX1, PX2). Petitioner testified that she faxed her restrictions to Respondent, but she was not offered light-duty work and she has not received any Workers' Compensation disability pay. (Tr. pp. 15-17).

The Arbitrator holds, for the reasons stated in the "Accident", "Causation" and "Prospective Care" sections and based upon all testimony and medical evidence, Petitioner is awarded temporary total disability (TTD) benefits from April 13, 2018, up to the date of trial or 27 and 5/7 weeks times Petitioner's TTD rate of $398.62 per week (AWW of $597.94 as stipulated, Arb EX1) for a total of $11,047.35 in TTD benefits due.

CONCLUSION

In conclusion, the Petitioner's testimony was credible and convincing. Petitioner's medical records and testimony corroborate that she injured her left knee working for Respondent on April 12, 2018. The Arbitrator finds that Petitioner was injured in the course of her employment with Respondent on April 12, 2018.

The Arbitrator finds that Petitioner proved that her left knee injuries were caused by the work accident of April 12, 2018. The Arbitrator holds that Respondent shall authorize Petitioner's recommended left knee surgery, post-surgery physical therapy and other related post-surgical medical treatment as provided in Section 8(a) Act.

The Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injuries and the Arbitrator awards the $9,974.03 of medical bills listed in Section J above, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator finds that Petitioner is owed temporary total disability (TTD) benefits due and owing of $11,047.35 for the period of disability from April 13, 2018, up to the date of trial on October 23, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK TANTILLO,

Petitioner,

21IWCC0165

vs. NO: 12 WC 34352

PTO SERVICES, INC., and the
ILLINOIS STATE TREASURER as
EX-OFFICIO CUSTODIAN of the
INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, benefit rate, wages, temporary total disability benefits and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's award regarding causation and the duration of temporary total disability benefits. However, the Commission modifies the calculation of the average weekly wage as well as the amount of permanency and medical benefits awarded.

The Commission disagrees with the Arbitrator's finding that Petitioner's working overtime was mandatory. At no point did the Petitioner testify that overtime was mandatory, but only that he worked approximately 55 hours per week. (T. 18) Additionally, although the wage statements entered into evidence between December 16, 2011 and June 15, 2012 reflect some overtime in 21 out of 27 pay periods, the number of hours worked are not regular and vary significantly. (Px14)

In *Airborne Express*, the Appellate Court found, that overtime should not have been

included in the claimant's average weekly wage because, "Although the claimant consistently worked overtime he did not work a set number of overtime hours each week." *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n (Bronke)*, 372 Ill. App. 3d 549, 555, 865 N.E.2d 979, 985 (1st Dist. 2007).

The same rationale applies in the instant case. Although Petitioner may have worked *some* overtime based on the evidence presented, the hours were not consistent and no evidence was presented that overtime was mandatory. Therefore, the Commission finds that Petitioner's average weekly wage is $17.90 x 40 hours per week = $716.00.

Regarding the medical bills, Petitioner failed to prove that the Prescription Partners charges contained in Px21 were reasonable, necessary and causally related to the accident of June 2, 2012. Petitioner's claims include $5,079.35 in charges from Prescription Partners. However, there are several problems with the bill of Prescription Partners:

1) It lists a date of injury of June 1, 2013 – not the date of accident that is at issue in this case – June 2, 2012.
2) The first Date of Service listed is June 27, 2013.
3) It is for medication dispensed by Dr. Howard Freedberg at Suburban Orthopedics. There are no treating records from this provider in evidence.
4) This record only lists *total amounts* per date of service and *NOT an itemized list* of prescriptions that were dispensed. Therefore, there is no way to know how, if at all, these charges are related to Petitioner's work accident on June 2, 2012.

We next modify the Arbitrator's award of permanency. The following is our analysis of Petitioner's permanent partial disability under §8.1b(b) of the Act:

i) No AMA impairment rating was submitted so we give this no weight.

ii) The Arbitrator gave "significant weight" to Petitioner's testimony that that he "is not able to pursue higher paying jobs due to his medical condition." However, there is no evidence of this. Petitioner was released to full duty with no restrictions for both his cervical and right shoulder. The Commission therefore only gives this factor some weight.

iii) The Arbitrator gave "greater" weight to this factor and concluded that Petitioner was an older individual whose disability "will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations." Although Petitioner testified that he takes an occasional Meloxicam and rubs "horse liniment" on his shoulder and neck area "every couple days" in the winter (T. 41-43), most of his testimony focused on how his disability affected his outside hobbies. The Commission gives this factor some weight.

iv) The Arbitrator found that Petitioner's "earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting," the Arbitrator gave "greater" weight to this factor.

Petitioner was released with no restrictions. Petitioner testified that he currently works at a job where he does paperwork and doesn't drive very much. (T.44-45, 52) However, Petitioner failed to prove that his decision regarding where to work has been anything other than a personal choice. Petitioner testified:

> Q: How has your earning capacity been impacted by the shoulder and neck injury of 2012?
>
> A: Well, it hurt due to the fact that I can't pass a test to drive for Holland or UPS and they call me all the time because I have an excellent driving record.
> But I know I can't pass the physical capacity test and lift 140 pounds or lift 80.
>
> I am getting paid $24 an hour now.
>
> Q: What are they paying at UPS or Holland?
>
> A: I think it's $29.30 and XPO that's a non-union company, they're paying $30.45.

Petitioner testified that he "can't pass a test to drive", but no evidence was introduced regarding the requirements of said test. Assuming the "test to drive" refers to the DOT test, no evidence was presented regarding those test requirements. Since Petitioner was released without restrictions, this testimony does not support a finding of a reduction in earnings capacity. Petitioner's claim that he is presently earning $24 per hour but could possibly be earning $29+ elsewhere is self-serving speculation. The Commission therefore gives this factor little weight.

v) The Commission modifies the last paragraph of page 12 of 13 of the Arbitrator's decision regarding factor "(v)" as follows:

> The Commission adds the phrase "as per the opinions of Drs. Burra and Lorenz" to the first sentence after the word "accident".
>
> The Commission further modifies that paragraph and adds the following:
>
> Although Petitioner's cervical issues resolved as Dr. Lorenz noted at the time of Petitioner's office vision on April 8, 2013, Petitioner sustained a SLAP-type tear of the superior labrum with the tear extending into the proximal biceps tendon as corroborated by a high resolution MRI arthrogram performed on August 28, 2012. Notwithstanding the fact that the office visit note dated January 5, 2013 authored by PA David Tan indicates "the high field arthrogram study noted no full thickness rotator cuff tendon tears and we do not believe he would be a candidate for a shoulder arthroscopy at this time," said note also reflects that "the

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definitive treatment for him would be a total shoulder arthroplasty at some point in the future."

The remainder of the paragraph remains unchanged.

As the Commission finds that Petitioner sustained a SLAP lesion and not a rotator cuff tear, the Commission reverses that finding by the Arbitrator. The Commission further vacates the award of 20% loss of a person as a whole. Based on its finding that the Petitioner sustained an unoperated SLAP lesion, the Commission awards Petitioner 10% loss of a person as a whole.

Additionally, the Commission awards 2.5% loss of a person as a whole based on the unoperated cervical radiculopathy. Although Petitioner's first EMG on September 14, 2012 showed "marked abnormality with respect to the C5-6-7 roots," the second EMG on March 22, 2013, did "not reveal any active denervation in the Rt C5, C6 or C7 distribution. [P's] strength has significantly improved and his pain has improved in the Rt arm, although not totally so."

Based on the above, we find that Petitioner has sustained the loss of use of 12.5% of the person-as-a-whole under §8(d)2 of the Act. Since we have found that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $716.00, his weekly permanent partial disability rate is $429.60.

Furthermore, the Commission modifies the award for medical expenses from $33,695.24 to $28,615.89 as the Commission finds that the Petitioner failed to prove the Prescription Partners bill was related to the accident of June 2, 2012.

In addition to the foregoing, the Commission corrects the following scrivener's errors contained in the Arbitration Decision:

1) In the first sentence of the sixth full paragraph on page 4 of 13, the Commission corrects the date to "July 26, 2012", from July 23, 2012.

2) In first sentence of the first full paragraph on page 10 of 13, the Commission corrects the date to "July 26, 2012", from August 22, 2012.

3) In the last sentence of the paragraph under issues (H) and (I), contained on page 11 of 13, the Commission deletes the word "not" in regard to Petitioner's marital status.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $477.33 per week for a period of 52 3/7 weeks, from September 1, 2012, through September 2, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

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the sum of $429.60 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,615.89 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 020921
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TANTILLO, PATRICK
Employee/Petitioner

Case# **12WC034352**

21IWCC0165

PTO SERVICES INC AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKER BENEFIT FUND
Employer/Respondent

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
ANTIA M DeCARLO
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0000 PTO SERVICES INC
1000 JORIE BLVD
SUITE 228
OAK BROOK, IL 60521

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

21IWCC0165

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Patrick Tantillo
Employee/Petitioner

Case # **12** WC **34352**

v.

PTO Services, Inc. and the Illinois State Treasurer as Ex Offico Custodian of the Injured Worker Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other - Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer

FINDINGS

On **June 2, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**50,288.16**; the average weekly wage was $**967.08**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**644.72**/week for **52 3/7** weeks, commencing **September 1, 2012** through **September 2, 2013**, as provided in Section 8(b) of the Act

Respondent shall be given a credit for any temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $**33,695.24**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**580.25**/week for **100** weeks, because the injuries sustained caused the **20**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 – 2019

FACTS:

Petitioner filed an original Application for Adjustment of Claim on October 3, 2012 alleging an injury to his "right arm (shoulder) & neck" while working for his employer, P.T.O. Services, Inc. on June 2, 2012. The Application for Adjustment of Claim was mailed to the Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 on October 3, 2012. In response to that filing, Chilton, Yamber, Porter, LLP (hereinafter "Chilton") filed an Appearance on behalf of P.T.O. Services, Inc. with the Illinois Workers' Compensation Commission.

Petitioner filed a Stipulation to Substitute Attorneys on February 2, 2017 which was sent to Chilton, on behalf of P.T.O. Services, Inc. on March 1, 2017 (PX 2 & 3).

The Illinois Workers' Compensation Commission sent a Notice of Hearing to the employer Chilton, on behalf of P.T.O. Services, Inc. by mail on July 10, 2017. (PX4). The Notice contained the following language: "This is a legal notice informing you that the Petitioner has filed a case with the IWCC for workers' compensation benefits. Employers, forward this notice to your insurance carrier or attorney."

On June 15, 2017, Chilton filed a Motion to Withdraw as the Attorney of Record for P.T.O. Services, Inc. citing the reason: "Our firm filed an appearance in this case on behalf of and at the request of P.T.O. Services, Inc. to protect it against any potential workers' compensation exposures in this case. Per the attached exhibit #1, P.T. O. Services, Inc. voluntarily officially dissolved as a corporation with the Secretary of State on April 17, 2017 and no longer exists, and our firm has no client remaining." (PX5). Based on this Motion, Chilton obtained an Order allowing them to withdraw as the attorney of record in this matter.

On July 7, 2017 an Amended Application for Adjustment of Claim naming "State Treasurer & ex officio-custodian of the Injured Workers' Benefit Fund was filed with the Illinois Workers' Compensation Commission. (PX6). On July 11, 2017 Petitioner filed a Request for Information on Employer's Insurance Coverage which was returned 07/12/2017 an indicated that there was no insurance coverage on the date of accident. (PX 7).

On January 17, 2018, Petitioner filed a Request for Hearing before Arbitrator Erbacci on March 1, 2018, with notice to the Respondent, P.T.O. Services Inc at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX8). The case was set for trial on March 12, 2018 and Respondent P.T.O. Services, Inc. failed to appear on that date. That same day, the Arbitrator specially set this matter for Hearing on June 7, 2018. Due to a clerical error, the Arbitrator dismissed this matter that same day. The Commission issued a Notice of Case Dismissal on March 13, 2018, which was sent to P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX9).

On March 20, 2018, Petitioner sent a certified letter to Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 detailing that this matter is specially set for trial on June 7, 2018 along with a Motion to Reinstate the Case. (PX10 & PX11). These items were delivered to P.T.O. Services, Inc. on April 2, 2018. (PX10).

On the trial date, June 7, 2018 the Arbitrator reinstated the case. Petitioner and IWBF were present with their attorneys and Respondent PTO Service, Inc. failed to appear. This

matter was set for trial on 09/17/2018. Due to a clerical error notice was not sent to PTO Services and this matter was continued by Email to December 7, 2018.

On September 7, 2018 a letter was sent to PTO Services Inc at 1000 Jorie Blvd, #228, Oak Brook, IL 60521 advising of a trial date of December 7, 2018 by regular and certified mail. Both mailings were returned to sender. (PX 23). Further, on September 11, 2018, Petitioner filed a Notice of Motion Request for Hearing requesting the agreed trial date of December 7, 2018. Respondent P.T.O. Services, Inc. failed to appear on December 7, 2018 and the case proceeded ex-parte.

Petitioner presented a Certification from NCCI confirming that P.T.O. Services, Inc. did not have insurance on the date of accident, June 2, 2012. (PX 12).

Petitioner testified that he was an employed as a commercial truck driver with P.T.O. Services, Inc. on the date of accident, June 2, 2012. He submitted a copy of his job description obtained from P.T.O. Services, Inc. Driver Hiring Policy updated March 24, 2010. (PX13). This job description confirms that he was hired to "operate 26,000+ lb. trucks on interstate and/or intrastate routes: arrange, load, transport and unload freight." (PX13). Petitioner also submitted a compensation report from P.T.O. Services, Inc. for the period of October 23, 2011 to June 23, 2012. (PX14). Further, Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He also testified that he worked on average 48 hours every week. He worked overtime 21 of the 27 weeks prior to his accident and working overtime was mandatory.

Petitioner was driving his route as an employee of P.T.O. Services, Inc. on June 2, 2012 when he attempted to open the rear of his trailer. He was forced to use a crowbar in order to open the jammed metal doors. While prying the doors open he fell forward, striking his head and body on the open doors. He notified his supervisor, Tom, the same day, June 2, 2012.

Petitioner first sought medical treatment on June 5, 2012 with his Rheumatologist, Dr. Alnadjm. (PX15). Of note, Petitioner began treating with this doctor prior to this accident, on April 17, 2012. At that time, Petitioner complained of right shoulder pain, however the hand written notes seem to suggest the doctor believed there to be an issue with the biceps tendon. On June 5, 2012, the first visit following his work related injury, Dr. Alnadjm noted "R shoulder pain. Crowbar slipped at work on 6-2-12 and now has a hard area by neck." (PX15). That same day, he prescribed an MRI of the neck and shoulder. Further, it appears at the bottom of the hand written page the doctor administered a cortisone injection. Petitioner followed up with Dr. Alnadjm on July 23, 2012 and was referred to Southside Orthopedics. (PX15).

Petitioner went to Southside Orthopedics on July 23, 2012. He was diagnosed with severe degenerative joint disease of his right shoulder. Further, the doctor opined: "I think you can blame all his shoulder symptoms on these changes with some exacerbation from the crow bar incidences." The doctor noted that since Petitioner did not get much benefit out of the cortisone shot, he is probably at the end stage disease. Lastly, the doctor referred him to Hinsdale Orthopedics to explore the option of a total shoulder replacement. (PX16).

Dr. Alnadjm again prescribed an MRI to the shoulder on July 31, 2012. (PX15). An MRI was performed on the cervical spine, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative change in the cervical spine with multilevel disc disease.

2. At C2-3, left peridiscal posterior osteothytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C3 nerve root.

3. At C3-C4, 2 mm broadbased posterior disc protrusion with peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in bilateral neural foraminal enchroachment and abuts the exiting C4 nerve roots, more on the left side.

4. At C4-C5, 2 mm posterocentral disc protrusion with small peridiscal posterior osteophytes (hard discs). There is no central canal or neural foraminal stenosis.

5. At C5-C6, subtle diffuse posterior disc bulge and small peridiscal posterior osteophytes (hard discs). No central canal stenosis or neural foraminal stenosis.

6. At C6-C7, 4 mm broadbased posterior disc protrusion indents the thecal sac and abuts the cord. The disc protrusion with small peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C7 nerve root. (PX17)

An MRI was performed on the right shoulder, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative disease of the glenohumeral and acromioclavicular joints with large effusion. Areas of marrow edema adjacent to these joints. Clinicopathological correlation is suggested to rule out possibility of infective etiology.

2. Supraspinatus tendinosis with no evidence of tear.

3. Type II acromion process with acromioclavicular joint arthropathy this results in impingement.

4. Collection in the subcoracoid and subscapularis bursa.

5. Diffuse degeneration of the glenoid labrum.

6. Biceps tendon tenosynovitis. (PX17)

Dr. Alnadjm reviewed the MRI on August 7, 2012 and released him into the care of an orthopedic surgeon. (PX15). Petitioner first treated with Hinsdale Orthopedics, at the request of Dr. Alnadjim, on August 22, 2012. (PX18A). Hinsdale details his history of accident as follows:

He is a right-hand dominant truck driver. He drives a spotting Jeep which essentially takes trailers and lifts them on hydraulics, and he as to position them into a dock and then open the doors. Of late, he has been handling the same Jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open these doors, and in the process of doing so, he has had a few injuries the most recent being a slipping injury where the crowbar slipped forward and his arm essentially

> impacts as it slipped and crashed against the shipping container. He described a series of 3 injuries which happened on March 24, 2012, June 2, 2012 and June 9, 2012. All of these are associated with these stuck doors when he was prying open with this crowbar. Consequent to this he has developed significant pain in his right shoulder. While he has had other problems on the rest of his body he had never had any for a problem with his right shoulder. He used to swim. He used to play recreational softball and baseball and other athletic activities without any problems and he has also been performing his job without any problems until this present situation. He does complain of some neck pain which appears to be resolving. At this point, he does not have any paresthesias or weakness on the right side. In the course of his development of symptoms he has also noticed that he is developing significant scapulothoracic pain and loss of range of motion. (PX18A).

Dr. Burra performed a complete examination including reviewing the MRI images. He noted a bulge at C3-4 with neural foraminal encroachment on the left; some changes at C4-5 and C2-3; and the most significant issue at C6-C7 with a 4 mm posterior disc protrusion that his encroaching on the left neural foramen. He noted the MRI of the shoulder revealed a significant amount of atrophy changes and streaking in the infraspinatus and osteophyte formation and chondral pathology was quite evident. Based upon same, Petitioner was diagnosed with a rotator cuff tear and glenohumeral arthritis. In order to confirm the rotator cuff tear, a high field MRI arthrogram was prescribed. Further, Dr. Burra noted that a total reverse total shoulder could be required. (PX18A).

The high field MRA was performed by Hinsdale Orthopedics on August 28, 2012 and found: "(1) SLAP type of superior labrum with the tear extending into the proximal biceps tendon. (2) Severe glenohumeral osteoarthritis with virtually complete absence of articular cartilage and subchondral cysts in the humeral head. (3) Supraspinatus tendinosis but no full thickness tears. (4) Inferiorly projecting AC arthrosis with an acquired type III acromion. (5) Degeneration of the inferior remainder of the glenoid labrum." (PX18A). At his follow up appointment on September 14, 2012, Dr. Burra diagnosed a partial-thickness tear of the supraspinatus with approximately 75% atrophy of the supraspinatus, a longitudinal tear of the biceps, a SLAP tear of the labrum and severe glenohumeral space narrowing with virtual absence of articular cartilage. In addition, an EMG with neurology consult was prescribed in order to determine if there is any neurological compromise to his supraspinatus which could be causing the atrophy. (PX18A).

Petitioner followed up with Hinsdale orthopedics on September 25, 2012. At that time, Dr. Burra reviewed his neurological consultation and EMG. The EMG revealed "evidence of right sided C5-6 radicular process. Based on the fact that there is some denervation of the tricep muscle, there may be some degree of C7 involvement as well. Not only are there findings of ongoing denervation corresponding to the described myotomes, but there is also evidence of chronic neurogenic change in these myotomes." Based upon same, Dr. Burra diagnosed "Disc Disease: Cervical" and prescribed "immediate spine consult before going forward with treatment for the right shoulder." He was again prescribed to be off work. (PX18A).

On October 17, 2012, Hinsdale Orthopedics noted complaints of fatigue and weight change. Petitioner was instructed to follow up with his PCP and remain off work. (PX18A).

Dr. Lipov from Oak Brook Surgical Center examined Petitioner on November 2, 2012 and diagnosed cervical radiculopathy with pain in the neck and right arm. That same day, he performed a cervical epidural steroid injection at C5-C6. (PX20).

On November 5, 2012, Dr. Burra again discussed the continuing right shoulder diagnosis of a SLAP lesion, bicep tendnitis, impingement, ACJ pain, PRCT with atrophy from neurological process, glenohumeral OA. However, he could not address the conditions with surgery until the neurological issues had been fully addressed. Petitioner was prescribed off work and to continue his spine and neurologic treatment. (PX18A).

Petitioner saw Dr. Lorenz at Hinsdale Orthopedics on November 21, 2012 and was diagnosed with: "1.Rotator Cuff Tear. 2. SLAP lesion. 3. Radiculopathy C5, 6, and 7 on the right which is really quite severe with nerve atrophy." Further, he was prescribed a myelogram and post Myelogram CT and to remain off work. (PX18A).

The CT of the cervical spine was performed at Hinsdale Hospital on December 7, 2012. It revealed: "broad based left paracentral disc protrusion at C6-C7 with resulting moderate spinal stenosis and broad-based central disc osteophyte complex at C3-C4 resulting in mild spinal stenosis. (PX19). Further, his final diagnosis from Hinsdale hospital that day was "brachial neuritis or radiculitis NOS." (PX19).

Dr. Lorenz reviewed the Myelogram on December 10, 2012 and noted "spinal stenosis most predominantly at C6-7 but also at C5-6 with fairly significant degenerative changes. L4-5 is only mild." Lorenz prescribed a decompression at C5-6 and C7; a second opinion with Dr. Franczak and continued off work. (PX18A).

Dr. Burra examined the shoulder again on January 5, 2013. Despite, Petitioner's reported improvement with strength and pain, the doctor noted that a total shoulder arthroplasty would be necessary at some point in the future. In an attempt to immediately address the pain, Burra performed cortisteroid injections to the primary pain generators in the biceps tendon and subacromial space, prescribed physical therapy and continued off work. (PX18A).

At Petitioner's follow up on April 9, 2013 with Hinsdale Orthpedics he reported 25% improvement of shoulder pain. His right shoulder diagnosis on that date was bicep tendinitis, impingement, ACJ pain and glenohumberal OA. Based upon his response to the injection, surgery may be appropriate to address the bicep, impingement and ACJ narrowing. However, Dr. Lorenz needs to provide clearance before proceeding with surgery. Lastly, he was again restricted from any kind of work. (PX18A).

Dr. Lorenz examined Petitioner on April 18, 2013 and noted that his cervical radiculopathy resolved and prescribed a functional capacity assessment to determine work limitations, if any, with the cervical spine. He further indicated the cervical issues were not an impediment to shoulder surgery by Dr. Burra. (PX18A).

On May 6, 2013, Dr. Burra addressed the right shoulder again. The best way to address his pain generators is to proceed with an arthroplasty of the right shoulder however Patrick does not want to proceed due to the potential effect on his ability to return to work. Dr.

Burra agreed with Lorenz' prescription for a functional capacity assessment to determine functional abilities and to remain off work until the results were reviewed. (PX18A)

On July 9, 2013 Petitioner returned to Dr. Burra for continued deep shoulder pain. As a result, a series of synvisc injections were prescribed, the first ultrasound guided injection on the right glenohumeral was performed on this day. Further, Petitioner remained off work and the FCA was put on hold until all three injections were performed. (PX18A).

The second ultrasound guided injection of the right subacromial space was performed on July 16, 2013 and the off work note was extended. The third and final viscosupplementation injection with Synvisc into his right shoulder on July 22, 2013. The doctor released him to return to modified duty on July 23, 2018. (PX18A). However, Petitioner testified that a light duty job was not offered at that time.

On August 8, 2013 the Functional Capacity Evaluation prescribed by both Dr. Burra and Dr. Lorenz was performed at Newsome Work Performance Center. The evaluation found: "This job specific evaluation was performed using a 100% kinesiophysical approach and Mr. Petitioner demonstrated the ability to perform 0.00% of the physical demands as a Truckdriver." (PX18A). However, Mr. Petitioner also "demonstrated the physical capabilities and tolerances to perform within the HEAVY physical demand level based on an occasional lift/carry of 80 lbs. and a frequent lift of 45 lbs. from floor to waist." (PX18A). Lastly, the evaluation concluded that Petitioner was putting for "maximum effort" during the testing. (PX18A). After reviewing the FCE, he was returned to work full duty, for his cervical condition on, August 14, 2013. It was specifically noted that he was not released to return to work for his shoulder condition. He returned to Hinsdale Orthopedics on August 27, 2013 and was returned to work full duty, for his shoulder condition. Specifically, it was noted that he continues to have limitations on range of motion. The doctor specifically noted Petitioner's motivation to return to work full duty. Further, the injections were expected to "work well for at least 6-8 months" but he "may be a candidate for a future series" depending on symptoms or "to postpone or avoid any total joint replacement." (PX18A).

Petitioner testified that he is currently employed as a truck driver but he is working in a supervisory capacity. He performs limited driving and no lifting in his position. His earnings are similar to what he was earning at the time of his accident. However, he did note that his earnings were impaired due to his lifting limitations. He is unable to pursue higher paying jobs as a truck driver due to his inability to lift and load cargo into the trucks.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (A.), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds and concludes as follows:

Petitioner testified that he began working for Respondent-Employer, P.T.O. Services, as a commercial truck driver in December 2011. He further testified that the Respondent-Employer was in the freight business stationed in Minooka, Illinois, and it delivered freight to various places all over the country. As a commercial truck driver, Petitioner drove trailers to various locations, then picked up

trailers from other locations. He also acted as a spotter, which involved opening shipping containers and moving the contents from one area of a shipping yard to another. Based upon the unrebutted testimony and other credible evidence, as well as the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

In Support of the Arbitrator's Decision relating to (B.), Was there an employee-employer relationship, the Arbitrator finds and concludes as follows:

The Arbitrator finds an employee-employer relationship did exist between the Petitioner and P.T.O. Services. The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties. While, the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. Roberson v. Indus. Comm'n, 225 Ill. 2d 159, 175 (2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Id.

Petitioner's testimony and other evidence established that he was employed by P.T.O Services. He was hired by Tom Wistlow in December 2011, and was paid by payroll check (PX 14). He clocked in and out daily, and received a ticket containing his duties for the day when he clocked in. P.T.O Services provided all of the equipment required to complete the job. As a commercial truck driver, Petitioner's work encompassed P.T.O. Services' general business as a freight distribution company.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 an Employee-Employer relationship existed between the Petitioner and Respondent-Employer P.T.O Services Inc.

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (D.), What was the date of accident, the Arbitrator finds and concludes as follows:

On June 2, 2012, Petitioner arrived at work and punched into a payroll clock. He obtained a ticket that laid out his "spotter" duties for the day. Petitioner was in the process of attempting to pry open a shipping container with a crow bar when something broke on the door, and he smashed his head in the door of the shipping container. Petitioner sat down on the ground due to experiencing head pain. Another employee walked by while Petitioner was sitting on the ground and asked Petitioner if he was ok. Petitioner's head and knuckles were bleeding. He immediately reported the accident to Tom Wistlow.

Petitioner sought medical attention on June 5, 2012 with Dr. Alnadkim. (PX 15). Petitioner reported that he was experiencing right shoulder pain after a crow bar slipped at work, and Dr. Alnadjim noted that Petitioner had a hard area by his neck. Id. Petitioner went to Southside

Orthopedics on June 26, 2012, where he reported that he was injured while pushing a crowbar at work. (PX 16).
Petitioner was subsequently referred to Dr. Burra at Hinsdale Orthopedics, who he saw on August 22, 2012. (PX 18). Id. Dr. Burra noted that Petitioner is a right-hand dominant truck driver, and he drives a spotting jeep which takes trailers and lifts them onto hydraulics, and he has to position them into a dock and open the doors. Id. Dr. Burra reported that Petitioner has been handling with same jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open the doors, and in the process, he has had a few injuries. Id. Petitioner reported that he injured himself at work on June 2, 2012 when the crowbar slipped forward and his arm impacted it, and, as it slipped, it crashed against the shipping container. Id. Petitioner was diagnosed with a right rotator cuff tear and glenohumeral arthritis, and a MRI arthrogram was ordered. Id.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that on June 2, 2012, he sustained an accidental injury which arose out of in the course of his employment by Respondent-Employer P.T.O Services, Inc.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner established that Respondent-Employer was aware of Petitioner's accident. Petitioner testified that he informed his supervisor, Tom Wistlow, of the accident immediately after it occurred on June 2, 2012. When Petitioner was given authority to return to work light duty, he informed Mr. Wistlow, who told him there was no light duty work available.

Based upon the unrebutted testimony and credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that he provided Respondent-Employer with timely notice of the accident as defined by the act.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner, as well as the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates establish that the injury of June 2, 2012 caused injury to the Petitioner's right shoulder and neck (cervical spine). The Petitioner, thereafter, commenced a continuous course of medical treatment for those injuries. The Arbitrator concludes that the Petitioner has proven by a preponderance of the evidence that his present condition of ill-being relative to his right shoulder and neck (cervical spine) is causally connected to his injury of June 2, 2012. This conclusion is based upon the unrebutted testimony of the Petitioner and an examination of the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

Petitioner alleges that his earnings from Respondent-Employer were $967.08 per week, or $50,288.16 per year. (Arb Ex 1). Petitioner submitted "compensation reports" dated November 1,

2011 through June 27, 2012. (PX 14). The compensation reports submitted show that Petitioner was paid a total of $18,615.80 over a 27-week period in "regular" pay, and $6,815.48 in "overtime" pay. *Id.*

Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He worked overtime in 21 of the 27 weeks prior to his accident and he testified that working overtime was mandatory. Petitioner's earnings were $50,288.16 in the 52-weeks prior to his injury of June 2, 2012. The Arbitrator concludes that Petitioner has proven beyond a preponderance of the evidence that his average weekly wage was $967.08. The basis for this conclusion was the unrebutted testimony of the Petitioner and the wage statements admitted into evidence as PX 14.

With respect to Issue (H), What was the Petitioner's age at the time of the accident, and (I), What was the Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of the Petitioner as well as the emergency room records, established that the Petitioner's date of birth is January 26, 1954, making him 58 years of age on the date of accident. The unrebutted testimony of the Petitioner established that he was married and he had no children under the age of 18 on the date of injury. Based upon the unrebutted testimony and other credible evidence the Arbitrator finds that Petitioner was 58 years old on the date of accident and that that Petitioner was not married and had no children on the date of injury.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the Petitioner has established by more than a preponderance of the credible evidence that the medical bills related to the treatment of the Petitioner's work injury of June 2, 2012are reasonable, necessary and causally related to the accident, and that the Respondent shall pay for those medical expenses under Section 8(a) of the Act and pursuant to the Illinois Fee Schedule. This conclusion is based upon the testimony of the Petitioner and an examination of the medical records. Respondent has paid no medical bills to date. As such, Respondent shall pay reasonable and necessary medical services of $33,695.24, as provided in Sections 8(a) and 8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner testified, and the medical records indicate that the Petitioner was off work as a result of his injuries from September 1, 2012 through September 2, 2013. Based upon the Petitioner's unrebutted testimony and the medical records admitted into the record, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 1, 2012 through September 2, 2013, a period of 52 3/7b weeks.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered a rotator cuff tear, SLAP lesion, C5,6,7 radiculopathy on the right with nerve atrophy as a result of this accident. He was prescribed a shoulder replacement and a cervical decompression that he did not pursue due to his fear of the surgeries themselves. He received physical therapy and injections to work through the pain. Further he testified that he continues to perform home exercises every day in order to deal with these physical conditions. Petitioner testified to continued need to take over the counter medication and horse liniment depending on the weather. He testified to continued work as a truck driver, however earning less at a job requiring less physical lifting.

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a truck driver, which the Arbitrator notes includes some heavy work. The Arbitrator notes that the Petitioner has been working in a position that requires limited driving and no lifting. Because of the testimony that petitioner is not able to pursue higher paying jobs due to his medical condition, the Arbitrator gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 58 years old at the time of the accident. The Arbitrator considers the Petitioner to be an older individual and concludes that because of his age the Petitioner's permanent partial disability will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations. The Arbitrator therefore gives greater weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that his earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting, the arbitrator therefore gives greater weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes significant surgeries of a shoulder replacement and cervical decompression at three levels have been prescribed for the Petitioner as a result of this accident. The Petitioner credibly testified that he currently experiences a loss of strength in his arm as well as pain in his shoulder and neck. These complaints are corroborated in the medical records of the Petitioner's treating

physicians. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 20% disability to his whole person.

In Support of the Arbitrator's Decision relating to (O.), Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer the Arbitrator finds and concludes as follows:

This matter was heard on December 7, 2018. It proceeded *ex parte* against Respondent-Employer P.T.O. Services. The Injured Workers' Benefit Fund was represented by the Attorney General's office by Assistant Attorney General Danielle Curtiss. A review of the Illinois Workers' Compensation Commission records by Roguens Loriston failed to reveal any workers' compensation insurance coverage for the Respondent-Employer ASM Transport Services, Inc. on June 2, 2012. (PX 12).

On the hearing date, no one from P.T.O. Services was present, and the hearing proceeded *ex parte* against the Respondent-Employer. Petitioner introduced into evidence correspondence from Petitioner's attorney's office sent via certified mail to the Respondent-Employer's addresses including the addresses filed with the Secretary of State registered agent for P.T.O. Services (PX 8; PX 10; PX 11; PX 24).

Based on the above, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that the Injured Workers' Benefit Fund of Section 4(d) of the Illinois Workers' Compensation Act , applies and that the Injured Workers' Benefit Fund has been properly named as a Respondent in this matter. Further, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Respondent-Employer P.T.O. Services had adequate and timely notice of the hearing.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM VRCHOTA,

Petitioner,

vs. NO: 13 WC 34611

DD&G DEVELOPMENT & RESTORATIONS, and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

21IWCC0169

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the January 8, 2020 Decision of the Arbitrator. Therein the Arbitrator found no employment relationship existed between Petitioner and Respondent DD&G Development & Restorations, and Petitioner failed to prove he sustained an accidental injury on October 9, 2013.

While the matter pended on Review, Respondent DD&G Development & Restorations ("DD&G") filed a Motion to Dismiss Petitioner's Review. Respondent Injured Workers' Benefit Fund subsequently joined the motion. The parties briefed the issue, and the matter was taken under advisement for ruling by the full panel. Notice having been provided to the parties, the Commission, after reviewing the record in its entirety, hereby dismisses Petitioner's Review for the reasons stated below.

In its Motion to Dismiss, DD&G noted, on April 9, 2020, Petitioner executed a settlement and release of his civil claim against DD&G for the injury at issue and a dismissal order was thereafter entered stating "said cause having been settled by agreement of the parties." Motion Exhibit B. DD&G further noted the dismissal order is a public record of a civil court case and therefore subject to judicial notice. DD&G argued, under Sections 5(a) and 11 of the Act and *Rhodes v. Industrial* Commission, 92 Ill.2d 467 (1982), Petitioner is now precluded from continuing his workers' compensation claim. The Commission agrees.

Initially, the Commission finds the April 29, 2020 Dismissal Order is subject to judicial notice. Illinois courts recognize that documents containing readily verifiable facts from sources of indisputable accuracy may be judicially noticed if doing so will aid in the efficient disposition of a case. *City of Centralia v. Garland*, 2019 IL App (5th) 180439, ¶ 10; *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 36. Public documents that are included in the records of courts and administrative tribunals are subject to judicial notice. *People v. Davis*, 65 Ill. 2d 157, 164 (1976); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009); *NBD Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520 (1993); see also *People v. Ernest*, 141 Ill. 2d 412, 428 (1990) (observing that trial court was authorized to take judicial notice of transcripts in underlying action); *In re McDonald*, 144 Ill. App. 3d 1082, 1085 (1986) (recognizing that trial court has authority to take judicial notice of hearing transcripts). While we do not believe judicial notice can be extended to the Release and Settlement Agreement itself, the Commission emphasizes the Dismissal Order states the civil claim "has been settled by agreement of the parties." Black letter contract law states there must be consideration in order to have a settlement.

The Commission further concludes *Rhodes* is dispositive of the instant matter. In *Rhodes*, the Supreme Court of Illinois held as follows:

> The legislative intention underlying section 5 of the Workmen's Compensation Act would obviously be frustrated if an injured employee could recover damages in a common law action and workmen's compensation benefits as well. If an employee initiates a common law action for his injury and receives payment from his employer as a result of such suit he is disqualified from obtaining an award under the Workmen's Compensation Act. The statute's design was to serve as a substitute for an employee's common law right of action and not as a supplement to it. 92 Ill.2d at 471. (Emphasis added).

The Commission finds the language of the Dismissal Order is sufficient to establish "the receipt of payment from the employer." Therefore, Petitioner "is disqualified from obtaining an award" under the Act, and his Petition for Review is hereby dismissed.

The Commission further notes, assuming *arguendo*, Respondent's Motion to Dismiss was denied and we reached the merits of Petitioner's Review, the Commission would affirm and adopt the Decision of the Arbitrator. The Commission finds the injury did not arise out of Petitioner's employment. We emphasize Mr. Kowalski credibly testified he works by himself, and on those occasions he needs assistance with flooring, he chooses the person; at no time would Mr. Schwager assign an assistant to him. As such, there is no credible evidence of an employment-related reason for Petitioner's use of the miter saw, and we find Petitioner was acting outside the scope of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review filed February 3, 2020, is hereby dismissed.

21IWCC0169

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2020 is final.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
TJT/mck
051
o020321

APR 13 2021

Thomas J. Tyrrell

Stephen J. Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on February 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VRCHOTA, WILLIAM
Employee/Petitioner

Case# **13WC034611**

DD&G DEVELOPMENT AND RESTORATIONS LLC & THE ILLINOIS STATE TREASURER AS EX-OFFICO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0169

On 1/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

4239 LAW OFFICE OF JOHN ELIASIK
BRIAN C HERCULE
180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

0210 CANAN & SHAPIRO PC
JOHN MORRIS
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

6285 ASSISTANT ATTORNEY GENERAL
DANIEL KALLO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Vrchota
Employee/Petitioner

v.

DD&G Development and Restorations, LLC

&

The Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund

Employer/Respondent

Case # **13 WC 34611**

21IWCC0169

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **October 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **10-09-13**, Respondent ***was not*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$5,541.00**; the average weekly wage was **$307.83**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds Petitioner was not an employee of Respondent on October 9, 2013 and that Respondent was not subject to the Workers' Compensation Act. As such, all claims for benefits are denied.

The Arbitrator finds Petitioner did not sustain an injury arising out of his employment. As such, all claims for benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

01-07-20
Date

ICArbDec p. 2

JAN 8 - 2020

21IWCC0169

FINDINGS OF FACT

William Vrchota (hereinafter "Petitioner") alleges he sustained a work-related accident while employed by DD&G Development (hereinafter "Respondent") on October 9, 2013. Respondent disputes Petitioner was an employee and contends he was instead an independent contractor, and disputes Petitioner sustained a compensable work-related injury regardless of the employment relationship. Petitioner testified on behalf of himself. Dave Schwager, Respondent's owner, Kenneth Kowalski and Orian Phillips testified on behalf of Respondent.

MEDICAL RECORDS (PX 2 and PX 4)

The EMS notes contained within the certified records state Petitioner was found with lacerations to the arm. The records state his medications were Norco, Oxycodone and Meloxicam. Petitioner was also intravenously given Fentanyl and Midazolam.

Petitioner arrived at St. Alexius Medical Center by ambulance at 9:48 a.m. immediately following the accident. The past medical history was noted to be heartburn, drug abuse, sleep apnea and chronic back pain. Petitioner stated he was cutting wood with a saw when his forearm got caught and pulled into the saw. An x-ray of the arm was completed which showed an open comminuted fracture with the distal defect at the ulnar.

Dr. Thomas Fendon evaluated Petitioner. The record stated Petitioner narcotized but arousable and able to communicate. Dr. Fendon noted the significant laceration and recommended surgery, which Petitioner underwent that day. The surgery included a number of tendon and muscle repairs as well as a debridement and irrigation of the ulnar fracture. Petitioner was released from the hospital later that day.

Petitioner next presented to APAC Groupe Centers for pain management on October 17, 2013. Petitioner stated he had been cutting hardwood flooring and put his arm up to protect his chest from getting cut. He stated it was not a workers' compensation case. He did state the injury was aggravated by movement and had associated numbness and swelling. Petitioner was diagnosed with an arm injury and musculoskeletal deformity of the upper arm as well as an open wound of the upper arm with tendon involvement. He was instructed to begin 30-days OxyContin, though it was noted there would have to be an exit plan and the medications would be regulated by his wife. He was also instructed to continue his Norco for breakthrough pain and follow-up in one month to check on pain management.

Petitioner returned on November 26, 2013 for medication management. He stated his pain was aggravated by movement but alleviated by medications. Petitioner stated the pain was disabling. He was prescribed Norco and Morphine. The next visit was December 24, 2013 at APAC Groupe, and Petitioner's chief complaint was pain in his thoracic spine and arm pain. There was no explanation for the start of the thoracic pain. Petitioner stated he was not working and had no therapy ordered by the orthopedic surgeon in Elgin. Petitioner was instructed to begin therapy and follow-up in one month, as well as continue medications as directed. On January 28, 2014, Petitioner presented with lower back pain with numbness down the right leg. Petitioner stated he was now a vegetarian. He still was not working and described chronic ongoing disabling pain. Dr.

Pang noted the pain was self-limiting. The diagnoses were back pain, myalgia, current drug user and shoulder pain. The impression was chronic myofascial back pain, and it was noted he was three months out from the left upper extremity trauma. Petitioner stated he was reducing the dosage and he was to continue decreasing his Norco.

The last medical record is a drug screen which was collected on January 28, 2014. The drug test noted inconsistent results based on the presence of pregabalin, cocaine metabolic, ethyl glucuronide sulfate. It was noted pregabalin was detected but did not match any of the reported prescriptions and that cocaine is a schedule 2 controlled substance with limited pharmaceutical application.

Testimony of KENNETH KOWALSKI

Kenneth Kowalski was the first to testify in this case as he testified via evidence deposition on June 27, 2018 given he was, at the time, in the process of undergoing chemotherapy. Mr. Kowalski testified he was a laborer with safety and OSHA certification and used to be a part of the laborers union. Mr. Kowalski testified he performed handyman work such as carpentry, flooring and drywall. He testified he worked for himself, though not under any corporation. He secured most of his work by word-of-mouth or with customers calling him directly. Mr. Kowalski testified he had no financial interest in the claim, and was in fact losing money by appearing.

Mr. Kowalski testified he met Mr. Schwager about 20-years prior and had performed work for Respondent for five or six years as a handyman. To secure work with Respondent, Mr. Schwager would call Mr. Kowalski and advise he had a possible job for him. Mr. Kowalski would then review the job and provide Mr. Schwager with an estimate, or bid, for what the work would cost. Mr. Kowalski stated that if his bid was chosen, he worked as an independent contractor. He stated if he had to bring extra help in for the work, he would bring one of his kids, at his own discretion and cost. Mr. Kowalski stated he was paid by the job, not on an hourly basis. He testified taxes were not taken out of his checks and he himself was responsible for paying taxes. He testified he would bring his own tools, unless he did not have something in which case he would ask Mr. Schwager if he could borrow his tools. He testified he was not required to wear any clothing with Respondent's name on it. He was not required to keep his hours and could arrive at the jobsite at his discretion. While doing work for Respondent, he was allowed to have concurrent employment and set his own hours, and testified he sometimes told Mr. Schwager he would not be present if he had another job, and that there was no problem with Respondent when such issues arose. He testified he and Mr. Schwager both had the right to terminate the contract. He stated he was only responsible for the flooring, and that he had discretion over how to do the work. He testified Mr. Schwager was not present at all times watching over him and Mr. Schwager was only present once or twice on the whole job. He was not given any type of vehicle by Respondent.

Mr. Kowalski testified he was working October 9, 2013. Mr. Kowalski's services were retained by Respondent to install flooring for a remodeling job on a residential home. Mr. Kowalski stated the house was essentially a three level building. The garage was down a little from the main level of the house, then there was a second staircase going to the top second floor. At the top of the second flight of stairs, to the right, there was a bedroom where all the tools were kept. There was also a children's bedroom on the same side of the staircase, and a closet in a room on the left-hand side

of the staircase. Mr. Kowalski stated all of the power tools were kept in the bedroom on the second floor to keep them away from children living in the house.

He testified he was doing the flooring by himself, and arrived at about 7:20 a.m. or 7:30 a.m. No one was present when Mr. Kowalski arrived. He testified Petitioner showed up much later while Mr. Kowalski was in the garage. Petitioner and Mr. Kowalski briefly talked, and Petitioner told Mr. Kowaski he was there to clean up. Mr. Kowalski testified, after this discussion with Petitioner, he witnessed Petitioner walk over to a corner and "crushed up a pill, rolled up a dollar bill, snorted [the pill], and immediately became lethargic, started slurring his words, stumbling" (RX 7, pg 27) Mr. Kowalski was about 6 feet from Petitioner during these actions. After snorting the pill, Petitioner became lethargic and started slurring his words and stumbling. He started walking towards Mr. Kowalski and almost head butted Mr. Kowalski given how close he was, all characteristics Mr. Kowalski did not notice before he witnessed Mr. Vrchota snort the pill. Mr. Kowalski testified he instructed Petitioner to go home but Petitioner told Mr. Kowalski he was not his boss and therefore not to tell him what to do. Given Petitioner refused to leave, Mr. Kowalski returned to his own work and instructed Petitioner not to touch any tools. Mr. Kowalski testified he was measuring the inside of a closet, with his head inside, when he heard a "Bam" and a yell. He ran to the room from where he heard the noise and Petitioner was bleeding everywhere. He wrapped the injury and took Petitioner downstairs. He called 911 and stayed with Petitioner until the ambulance arrived.

Mr. Kowalski testified Petitioner was not working with Mr. Kowalski on of the flooring job. Mr. Kowalski testified the flooring was his own job and, to the best of his knowledge, Petitioner was not supposed to help or aid in doing the flooring work. He testified he did not ask Petitioner do any work for him, and prior to that date had not ever asked Petitioner to help them with any flooring work. He also testified there was no other carpentry work going in the house besides the flooring, or any other work in the house besides the flooring which would necessitate use of the saw.

The saw was present during the deposition of Mr. Kowalski. He testified it was a Bosch 12 inch circular compound miter saw, or sliding compound miter saw. He testified it was the same saw present at the job on October 9, 2013. Mr. Kowalski noted the blade had a guard over it, which was in place on October 9, 2013. He testified he had used the saw on October 9, 2013 before Mr. Vrchota did, and that there were no problems with the saw. He testified the blade worked fine and was not dull. He stated there were no alterations made to the machine and that the saw was new at the time of the accident, having been bought for a job right before the one in question. Mr. Kowalski stated he would likely use the saw even if the cover were off, but that he was certain the cover was not off on the date in question. Mr. Kowalski explained how to use the saw, noting one would put a piece of wood onto the plate and against a back guard. He noted the safety switch on the handle, and that the blade guard only raised when the blade went down. He stated the hand holding the wood would be kept a couple inches from the blade, and the blade would come straight down into the lumber. He noted the blade could not move left to right given the lock on it, which would have to be released in order to move it side to side. He also stated the plate itself cannot be moved.

Mr. Kowalski testified there were no problems with the locking of the machine. He also testified the back stop for the lumber not only keeps it straight but prevents it from launching backwards

when the blade enters the wood. He noted the wood would be pressed against the blade when cut, and that if there was an issue the wood would stall against the backstop. He testified based on the direction the blade moved it could not shoot the wood forward, only backward, which would then have it hitting the backstop. He opined it was physically impossible for the wood to have caught and pulled Petitioner forward because, at worst, if the blade was dull it would just bump and stop. He testified, based on where the lumber is held, it would be impossible for the cut like Petitioner's to have occurred as the wood can only be pulled backwards, not forwards, and there is a backstop to prevent the wood from actually moving.

On cross-examination, Mr. Kowalski confirmed he did not know what the actual pills were that Petitioner crushed and snorted. Mr. Kowalski testified he saw Petitioner come upstairs and walk past him, but did not stop him as he was there to do his own job. He testified the arrangements to do any particular job were generally verbally made with Mr. Schwager, and that they had a general agreement each year rather than one done before each specific job. He testified he was present during one of the first jobs Petitioner had with Respondents in which Petitioner provided an estimate for a painting job. He was also unaware how many jobs Petitioner had with Respondent. Mr. Kowalski was asked if the wood could slip one way or the other before the blade engaged with the wood, and Mr. Kowalski testified the wood could move before the blade engaged. He testified it was not possible for that to happen after the blade engaged. Mr. Kowalski again confirmed he had never use the saw with the blade cover off. On examination by the State, Mr. Kowalski confirmed the blade comes straight up and down and does not come at an arc.

Mr. Kowalski, on redirect, testified he instructed Petitioner to go home but had no reason to believe he would disobey the statement of not using the tools. He also testified there was no benefit to having the blade guard taken off. He testified it did not make the saw work quicker and there was no reason someone would take the blade off. He also testified the only difference between the blades on the date in questioned and at the deposition was that it was newer, but there were no other differences.

Testimony of PETITIONER

Petitioner testified on his own behalf at trial. Petitioner testified DD&G Development was his employer on October 9, 2013. Petitioner stated he had worked for Respondent for a few years. He testified he made $15.00 per hour and worked full time, sometimes six days a week. He testified he did plumbing, carpentry, and some general stuff like picking up supplies, driving the truck and cleaning up around a job site. He testified he never did painting for Respondent, but he had done flooring for them one or two times before the accident. He testified he was paid in cash and checks and was paid hourly, not by the job. He testified he kept track of hours on his phone and then compared them with Mr. Schwager, and would be paid for the hours worked. He stated Mr. Schwager was his boss. He testified he did not sign anything when he was first hired nor fill out an application. He also stated, when he first started, he drove a truck one day to pick up supplies and started doing general helping, but was eventually asked to sign the Independent Contractor agreement to continue working for Respondent. Petitioner testified Mr. Schwager appeared at a job site and said Petitioner had to sign the document to get paid. Petitioner testified he did not want to sign the form, but was told he would not receive his money for the week if he refused to do so.

Petitioner testified he had never worked under the name, owned a business or solicited business as Bill's Painting. He testified he was not familiar at all with the name Bill's Painting.

Petitioner testified that, in order to determine his job duties, Mr. Schwager would come in to the job site at the end of the day and tell him to be there the following day. He testified Mr. Schwager set his hours and he was basically instructed to appear at a specific time, generally around 7:30 or 8:00 a.m., and worked 8 1/2 or 9 hours per day. Petitioner testified he had no other jobs while working for Respondent. He testified he had done a little construction but mostly plumbing prior to working for Respondent and, when asked whether he could've taken other jobs, testified he did not have the time. Petitioner testified he was not allowed to come and go from job sites as he pleased, and would have to secure permission from someone else at the jobsite. Petitioner testified he and other workers would take lunch together but could do so whenever they wanted. He testified he did sometimes have to run errands for Respondent such as picking up supplies, at which point he would use a company credit card. He testified he would do this once or twice a day. Petitioner testified he did not bring his own tools, or in fact own any, as they would be provided by Mr. Schwager. Petitioner also testified Mr. Schwager had bought him some clothes given he was unhappy with the clothes Petitioner chose to wear to a job site.

Regarding the alleged date of accident, Petitioner testified he was working a hardwood floor job in Schaumburg. He testified he was supposed to cut the wood and bring it back and forth to Mr. Kowalski. He stated it was only the first or second day they had been on this job. Petitioner testified it was him and Ken working at the job site that morning. He testified Dave had been there briefly in the morning but left once the work started. Petitioner testified he was using the saw to cut a piece of hardwood and that the saw blade was older. He testified having said that they needed a new blade given the saw was not cutting properly. He also testified the safety guard on the blade was taped up because Mr. Schwager had said he and Mr. Kowalski were working too slow. Petitioner testified when he brought the saw down, the wood got bound up and pulled him forward, at which point he put his arm up to block his chest, and cut his arm on the blade. Petitioner testified the cut was on his left arm right above his wrist, and he did show the Arbitrator the cut during the trial. The Arbitrator noted the scar started at one part of the arm and sort of went around creating a Y shape at both ends. The Arbitrator does note pictures of the initial injury were entered into evidence as Petitioner's Exhibit 7. The Arbitrator noted he would not notice the scar from where he was sitting. He noted the scar was long and significant, but not prominent and that he would not have noticed a scar even if the sleeve had been rolled up as it was not a raised scar.

Petitioner testified after the injury he was rushed to the emergency room by ambulance where he underwent immediate surgery at St. Alexius. He reported he was released the same day of the surgery and was given pain medication immediately. He also testified he had been completely knocked out for the surgery. He testified he was supposed to have physical therapy but did not due to insurance issues. He testified he did follow up to treat with Dr. Peng for pain in his arm. He testified he wore an open cast for about a month and a half to two months. Petitioner testified he never returned to work for Respondent or anyone else given he could not use his arm properly. He testified he also got a staph infection in his leg that ate the skin off his shins, though clarified he was not alleging he injured his shins during the work accident. Petitioner testified he was receiving Social Security disability benefits since November of 2018. He testified to having difficulty

gripping items and that he did not have the same strength he used to. He also testified he still had pain in his arm which was at a seven at the time of the trial.

On cross-examination, Petitioner reviewed payment screens for his work with the Respondent. He noted they show payments to Bill's Painting and were not weekly or biweekly paid. He testified again he had never done any painting for Respondent. Petitioner also noted that, when Respondent had bought him clothes to wear, he had been wearing jeans and a Tupac shirt. He testified none of the clothes purchased for him had Respondent's name anywhere on the clothing. Petitioner testified he still had issues with the arm and was still treating for the issue every week or so, though he then clarified that it was actually for issues with his leg. He testified treatment for his arm went on for about a year or year and a half after the accident. Petitioner also testified he was not required to clock in or out, just to keep track of time. Petitioner testified he did not have any pay stubs. He testified Respondent had five or six employees, including himself, Mo, Bud (Orian Phillips) and Kenny, as well as Kenny's kids who were brought in sometimes.

Testimony of DAVID SCHWAGER

Dave Schwager testified first on behalf of Respondent at the trial. He testified he currently owns a company called Quality Building Renovation Services, which does general contracting. He testified on October 9, 2013, he was the sole owner of Respondent. He testified Respondent was an LLC, which also performed general contracting. He stated he started Respondent in 2004, but did not register with the State until 2008 or 2009. He testified the company is no longer in existence as it was dissolved in 2015 or 2016. Mr. Schwager testified Respondent did not have workers' compensation insurance on October 9, 2013 based on the way the business was set up as a general contractor. He stated he was the only person doing work for the Respondent, unless he retained other independent contractors. In that case, they would be required to carry their own insurance. He testified Respondent had general liability insurance based on discussions with his agent in which he inquired what insurance was needed as an LLC doing general contracting. His agent had instructed him he did not require workers' compensation given he was the only "employee" and would not be covered under workers' compensation policies. He testified he secured a balloon policy, which included workers' compensation coverage, after October 9, 2013 to protect himself and his company. He testified Respondent did a total of 30 or 40 jobs over the years he owned it, most of which were residential. The jobs all involved remodeling and most were small, such as kitchens and bathrooms, facelifts and painting, flooring and hardwood changes.

Mr. Schwager stated he would do most of the work himself, but if he needed assistance, he would usually find help with referrals from other contractors or some of his suppliers. Mr. Schwager testified anyone who did work for him was required to sign an independent contractor agreement, such as those signed by Mr. Kowalski, Petitioner and Mr. Phillips. Mr. Schwager specifically testified as to Respondent's Exhibit 1, which is the independent contractor agreement between Petitioner and Respondent. The top of the exhibit states the contract was entered into between Respondent and William Vrchota D/B/A Bill's Painting and Remodeling. There was writing on the front page which has both Mr. Schwager's and Petitioner's signatures, and the last page of the contract was signed by both parties. The contract was signed on March 1, 2013. Mr. Schwager testified he was present when Petitioner signed the contract. He testified anyone who did work for Respondent would have to sign a similar agreement. Mr. Schwager testified if someone had not

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done work for him in the year prior to a new job and wanted to do work, he would have them sign a new agreement. He testified that was why Petitioner's was signed March 1 despite having worked for Respondent before then. He testified the agreements were mostly the same, with some minor tweaks as the contracts were updated. Mr. Schwager testified he chose to use independent contractors rather than hiring employees because it was not often he needed other people to complete jobs for him and he generally preferred to do the work on his own. He also sometimes would need to bring in a licensed worker, for things such as plumbing or roofing, for which he would again use the independent contractor agreements.

In order to hire independent contractors, Mr. Schwager would call five or six different people and inform them he had a project coming up for which he would need help on. Of those, some sent a quote/bid for the job. Mr. Schwager would then pick the best bid. He would pay the independent contractors once the work was completed or once he got paid. He testified the contract would be paid per the bid, regardless of how many hours it actually took to do the work. Mr. Schwager testified Respondent did not take taxes out of payment for contractors. He testified anyone who did jobs for him would provide their own tools, though noted he would also have his tools present given he would generally also be working. He testified the bid would decide who provided materials as that would be part of the bidding process. He testified he did not instruct people when they had to appear, but he would give them a timeframe in which work would be allowed at a job site. He testified contractors could work for other companies while they were doing work for him as well. He testified he would be at most jobsites doing his own work, but had no say in how other workers did their jobs. He testified people could reject a job he offered them without repercussions and noted there were multiple instances when he had offered someone a job and they had rejected it, yet he had still called them later to offer more work. He testified his subcontractors could hire anybody they wanted as it had nothing to do with him. He testified people working for him did not wear any clothing bearing the Respondent's name or logo. He testified people who did work for him had no other benefits such as retirement or health insurance, and that there were times during the existence of Respondent in which they did not have work and no one was paid.

Mr. Schwager testified he was familiar with Petitioner as he met him several years prior through his sister. He testified Petitioner had performed work for Respondent doing one job in 2009 or 2010 when they first met. He testified they hired him to do some painting work, but that at the time it did not seem to be working and thus he did not bring him back for further jobs for some time. Mr. Schwager testified when they did hire Petitioner, they brought him in to do painting and cleanup work for light painting jobs, or for dry-walling and sanding. Mr. Schwager was asked on cross-examination why he would use Petitioner despite the fact he did not feel he was the best painter, and Mr. Schwager testified it was because Petitioner was cheaper.

Regarding the job on October 9, 2013, Mr. Schwager testified they had done some drywall work in the client's basement and were replacing all the hardwood floors in the upstairs of the house, as well as all the floor trim and quarter round in the house. Mr. Schwager testified Petitioner was called to paint and do clean up. He stated most of the hardwood had been done at that point. He testified he brought Petitioner to the job site on the first day he arrived to drop off hardwood given Petitioner lived nearby, and offered Petitioner the chance to do painting work. Petitioner provided Mr. Schwager with his estimation for how much the job would cost. Mr. Schwager testified he retained Mr. Kowalski to do the hardwood flooring, and Petitioner was the only other person on

the job. Mr. Schwager testified Petitioner had requested $300.00 to do the job, which Mr. Schwager had agreed to pay. Mr. Schwager testified this would have been how much Petitioner was paid regardless of how many hours it took to complete the work. Mr. Schwager also testified Petitioner had refused work from the Respondent in the past, yet was still offered this job. He testified the tools necessary for Petitioner's job would be sponge, broom, paintbrush, dustpan and tarp, all of which Petitioner would have brought in on his own. Mr. Schwager testified he had never retained Petitioner to do any carpentry job, either at this project or at prior projects. He testified he never provided Petitioner with a specific time to arrive, but did provide a time range when Petitioner could appear at work. Petitioner was never given a DD&G Development vehicle to drive, and did not have any direct supervisor watching his performance.

Mr. Schwager testified the saw present at the trial was the same saw on which Petitioner alleges he injured himself, which Petitioner confirmed at the Arbitrator's request was the same saw as well. He testified Mr. Vrchota did not require the use of the miter saw to perform his duties for his job, nor was he authorized to use the miter saw in the performance of his duties. He testified he was not aware of Petitioner having any training to use a miter saw. He testified he had purchased the saw possibly three weeks to a month before the alleged accident date, and that it was his saw. He testified he and Mr. Kowalski were both retained to do carpentry work, and that Petitioner was not retained to help or assist Mr. Kowalski in performing the carpentry work in any way.

Mr. Schwager testified October 9, 2013 was his birthday and he did not go to the job site at all that day. He testified both Mr. Kowalski and Petitioner were authorized to work without him present as they did not require his direct supervision. Mr. Schwager testified he first heard about the accident when he received a text from Mr. Phillips saying to call Mr. Kowalski. Mr. Schwager then went to the hospital where Petitioner was taken. Mr. Schwager testified he requested a drug test, which was never completed given the emergency room physician informed him they had already given him significant pain medications.

After leaving the hospital, Mr. Schwager returned to the job site, where he went to the room with the miter saw. He noted a little blood on the floor and another trail of blood leading outside. He testified no one had used the saw since the accident. He also testified he did not see any partially cut pieces of wood on which a blade had been caught. Mr. Schwager testified, given Petitioner's work had not been completed prior to the injury, he did have to bring someone in to complete the work. He brought in Mr. Phillips, his half-brother, who had a similar independent contractor agreement as Petitioner. He stated Mr. Phillips provided him with the cost of the job, but he did not take other bids given the job needed to be completed and he did not have time for such action.

The saw in question was in the hearing room during Mr. Schwager's testimony, which was confirmed by Petitioner. Mr. Schwager testified the only potential change was that the blade would have been replaced multiple times in the last few years. Mr. Schwager testified he never requested the blade guard be lifted as it made no sense and would not make cutting any faster. Mr. Schwager noted when the saw is in its initial position, the blade guard would cover the entire blade. He stated once someone started cutting wood, they would keep the blade in a locked position going straight down. He also testified there was an electric brake on the unit and two safeties. He stated the worker would have to pull a knob and then squeeze a trigger before the saw would turn on. As soon as the hand/thumb lifted from the trigger, the blade would stop immediately. He also testified,

given the power of the saw, that even a flat blade would still cut the wood and not pull the wood or person forward. Mr. Schwager testified the hardwood floor would have been about 3/4 inches thick and 3 inches wide. As such, the hand would be about three quarter inches above the plate and about 3 inches back from the backstop. Mr. Schwager testified, given the setup of the saw, it was irrelevant if someone was right or left-handed, but would hold the piece of wood with the left hand and bring the saw down with the right hand. He testified there would be no reason for an arm to be near the center region as the person cutting would keep the arm and hand holding the wood to the side while bringing the saw down. In overruling an objection regarding the demonstration of the saw, the Arbitrator noted he was hoping to see Petitioner go through the mechanism of the accident.

Mr. Schwager testified when he first started Respondent in 2004, he did have some people work for him, but that when he became an LLC in 2008, he only used independent contractors. He testified he never hired Petitioner, but he did contract him to do painting and cleanup, such as sweeping. He again noted the independent contract stated Petitioner would have been retained to do residential remodeling and painting services. He also testified if Petitioner did not secure an actual painting job, he could still bid to do some cleanup work instead, but it would still be done in the same general manner with a bid process for specific hours it would take him to complete the job. He stated the pay would be the same regardless of the amount of hours it took based on the bidding process. When asked how he discovered the business he believed to be Bill's Painting, he testified that was how Petitioner had presented himself, and that he provided business cards. Mr. Schwager was asked about a prior testimony from 2016 in which he stated he was unsure if he had received a business card from Petitioner, but stated had thought more and did remember he had in fact received a business card from Petitioner. He also noted the paystubs were made out to Petitioner, not Bill's Painting, which Mr. Schwager testified was a common practice. He also testified he did not always check whether independent contractors had insurance, but generally would only do so if it was a job in which he believed insurance might be necessary. He did not check Petitioner for insurance given he had only had them to painting and general cleanup, neither of which he believed were likely to involve injuries in his mind. Mr. Schwager testified Petitioner was known as a painter to the representatives at Sherman Williams and they had business cards of him on a board there as well.

Mr. Schwager testified he would be the one to generally discuss hours and other issues with the homeowner, but sometimes the other workers would have to discuss issues directly with them. Finally, he testified he did not understand how someone could accidentally sustain the injuries Petitioner had. He again testified Petitioner did not belong in the room with the saw, let alone use the saw itself. He was asked if the room with the saw was locked, and testified it might not have been given people had already appeared for work that day. On redirect, Mr. Schwager confirmed he had never hired any actual employees as DD&G Development and Restoration, LLC. He also confirmed that, if Petitioner worked less hours than had bid, he would still receive the full cost of the bid given he was not paid hourly.

Petitioner entered a prior deposition transcript of Mr. Schwager into evidence as Petitioner's Exhibit #5. The deposition was taken on May 3, 2016 for the civil claim also arising out of this accident, *William Vrchota v. DD& G Development*, 2014 L 005680. Without going into significant

detail, the Arbitrator notes Mr. Schwager maintained throughout this deposition Petitioner was an independent contractor, not an employee.

Testimony of ORIAN PHILLIPS

Mr. Phillips testified he was brought in to complete Petitioner's work after the injury on October 9, 2013. He testified he was brought in for the same job as Petitioner, and that at no point did these job duties require use of the miter saw. He was never asked to assist Mr. Kowalski in the wood cutting or carrying process. He testified his duties for the job involved just painting. He also testified he had an independent contractor agreement similar to the one signed by Mr. Kowalski and Petitioner. He testified he was paid by bid, not hourly, he set his own hours, and did not have any supervisor from Respondent overlooking his work.

Petitioner's Exhibit 6

Petitioner's Exhibit 6 is a payment screen for payments made by Respondent to Petitioner for his work from June 11, 2013 through August 12, 2013. The "original amount" and "paid amount" on all payments was equal. On 13 of the 18 payments, the memo line included Bill's Painting in some fashion. Finally, the Arbitrator notes the payments were not paid on a consistent biweekly or weekly schedule, with some payments being made on back to back dates, such as July 10 in July 11, 2013. Finally, the Arbitrator notes that Respondent made a total of $5,541.00 per the payment screens over the course of the payment period.

CONCLUSIONS OF LAW

Regarding issues (A) and (B), whether Respondent was under the Workers' Compensation Act and whether there was an employee-employer relationship between Petitioner and Respondent, the Arbitrator finds as follows:

No rigid rule of law exists regarding whether a worker is an employee or independent contractor. *Area Transportation Co. v. Industrial Comm'n,* 123 Ill. App. 3d 1096 (1984). In determining whether one is an independent contractor or employee, courts have considered several factors. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309 (1990). The single most important factor is whether the purported employer has a right to control the actions of the employee. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000). Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities and whether income tax has been withheld. *Wendholdt v. Industrial Comm'n,* 95 Ill. 2d 76 (1983). A factor of less weight is the label the parties place upon their relationship. *Earley.* When applying the facts of the present case to the factors set forth by the courts, the Arbitrator finds Petitioner was an independent contractor

The Arbitrator notes there are discrepancies in the multiple testimonies regarding a number of the factors. The Arbitrator finds the testimonies of Mr. Schwager, Mr. Kowalski, and Mr. Phillips more credible than the testimony of Petitioner. The Arbitrator finds the payment screens and check stubs particularly persuasive. Petitioner testified he worked 8 ½ to 9 hours a day, 6 days a week for Respondent making $15 per hour, but the payment screens show Petitioner averaged $307.83

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per week, which would only equate to about 20 hours per week. Petitioner never testified to having been underpaid by Respondent. Petitioner testified he never did painting jobs for Respondent, and that he had never heard the name Bill's Painting. The Arbitrator finds this unbelievable given Petitioner cashed at least 13 checks with a memo line of Bill's Painting, most of which were written before October 9, 2013, and he signed an Independent Contractor Agreement which specifically stated he would do painting. The Arbitrator notes the agreement was signed on March 31, 2013, well before the date of the accident, and indicated Petitioner would do painting and general labor. The Arbitrator also notes the payment screens do not show weekly or bi-weekly payments. Finally, the Arbitrator notes the memo lines on most of the payments contain a specific job (ie. Bill's Painting/Bosshart, Bill's Painting/Fisher, etc), which would indicate Petitioner was receiving payments for the specific jobs. The Arbitrator does not see any reason the jobs would be noted if Petitioner was an employee who was just paid by the hour.

Furthermore, Petitioner testified he had worked for Respondent for years prior to October 9, 2013 but, despite the fact he had not done any painting jobs, had only done 1 or 2 hardwood flooring jobs. Petitioner testified Mr. Phillips and Mr. Kowalski were both employees, but both testified they were independent contractors. Petitioner also testified he could not work for other companies because he would not have had the time, yet also did not deny he was working on another project for his ex-wife.

The Arbitrator finds the testimony of Mr. Schwager credible. He testified he did most of the work for Respondent, and that if he was unable to complete a job on his own, he would bring in independent contractors for help. He testified Petitioner was an independent contractor and verified the independent contractor agreement between Respondent and Petitioner. He testified he did not control Petitioner's work, his hours or the means by which he completed his tasks. He testified Petitioner was brought in to do painting, which was corroborated by the payment stubs (RX 2) and the payment screens (PX 6). He testified Petitioner could have rejected work and he still would have been offered jobs, and that Petitioner could have had concurrent employment while working for him. Mr. Schwager testified contractors would secure work via a bidding process, which Mr. Kowalski testified he witnessed happening between Petitioner and Respondent. He testified Petitioner was paid at the end of a job, which appears to be corroborated by the payment screens showing payments not made on a weekly or bi-weekly basis. Mr. Schwager also testified Petitioner would be paid the bid amount, regardless of whether he actually worked more or less hours than he bid.

The Arbitrator also notes Mr. Schwager's testified regarding the employment status for a civil claim (PX 5), throughout which Mr. Schwager maintained Petitioner was an independent contractor, despite the fact such testimony would have been against his interests in that case as owner of Defendant. The Arbitrator also finds Mr. Kowalski and Mr. Phillips were independent contractors based on their testimony regarding relevant factors, and the Arbitrator does not believe Petitioner would be the only employee of Respondent.

Based on the above testimony, the Arbitrator finds Petitioner was an independent contractor and was not an employee of Respondent. As such, Respondent did not sustain injuries which are compensable under the Workers' Compensation Act.

Regarding issue (C), whether an accident from an employment-related or neutral risk occurred that arose out of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Additionally:

Even assuming, *arguendo*, Petitioner was an employee, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment. Petitioner bears the burden of proving that his injury both occurred in the course of his employment and arose out of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). The fact that an injury occurred at Petitioner's workplace is not dispositive as it does prove the injury "arose out of" Petitioner's work activities. Instead, the arising out of question addresses whether "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003). There are three types of risk: employment-related, neutral and personal. Employment related risks exist when Petitioner is performing a task he was instructed to perform by the employer, one he had a common law or statutory duty to perform, or one the employer might reasonably expect Petitioner to perform incident to his assigned duties. The Arbitrator finds Petitioner's injury did not arise out of an employment-related risk given he was never assigned any work that required cutting wood, nor did his employer expect Petitioner, as a painter, to cut wood, especially given Petitioner had no specific training in carpentry.

The Arbitrator notes there is a significant discrepancy in the testimony regarding Petitioner's job duties. The Arbitrator finds Petitioner's testimony was not credible for the reasons laid out above. The Arbitrator finds Petitioner was hired to do painting and general labor, and was not hired to do carpentry. None of the witnesses, Petitioner included, testified the jobs of painting and general labor required the use of a miter saw. Instead, Petitioner testified he was hired to do carpentry, despite the fact he had no expertise in this field, unlike Mr. Kowalski, who was a former labor union employee. The Arbitrator also relies of the testimony of Orian Phillips, who testified he was brought in to the job after Petitioner's injuries. Mr. Phillips testified he never had to use the saw to complete the tasks Petitioner had been hired to do. Similarly, Mr. Kowalski testified he was hired to do the carpentry work, and did not ask Petitioner for help. He testified that if he ever needed help, he would bring one of his sons in to assist him, which Petitioner testified was also the case. Mr. Kowalski and Mr. Schwager both testified they did not believe Petitioner had any special training in carpentry work. The Arbitrator therefore does not see any reason Mr. Kowalski would have asked Petitioner to assist Mr. Kowalski or would have been hired to do any carpentry work. The Arbitrator notes the memo line in most checks contained "Bill's Painting", but none included anything about carpentry. For all these reasons, the Arbitrator finds Petitioner was not hired to do carpentry work, that he had no common law or statutory duty to perform carpentry work, and that Respondent had no reasonable expectation Petitioner would do carpentry work. As such, Petitioner's injuries did not arise out of an employment-related risk.

The next question is whether Petitioner's risk was neutral or personal. A neutral risk is one which has no particular employment characteristics, but is instead incidental to Petitioner's employment. The Arbitrator does not find this risk to be neutral as it is not a risk to which the general public is exposed. The Arbitrator again notes Petitioner had no valid reason for using the saw for any work-related purposes, and thus use of the saw was not even incidental to his employment.

The Arbitrator instead finds Petitioner's injuries arose out of a personal risk, and thus the injury is not compensable. In this regard, the Arbitrator notes the Petitioner's explanation of the accident was not credible for any legitimate use of the miter saw based on the description of the miter saw and demonstration of its use at trial. Petitioner testified he was cutting wood and the blade, which he testified was old and dull, stuck in the wood and pulled him forward. Petitioner testified he then reached out his left arm to protect his chest. Mr. Schwager testified the saw only turned on when someone pressed their thumb down on a button on the handle/lever, and he testified, undisputed, that the blade stopped immediately when the thumb released the button, as an emergency brake system. Mr. Schwager and Mr. Kowalski both testified the blade cover was on the blade on October 9, 2013, and both testified that lifting or removing the cover would not affect the speed in any way. The Arbitrator agrees with this testimony based on his examination of the saw, noting the blade cover automatically lifts when the blade is brought down to the wood. The Arbitrator also notes there is a backstop behind the wood which would prevent it from being thrown backwards, as Petitioner claims occurred. As the wood could not be thrown backward, Petitioner could not be pulled forward toward the blade.

The Arbitrator notes the saw held a 12-inch blade, which would mean 6 inches in diameter on the cutting end, and Petitioner was cutting a piece of wood 3 inches thick. The Arbitrator does not believe Petitioner could have brought his arm from holding the piece of wood, which would have been 3 inches in front of the blade, back around behind his chest and in front of the blade in less time than it took to remove his thumb from the emergency brake. The Arbitrator also notes Mr. Schwager and Mr. Kowalski testified the saw was fairly new on October 9, 2013, and thus does not believe the blade in question was dull. Finally, the Arbitrator notes the saw was present in the hearing room and Petitioner had a chance on rebuttal to demonstrate how his injury occurred, which the Arbitrator encouraged him to do, yet refused to do so. For all these reasons, the Arbitrator does not find Petitioner's explanation of the accident possible, and does not find Petitioner credible.

Based on the above, the Arbitrator finds Petitioner finds the testimony of Mr. Schwager, Mr. Kowalski and Mr. Phillips credible, and finds Petitioner was hired to do painting and clean-up work, none of which required use of the miter saw. The Arbitrator finds Petitioner was not employed to do any carpentry work, nor was he asked on to do any carpentry work or wood cutting on October 9, 2013. As wood cutting was not part of the job for which Petitioner was hired, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Regarding issue (C), whether Petitioner was intoxicated to an extent he was considered no longer in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

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Additionally:

Petitioner bears the burden of proving his injury occurred in the course and scope of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An employer may raise a defense of intoxication, though intoxication itself is not a complete bar against compensability. Instead, the employer must show that either (1) the intoxication was the sole cause of the employee's injury or (2) the intoxication was so excessive as to constitute a departure from the course of the employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468 (1989). A decision on compensability is one of fact, which involves a number of factors, and the Arbitrator notes neither the Workers' Compensation Act, the Commission nor the Appellate Courts have found a blood test necessary for an intoxication defense.

One way in which an employer can prove intoxication is by showing a significant difference in behavior before and after the intoxicating activity. Mr. Kowalski testified he was the first person to arrive on October 9, 2013. He testified Petitioner arrived a while later, likely around 8:30 or 9:00, at which time Mr. Kowalski and Petitioner had a short conversation. Mr. Kowalski testified Petitioner, during this conversation, was speaking in a normal tone, was standing normal, and did not look impaired in any way. Mr. Kowalski testified that after their conversation, Petitioner went to a corner of the garage, crushed up a pill, and snorted the pill. Mr. Kowalski testified Petitioner's eyes looked glassy after Petitioner snorted the pill, and that Petitioner started slurring his words. He testified Petitioner started swaying and stumbling, to the point he almost hit Mr. Kowalski with his head.

The Arbitrator notes Mr. Kowalski testified before Petitioner given he was deposed before the trial, and that Petitioner had an opportunity to respond to and deny the accusation he took drugs prior to the accident. The Arbitrator finds it compelling Petitioner never denied Mr. Kowalski's testimony that he crushed and snorted the pill, either during his case in chief or on rebuttal. As such, the Arbitrator finds the testimony of Mr. Kowalski to be undisputed and therefore accepts the factual basis of his testimony. The Arbitrator also notes Mr. Schwager testified he requested a blood test be done at the hospital, but that the hospital staff informed him Petitioner had already been given pain medications and it would therefore be impossible to determine what was in his system before the accident. The Arbitrator finds this claim is corroborated by the EMT records showing Petitioner was given pain medications in route to the hospital. The Arbitrator also notes the initial hospital records showed Petitioner had a medical history of drug abuse, and that the last medical record in the file is a drug test in which Petitioner tested positive for cocaine and another unprescribed medication. For all these reasons, the Arbitrator finds Mr. Kowalski's testimony regarding Petitioner's drug use more probable than not.

The Arbitrator also finds Petitioner's drug use either was the sole reason for Petitioner's injury or at least constituted a departure from the course of the employment. The Arbitrator finds, for reasons discussed above, Petitioner had no reason to use the saw as part of his employment, and that Petitioner's explanation for how his accident occurred does not make sense based on the demonstration of how the saw is used. The Arbitrator notes that the mitre saw present in the hearing room at trial, the Petitioner was invited to give a demonstration of how the accident occurred and declined to do so. The mechanism of injury remains a mystery. The Arbitrator ttherefore finds the

only way Petitioner could have injured himself as he did was because of his intoxication or intentionally operating the saw in an improper manner. The Arbitrator does not find Petitioner's testimony regarding the blade guard being taped up credible. He therefore can find no explanation for why the blade guard, which only raises a couple inches when the blade goes down, and would not expose the chest to the blade in any way, would not have protected Petitioner's arm from the blade if the accident happened as Petitioner alleges. The only reasonable inference to draw from the evidence presented is that Petitioner was intoxicated while using the miter saw or intentionally using the saw in an improper manner so much so that he was no longer in the course and scope of his employment.

Regarding issue (F), whether Petitioner's current condition of ill-being is causally related to Petitioner's work activities on October 9, 2013, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's condition of ill-being is not causally related to Petitioner's work activities on October 9, 2013.

Regarding issue (G), Petitioner's earnings in the year preceding October 9, 2013, the Arbitrator finds as follows:

The Arbitrator notes the only evidence in the claim regarding wages aside from testimony of witnesses was the wage information Petitioner himself entered as Petitioner's exhibit 6. The Arbitrator notes the wage information indicates, at the top, that it includes all payments made from January 2013 through December 2015. No ruling is made on this issue. The Arbitrator finds that Petitioner was an independent contractor, not an employee.

Regarding issue (J), whether medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, nor that Petitioner sustained an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's did not incur any medical bills for which Respondent is liable.

Regarding issue (K), whether Petitioner is owed any TTD benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Respondent does not owe any TTD benefits as a result of Petitioner's activities on October 9, 2013.

Regarding issue (L), whether Petitioner is owed any nature and extent benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner is not entitled to any nature and extent benefits as a result of his activities on October 9, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☒ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DELLA DOWNING,

Petitioner,

20IWCC0657

vs.

NO: 11 WC 9902

DELNOR COMMUNITY HOSPITAL

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits, nature and extent, maintenance, and permanency and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission vacates the award of maintenance and strikes paragraph 2 of the Order section of the Arbitrator's Decision.

Additionally, the Commission replaces paragraph 3 of the Order section of the Arbitrator's decision with the following:

> Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.
>
> Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this

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credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Lastly, the Commission strikes paragraph 4 of the Order section of the Arbitrator's decision and replaces it with the following:

Respondent shall pay Petitioner permanent total disability benefits of $1,080.12 per week commencing on January 20, 2016, as provided in Section 8(f) of the Act. Commencing on the Second July 15th after the entry of this Award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act. Respondent shall pay Petitioner compensation that has accrued from January 20, 2016 through June 8, 2018.

Regarding page 6 of 22 of the Arbitrator's decision, the Commission strikes the second sentence of the first paragraph. Referring to page 17 of 22 of the Arbitrator's decision, the Commission strikes the last paragraph of Section (J) in its entirety, and replaces it with the following:

Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.

Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Referring to the last paragraph under Section (K) at page 19 of 22 of the Arbitrator's decision, the Commission strikes the last two sentences of said paragraph. The Commission also strikes page 22 of the Arbitrator's decision.

Lastly, in the fourth sentence of the last paragraph at page 13 of 22 of the Arbitrator's decision, the Commission corrects a scrivener's error and revises "board-based" to "broad-based".

Petitioner met her burden of proving that her current condition of ill-being regarding her cervical spine is causally related to injuries sustained in the work accident of August 29, 2010, and that this condition has rendered her permanently and totally disabled.

The award of permanent total disability is supported by a consistent and continuing course of treatment relating to Petitioner's cervical spine from the time of the initial 19(b) hearing on June 9, 2011, through the date of trial. The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies.

Following the 19(b) hearing, Petitioner continued treating with her neurosurgeon, Dr. Brayton, for her cervical spine condition (Px1), and at various pain clinics. (Px2, Px5, Px10) Petitioner continued these visits up through the date of trial. (Px10)

In February 2012, Petitioner underwent another cervical MRI, the prior one having been performed on February 9, 2011. The MRI study of the cervical spine performed on February 16, 2012 revealed: "the posterior disc protrusion at C5-C6 is slightly more broad-based with the presence of an annular tear." (Px2)

On March 2, 2012 Dr. Brayton reviewed the MRI results and noted "the slight progression in the C5-C6 along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal spine tenderness..." (Px1) However, as Dr. Brayton observed other findings requiring further explanation, he referred Petitioner to Dr. Santwani, a neurologist, for further testing.

In March 2012, Dr. Santwani diagnosed the Petitioner with multiple sclerosis. Significantly, Dr. Santwani also noted Petitioner's increased neck pain and arm paresthesias. (Px4) Petitioner makes no claim that her multiple sclerosis or treatment for same is related to the August 29, 2010 work accident.

Although Petitioner missed some of her appointments at the pain clinic between March and October 2012, she consistently continued to complain of neck and arm pain. By December 31, 2012, Petitioner was presenting with continued pain, worse in her neck and shoulders. (Px2) Through mid-2013 Petitioner continued to voice complaints and received treatment at the pain clinic for same. (Px2)

On May 28, 2013 Petitioner underwent an EMG/NCV of the upper extremities. This was an abnormal study indicating acute C5 radiculopathy on the right and C6 radiculopathy on the left. (Px4)

On May 30, 2013 Petitioner began treating at the pain clinic at Kishwaukee Hospital for chronic neck pain. History reflects the "pain began in August 2010 when she was lifting a patient." (Px5) She treated with Dr. Gregory Arnold at the clinic through 2013. (Px5) He diagnosed Petitioner with cervical radiculopathy, fibromyalgia syndrome and prescribed opioid therapy along with cervical trigger point injections. (Px5)

By the end of 2013, Petitioner switched pain management clinics as her insurance would no longer cover visits to Dr. Arnold and she began treating with Dr. Todd Hagle.

On December 26, 2013 Petitioner was seen by Dr. Hagle whose diagnosis included

chronic neck pain and at which time he noted "she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this." (Px10) Petitioner continued to see Dr. Hagle on a monthly basis with complaints of pain in her neck and into her arms ranging from 8/10 to 10/10. (Px10)

On February 10, 2014 Petitioner complained of pain in her neck, shoulders and arms. She noted the pain was "severe, chronic and disabling." (Px10)

An updated cervical MRI performed on February 25, 2014 revealed persistent multi-level degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annular tear as well as right paracentral C5-C6 disc protrusion. (Px1)

In August 2014 Dr. Brayton related Petitioner's "severe, unremitting neck pain and cervicogenic headaches" to the work injury. (Px1)

A repeat cervical MRI performed on August 1, 2014 revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (Px7)

On October 22, 2014 Petitioner underwent provocative discography ordered by Dr. Brayton resulting in a positive provocation discogram at C4-C5 and C5-C6. (Px8)

On December 29, 2014 Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Throughout 2015 Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications. (Px10)

On December 29, 2014 Dr. Neil Allen conducted a medical records review at the Respondent's request. He did not examine Petitioner on this date. Although Dr. Allen opined Petitioner's current state of ill-being was related to multiple sclerosis, even he related Petitioner's upper extremity pain and in the back of her neck to the work injury. (Rx1)

On February 12 ,2015 Dr. Brayton met with Petitioner to review the results of the provocative discogram, the last MRI and to discuss further treatment options.

At the time of this visit, Dr. Brayton noted Petitioner had sustained a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic changes at C4-C5 and C5-C6. (Px1) Dr. Brayton also noted Petitioner had been diagnosed with multiple sclerosis and had dysesthetic pain in both the lower and upper extremities. (Px1) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6 with a negative control level at C6-C7. The MRI revealed a progressive large, broad-based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which had progressed since her last imaging study. (Px1) There was also an increase in the annular bulge and ventral CSF effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5.

(Px1)

In terms of future treatment, among options discussed were surgical intervention involving a C4-C5 anterior cervical decompression and fusion including the risk of accelerated spondylitic changes at C6-C7. (Px1) Petitioner chose to defer surgery and continue with pain management.

On February 26, 2015 Petitioner was evaluated by Dr. Allen at Respondent's request. Dr. Allen included the "cowl-like discomfort she has over her shoulder" as part of Petitioner's current state of ill-being. (Rx1) Dr. Allen also conceded that the decrease in pin-prick to both upper extremities and the cowl of her shoulders was consistent with Petitioner's work injury. (Rx1, p. 73) Dr. Allen also referenced a cervical MRI Petitioner underwent specifically indicating an early annular tear at C4-C5 which he testified explained neck pain. Dr. Allen also testified annular tears are very painful and some people are actually confined to bed with annular tears. (Rx1, p. 23) Dr. Allen also acknowledged that he never reviewed the discogram of Petitioner's cervical spine as he didn't understand them, was never trained in them and has a hole in his knowledge. (Rx1, pp. 88-89)

On January 21, 2016 Petitioner saw Dr. Brayton who noted Petitioner "continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain and cervicogenic headaches." Dr. Brayton opined these conditions were caused by her work accident on August 29, 2010 and were conditions distinct from her multiple sclerosis. (Px1)

Dr. Brayton further noted cervical disc herniation persists at C5-C6 and had not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (Px1) Disc disease was noted at the C2 through C4 levels which he deemed permanent. (Px1)

Overall, it was Dr. Brayton's opinion that Petitioner had a permanent disc injury at C5-C6. Considering Petitioner's concurrent multiple sclerosis diagnosis, Dr. Brayton was not in favor of surgery given the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the cervical fusion needed at C5-C6. (Px1) Dr. Brayton cautioned that surgery remained a future potential need but presently, he would advocate against surgery.

Dr. Brayton further indicated Petitioner would require "comprehensive and procedural pain management, chronic pain control and permanent disability as a consequence to her injury." (Px1)

Dr. Brayton determined Petitioner was "permanent disability" and issued a script dated January 21, 2016 indicating "permanent work restrictions of no lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent." (Px1)

In May 2016 Petitioner underwent a second Section 12 exam by Dr. Martin Herman at Respondent's request. Dr. Herman opined Petitioner sustained a disc herniation as a consequence

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of the August 29, 2010 accident but it had been effectively treated and she was at maximum medical improvement subsequent to her return to work with restrictions issued by Dr. Brayton. He further opined that in May 2016 Petitioner was *not* capable of returning to work but related same to the multiple sclerosis and not the work-related injuries. (Rx2, pp. 47-48, 60)

Dr. Herman failed to review films of the MRIs Petitioner underwent on February 16, 2012, May 5, 2013, August 1, 2014, January 21, 2015 and December 3, 2015, and the discogram performed on August 20, 2014. (Rx2, pp. 30-31) Dr. Herman also acknowledged that Petitioner's condition was multi-factorial. (Rx2, p. 43)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2016, 2017, and 2018. (Px10) She has continued to complain of neck pain radiating into her arms, as well as tingling and numbness. (Px10)

An accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003) *citing Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d 123, 127 (1967).

Notwithstanding Petitioner's ability to return to restricted work at various times subsequent to the work accident, Petitioner's work-related cervical condition continued to gradually worsen both in terms of the severity of her symptoms and as confirmed by multiple diagnostic tests.

Given the totality of the evidence, the Commission finds Petitioner's work-related cervical spine condition was a contributory cause in rendering her permanently and totally disabled. The Commission further finds Petitioner was permanently and totally disabled commencing on January 21, 2016 based on Dr. Brayton's opinion of permanent disability rendered on said date.

Additionally, the Commission vacates the award for maintenance benefits. Having found Petitioner was permanently and totally disabled effective January 21, 2016, the issue of Petitioner's entitlement to maintenance benefits subsequent to that date is moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for a period of 169 1/7 weeks, commencing June 10, 2011 through August 11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2014 through January 20, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for life commencing on January 20, 2016, as provided in §8(f) of the Act, for the reason that the injuries sustained caused the Petitioner to be permanently disabled. Commencing on the second July 15th after the entry of this award, Petitioner may

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become eligible for cost-of-living adjustments, paid by the rate adjustment fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 12 2020

Maria E. Portela

Thomas J. Tyrrell

MEP/dmm
O:091520
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Dissent

I respectfully dissent from the majority. I would find that Petitioner has not sustained her burden of proving that she is permanently and totally disabled as a result of her August 29, 2010, accident. Rather, Petitioner's permanent total disability is because of her progressive multiple sclerosis (MS) disease, diagnosed after her work-related accident and after she had returned to work as a registered nurse. While I empathize with Petitioner's suffering, for the following reasons I would award permanency on the basis of §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7 with permanent restrictions.

Prior §19(b) Hearing and Award

Before the work accident of August 29, 2010, Petitioner underwent a cervical spine MRI on January 22, 2010, and was diagnosed with neck pain and right cervical radiculopathy secondary to a herniated disc at C5-C6 for which she treated with Dr. Brayton, a neurologist, and Dr. Cherala, in Respondent's pain management clinic. (ArbX2, 1, PX1) After a §19(b) hearing, the Arbitrator deemed the August 29, 2010, accident resulted in: 1) an *aggravation* of a pre-existing herniated disc at C5-C6; and 2) a new disc herniation at C6-C7. (ArbX2, 4) (emphasis added)

The Arbitrator's §19(b) Decision notes that Petitioner underwent a cervical MRI on February 9, 2011, at Dr. Brayton's recommendation, to determine whether the C5-C6 herniation had worsened. "The radiologist's impression was that there was little change from the previous MRI *with the possible slight decrease in size of the C5/6 right disc herniation.*" (ArbX2, 2) (emphasis added)

The Arbitrator's §19(b) Decision further notes Dr. Butler's second IME of Petitioner on February 17, 2011, which states, "[t]he MRI finding *had actually improved to some degree.* Her symptoms were primarily subjective in nature and there was no objective neurologic deficit." (ArbX2, 3) (emphasis added) In the §19(b) award, the Arbitrator noted the improvement detected by the cervical MRI of February 17, 2011, most notably at C5-C6.

The Arbitrator awarded physical therapy (P.T.) as reasonable medical treatment and specifically denied the epidural steroid injection (ESI) that Dr. Brayton recommended concluding that, "Petitioner failed to prove the ESI prescribed by Dr. Brayton are (sic) reasonable and necessary medical treatment. However, she has not reached MMI and is entitled to further treatment with Dr. Brayton....Dr. Brayton has prescribed P.T., which is reasonable treatment for Petitioner's exacerbation." (ArbX2, 4-5)

The §19(b) Decision was appealed to the Commission where it was later affirmed and adopted. (ArbX2)

Post §19(b) Medical Treatment and Return to Work

After the §19(b) award, Petitioner called Dr. Brayton on August 1, 2011, and requested a release to return to work. Dr. Brayton imposed work restrictions of no lifting greater than 10 pounds, and to avoid excessive pushing and pulling. (PX1) On August 10, 2011, Petitioner saw

Dr. Yang at Delnor for pain management to obtain a repeat ESI, despite the Arbitrator's denial of the ESI. (PX2) Dr. Yang reviewed the MRI from February 9, 2011, and noted a "C6-7 minimal disc bulge." There is no evidence that Petitioner ever attended the P.T. awarded by the Arbitrator intended to address her cervical issues.

Petitioner began working full-time as a nursing supervisor at Loretto Hospital on August 12, 2011. (T, 25-26)

Petitioner returned to Delnor pain management clinic on October 21, 2011, and saw Dr. Hanna where Petitioner's past medical history was positive for migraines, chronic neck and back pain, chronic bronchitis, DVT, asthma, sleep apnea, IBD, Crohn's disease, hypothyroidism, anxiety/depression, ADD, obsessive-compulsive disorder, fibromyalgia, and endometriosis. (PX10, 10/21/11). Review of systems on that same day reflects that Petitioner complained of some nausea, stress incontinence, and joint swelling. Dr. Hanna noted only her pre-existing cervical disc at C5-C6 on the right side, omitting any reference to the C6-C7 level. Dr. Hanna found that a large segment of her pain is also myofascial related. Thus, he administered trigger point injections to the bilateral levator scapular muscles. (PX2)

On November 9, 2011, Petitioner saw Dr. Hanna for an ESI and medication management. Dr. Hanna administered a cervical ESI at C7-T1 and trigger-point injection to her bilateral levator scapular muscles. On December 12, 2011, Dr. Hanna administered additional trigger-point injections at the same level. Dr. Hanna noted a new diagnosis of "Abnormal neurologic examination with clonus. And Dysphagia."

Petitioner continued working full-time as a nursing supervisor for Loretto Hospital. On February 15, 2012, Dr. Hanna noted Petitioner's dysphagia has been increasing, and she had to bend her head forward or tuck her neck to swallow and that Petitioner has an abnormal neurologic exam with clonus. Dr. Hanna recommended a repeat cervical MRI and administered trigger point injections. (PX2)

Petitioner underwent the cervical spine MRI scan on February 16, 2012. The findings at C5-C6 were as follows:

> "There is a posterior disc osteophyte complex an associated right paracentral small posterior disc protrusion. The overall posterior extent of this disc protrusion *has not significantly changed* although there is slight broadening at the base of the protrusion and presence of an annular tear now identified. Mild effacement of the ventral CSF space is again noted. There is slight right facet degeneration resulting in minimal thinning of the right neural foramen, stable." (PX2) (emphasis added)

The radiologist's impression states: "The posterior disc protrusion and at C5-C6 *is slightly more broad-based on the current exam than when compared to previous although the posterior extent of the protrusion is stable. Remainder of findings are unchanged.*"(PX2) (emphasis added)

Dr. Brayton authored a letter to Dr. Branshaw, Petitioner's PCP, dated March 2, 2012. He notes that she "[h]as an extensive history of pain and radicular symptoms after a work related

injury of her neck causing a C5-C6 disc herniation on August 29, 2010. ... concerning symptoms of swallowing dysfunction, increasing spasticity of her upper and lower extremities especially noted in her lower extremities.... There is also hyperreflexia at the patellar tendon including crossed adductor reflexes and distribution of reflexes. There is an exaggerated wrist extensor reflex as well as brachioradialis reflex in the upper extremities, again with distribution of reflexes. There is sustained clonus bilaterally. There is also Babinski sign." (PX1)

Dr. Brayton advised the cervical spine results showed, "the *slight* progression in the C5-C6 (disc) along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her focal spine tenderness but it certainly does not explain her pathologic reflexes, hyperreflexia, clonus, and Babinski signs. There is no evidence of intrinsic cord lesion on the presented cervical MRI scan, but I am concerned that *she has evidence of diffuse upper motor dysfunction.*" (PX1)

Dr. Brayton further wrote, "In summary, the patient's neck pain may be explained by the *relatively modest changes* of the C5-6 disk herniation which does not exert any further compression of the neural elements combined with the facet disease at C5-6 and C6-C7, but it certainly does not explain the patient's rather concerning finds consistent with diffuse upper motor dysfunction." (PX1) (emphasis added)

On March 2, 2012, an MRI of the brain confirmed a brain lesion at the right aspect of the pons and loss of the surrounding white matter material around the brain stem. Thereafter, on March 30, 2012, a spinal tap and lumbar puncture ordered by Dr. Santwani was performed because of the brain lesion, or abnormal mass in Petitioner's brain, the clonus and the increased reflexes. The spinal tap confirmed multiple abnormal bands consistent with a clinical diagnosis of MS. (RX1, 19-21, PX4)

During this work-up that diagnosed MS, Petitioner continued working full-time as a nursing supervisor. However, Petitioner was terminated from her position at Loretto Hospital for labor/union reasons unrelated to her physical condition on May 20, 2012. Petitioner testified that she continued to look for work in the nursing field. (T, 26, 33) The fact that the Petitioner was still looking for work at this juncture shows the work injury did not disable Petitioner from working at that time, and further, that her work-related condition was stable and not worsening.

On August 23, 2012, Petitioner advised Dr. Brayton she wanted to return to work and requested new, more lenient restrictions. Dr. Brayton assigned restrictions of lifting 50 pounds frequently and 100 pounds occasionally. (T, 31) Petitioner testified that essentially if she went into the doctor and said, "I feel like I can do this" they were willing to adjust her restrictions so she could take a job she located. (T, 66)

Petitioner underwent an EMG/NCV some nine months later, on May 28, 2013, which showed "evidence of a *trace*, acute, C5 radiculopathy on the right and a *mild,* acute C6 radiculopathy on the left. There is no definitive electrophysiological evidence of a brachial plexopathy or peripheral neuropathy affecting the upper extremities at this time." (PX4) (emphasis added) This is at the level of Petitioner's pre-existing C5-C6 disc herniation, and the findings are

the same or similar to the EMG/NCV of October 20, 2010. These objective tests do not explain Petitioner's ongoing symptoms and complaints.

In 2013, Petitioner applied for Social Security Disability Insurance (SSDI) benefits. (T, 67)

Petitioner began working full-time as a float nurse on September 9, 2013, at DuPage Convalescent Center. (T, 18) Petitioner continued to work until January 5, 2014, at which time Dr. Santwani provided an off-work slip excusing Petitioner from work through January 9, 2014, citing a flare-up of her MS condition or from multiple falls. Dr. Santwani further excused Petitioner from work on February 23, 2014, February 26, 2014, and February 27, 2014, and February 23 through March 9, 2014, again for flare-ups of her MS condition, or from multiple falls. No off work slips were related to her work-related cervical condition. (PX4, work status notes)

On February 25, 2014, Petitioner underwent a cervical MRI which showed her objective results were unchanged from previous scans. By that time, however, Petitioner was exhibiting symptoms of left foot drop. According to Dr. Allen, absent lumbar spine disease, which was confirmed by MRI on February 25, 2014, the lesion causing this symptom had to be above that level, at the neck or in the brain. In fact, she had findings both in the neck, but particularly in the brain, that would explain the foot drop. (RX1, 25)

Dr. Santwani released Petitioner to return to light duty work on March 12, 2014, after an MS flare-up. Petitioner was released to return to work *with no* restrictions on March 13, 2014. (PX4) (emphasis added) Thereafter, on March 30, 2014, April 2, 2014, and April 3, 2014, Dr. Santwani excused Petitioner from work after multiple falls attributable to her MS and unrelated to her cervical condition. She also received an off work note from Dr. Santwani on April 5 and April 6, 2014, again for MS exacerbation and severe falls. (PX4) On April 21, 2014, Petitioner reported to Dr. Santwani that she was hospitalized for an MS flare up. Petitioner reported that her legs were weak, she reported frequent falling and memory problems, increased dysphagia and choking on liquids, her vision was blurred, and her body was weak with generalized pain. (PX4)

Petitioner testified that she was terminated from her position at DuPage Convalescent Center in May 2014, "for missing work for medical reasons." When asked if she missed work because of issues regarding her cervical spine, Petitioner testified that she did. (T, 32) However, Dr. Santwani's off-work notes from January, February, March, and April 2014, indicate Petitioner missed work because of MS flare-ups or falls and not the work-related cervical condition. (PX4))

Petitioner testified that she looked for work in nursing management thereafter until she was awarded SSDI benefits in 2015. (T, 71) Petitioner never looked for work after her award of SSDI. (T, 67)

Petitioner had not seen Dr. Brayton in two years, since he wrote Dr. Branshaw in 2012 and referred her to Dr. Santwani at that time. On August 19, 2014, however, Petitioner returned to Dr. Brayton. After reviewing the August 1, 2014, cervical MRI, Dr. Brayton advised Dr. Branshaw that the continued herniation at the C5-C6 level *has not progressed much* and does not significantly compress the neural elements and suggested a provocative discography of the cervical spine both

at the C5-6 level and control levels. (PX1) He did not mention the disc at C6-C7. Dr. Brayton saw Petitioner only two more times, on February 12, 2015 and on January 21, 2016.

Petitioner underwent a discogram at Kendall Pointe Surgery on October 22, 2014. The discogram report states, "[a]t both the C4-C5 and C5-C6 discs, the patient experienced posterior bilateral cervical pain. (PX8) The pain experienced was equal at both levels. At the C6-C7 disc, the disc appeared normal, and no pain was produced." (PX8) On February 12, 2015, Dr. Brayton reviewed the discogram.

On December 2, 2014, Dr. Santwani ordered a functional capacity evaluation (FCE) to assess Petitioner's capabilities at that time. Petitioner never underwent the FCE to quantify her work capabilities.

Before trial, on March 28, 2018, Petitioner underwent another cervical MRI. The radiologist's impression states, "small central protrusion of the disc at C2-3 and C5-6 contributing to mild central stenosis; 2) multilevel degenerative disease of the cervical spine; 3) no abnormal signal or enhancement of the visualized spinal cord."

Dr. Allen's Medical Opinion

Petitioner was seen by Dr. Neil Allen at Respondent's request pursuant to §12. Dr. Allen authored two reports dated December 29, 2014, and February 26, 2015, and testified via evidence deposition on August 10, 2015. Dr. Allen is board certified in both internal medicine and neurology but also published and involved in presentation and research of MS for 15-20 years. (RX1, 8-9) He testified that he reviewed Dr. Brayton's medical records from 2002 noting that seven years prior to 2003, Petitioner was kicked in the head during a soccer game and had migraine type headaches including in the back of her head. (RX1, 15, 84) Dr. Allen reviewed the August 29, 2010, cervical MRI and confirmed the only new finding was the C6-C7 diffuse disc bulge. (RX1, 16)

Dr. Allen agreed with Dr. Brayton's assessment of her symptoms and that the February 16, 2012, cervical MRI showing that the C5-C6 protrusion was slightly more broad-based than on earlier examination and that the "MRI didn't explain her increased reflexes and clonus in her legs, difficulty walking, and problems swallowing." (RX1, 19) An MRI of the brain was performed on March 2, 2012, which showed a brain lesion at the right aspect of the pons which turned out to be a demyelinating area, an area of local inflammation, and loss of the surrounding white matter material around the nerves of the actual spinal—of the actual brain stem itself, consistent with MS. (RX1, 20) She underwent a spinal tap or a lumbar puncture because of the clonus in her ankles, the abnormal mass in the brain and increased reflexes. The puncture showed multiple abnormal bands, consistent with MS. (RX1, 21)

Dr. Allen opined that Petitioner's falling was from the lesion noted in the pons of the brain. Her increase in memory problems could be from the narcotic medications; the difficulty swallowing was likely from the lesion in the pons as was the occasional choking on liquids. Petitioner's problems finding words and lack of coordination were from narcotics and the MS. (RX1, 27-28, 34)

Dr. Allen also testified that lesions in the brain can be caused by the MS, migraines and encephalitis. (RX1, 37) Petitioner's hyperreflexia was caused by interruption in the transmission of impulses from the brain stem spinal cord to lower extremities. It is a manifestation of MS, the tumor, and a vitamin B-12 deficiency, which Petitioner had in the past. (RX1, 38) There was no evidence of myelomalacia (spinal cord damage) or spinal cord compression. The physical examination of February 26, 2015, revealed Petitioner complained of migraines dating to 1995 when she suffered a Grade 2 concussion. (RX1, 41-42, 84).

Dr. Allen's impression after the February 2015 examination was that her current condition of ill-being appeared to be a loss of balance, increased frequency of headaches, occurring two to three times a week, and the cowl-like discomfort she has over her shoulders secondary to the cervical spine injuries that have been previously adjudicated. It was his opinion that none of the conditions of MS, hyperreflexia in her legs or fibromyalgia were related to the work accident. (RX1, 50) He opined any work restrictions that she has at this time would be related to migraines and would not be related to her work accident. (RX1, 52)

Dr. Allen opined the only symptoms related to her work injury, were "[p]ain in her neck, pain in her arm, any numbness or weakness that she had in her upper arm as found by other examiners which I did not go into since that information had already been adjudicated." (RX1, p. 53) No lower extremity findings, headaches, intermittent and episodic dizziness, light sensitivity, sound sensitivity, nausea, her gait, spasticity of her lower extremities, weakness, lack of attention, and difficulty with memory are related. (Rx1, 53-56)

When asked if Petitioner was capable of working with regard to her injury which had been adjudicated in the §19(b) hearing, Dr. Allen opined that, "[i]t was documented that she returned to work subsequent to her neck injury in 2010, and she returned to work in 2011. She was performing her full duties as a nurse at Loretto Hospital when she did, in fact, return to work and was also capable of exercising up to three time per week. (RX1, 56) Dr. Allen testified that on August 23, 2012, Dr. Brayton released Petitioner to return to work with restrictions of lifting 50 pounds and occasional lifting of up to 100 pounds, consistent with the duties of a registered nurse and he was in agreement with those restrictions. (RX1, 23, 88)

Dr. Brayton's Medical Opinion

On January 21, 2016, Dr. Brayton opined that Petitioner continued to be disabled by pain requiring high-dose analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches, caused by her work injury which is a separate condition from her MS. He also opined that Petitioner's MS was triggered by her work injury and disc herniation. Dr. Brayton further stated that the cervical disc herniation persists at C5-C6 and has not healed or improved but does not progress. Dr. Brayton described her disc disease at C2-3 and C3-4 levels that are unrelated to the August 29, 2010, work accident. He advocated avoiding surgery. Dr. Brayton provided one work status note that was handwritten that states, "Permanent work restrictions no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment-permanent. He also provided a hand-written note on a prescription pad that documents, "Permanent Disability."

Dr. Brayton never testified regarding his January 21, 2016, opinions.

Dr. Herman's Medical Opinion

Petitioner underwent a second §12 exam by Dr. Martin Herman, a neurosurgeon, at Respondent's request in May 2016. Dr. Herman testified that Petitioner has three ongoing problems: 1) a pre-existing condition of long-standing neck pain since 1995 with cervical degenerative disease; 2) the disc herniation (C6/7) that occurred in 2010; and 3) progressive neurological abnormalities due to her MS. The pre-existing disc disease and the herniated disc did not prevent her from working as a registered nurse. The symptoms from the MS would prevent her from returning to work as a registered nurse. (RX2, 42-43) Dr. Herman opined that her (C6-C7) disc herniation was very small according to her reports and it is not possible to attribute the large number of not associated symptoms and signs that she's having to this disc herniation because people with disc herniations do not get loss of coordination, blurry vision, memory loss, or the kind of weakness she's describing. (RX2, 43-45) Dr. Herman testified that a 50-pound and a 100-pound restriction at medium duty, roughly two years after her injury was completely reasonable in regard to her work-related condition. (RX2, 22) He found that Petitioner had reached MMI when she was returned to work with the restrictions Dr. Brayton imposed of 50-pounds and 100-pounds occasionally. Petitioner did not need additional treatment for her work-related condition. (RX2, p. 17)

Analysis and Conclusions

The majority finds that, "The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies." I disagree. The medical records show Petitioner's work-related condition was stable and this stable work-related condition did not prevent Petitioner from working. Also, the condition that was progressively worsening was her MS condition that Petitioner stipulated was not causally related to the work accident.

The sole new finding resulting from the work accident, the disc at C6-C7, was non-symptomatic. Moreover, the February 16, 2012, cervical MRI confirmed the pre-existing C5-C6 disc was almost completely stable and unchanged. Objectively, Petitioner's work-related conditions at C5-C6 and C6-C7 were stable some two years post-accident. Also, the May 28, 2013, EMG/NCV (6/8/18 Hearing, PX4) documents the same or similar results as the October 20, 2010, EMG/NCV. (6/29/11 Hearing, PX1)

Petitioner was able to return to work and did, in fact, return to work. Petitioner worked as a full-time registered nurse after the accident from August 12, 2011 – May 20, 2012. Shortly thereafter, in August 2012, Dr. Brayton updated his employability assessment imposing more lenient restrictions, 50-pounds frequently and 100-pounds occasionally. Petitioner was working from September 9, 2013 – January 5, 2014, until taken off by Dr. Santwani because of her progressively worsening MS symptoms that even required hospitalization. (PX4) Dr. Santwani's treatment from April 23, 2012, solely addressed Petitioner's progressing MS symptoms. The only condition that was progressively worsening both symptomatically and per the objective diagnostic studies was Petitioner's non-work-related MS condition not her work-related cervical condition.

It is noteworthy that only after the progressively worsening non work-related MS condition, did Dr. Brayton change her work restrictions and find she was unemployable.

The majority's reliance on *Sisbro* to award PTD benefits is misplaced. (citations omitted) The majority asserts that the Petitioner's cervical condition is a "contributing cause" to her permanent and total disability. It is the responsibility of the claimant to establish that he or she is entitled to permanent total disability benefits. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 IllApp.3d 1117, 1129, 864 N.E.2d 838, 309 Ill.Dec. 597 (2007). A claimant is required to establish the elements of his right to compensation under the Workers' Compensation Act. *Certified Testing v. Industrial Com'n.*, 305 Ill.Dec. 797, 856 N.E.2d 602, 367 Ill.App.3d 938 (2006). In order to establish entitlement to PTD benefits, a claimant must establish that she is incapable of performing services except for those for which there is no reasonable stable labor market because of the effects of the work injury. *Federal Marine.*

The Appellate Court in *Alano v. Industrial Commission* stated:

> [T]he focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability, and 'if an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, such employee is not totally and permanently disabled.' *Alano v. Industrial Com'n.*, 282 Ill.App.3d 531, 668 N.E.2d 21 (1996) citing *E.R. Moore Co. v. Industrial Com'n*. (1978), 7 Ill.2d 353, 361, 17 Ill.Dec. 207, 376 N.E.2d 206.

In this case, Petitioner's work-related medical disability is her cervical condition at C5-C6 and C6-C7. However, the C5-C6 disc was stable and did not prevent her from returning to work, albeit with restrictions, in 2011, 2012, 2013 or thereafter. In fact, Petitioner returned to work full duty at Loretto Hospital in 2011 until she was terminated in 2012, and also at DuPage Convalescent Center, until she was terminated in 2015. The condition of disability preventing Petitioner from gainful employment was the progressively worsening and debilitating non-work related MS condition. Petitioner has failed to show her work-related medical disability impaired her employability.

Dr. Brayton is the only doctor who opined that Petitioner is permanently and totally disabled as a result of the August 29, 2010, work injury. Dr. Brayton's credibility is tainted for a multitude of reasons. First, he allowed the Petitioner to dictate her work restrictions on multiple occasions. Second, Dr. Brayton did not testify and thus never provided the basis for his opinion, that the aggravation of a pre-existing herniated disc at C5-C6, which was stable or smaller on the cervical MRI on February 10, 2011, caused Petitioner's permanent disablement. Finally, Dr. Brayton's opinion on Petitioner's employability regarding her cervical spine restrictions, lacks foundation, and the purview of that opinion belongs to a certified vocational counselor. The Appellate Court specifically rejected a medical opinion regarding an injured employee's employability in *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 865 N.E.2d 342 (2007). In *Westin,* the court held:

> As far as we can tell, Dr. Coe had not ordered or reviewed any vocational or rehabilitative tests, conducted a labor-market survey on claimant's behalf,

> attempted to find claimant a position within his restrictions, or prescribed a functional capacity evaluation. In fact, Dr. Coe acknowledged on cross-examination that he never reviewed a job description for claimant's position, that claimant only told him "in general in his limited way" what his job duties entailed, and that he never ordered any vocational evaluation of claimant. Although Dr. Coe emphasized that claimant's limited knowledge of the English language restricted his ability to be rehabilitated in an occupation other than a painter, our supreme court has suggested that one's language skill is insufficient to support a finding of odd lot. *Valley Mould & Iron Co.*, 84 Ill. 2d at 548. [***41]

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 544-545, 865 N.E.2d 342, 358, (2007).

The evidence is clear Petitioner's work-related cervical condition had stabilized and she was able to return to gainful employment until her progressively worsening MS rendered her unable to do so. Therefore, Petitioner did not sustain her burden of proving that she was permanently and totally disabled as a result of the injuries caused by the work accident.

Therefore, I find that the opinions of Dr. Allen and Dr. Herman are more credible than Dr. Brayton's unsubstantiated opinion that Petitioner is permanently and totally disabled as a result of the work injury. Dr. Herman opined Petitioner sustained a disc herniation from the August 29, 2010, accident but it had been effectively treated and she was at maximum medical improvement with her return to work with 50/100 pound lifting restrictions imposed by Dr. Brayton in 2012, comporting with Dr. Allen's opinion. He further opined that as of May 2016 Petitioner was *not* capable of returning to work but because of the MS and not because of the work-related condition. (Rx2, 47-48, 60) Further, the off work notes provided by Dr. Santwani in 2014 for MS flare-ups are consistent with Dr. Herman's opinion that Petitioner could not work because of her MS, not her cervical condition.

Several Commission Decisions support the proposition that when a Petitioner is disabled from another medical condition(s) unrelated to the work accident, it is the Petitioner's burden to prove that she is entitled to an award of permanent and total disability for her work accident. See, *Hamilton v. A T & T*, 99 IIC1127, (Petitioner was diagnosed with carpal tunnel syndrome and she ultimately underwent bilateral carpal tunnel releases for her condition. Subsequent to her surgeries, Petitioner was diagnosed with left reflex sympathetic dystrophy and later with bilateral epicondylitis and fibromyalgia. Eventually Petitioner was diagnosed with sarcoidosis. In denying benefits, the Arbitrator found, and the Commission upheld, that Petitioner was taken off work completely due to an unrelated lung condition in February of 1997); *Tidemann v. Homes By Hemphill*, 09 IWCC 0330 (Commission reversed the Arbitrator's decision regarding permanent and total disability, finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent, however that Petitioner failed to prove a causal connection between her work related injuries of August 14, 1989, and her current condition of ill-being with respect to her nose, left hip, right and left feet, and pre-existing rheumatoid arthritis and awarded permanency on the basis of §8(d)2 and §8(e)); and *Karen McCurrie v. Grove Dental*

Associates 09 IWCC 0050 (Commission upheld Arbitrator's denial of permanent and total disability award, where Petitioner had a compensable accident on December 10, 2002, which did aggravate an underlying condition in her lower back. She also had prior to that work accident complaints of headaches and chronic fatigue among other symptoms, which eventually were diagnosed in 2005 as fibromyalgia and chronic fatigue syndrome. In reviewing the treating records following the accident of December 10, 2002, the Arbitrator/Commission held that Petitioner's condition of ill-being about her lower back was related to the accident of December 10, 2002, but her prior and subsequent and present complaints diagnosed as fibromyalgia, chronic fatigue syndrome, and headaches are unrelated to the accident of December 10, 2002. While the Petitioner may very well be unable to work at the present time, that inability to work is related to the non-work related conditions of fibromyalgia, chronic fatigue syndrome, and headaches.)

Based on a careful review of the evidence, I would award Petitioner permanency on the basis of loss of use of a person-as-a whole under §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7, resulting in permanent restrictions. Therefore, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOWNING, DELLA
Employee/Petitioner

Case# **11WC009902**

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

20IWCC0657

On 8/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1876 CZAPLA LAW
EDWARD A CZAPLA
1821 WALDEN OFFICE SQ STE 400
SCHAUMBURG, IL 60173

2965 KEEFE CAMPBELL & ASSOC LLC
SHAWN R BIERY
118 N CLINTON STE 300
CHICAGO, IL 60661

20IWCC0657

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ XXNone of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DELLA DOWNING
Employee/Petitioner

v.

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

Case # 11 WC 9902

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Wheaton**, on **6/8/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **8/29/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$84,249.36**; the average weekly wage was **$1,620.18**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

1. RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR 169 1/7 WEEKS, COMMENCING JUNE 10, 2011 THROUGH AUGUST 11, 2011; MAY 21, 2012 THROUGH SEPTEMBER 19, 2013; AND MAY 5, 2014 THROUGH JANUARY 20, 2016, AS PROVIDED IN SECTION 8(b) OF THE ACT.

2. RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $1,080.12/WEEK FOR 124 AND 1/7 WEEKS, COMMENCING JANUARY 21, 2016 THROUGH JUNE 7, 2018, AS PROVIDED IN SECTION 8(a) OF THE ACT.

3. RESPONDENT SHALL PAY PETITIONER THE REASONABLE AND NECESSARY MEDICAL EXPENSES INCURRED FOR THE CERVICAL SPINE AS IDENTIFIED IN PX.1., PX.2, PX.4, PX.5, PX.6, PX.7, PX.8, PX9, PX 10, PX.11, PX.12, PURSUANT TO SECTION 8 (A) AND 8.2 OF THE ACT AND SUBJECT TO THE MEDICAL FEE SCHEDULE.

4. RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR LIFE, COMMENCING ON JUNE 8, 2018, AS PROVIDED IN SECTION 8(f) OF THE ACT. COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(g) OF THE ACT. RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM 8/29/10 THROUGH 6/8/18, AND SHALL PAY THE REMAINDER OF THE AWARD, IF ANY, IN WEEKLY PAYMENTS.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

KSSteffen **July 28, 2018**

Signature of Arbitrator Date

AUG 10 2018

PROCEDURAL HISTORY

On June 9, 2011, a prior 19(b) Petition for Immediate Hearing was heard before an Arbitrator. The Arbitrator found that Petitioner's current condition was causally related to her undisputed work accident of August 29, 2010. Specifically, Petitioner was found to have sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator Ex.2) Petitioner was awarded temporary total disability benefits commencing September 10, 2010 through November 11, 2010; February 3, 2011 through February 4, 2011; February 27, 2011 through March 10, 2011; March 12, 2011 through March 16, 2011; and March 19, 2011 through the June 9, 2011 19(b) hearing. (Arbitrator's Ex. 2) The Arbitrator determined Petitioner had not reached maximum medical improvement and was entitled to further medical treatment with Dr. Brayton (Arbitrator's Ex.2).

The Arbitrator's 19(b) decision was affirmed and adopted by the Commission on August 2, 2012 (Arbitrator's Ex.2) A transcript of the 19(b) hearing was admitted into evidence. (Arbitrator's Ex.2)

On June 8, 2018, the matter was heard by the Arbitrator Ketki Steffen. The issues of accident, notice and causation were previously decided Petitioner stipulated that there was no claim for multiple sclerosis attributable to the August 29, 2010 accident at work.

Unpaid medical charges and unpaid lost time in the form of TTD and maintenance were alleged at hearing along with the request for a finding related to Nature & Extent if the Arbitrator were to agree that the evidence presented supports a finding of Petitioner having reached a state of Maximum Medical Improvement. Petitioner alleged odd-lot permanent disability applies in regard Nature & Extent.

Petitioner further stipulated that Respondent was entitled to a credit pursuant to Section 8(j) of the Act for any payment of Petitioner's medical expenses. Respondent's counsel acknowledged that he was not disputing Petitioner's claim for permanent total disability benefits pursuant to Section 8(f) of the Act.

FACTUAL HISTORY

Petitioner is a licensed nurse and had worked in that capacity at the time of her accident on August 29, 2010 when sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6.

The following history entails the medical and other relevant facts after the prior 19B/8A hearing and decision:

On July 14, 2011 Petitioner telephoned Dr. Brayton complaining of left and right arm numbness and pain. (PX.1.) Dr. Brayton's August 1, 2011 office note reflects Petitioner "called in req release to work still has neck and arm SX but must RTW due to financial situation." (PX.1) Dr. Brayton released Petitioner back to work at her request with a 10-pound lifting restriction and no excessive pushing/pulling (PX.1.)

On August 12, 2011 Petitioner went to work at Loretto Hospital as a nursing supervisor. Petitioner worked full-time until May 20, 2012 when she was terminated. The nursing staff unionized and Petitioner lost her job.

Petitioner continued to experience radiating neck pain and was referred by Dr. Brayton to the Delnor Hospital pain clinic for a series of cervical epidural steroid injections. (PX.1.) Dr. Yang examined Petitioner on August 10, 2011 and noted Petitioner's neck pain radiating to her bilateral upper extremities (PX.2.) Petitioner complained of numbness in all 5 fingers on both hands. Dr. Yang reviewed the

February 9, 2011 cervical MRI which showed a C5-C6 right sided paracentral disc herniation, C4-C5 small disc protrusion and C6-C7 disc bulge. (PX.2.) Petitioner was diagnosed with cervical radiculopathy, secondary to spinal stenosis, cervical degenerative disc disease with overlying myofascial pain. (PX.2.)

On August 17, 2011 Petitioner received the first of a series of cervical epidural steroid injections at Delnor Hospital. Dr. Hanna prescribed Vistaril, Zanaflex and Norco for Petitioner's cervical pain. (PX.2)

On October 21, 2011, Dr. Hanna prescribed a Duragesic patch for Petitioner's cervical pain and Petitioner received trigger point injections to the bilateral scapular and a second cervical epidural steroid injection. (PX.2) On November 9, 2011, Petitioner received a third cervical epidural steroid injection and bilateral scapular trigger point injections. (PX.2.)

Petitioner returned to see Dr. Hanna on December 12, 2011, complaining of increasing neck pain. While Petitioner reported pain relief with the injections and Duragesic patch she continued to experience muscle spasms along the neck, upper shoulders and lots of right arm pain. (PX.2.) Dr. Hanna continued to prescribe Norco, Zanaflex, Vistaril along with the Duragesic patch for Petitioner's chronic neck pain and cervical radiculitis. (PX.2.) Petitioner received 5 trigger point injections to the scapula, trapezius and cervical paraspinal muscle.

Petitioner saw Dr. Hanna on February 15, 2012 complaining of *"worsening neck pain down both arms with numbness and tingling into the hands."* (PX.2.) Dr. Hanna refilled Petitioner's Duragesic patch, Norco, and Zanaflex. Petitioner received bilateral trigger point injections to the trapezius and levator scapula for her myofascial pain. (PX.2.)

MRI study of the cervical spine performed on February 16, 2012 revealed:

"The posterior disc protrusion at C5-C6 is slightly more broad based with the presence of an annular tear." (PX.2.)

Dr. Brayton reviewed the MRI results with Petitioner on March 2, 2012 and noted *"the slight progression in the C5-C6 disc along with the more pronounced annular tear explains some of her increased neck symptoms and pain. The increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal cervical spine tenderness, but it certainly does not explain her pathologic reflexes, hyperreflexia, Clonus and Babinski signs."* (PX.1) Petitioner was referred to Dr. Santwani, a neurologist, for electrophysiologic testing.

Dr. Santwani performed a number of tests including a lumbar puncture and spinal tap and ultimately diagnosed Petitioner with multiple sclerosis. (PX.4.) Petitioner stipulated at the onset of the hearing that treatment for the multiple sclerosis was unrelated to her August 29, 2010 injury at work.

Dr. Hanna continued to refill Petitioner's narcotic pain medications throughout 2012. (PX.2,3) Dr. Hanna noted on December 31, 2012 that the *"pain was severe with significant impact on functions and quality of life."* (PX.2.) Petitioner returned to Dr. Hanna on February 25, 2013 *"complaining of worsening pain in her fingertips, with neck pain across both shoulders, radiating down both of her arms with spasms on 9-10-out of 10 in severity, constant numbness and tingling into the arms."* (PX.2.) Dr. Hanna continued the narcotic pain treatment.

Cervical MRI study performed on May 5, 2013 revealed:
C4-C5 small central disc protrusion with minimal early annular tear;

C5-C6 disc desiccation and mild loss of disc height with broad-based central right paracentral disc protrusion which moderately indents the ventral sac with the associated central annular tear; and C6-C7 small lateral spurs.

Petitioner's last treatment with Dr. Hanna was May 13, 2013. Petitioner's insurance changed and she needed to switch to a pain physician in her network. Petitioner's medications were refilled and she was referred by her primary care physician, Dr. Branshaw, to Kishwaukee Hospital for pain management. (PX.2.)

On May 30, 2013, Petitioner presented to the pain clinic at Kishwaukee Hospital for her chronic neck pain. History reflects the *"pain began in August 2010 when she was lifting a patient"*. (PX.5.) Petitioner described the pain as aching, burning, constant, numb, pressure, radiating, sharp, squeezing, tingling, and tiring. Petitioner successfully underwent an opioid assessment to determine if she was an appropriate candidate for continued opioid therapy. (PX.5.) On June 12, 2013, Dr. Gregory approved long term opioid therapy and prescribed the Fentanyl Duragesic patch and Norco for breakthrough pain. (PX.5.)

Petitioner treated with Dr. Gregory at the Kishwaukee Pain Clinic throughout 2013. (PX.5.) He diagnosed Petitioner with cervical radiculopathy and fibromyalgia syndrome. On August 8, 2013, Petitioner received 4 cervical trigger point injections for her neck pain. (PX.5.) Patient reported that off of opioid medications she is not able to get out of bed and function, but with the medications, she is able to function. (PX.5.)

On September 20, 2013, Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was let go because of missing work.

On October 31, 2013, Dr. Gregory noted that Petitioner's pain has been worse since she has been back to work. (PX.5.) Dr. Gregory continued to prescribe the

Duragesic patch and Norco. In December 2013, Petitioner had to switch pain management physicians because of insurance coverage.

On December 26, 2013, Petitioner saw Dr. Todd Hagle for her chronic neck and back pain. (PX.10) Petitioner was referred to Dr. Hagle, a pain management anesthesiologist, by Dr. Branshaw. Dr. Hagle diagnosed Petitioner with chronic neck and back pain and noted *"she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this."* (PX.10) Dr. Hagle initially prescribed Lyrica and Baclofen for Petitioner's neck pain but she experienced side effects with Lyrica and it was discontinued. Thereafter, Dr. Hagle prescribed the Duragesic patch, Norco and Baclofen for Petitioner's neck pain. (PX.10)

Petitioner treated with Dr. Hagle on a monthly basis for her chronic neck pain. On February 10, 2014, Petitioner complained of pain in her neck, shoulders, and arms. Petitioner noted the pain was *"severe, chronic and disabling."* (PX.10) Dr. Hagle continued to prescribe the Duragesic patch, Baclofen and Norco for Petitioner's neck pain. Dr. Hagle's May 12, 2014 office note states ***"she*** (Petitioner) ***lost her job recently due to many falls/sick days."*** (PX.10)

A February 25, 2014 cervical MRI revealed persistent multilevel degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annual tear as well as right paracentral C5-C6 disc protrusion. (PX.1.)

Petitioner returned to Dr. Brayton on August 14, 2014 to discuss the recent MRI findings. Dr. Brayton noted that while recovering from her cervical disc herniation she was diagnosed with multiple sclerosis. Petitioner complained of severe painful dysesthesias in her arms and legs as well as severe unremitting neck pain and

cervicogenic headaches. (PX.1.) Dr. Brayton noted Petitioner has persistent pain associated with her work injury causing a C5-C6 disc herniation. (PX.1.) Dr. Brayton ordered provocative discography at C5-C6 which was performed at Kendall Pointe Surgery Center on October 22, 2014. Discography demonstrated posterior bilateral cervical pain at C4-C5 and C5-C6. (PX.8.) Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications.

An August 1, 2014 cervical MRI revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (PX.7.)

On December 29, 2014, Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Petitioner was also experiencing diffuse pain secondary to her multiple sclerosis. Petitioner continued to see Dr. Hagle on a monthly basis throughout 2015 to refill her pain medications. (PX.10)

Dr. Brayton discussed the results of the discogram with Petitioner on February 12, 2015. He noted at that time that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Dr. Brayton further noted that Petitioner had been diagnosed with multiple sclerosis and had dysethetic pain in the upper and lower extremities. (PX.1.) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6. MRI revealed a progressive, large, broad based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which have progressed since her last imaging study. (PX.1.) There was also an increase in the annular bulge and central CFS effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a

strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5. (PX.1.) Surgical intervention involving a C4-C5 anterior cervical decompression and fusion with plating was discussed including the risk of accelerated spondylitic changes at C6-C7. (PX.1.) Petitioner wished to defer surgery and continue with pain management.

Petitioner continued to refill her pain medications with Dr. Hagle on a monthly basis throughout 2015. (PX.10) Petitioner was awarded Social Security Disability benefits in 2015. MRI of the cervical spine completed on December 3, 2015 revealed no significant interval change.

Petitioner returned to Dr, Brayton on January 21, 2016 to discuss the MRI results. Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her M.S."* Examination revealed continued myelopathy with spasticity in both upper extremities. Cervical disc herniation persists at C5-C6 and has not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (PX.1.) There were also disc disease at C2-C3 and C3-C4 which is permanent. (PX.1.)

Dr. Brayton noted that *"overall it appears the patient has a permanent disc injury at C5-C6 I would favor against surgery given the concurrent diagnosis of MS and the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the surgical fusion needed at C5-C6." (PX.1.)* Dr. Brayton further noted that Petitioner *"will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a*

consequence to her injury." (PX.1.) Petitioner was issued ***"Permanent work restrictions of no lifting, frequent breaks, with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent."*** (PX.1.)

Petitioner refilled her pain medications with Dr. Hagle throughout 2016. (PX.10.) A follow-up cervical MRI performed at Kishwaukee Hospital on November 23, 2016 revealed some mild degenerative changes at C5-C6. (PX.10)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2017 and 2018. (PX.10). On January 16, 2017 Dr. Hagle stated *"I don't have much I can help or offer Della if she doesn't want to consider interventional therapy in the form of CESI or medial branch blocks." (PX.10).* Dr. Hagle continued to fill Petitioner's prescription for Norco, Baclofen and the Fentanyl patch. (PX.10) MRI of cervical spine performed on March 26, 2018 revealed a small central protrusion of the disc at C2-C3 contributing to the mild central canal stenosis and a small board-based central disc protrusion and mild osteoarthritis at C5-C6. (PX.10) Based upon the new MRI findings and Petitioner's persistent headaches and chronic neck pain Dr. Hagle recommended a cervical epidural steroid injection to relieve Petitioner's inflammatory radicular pain. (PX.10) Petitioner received the C7-T1 injection on June 1, 2018.

FINDINGS/ANALYSIS

WITH RESPECT TO ISSUE (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING OF THE CERVICAL SPINE CAUSALLY RELATED TO THE AUGUST 29, 2010 INJURY AT WORK, THE ARBITRATOR FINDS AS FOLLOWS:

The Commission affirmed and adopted the Arbitration Decision and Findings that Petitioner's current condition of the cervical spine causally related to her undisputed work accident of August 29, 2010, having sustained a new herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator's Ex. 2.) Respondent does not dispute the causal relationship between Petitioner's cervical spine and the injury at work. However, Respondent denies that Petitioner's multiple sclerosis is causally related to the August 29, 2010 injury at work. Petitioner stipulated at the onset of the hearing that she was not making any claim relating to multiple sclerosis diagnosis and that her claimed injuries were confined to the cervical spine.

The Arbitrator notes that Petitioner has consistently sought medical treatment for her cervical spine through the June 9, 2011 19(b) hearing. The treating medical records admitted into evidence document Petitioner's chronic neck pain and bilateral cervical radiculopathy resulting from her August 29, 2010 injury at work. Dr. Brayton noted on February 12, 2015 that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Discogram revealed concordant pain at C4-C5 and C5-C6 consistent with the MRI findings which demonstrate a progressive, large, broad based annular bulge at C5-C6, annular bulge at C4-C5 and continued spondylitic changes at C6-C7. (PX.1.)

On January 21, 2016, Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her MS"* (PX.1.)

The Arbitrator has carefully reviewed and considered all medical evidence along with the credible testimony of the Petitioner. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she sustained injury to her cervical spine which is causally related to the August 29, 2010 accident at work. It is undisputed that Petitioner injured her cervical spine lifting a patient at work. The Commission previously found that Petitioner sustained a disc herniation at C6-C7 and aggravation of a pre-existing herniated disc at C5-C6. (Arbitrator's Ex. 2) The medical records clearly document that progression of Petitioner's cervical disc disease which include permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.)

The Arbitrator finds the opinions of Dr. Brayton, a neurosurgeon, to be credible and persuasive. Moreover, the Petitioner credibly testified to the progression of her symptoms associated with her cervical disc disease. The Arbitrator finds it significant that Petitioner sustained no subsequent trauma to her cervical spine after the August 29, 2010 injury at work. Therefore, based upon the credible medical evidence along with Petitioner's uncontradicted testimony, the Arbitrator finds that the current condition of Petitioner's cervical spine is causally related to the August 29, 2010 accident at work. Additionally based on the testimony of Dr. Allen (RX.1.) and Dr. Herman (RX.2.), the Arbitrator finds that Petitioner's multiple sclerosis is not related to the August 29, 2010 accident at work.

The Arbitrator further finds that the lower back and any care related to the multiple sclerosis diagnosis, or any other diagnoses unrelated to the cervical spine condition is specifically determined to have no causal connection to the work injury alleged and awarded.

WITH RESPECT TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator having found that Petitioner's current condition of the cervical spine is causally related to the August 29, 2010 accident at work further concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment Petitioner received for her cervical spine was reasonably required to diagnose, treat, relieve and cure Petitioner from the effects of her cervical injuries and the medical services are causally related to her work injury. Respondent shall pay Petitioner all the reasonable and necessary medical services related to treatment of the cervical spine as contained in Petitioner's Exhibits No. 1, 2, 4, 6,7,8,9, 10, 11 and 12 (listed below), as provided in Section 8(a) and 8.2 of the Act, and subject to the medical fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner's Medical Exhibits

- PX1-Neurosurgery and Spine Surgery Dr. Brayton--$0.00 per statement
- PX2-Delnor Hospital--$0.00 per statement

- PX4-Suburban Neurology Group--$1,699.42 total which includes $423.81 for 2012 codes 99215($145.71) & 99255($278.10); $707.79 for 2013 codes 95886(POC53.2=$148.96 x 2) & 95910(POC53.2=$308.03) & 99214($101.84); and $567.82 for 2014 codes 99213($67.02) & 99232($91.85 x 3) & 99254($225.25).
- PX6-Kishwaukee Hospital--$0.00 per statement
- PX7-Center for Diagnostic Imaging--$0.00 per statement
- PX8-Kendall Pointe Surgery Center--$1,478.49 for 2014 code 62291 ($490.82 x 3)
- PX9-Interventional Pain Specialists--$1,701.68 for 2014 code 62291($490.82), code 72285($837.20), code 77003($218.26), code 99144($81.11), & code 99202($74.29)
- PX10-APAC Centers for Pain Management—$108.18 for 2018 code 99214
- PX11-Fox Valley Medical Associates/Dr. Branshaw--$0.00 per statement
- PX12-Tri City Radiology--$0.00 per statement

In conclusion, $4,987.77 is awarded per Fee Schedule with regard to the exhibits entered into evidence in conjunction with the findings related to causal connection for cervical issues only.

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner continued to be restricted from all work activities following the June 9, 2011 19(b) hearing. Respondent continued to deny Petitioner's weekly TTD benefits. Consequently, on August 1, 2011, Petitioner requested Dr. Brayton release her back to work with a 10 # lifting restriction and no excessive pushing/pulling. (PX.1.) Petitioner testified that she went to work for Loretto Hospital as a nursing supervisor on August 12, 2011. Petitioner worked full time until she was fired on May 20, 2012.

From May 21, 2012 through September 19, 2013, Petitioner remained unemployed and restricted to 10# lifting with no excessive pushing/pulling. Petitioner testified she looked for work as a nursing supervisor. On September 20, 2013 Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was terminated for missing work. Dr. Hagle's May 12, 2014 office note states "**she lost her job recently due to too many falls/sick days.**" (PX.10) Petitioner has not worked since that time despite looking for a nursing supervisor position. Petitioner was awarded SSDI benefits in 2015.

On January 21, 2016, Dr. Brayton issued Petitioner the following permanent work restrictions:

"No lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent" (PX.10)

Dr. Brayton wrote a script stating this was a ***"permanent disability".*** (PX.10)

Petitioner seeks temporary total disability benefits from June 10, 2011 through August11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2016 through January 20, 2016. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized (i.e., whether the claimant has reached maximum medical improvement). Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132,142; 923 N.E.2d 266, 271; 337 Ill. Dec. 707 (2010). The Arbitrator notes that Respondent previously terminated Petitioner on May 7, 2011 and denied her claim for temporary total disability benefits.

Therefore, based on the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner's condition had not

stabilized and finds that Petitioner is entitled to temporary total disability benefits of $1,080.12 /week for 10 and 1/7 weeks commencing June 10, 2011 through August 11, 2011; 64 and 4/7 weeks commencing May 21, 2012 through September 19, 2013; and 89 3/7 weeks commencing May 5, 2014 through January 20, 2016.

Furthermore, the Arbitrator finds that Petitioner reached maximum medical improvement on January 21, 2016 when Dr. Brayton determined Petitioner was ***"permanent disability** as a consequence to her injury"* and issued her permanent work restrictions prohibiting her from gainful employment. (PX.10). Petitioner's subsequent demand for permanent total disability benefits pursuant to Section 8(f) of the Act was ignored by Respondent. (PX.13) Therefore, the Arbitrator finds that Petitioner is entitled to maintenance benefits of $1,080.12/week for 124 and 1/7 weeks commencing on January 21, 2016 through the date of the hearing.

WITH RESPECT TO ISSUE (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY AND ISSUE (O) Other §8(f) PTD BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8(f) of the Workers' Compensation Act provides in part:

> *In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of a total permanent disability as provided in subparagraph 18 of paragraph e of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for Life. (820 ILCS 305/8(f))*

Therefore, a Petitioner is entitled to permanent total disability benefits where there is evidence of **"complete disability which renders the employee wholly and permanently incapable of work."** An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of

wages to him. A.M.T.C. of Illinois v. Industrial Commission, 77 Ill.2d 482,487 (1979). Thus, a Petitioner is entitled to permanent total disability benefits if there is medical proof to establish that he cannot work. Continental Drilling Co. v. Industrial Commission, 155 Ill.App.3d 1031, 508 N.E.2d 1246 (5th Dist. 1987).

It is undisputed that Petitioner injured her cervical spine lifting a patient at work on August 29, 2010 sustaining an aggravation of a pre-existing herniated disc at C5-C6 and a new disc herniation C6-C7. (Arbitrator's Ex. 2) The condition of Petitioner's cervical spine continued to progress and has led to permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.) Cervical fusion surgery was discussed with Dr. Brayton who believes the risk is too great considering Petitioner's MS and the potential for flare-up caused by the surgical stress. (PX.1.)

Petitioner continues to receive opioid therapy treatment for her chronic neck pain. On January 21, 2016 Dr. Brayton noted *"she continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches."*. (PX.1.) Dr. Brayton further noted that ***"She will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a consequence to her injury."*** (PX.1.)

Dr. Brayton determined Petitioner was ***"permanent disability"*** and issued a written script along with ***"permanent work restrictions of no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment – permanent".*** (PX.1.)

Thereafter, Petitioner requested permanent total disability benefits pursuant to Section 8(f) of the Act. (PX.13) Respondent failed to issue Petitioner's permanent total

disability benefits or prepare a written vocational assessment as required under Section 7110.10 of the Rules Governing Practice before the Industrial Commission.

Petitioner testified she continues to receive the Fentanyl patch along with Norco and Baclofen for her chronic and disabling neck pain. Petitioner sees Dr. Hagle on a monthly basis for her narcotic pain medications. Petitioner testified she experiences muscle spasms across the neck and top of the scapula (paraspinal spasms) on a daily basis. She has pain and stiffness in both arms with ongoing radiculopathy that causes numbness in all five fingers in both hands. Petitioner testified the neck pain *"affects her entire life".*

Petitioner testified she no longer cooks or performs household activities and relies on her husband and sons to do most of the housework. Petitioner is unable to work in the yard or perform any overhead activities. Petitioner testified she spends most of her time in a recumbent position and lives in her bedroom. Petitioner eats her meals in her bedroom, where she watches TV and can access her computer. Petitioner testified her daily pain level is 6 out of 10.

Therefore, based upon the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner met the burden of establishing that she is totally and permanently disabled pursuant to Section 8(f) of the Act. This Arbitrator notes §8(f) of the Act provides that compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life. Respondent shall pay Petitioner permanent and total disability benefits of $1,080.12/week for life, commencing June 8, 2018, as provided in Section 8(f) of the Act.

With regard to the maintenance period of January 21, 2016 to present, the evidence presented does not support an award for maintenance due to the lack of qualification due to the stated lack of vocational effort.

Respondent shall have credit for amounts paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim Nyberg,

Petitioner,

vs. NO: 19 WC 730

Vine Industries,

Respondent.

21IWCC0170

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent disability, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. CAUSAL CONNECTION

The Commission modifies the Decision of the Arbitrator with respect to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

The Arbitrator ruled that the causal connection between Petitioner's injury and his current condition of ill-being terminated as of September 17, 2018, the date on which Petitioner reported to his treating physician, Dr. Brian Chilelli, that he was approximately "80-90% better overall." In so ruling, the Arbitrator accepted the opinion of Dr. Shane Nho, Respondent's Section 12 examiner. Given the facts and circumstances of this case as stated in the Decision, the Commission declines to find that the causal connection between Petitioner's accident and his condition of ill-being terminated on September 17, 2018 based solely on Petitioner's broad self-estimate on a single date, or broadly accept the opinions of Dr. Nho.

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More significant is the November 19, 2018 surveillance video, which shows Petitioner engaged in activities expected of Petitioner as an electrician during a period when his treating physician had placed him off work. The video occasionally depicts Petitioner favoring his right leg and keeping weight off the left leg, but more often shows Petitioner placing weight on the left leg to descend from the porch or back of his van. Similarly, the video occasionally shows Petitioner leaning against the ladder in a manner to keep weight off his left leg, but more often depicts Petitioner standing on the rungs of various ladders using both legs as support. The video also tends to show Petitioner with a normal gait. In short, the video recording submitted in this case confirms that Petitioner was able to perform the job duties of an electrician, whether with restrictions or without, as of November 19, 2018. Conversely, Dr. Chilelli's treatment records do not suggest that Petitioner ever informed him of these activities, which may have affected Dr. Chilelli's decision to keep Petitioner off work rather than impose work restrictions, and the speed at which Petitioner was advanced to return to work.

Accordingly, after considering the record as a whole, the Commission concludes that Petitioner established a causal connection between his injury and his condition of ill-being that terminated as of November 19, 2018.

II. MEDICAL EXPENSES

The Arbitrator denied Petitioner's claim for $935.00 in physical therapy expenses between April 24, 2019 and May 30, 2019 based on the Arbitrator's determination that Petitioner reached maximum medical improvement (MMI) on September 17, 2018. The Commission determines that Petitioner reached MMI as of November 19, 2018, but Petitioner's claim is for medical expenses after this date. Accordingly, the Commission affirms the Arbitrator's denial of unpaid medical expenses.

III. TEMPORARY TOTAL DISABILITY

The Arbitrator concluded that Petitioner was entitled to temporary total disability (TTD) benefits from June 14, 2018 through September 17, 2018, the date on which the Arbitrator found Petitioner to be at MMI. Given that Respondent paid Petitioner more than the amount due under this calculation, the Arbitrator also awarded Respondent a credit for the difference to be applied against the permanency award. The Commission concludes that Petitioner is entitled to TTD benefits for a period of 22 and 5/7ths weeks, from June 14, 2018 through November 19, 2018, the date on which the Commission has determined that Petitioner reached MMI. In addition, Respondent is entitled to a credit of $5,621.29 in TTD benefits already paid against the increased TTD award.

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IV. PERMANENT PARTIAL DISABILITY

The Arbitrator awarded Petitioner permanent partial disability (PPD) benefits representing a 10% loss of use of the left leg. The Commission agrees with the award but writes additionally to elaborate on our view of the weight of the factors we considered in reaching our conclusion.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2016). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i), as the Arbitrator correctly noted that neither party submitted an impairment rating. The Commission places significant weight on factor (ii) because Petitioner continues to work for Respondent as an electrician, a job involving squatting, stretching, and climbing ladders, activities which Petitioner testified can aggravate his lingering symptoms. The Commission places some weight on factor (iii) because Petitioner is 51 years old, suggesting that his condition will be a factor in his work life, which may be expected to be as long as 14 years. Regarding factor (iv), the Commission observes that no direct evidence was submitted regarding Petitioner's future earning capacity and that Petitioner has returned to his job with Respondent and works as close to eight-hour days as possible, leading us to place no weight on this factor. Lastly, regarding factor (v), Petitioner testified that he still experiences pain, stiffness and soreness in his hip after a few hours of a little exertion. He stated that if he spends time squatting near receptacles, he would get a really bad charley horse in his calf. He also stated that he needs to rotate his sleeping position three or four times nightly or the hip becomes stiff and awakens him. According to Petitioner, "It's not horrible. It's just an annoying little pain." He added that he lost a lot of muscle mass but was regaining it slowly. Petitioner's testimony finds support in his treatment records, which suggested improving left lower extremity strength and neuromuscular deficits. The Commission places the greatest weight on this evidence.

Considering the statutory factors as a whole, but particularly the magnitude of Petitioner's current disability, the Commission affirms the Arbitrator's award representing a 10% loss of use of the left leg.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his left leg is causally connected to the accident alleged in this case, as the causal connection terminated as of November 19, 2018.

IT IS FURTHER FOUND BY THE COMMISSION that Respondent has paid all

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reasonable and necessary medical expenses incurred through November 19, 2018.

IT IS THEREFORE ORDERED that Petitioner's claim for additional unpaid medical expenses incurred after November 19, 2018 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.33 per week for the period from June 14, 2018 through November 19, 2018, a period of 22 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $5,621.29 in benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $264.00 per week for a period of 21.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for Penalties pursuant to §§19(k) and 19(l) of the Act, and Fees pursuant to §16 of the Act, is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 2, 2020 is hereby affirmed as modified herein.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2021
o: 4/1/21
BNF/kcb
045

/s/ *Barbara N. Flores*
Barbara N. Flores

/s/ *Christopher Harris*
Christopher Harris

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NYBERG, TIM
Employee/Petitioner

Case# **19WC000730**

VINE INDUSTRIES
Employer/Respondent

21IWCC0170

On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0340 LAW OFFICES OF JOHN W TURNER
209 S MAIN ST
2F
MT PROSPECT, IL 60056

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tim Nyberg
Employee/Petitioner

v.

Vine Industries
Employer/Respondent

Case # **19WC 00730**

Consolidated cases: _____

21IWCC0170

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts** Arbitrator of the Commission, in the city of **Chicago**, on **8/22/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0170

FINDINGS

On **6/13/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**22,880.00**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **50** years of age, married with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,621.29** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,621.29**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS CAUSAL CONNECTION BETWEEN THE ACCIDENT OF JUNE 13, 2018 AND THROUGH SEPTEMBER 17, 2018, ONLY.

RESPONDENT HAS PAID ALL REASONABLE AND RELATED MEDICAL BILLS INCURRED THROUGH SEPTEMBER 17, 2018. CLAIMED FOR ANY FURTHER MEDICAL BILLS/BALANCES/OUT OF POCKET PAYMENTS AFTER THAT DATE IS DENIED.

PETITIONER WAS TEMPORARILY TOTALLY DISABLED FOR A PERIOD OF 13 6/7'S WEEKS BETWEEN JUNE 14, 2018 AND SEPTEMBER 17, 2018. HE IS ENTITLED TO A SUM OF $293.33 PER WEEK FOR THAT 13 6/7 WEEK PERIOD. NO FURTHER TEMPORARY TOTAL DISABILITY IS DUE.

PETITIONER SUSTAINED ACCIDENTAL INJURIES TO THE EXTENT OF 10% LOSS OF USE OF THE LEFT LEG, UNDER SECTION 8(E) OF THE ACT. HE IS THEREFORE ENTITLED TO THE FURTHER SUM $264.00 PER WEEK FOR A PERIOD OF 21.5 WEEKS.

RESPONDENT IS ENTITLED TO A CREDIT OF $1,556.58 IN OVERPAID TEMPORARY TOTAL DISABILITY. THIS AMOUNT IS A CREDIT TOWARD THE FURTHER BENEFITS DUE PETITIONER.

CLAIM FOR PENALTIES AND ATTORNEYS' FEES IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 31, 2019
Date

JAN 2 - 2020

Tim Nyberg v. Vine Industries
Case Number: 19WC 00730

21IWCC0170

Statement of Facts Petitioner was employed with Respondent, his father's company, as an electrician, working one day per week about 30 weeks per year. (T.29) He described his duties as climbing ladders, pulling wire, bending pipe, and installing lighting for commercial customers. (T.8) When not working, Petitioner did work around the house, took care of his son, quoted customers for Respondent's business, and worked a hobby farm where he had an orchard, grew sweet corn, vegetables, and tended bees for honey. (T.29, 30) Petitioner also operated Vine Aquatic Designs, building fountains and ponds, although in calendar year 2018 Vine Aquatic Designs reported no income. (T.31, Resp.Ex.#2)

On June 13, 2018 he was working for Respondent at a bowling alley. As he stepped off a ladder, his foot slipped on the waxed alley and he landed on his left side. (T.10) He called his father and went home. (T.11) Petitioner did nothing June 14. On June 15, a Friday, he and his wife went up to Wisconsin for the weekend. (T.12) Petitioner testified he didn't do much up there, and that whenever he stopped down on his foot he felt "ungodly pain. I figured I had torn a muscle." (T.12)

Petitioner called his primary care physician and was given an appointment with Dr. Chilelli for June 25, 2018. (T.13) Petitioner admitted he was full weight bearing between June 13 and June 25, 2018, and that he did not make any attempt to seek emergency room or urgent care. (T.36, 37) On June 25, 2018 Petitioner reported left hip pain following the June 13, 2018 incident. Petitioner reported he had been able to bear weight on the left leg but did have pain with walking, standing or climbing stairs. X-rays performed by Dr. Chilelli on this date were negative for any fracture. The doctor suspected a stress fracture, abduction tendon injury or "other process." He ordered a MRI of the left hip. (Pet.Ex.#6)

MRI testing performed June 26, 2018 showed significant edema in the femoral head, suggesting a subchondral stress or insufficiency fracture. Transient osteoporosis was noted to already be present. A tiny linear tear of the musculoskeletinous junction was noted. (Id.)

Dr. Chilelli reviewed that MRI testing on June 28, 2018 as showing transient osteoporosis or an insufficiency fracture. He prescribed non-weight bearing and Vitamin D. (Id.) Petitioner testified he was told to "use crutches until early October and don't do any work." (T.14)

When seen in follow-up on August 6, 2018 Petitioner reported less left hip pain. He was directed to continue taking Vitamin D, to remain on crutches for two more weeks, and to not to work until a next exam September 17, 2018. (Pet.Ex.#6)

When seen by Dr. Chilelli on September 17, 2018 Petitioner reported he was "80% to 90" better. He reported some continued "discomfort" in the hip but had no report of weakness. He was directed to begin physical therapy and follow-up in six weeks. (Id.) At

trial, Petitioner stressed that he was still on crutches and keeping his left leg elevated. (T.39)

Petitioner admitted he posts on Facebook. On October 23, 2018 Petitioner admitted he posted ". . . trying to get these people to let me start working again, hopefully in a few weeks. I'm already sneaking out and doing things." A friend responded, asking Petitioner to come work on his salt water tank. Petitioner responded he was "sneaking in slowly." (T.41; Resp.Ex.#3)

At trial Petitioner claimed he was referring to having gone out fishing. He testified he went out with a buddy to fish on the Fox River for about three hours, off an 18 foot Skeeter bass boat. Petitioner claimed he just sat in the front chair on the boat for three hours. He also admitted to having gone to Port Clinton for two days in October, 2018, out 16 hours on a fishing charter on Lake Erie. (T.41 – 44) The arbitrator takes judicial notice that getting onto and ambulating on a boat on even the calmest days does require balance and weight distribution through the legs and into both hips.

Petitioner testified he was not released to return to work in any capacity until March 6, 2019, at which time Dr. Chilelli directed him to work part time and avoid climbing 8 – 10 foot ladders. (T.15)

On direct exam Petitioner admitted to performing electrical work at his sister's house in Park Ridge. He recalled being at the property from 9:00 a.m. to about 2:30 p.m. on November 19, 2018. (T.17-18) He testified he had asked his doctor about returning to work. (T.19) There is no reference to this request or that Petitioner was indicating any ability to return to work in any capacity in Dr. Chilelli's records. (Pet.Ex.#6)

Petitioner described the work at his sister's house as a "favor" and so that he could "gauge where my leg was so I could tell my doctor . . . and the therapist what was going on." (T.19) Petitioner testified his total work hours on that date was 1 ½ to 2 hours, and that he had to go inside the house a couple of times to take break and get the weight off his leg. (T.20) He admitted to using 2, 4 and 6 foot ladders, but claimed he put weight on his right leg and used his left leg "just like another third support, just a temporary balance measure . . ." (T.21) He described sitting atop the ladder so as to not put weight on his legs, sitting in a chair or with his back to the wall. (T.21) He described that if he had more than 20% weight on his left leg "the muscles would start shaking again. It was a really bad balance time." (T.22)

On cross exam Petitioner admitted he arrived in and climbed into and out of a Ford F250 van multiple times. He walked back and forth to obtain equipment and supplies from the van. He climbed up and down the ladders, bent, stooped, and stood. When asked if he brought or used his crutches, he stated "No, because it was in November." (T.47 – 51) When asked why at the next visit with Dr. Chilelli on December 6, 2018 he did not make mention of his trying to work or what he had done on November 19, 2018, Petitioner then said "I actually told the therapist because they were the ones trying to get me better." (T.51)

Petitioner's first physical therapy visit was with Fox Valley Physical Therapy November 28, 2018. He described "not pain as much as lack of strength." He described that he was "self employed: has 4-5 guys working for him." The therapist noted a standing prescription for a total knee replacement that Petitioner was hoping to put off until age 55. (Pet.Ex.#6) There is absolutely no report of Petitioner describing what he was doing on November 19, 2018 to the therapist on this or any subsequent visit. (Id.)

The Arbitrator notes that while Petitioner testified to prior injections for his knees at Dr. Chilelli's office, he did not disclose a pending knee replacement surgery nor discuss any impact his pre existing knee condition would have on his gait, ability to bear weight, climb ladders or work as an electrician full time.

When seen by Dr. Chilelli on December 6, 2018 he did report he was 80% better. He advised the doctor for some reason he had not yet been to physical therapy although clearly had commenced those services about a week before. Dr. Chilelli again ordered physical therapy. (Id.)

On January 24, 2019 Dr. Chilelli documented Petitioner was "significantly better." Physical therapy was continued as well as a "no work" status. (Id.)

On March 7, 2019 Dr. Chilelli again documented Petitioner was "significantly better." He noted Petitioner was in physical therapy. He was happy with Petitioner's progress. He noted Petitioner was in no acute distress. Petitioner demonstrated 90° of flexion, 10° of extension, 30° external rotation, with some pain with rotation of the hip and some mild trochanteric tenderness only. Dr. Chilelli ordered continued physical therapy due to some reported weakness and muscle deficits. He first cleared Petitioner to return to work in any capacity on this date. (Id.)

Dr. Chilelli reiterated continued therapy and restricted work April 18. On June 3, 2019 he noted Petitioner "appeared well." He was in no acute distress. Petitioner's sensation was intact. He had normal motor function, reflexes and pulse. He allowed Petitioner to return to full duty for half days and return to see him in six weeks. (Id.) At trial Petitioner testified he has not sought further medical attention with Dr. Chilelli or elsewhere, to date. (T.15)

Petitioner testified that with a few hours of exertion he feels some pain in his left hip, described as "stiffness, soreness." If he spent any time squatting, he got a "bad Charley horse" sensation in the upper part of his left leg. He needs to stretch and rotate. He described it as "just an annoying little pain." (T.26)

Petitioner continues driving a Ford F250 van and a 2006 Toyota Tundra pickup truck. (Id.)

Petitioner testified he returned to work for Respondent in May, 2019. He testified to working one job every week or two, on 8 hour jobs. (T.53) He described one at a

Bowlero in Glendale Heights, where he put a 50 foot, 4 head light atop a parking lot pole reached using a bucket lift. (T.53-54) He described a second job at Hosiden, where he installed a light fixture over a door while on a stepladder, after which he replaced LED lightbulbs in the ceiling of a hallway while on a six foot ladder. (T.55-56) He repaired a hot tub filter pump in his father's basement, cutting old PVC pipe, replacing and rewiring the pump. (T.56) Lastly, he climbed up two stairs and replaced a diesel transfer pump at another location. (T.57)

Gregory Spelson testified he is a private investigator working for Robison Group and hired by Respondent's carrier. He conducted and obtained surveillance of Petitioner on November 19, 2018. He positively identified Petitioner as the individual he shot surveillance of, at trial. (T.73-75)

On November 19, 2018 he followed Petitioner from his home in West Chicago to a gas station, obtained video at the gas station, followed Petitioner to a Menard's where he likewise obtained several minutes of video, then followed Petitioner to a private residence where he obtained several hours of video. T.76 – 79)

A highlight of the video shot by Mr. Spelson was viewed by the parties, at trial. (Resp.Ex.#5a). The full surveillance video was introduced into evidence and has now been viewed by the Arbitrator. (Resp.Ex.#5b) In pertinent part, the Arbitrator notes the following activities performed by Petitioner on November 19, 2019:

9:38 through 9:41 a.m. stands outside work van pumping gas. Ambulates without any obvious limp or difficulty.

10:26 a.m. walks from the van, across the street and to the Park Ridge address. Appears initially to have a bit of "drag" or limp in his step, but what appears to be even weight-bearing by the time he walks across the yard and steps up about 2 – 2 ½ feet onto the porch.

10:27 a.m. walks back to the work van, now without any noticeable limp or pause in his step.

10:29 a.m. walks back from van again, without obvious limp, climbing dirt incline up to left side of porch to hand off tools.

10:29 through 10:31 a.m., stands below porch level, appearing to be receiving instructions from an older gentleman (identified at trial as his father).

10:31 a.m. appears to try front door and finds it locked.

10:31 a.m. steps down from height of porch to ground with left leg first.

10:34 through 10:36 a.m. stands on porch discussing work with father.

10:36 a.m. steps down from 2 ½ foot porch height to ground on left leg first, walks to work van.

10:37 a.m. seen in back of van pulling out various pieces of equipment, stepping onto back bumper and then down with left leg to street level.

10:39 through 10:40 a.m. stands on smoke break outside porch, then walks across street to work van. Drives away.

10:54 a.m. walks across Menard's parking lot without limp.

10:59 a.m. inside Menard's store pushing cart, walking in rapid fashion without limp.

11:02 a.m. walks across Menard's parking lot carrying small bag, walking without limp.

11:18 a.m. back at Park Ridge home at ground level, bending forward and working with equipment/supplies.

11:19 a.m. standing on porch.

11:20 a.m. climbs ladder up four steps and begins working overhead on porch. Remains on ladder until 11:22 a.m., then climbs down.

11:23 a.m. bends forward to pick up small items and box from ground level, bending at knees and hips.

11:24 a.m. climbs a second ladder up three steps, using both feet to elevate self, then works overhead, remaining on ladder with arms extended overhead using tape measure until 11:25 a.m. when then descends ladder, bearing weight evenly on both legs as climbs down.

11:26 a.m. re-ascends same ladder, up three-rungs, using both feet and bearing weight evenly to again work overhead.

11:28 a.m. climbs down ladder, ambulating across porch with even gait.

11:29 a.m. again climbs up ladder with both feet, even weight-bearing.

11:33 a.m. ascends a third step ladder up 2 to 3 rungs, with both feet, to again work overhead. For next several minutes continues climbing and descending the ladders, to perform overhead work without break or interruption until 11:53 AM when walks back across street to van, walking with even gait and no obvious limp or disability.

Beginning at 11:55 a.m. seen bending forward while standing on porch, grabbing pieces of conduit and bending them, handing them to older gentleman on ladder. Continues with this activity until 12:05 p.m. when ascends up second step of step ladder to begin working overhead with conduit himself.

12:05 p.m. climbs three steps with left foot first and full weight bearing on left foot for some seconds before right foot placed on step ladder step. Then some seconds later climbs three steps back down, likewise with weight on left foot before right leg comes down on to step.

12:06 p.m. enters house with father, comes back out at 12:33 p.m.

12:35 p.m. walks on uneven ground in yard of property, descending from porch level to street level with even gait and no observable limp.

12:44 p.m. begins work up on ladder again.

Between 12:45 and 1:05 p.m. stands on porch observing and taking smoke break. At 12:59 and 1:01 p.m. steps down from height of porch about 2 ½ feet onto right foot, with all weight on left foot

1:03 p.m. begins bending conduit, bending forward, using right foot to step on conduit to bend with all body weight on left foot; repeats at 1:06 p.m., 1:12 p.m., 1:14 p.m.

Beginning at 1:13 p.m. seen bending forward at waist to porch floor to measure conduit, pick up equipment.

Continues in these activities until 2:22 p.m.

Petitioner was examined at Respondent's request by Dr. Nho on June 10, 2019. Dr. Nho was provided copies of medical records and the surveillance video. At the time of the examination Petitioner appeared in no apparent distress. He walked with non-antalgic gait. He demonstrated 5° loss of flexion in the left hip, a positive subspine but negative trochanteric pain, and a painful arc from 1 to 3 o'clock. He had normal strength, abduction and adduction, no tenderness and was neurovascularly intact. (Resp.Ex.#6)

Three x-rays taken on June 11, 2019 and personally reviewed by Dr. Nho showed no evidence of fracture, dislocation or acute abnormalities. Prior x-rays taken June 25, 2018 likewise showed no evidence of fracture, dislocation or acute bony abnormalities. The MRI of the left hip performed June 25, 2018 was personally reviewed and showed extensive bone marrow edema in the femoral head extending into the neck with a stress fracture of the femoral neck. (Id.)

Petitioner reported a dull achy pain rated 1 out of 10. He denied radiating pain. He reported pain worse with squatting, standing and working. Dr. Nho diagnosed a left hip

stress fracture with extensive bone marrow edema in the femoral head. He believed the work incident of June 13, 2018 resulted in that condition. He suggested Petitioner would have required a "no work" status for 12 weeks following the injury, but that Petitioner demonstrated he was capable full duty as the appointment with Dr. Chilelli September 17, 2018 when Petitioner reported 80 to 90% improvement.

Dr. Nho reviewed the surveillance of November 19, 2018 and concluded Petitioner demonstrated he was capable of working full duty per the activities demonstrated on the surveillance. Dr. Nho concluded Petitioner did not require work restrictions or treatment following September 17, 2018 when he reported he was 80 to 90% better and having little to no symptoms.

Conclusions of Law

Regarding F) is Petitioner's condition of ill being causally related to the injury, the Arbitrator finds the following:

Petitioner sustained an injury to his left hip when he slipped and fell while coming down a ladder on June 13, 2018. He did not require or seek immediate medical attention, accepting an appointment for June 25, 2018 with Dr. Chilelli's office. He continued weight bearing, climbing and walking on the left leg for that 15 day period. X rays taken June 26, 2018 and again June 11, 2019 failed to show any outright fracture; Dr. Chilleli diagnosed a subcondral stress or insufficiency fracture in the femoral head of the left hip per the MRI. Petitioner was directed to remain off all work duties until March 6, 2019, to be non weight bearing for at least three months following the injury and to participate in physical therapy he began November 28, 2018 and continued until May 30, 2019.

While Petitioner reported he was 80 – 90% better by September 17, 2018, he clearly did not disclose his outside activities or capabilities to either Dr. Chilelli or Fox Valley Physical Therapy at all. While on October 23, 2018 he provided on Facebook he was "trying to get these people to let me start working again," there is nothing to suggest he was making that request to any of his medical providers. He also confided in that same posting he was "already sneaking out and doing things."

Petitioner admitted to going out fishing with a friend on the Fox River, and on a two day, 16 hour fishing charter on Lake Erie.

While he admitted to doing a few hours' work at his sister's house on November 19, 2018, he claimed to have to go inside for breaks, and to sit or lean when performing work. The surveillance demonstrates Petitioner standing, walking and climbing while working for several hours, with only one half hour break. He was seen walking without a limp, stepping on and off a an approximately 2 ½ foot high porch, climbing up and down ladders with full, uncompromised weight bearing on his left leg, walking on uneven ground, bending to the floor to retrieve items, and bearing weight on his left leg while using his right foot to bend conduit. The Arbitrator concludes Petitioner demonstrated no evidence of any disability or inability to work by this date.

While noting treating physician Dr. Chilelli continued in his "no work" and therapy recommendations for the next several months, there is no evidence he was ever aware of Petitioner's actual activities and capabilities, and thus, those recommendations can be discounted.

Dr. Nho examined Petitioner at Respondent's request, reviewed all of the medical records, and viewed the surveillance. He concluded that Petitioner was actually at maximum medical improvement and capable of full duty by September 17, 2018, when Petitioner was demonstrating no continuing evidence of injury, to quote Dr. Chilelli just "discomfort" but "no weakness, and was reporting he was "80 – 90%" better.

The Arbitrator therefore finds causal connection through September 17, 2018 only, based on the fully informed opinions of Dr. Nho.

Regarding J) what medical bills are due, the Arbitrator finds the following:

Petitioner claimed $935.00 in medical bills incurred and paid by Petitioner for therapy between April 24 and May 30, 2019. Having found Petitioner at maximum medical improvement by September 17, 2018, claim for these medical charges is denied.

Regarding K) what temporary total disability benefits are due, the Arbitrator finds the following:

Petitioner is entitled to a sum of $293.33 per week for a period of 13 6/7's weeks, from June 14, 2018 – September 17, 2018, adopting the findings of Dr. Nho in this regard.

Regarding L) what is the nature and extent of the injury, the Arbitrator finds the following:

No impairment rating was offered by either party. Petitioner testified he is back to full duties for Respondent, working one day per week as he did before his injury. He is currently 51 years old. There is no showing the injury will result in any impact on his earning capacity. He testified to stiffness, soreness, an occasional Charley Horse sensation in his calf, and what he described as a "little, annoying pain."

The Arbitrator therefore finds Petitioner entitled to the sum of $264.00 per week for a period of 21.5 weeks, as the injury resulted in permanent partial disability to the extent of 10% loss of use of the left leg.

Regarding M) whether penalties and attorneys' fees should be imposed on Respondent, the Arbitrator finds the following:

Per the payment screen Respondent continued paying temporary total disability until November 7, 2018. Respondent continued paying medical bills incurred by Petitioner until mid December, 2018. (Resp.Ex.#1) Respondent received the surveillance

suggesting Petitioner was working as of November 19, 2018. Respondent notified Petitioner of suspension of benefits based on that information December 6, 2018. (Pet.Ex.#2) Respondent obtained Dr. Nho's exam finding Petitioner not entitled to temporary total disability or in need of medical care after September 17, 2018, thus solidifying the denial of further benefits.

For the foregoing reasons, claim for penalties and attorneys' fees is denied.

Regarding N) is Respondent due any credit, the Arbitrator finds the following:

Having found Petitioner entitled to $293.33 per week in temporary total disability for 13 6/7's weeks through September 17, 2018, a total of $4,064.71 would have been due. Petitioner was paid $5,621.29, and Respondent therefore has a credit of $1,556.58 toward the permanency due.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAVIER MORENO,

Petitioner,

vs. NO: 14 WC 32681

NOT JUST GRASS, INC.,

21IWCC0147

Respondent.

DECISION AND OPINION ON REMAND

This cause comes before the Illinois Workers' Compensation Commission ("Commission") pursuant to the Rule 23 Order of the Appellate Court, Second District, Workers' Compensation Commission Division (Appellate Court), No. 2-17-0736WC, entered January 14, 2020. The Appellate Court reversed the Circuit Court of Kane County, Sixteenth Judicial Circuit, Miscellaneous Remedies Division's ("Circuit Court") decision, 17-MR-64, confirming a decision of the Commission which affirmed and adopted the Arbitrator's Decision, and further remanded the matter to the Commission for further proceedings.

Based upon the Remand Order, an analysis of the Petitioner's work duties, the record in its entirety including the testimony, the medical evidence and expert opinions, the Commission reverses the Arbitrator's Decision regarding accident, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, awards TTD, reasonable, necessary, related medical expenses and prospective medical pursuant to §8(a) and §8.2, and remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

21IWCC0147

Background

On February 22, 2016, Arbitrator Brian Cronin issued a Decision in case number 14 WC 32681, finding that the Petitioner failed to prove the issue of accident, denying benefits, and rendering all other issues moot.

Petitioner timely filed a Petition for Review of the Arbitrator's Decision, raising issues of accident, medical expenses, prospective medical, temporary total disability (TTD), permanent disability and penalties under §19(k), §19(l) and §16. On November 1, 2016, oral arguments were heard in the matter, with both parties represented by counsel. On December 22, 2016, the Commission, after considering the issues raised by Petitioner, and being advised of the facts and law, affirmed and adopted the February 22, 2016, Arbitrator's Decision in its entirety and clarifying that the Commission based its decision on the Petitioner's testimony that he was injured when he bent over and finding that the act of bending over, or the act of bending forward, is movement consistent with normal daily activity and by itself is not an activity associated with a risk of employment. The Commission agreed with the Arbitrator that the Petitioner did not sustain his burden of proving accident under a neutral risk analysis relying on the court's analysis in *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC.

In *Noonan*, Petitioner alleged he hurt his right wrist when he leaned over in a rolling chair and fell while trying to retrieve a pen off the floor. He ultimately sought and received medical treatment, including surgery, for an injury to his right wrist.

The Court in *Noonan* held that the claimant's action of bending over or reaching while seated in his work chair, without more, was insufficient to establish a work related cause to his accidental injury. The risk of injury at issue was simply not one "distinctly associated" with claimant's employment. *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC, 65 N.E.3d 530.

In a specially concurring opinion in *Noonan*, Presiding Justice Holdridge emphasized "a claimant may not obtain benefits for injuries caused by activities of everyday living (such as bending, reaching, or stooping), even if he was ordered or instructed to perform those activities as part of his job duties, unless the claimant's job required him to perform those activities more frequently than members of a the general public or in a manner that increased the risk." quoting from *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC. "In other words, such injuries should be analyzed under neutral risk principles. *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 41. The Commission therefore concluded that the Arbitrator properly applied the neutral risk analysis and found the evidence to establish accident deficient under either the qualitative or quantitative analysis.

Petitioner sought judicial review in the Circuit Court of Kane County. On August 25, 2017, Judge David Akemann, Circuit Judge of the Sixteenth Judicial Circuit Court, affirmed the Commission Decision in its entirety and Petitioner filed a timely appeal to the Appellate Court,

Second District, Workers' Compensation Commission Division. In a unanimous Decision, with Justice Holdridge specially concurring, the Court remanded the case to the Commission. The Court held that the Commission employed an improper analysis in categorizing the risk of harm, the injury involved a risk incidental to his employment, thus, remand to the Commission is necessary. The Court relied on their holding in *McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶ 38, 430 Ill. Dec. 434, 126 N.E.3d 522, where a majority of the court rejected the neutral-risk analysis utilized in *Adcock* finding that *Adcock's* analysis was at odds with other decisions of the court, which did "not automatically exclude from the definition of an employment-related risk activities that might involve common bodily movements or *** 'everyday activities.'" *McAllister*, 2019 IL App (1st) 162747WC, ¶ 38. The Court further held that when presented with employment-risk and neutral-risk alternatives, the trier of fact should first consider whether the risk at issue had employment-related characteristics. *Id.* ¶ 68. Additionally, the *McAllister* Court stated the following:

> "[A]n 'arising out of' determination requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis."

McAllister v. Illinois Workers' Comp. Comm'n,, 2019 IL App (1st) 162747WC, ¶ 73,

The Appellate Court further reasoned that both the arbitration and Commission decisions reflect adherence to the *Adcock* analysis and application of the neutral-risk definition that was rejected in *McAllister*. "In other words, the Commission automatically excluded the claimant's risk of injury from the employment-risk category because the activity resulting in injury involved a common bodily movement. The Commission's decision reflects that, because it applied an *Adcock* analysis, it did not consider the nature of the claimant's employment and his required work duties before finding that the claimant's injury stemmed from a neutral risk." *Moreno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 170736WC-U, P29-P31, 2020 Ill. App. Unpub. LEXIS 54, *15-16

Given these circumstances, the case was remanded to the Commission so that it may apply the proper risk analysis, make necessary findings of facts and draw reasonable inferences from the evidence to determine whether the claimant's injury arose out of his employment.

Therefore, the Court reversed the circuit court's judgment confirming the Commission's decision, vacated the Commission's decision and remanded this case to the Commission with directions to employ the proper risk-analysis set forth in *McAllister v. v. Illinois Workers' Comp. Comm'n,* 2019 IL App (1st) 162747W, 2019 IL App (1st) 162747WC, 430 Ill. Dec. 434, 126 N.E.3d 522.

In accordance with the Remand Order, after considering the entire record, and being advised of the facts and law, the Commission reverses the Arbitrator's Decision regarding

accident. The Commission finds that the Petitioner's act of bending to pick up a gas can was incidental to his employment and that he has proved that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, based upon the following:

Since the subject case was appealed and the Appellate Court remand issued, the claimant in *McAllister* filed a petition for leave to appeal to the Supreme Court which was granted to settle the issue of whether a compensable injury can arise out of an employee's employment when the employee is injured while performing job duties that involve common bodily movements or routine "everyday" activities", such as bending, twisting, reaching, or standing up from a kneeling position. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P20, 2020 Ill. LEXIS 561, *7

The Supreme Court enunciated the proper risk analysis that should be applied in the context of sustaining injury while performing job duties that involve common bodily movements or routine "everyday activities" as follows:

> The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill. Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill. Dec. 359, 67 N.E.3d 571. ***, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident [**16] to his or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill. Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P46, 2020 Ill. LEXIS 561, *15-16

Confusion resulting from several Appellate Decisions culminated in the split between the majority and dissenting opinions in *McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, and those Decisions were analyzed in the special concurrence written by Justice Holdridge, and joined by Justice Hoffman (*McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, P78-P116). The divergent opinions were addressed by the Supreme Court as follows:

> *Caterpillar Tractor* prescribes [**27] the proper test for analyzing whether an injury "arises out of" a claimant's employment, when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. *Sisbro* and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the

> common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill. 2d at 58.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P63, 2020 Ill. LEXIS 561, *26-27.

Further, the Supreme Court held that *Adcock* and its progeny required an additional unnecessary step in the risk analysis and as such were essentially overruled "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P64, 2020 Ill. LEXIS 561, *28.

Findings of Fact

Accident

Based upon the risk analysis as detailed by the Supreme Court in *McAllister* (citations omitted), we turn our analysis to Petitioner's job duties based on his testimony, the medical histories, and the expert opinions. Petitioner testified that he was employed as a general laborer for Respondent performing mowing, different types of construction on some jobs, and landscaping. (T, 18) Petitioner further testified that he did heavy lifting as part of his job duties, including lifting rocks, stones, heavy machines and trees, and mowing lawns and trimming trees. When he began working for Respondent he was completely fine to work and was never diagnosed with a herniated disc or sought treatment for lower back pain. (T, 19- 20) Petitioner testified to an incident on August 25, 2014, wherein his supervisor would not let him move heavy, "like 150 pounds each stone", with a Bobcat; instead his supervisor insisted that they move these flagstone stones quickly because they had to do something else. Petitioner helped his supervisor lift the stones from one pallet to another pallet and he started feeling a "low pain in my back, like real light in my lower back." (T, 21) He did not think it was an emergency or that he had to go to a doctor at the time. He did not report the incident at that time and kept working. (T, 21-22)

Petitioner continued to work through August 30, 2014. Thereafter, he was off for the Labor Day holiday and missed two days of work due to an unrelated incident and returned to work September 4, 2014. (T, 22-24) On September 5, 2014, Petitioner was working with two co-workers mowing lawns. He was getting machines ready, filling them up with gas. Petitioner testified that the gas can was six liters or about 30 pounds, and "then I bend over and I reach with my right hand

and when my body gets tense and I hear my back pop." (T, 25) He then testified that he bent over and grabbed the gas can but he never lifted it. The can was on the ground because when Petitioner bent over and felt his back pop, he could not move. (T, 26) Petitioner testified that his co-worker provided an Ibuprofen pill for pain, and massaged a cream on his back. (T, 29-30)

Petitioner reported the incident to his supervisor when he arrived at the next house, and he continued working that shift. He noticed "real sharp pain" in his lower back, and it started to go in his left leg and left testicle and he was not able to walk. He held his back all the time the whole day. (T, 30) Prior to September 5th, he had never felt pain going from his back down his left leg or into his left testicle. He reported the incident to his boss, Greg, the owner of the company, at the shop around 6:00 in the afternoon (sic). (T, 31)

Petitioner testified that he was off for the weekend and on Monday texted with his boss and reported he was going to the emergency room because his pain had not gone away over the weekend. (T, 36-38)

Greg Voirin, (Greg) the owner of the landscaping company, was called as an adverse witness by Petitioner. Greg testified that Petitioner worked for him as a laborer/landscaper. As part of his duties Petitioner cut grass, using a variety of equipment, i.e., riding mowers, walk behind mowers, trimming equipment. (T, 123) As part of his duties, if the machines run out of gas, they need to be refilled. There are different places where a gas can would be kept. A trailer would be one of them. If one of his employees moves the gas can from the trailer to the ground, he would have to pick it up to get gas to put in the trimmer or whatever equipment he was using. (T, 124-125) Depending on the job, it could be common for workers to pick up rocks or heavy debris. There are usually different sizes, whether it be landscaping materials and what not, and usually there is a one-to-two man carrying system and he would pick things up. That would be expected of his general duties. (T, 127) Greg also testified he does communicate with workers via text and recalled the text message exchange with Petitioner. Greg testified that he was in favor of Petitioner making a claim if he was hurt. If he was hurt, he should seek treatment. (T, 132-133)

Greg further testified light duty work would still require using hand tools and machines for various repairs and when Petitioner had asked for light duty work initially, he was taking Vicodin. Greg did not think that was a wise decision. Thus, if Petitioner was still taking prescription medications, such as Vicodin or Norco, Greg would not be able to offer him light duty work. (T, 133)

Petitioner treated at Rush Copley Medical Center on September 8, 2014. His chief complaint was back pain. The history stated that the symptoms started two days prior when he was trying to pick up a gas can. He started experiencing mild left testicular pain. The Assessment was left-sided back pain that radiates to the left groin. The differential diagnosis included back pain/flank pain, kidney stone, UTI, muscle strain. The diagnosis was noted to be a strain of the lumbar paraspinous muscle; acute back pain. He was discharged and released to return to work September 9, 2014. (PX1)

On September 23, 2014, the Petitioner presented to Dr. Samir Sharma, at Illinois Orthopedic Network, a board certified anesthesiologist, where his chief complaint was listed as low back pain. The history notes the following:

> This is a 32 year old gentleman who sustained a work related injury on September 5, 2014, while he was employed as a landscaper. He was doing a job including repetitive bending, lifting, twisting, moving locks (sic) that were over 100 pounds in weight when he felt a slight strain which was aggravated when the patient was bending to lift a gas can to fill a lawnmower. The patient states at that time he bent forward and felt a strain in his left low back aggravated it as he was going to a standing position around 10:30 a.m. on September 5, 2014, and it was reported to his supervisor at approximately 11:30 a.m. *** (PX2)

The Petitioner's history form stated that the "Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + con.t working." Dr. Sharma diagnosed the Petitioner with low back pain and left lumbar radiculopathy and instructed the claimant to remain off work. He prescribed medication, ordered an MRI and recommended physical therapy. (PX2)

On September 24, 2014, the Petitioner started physical therapy. On January 29, 2015, Petitioner was seen by Dr. Matthew Ross at Respondent's request pursuant to §12. Dr. Ross authored a report and documented the history that Petitioner provided to him. Dr. Ross noted that Petitioner is a laborer doing construction and landscape work. On September 25, 2014, Petitioner bent forward to pick-up a gasoline can to refill the tanks of the machines. He experienced immediate sharp lower back pain preventing him from standing upright. He states that he did not actually lift the can of gasoline. He slowly was able to stand back up. He notified his boss. The boss did not tell him to do anything about it. He continued working that day. He was off for the weekend. His pain continued to worsen. By Monday he was barely able to get out of bed. He then went to the emergency room for treatment. He first began experiencing back pain approximately a week earlier when he had to lift and carry heavy rocks weighing as much as 150 pounds. At that time, he had only "light" pain; he continued working. At the onset of pain, there was also some radiation of discomfort into his left testicle. After his emergency room visit he started treating with a chiropractor. He had had three months physical therapy with limited relief. After an injection he had pain radiating down his left posterior thigh to his lower leg and foot. Not sure if left leg will give out and has occasional numbness in the left leg and foot. He specifically denies any prior history of back pain or injury. He had an altercation 2 weeks (sic) before but was hit in the head. (PX22, RX3)

The Commission finds that based upon the Petitioner and the owner's testimony that as a general laborer working in the landscape business, the act of bending to pick up a gas can was incidental to the Petitioner's employment. Therefore, no additional analysis is required under

McAllister (citations omitted) and the Petitioner has sustained his burden of proving that he sustained an accident arising out of and in the course of his employment.

Causal Connection

On January 29, 2015, Dr. Ross, the expert retained by Respondent pursuant to §12, opined that there was "a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment." (PX22, RX3). Dr. Ross further stated that Petitioner had low back and left sciatic pain following his work incident and September 5, 2014, and noted the following:

> By history, Mr. Moreno started becoming symptomatic a week or two earlier with lifting heavy rocks at work. There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can. Although Mr. Moreno did not have an accident or overstress injury of his back on the date of major pain flare-up, his history of low level back pain following lifting rocks suggests that his injury actually occurred earlier. The L4-5 disc may have been initially injured lifting the rocks. The bending forward to lift the gas can may literally have been the straw that broke the camel's back. It is not uncommon to see disc herniation in evolution begin as back pain, and then erupt as sciatic pain following a trivial event. (PX22, RX3)

The Commission finds that based upon Dr. Ross's credible opinion, that the Petitioner's lumbar spine condition is causally related to the accident he sustained on September 5, 2014.

Medical

When Dr. Sharma saw Petitioner on September 23, 2014, the notes confirm that the Petitioner's pain was localized to the left lower back, with a moderate intensity described as an aching, throbbing sensation aggravated with any prolonged positioning including standing, sitting or walking for extended periods of time. (PX2) Petitioner had a lumbar spine MRI on September 25, 2014. The radiologist's impression noted a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On October 21, 2014, Dr. Sharma noted that Petitioner's pain was improved compared to initial evaluation with therapy; increasing with repetitive bending/lifting/twisting. His MRI showed a far lateral left L4-L5 disc herniation contributing to moderate lateral recess and foraminal stenosis as well as left facet joint effusion at the L4-5 level. Dr. Sharma's assessment/plan was to continue therapy. If he continued to improve, he would advance to work conditioning, followed by a functional capacity evaluation (FCE). If no improvement, he planned to discuss interventional options. Work restrictions included a maximum of 20-pound lifting, repetitively 10 pounds, with no repetitive bending, twisting, lifting, kneeling, crawling, or climbing ladders. (PX2)

On December 2, 2014, Dr. Sharma noted that the Petitioner's original pain subsided, however, now progressed to a burning sensation localized to his buttocks and his left posterior thigh with associated numbness and tingling involving his left leg, however, Petitioner denied any weakness involving the left lower extremity, radiculopathy or involvement with his right lower extremity. He completed eight weeks of therapy with persistent radicular pain. Options included a left L4-5 transforaminal ESI. He was to maintain current work restrictions of 20 pounds maximum and 10 pounds repetitive lifting, no repetitive bending, squatting, climbing ladders, or kneeling or crawling. Petitioner continued conservative treatment.

On January 9, 2015, Petitioner underwent an L4-L5 transforaminal epidural steroid injection (ESI). He underwent a second ESI on January 30, 2015.

On February 13, 2015, Petitioner presented to Dr. Goeffrey Dixon, an orthopedic surgeon. The history was somewhat inconsistent noting that Petitioner was lifting a large container of fuel for a lawnmower when he immediately began to have pain in his back. After the first ESI, he began to experience significant radiation into the left leg down to the knee and calf. Dr. Dixon's review of the lumbar spine MRI notes that it demonstrates a significant disc herniation at L4-L5 to the left extending into the lateral recess and foramen. There is a smaller disc protrusion at L5-S1 on the same side into the left lateral recess, however, Dr. Dixon thought this was likely asymptomatic. Dr. Dixon recommended an L4-L5 micro lumbar decompression and discectomy and opined that Petitioner should remain off work pending completion of treatment. (PX2)

On March 18, 2015, Petitioner underwent a second lumbar spine MRI at Fox Valley Imaging. The radiologist's findings document an L4-L5-moderate far left lateral herniated disc with an annular tear. The annular tear is identified on the axial images at the anterior aspect of the left neural foramen. There is hypertrophy of the facet joints and ligamentum flavum. There is resultant moderate to severe central spinal stenosis. There is moderate left neural foramen stenosis. At L5-S1, there is a small broad-based herniated disc. There is mild hypertrophy of the facet joints and ligamentum flavum. There is mild central spinal stenosis. The radiologist's impression was a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On March 20, 2015, Petitioner saw Dr. Dixon and discussed the findings of a new MRI which was obtained two days prior which again re-demonstrated the large left L4-L5 disc herniation within the lateral recess and foramen. His plan was to pursue workers' compensation authorization for the surgery, and Petitioner was to remain off work until such time as he has completed his treatment. (PX2)

Petitioner next presented to Dr. Dixon on April 17, 2015. The objective findings stated that Dr. Dixon reviewed the MRI which demonstrates a large left L4-L5 disc herniation causing central canal lateral recess and foraminal stenosis with increased T2 signal suggesting acute or subacute etiology as well as significant inflammation. The assessment/plan remained the same. Dr. Dixon again discussed the treatment options with Petitioner, comparing conservative therapy

with surgical intervention. He again recommended that he have a micro lumbar decompression and discectomy at L4-L5. He prescribed Norco 10/325. (PX3)

When Petitioner was seen for his §12 evaluation on January 29, 2015, Dr. Ross opined that the initial MRI was a poor quality study although documenting that it shows evidence of a left foraminal disc herniation at L4-L5. As a result, Dr. Ross was of the opinion that there is a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment. He recommended an updated MRI of his lumbar spine in a good quality scanner. The fact that the earlier scan was obtained when the patient was not really having leg symptoms suggests that it may not be an entirely accurate reflection of his current state. If the repeat scan continues to show a foraminal disc herniation at the L4-L5 level, Dr. Ross opined that he would agree that Petitioner would be an appropriate candidate for a left L4 (L4-5 foramen) selective nerve root block and transforaminal cortisone injection. The nerve root block would provide confirmation that this is the source of his pain complaints. If not, the patient could be a candidate for a lumbar discectomy.

Given Dr. Dixon's surgical recommendation, corroborated by Dr. Ross's opinion, the Commission finds that Respondent should provide and pay Petitioner's reasonable and necessary medical treatment related to Petitioner's lumbar spine injury and for prospective medical in the form of the surgery recommended by Dr. Dixon.

Temporary Total Disability

The combined work status notes reflect Petitioner was off work September 23, 2014, through October 21, 2014, then assigned restrictions with carrying, pushing/pulling, lifting less than 20 pounds, no bending, squatting, kneeling through January 26, 2015. When Petitioner saw Dr. Ross at Respondent's request on January 29, 2015, Dr. Ross opined that Petitioner was currently capable of working only in a sedentary position with a 15 pound lifting restriction. He would need to be allowed to vary his position from sit to stand or vice versa. Subsequent off work notes were authored by Dr. Dixon March 5, 2015, through April 17, 2015, with recommendation for surgery. The trial stipulation reflects Petitioner claimed lost time commencing September 23, 2014, through June 28, 2015. (ArbX2) The owner of the company, Greg Voirin, testified that he would not have light duty work if the Petitioner were taking Norco or Vicodin. (T, 133) There is no evidence in the record that after an initial inquiry, there was any further attempt to accommodate Petitioner's restrictions and there is evidence that he had pain prescriptions.

Given the Commission's findings regarding accident and causal connection referenced above, the Commission finds Petitioner has sustained his burden of proving that he is entitled to TTD commencing September 23, 2014, through June 28, 2015.

21IWCC0147

Conclusions of Law

Based upon the above evidence, the Commission reverses the Arbitrator's finding that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, finds that Petitioner sustained his burden of proving accident because the act of bending to pick up the gas can was incidental to his employment, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, and awards the Petitioner TTD, medical expenses and prospective medical, however, the Commission declines to award penalties and fees based upon the existing legal precedent at the time of the accident and both the Arbitration Hearing and Commission review of the Arbitration Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 22, 2016, is hereby reversed on the issue of accident for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $400.00 per week for a period of 39-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary related medical services as set forth in Petitioner's exhibits four through fifteen, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall also provide and pay for prospective medical care limited to treatment as it relates to Petitioner's lumbar spine, including surgery and expenses attendant to recovery thereafter, which is reasonably required to cure or relieve from the effects of the accidental injury, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,100.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
KAD/bsd
O111020
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK DUPREE,

Petitioner,

vs. NO: 17 WC 09232

DIAGEO NORTH AMERICA, INC.,

Respondent.

21IWCC0148

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 21, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
o- 3/23/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DUPREE, FRANK
Employee/Petitioner

Case# **17WC009232**

DIAGEO INC
Employer/Respondent

21IWCC0148

On 8/21/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.84% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1987 RUBIN LAW GROUP LTD
ARNOLD G RUBIN
20 S CLARK ST SUITE 1810
CHICAGO, IL 60603

2284 COZZI & GOGGIN-WARD
MARK ZAPF
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

FRANK DUPREE
Employee/Petitioner

v.

DIAGEO, INC.
Employer/Respondent

Case # 17 WC 9232

Consolidated cases: N/A

21IWCC0148

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **7/9/19 and 7/12/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On the date of accident, **2/15/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,656.00**; the average weekly wage was $**1,628.00**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay the further sum of $**3,300.40** for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bills of Physicians Immediate Care ($168.40) and Hinsdale Orthopedic ($3,132.00). The medical bills are awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule. The payment shall be sent directly to Petitioner's attorney in accordance with Section 7080.20 of the Rules Before the Illinois Workers' Compensation Commission.

Respondent shall authorize and provide payment for the medical treatment, including the pre-operative testing, MRI and surgery, recommended by Petitioner's treating physicians, Dr. Chudik. The authorization shall be in writing and forwarded to Petitioner's attorney.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Gerald Granada

8/20/19
Date

AUG 21 2019

FINDINGS OF FACT

This case involves Petitioner Frank DuPree, who alleges injuries sustained while working for Respondent Diageo North America, Inc. on February 15, 2017. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) date of accident; 3) notice; 4) causation; 5) medical expenses; and 6) TTD. The main point of contention - and the basis of the disputes - in this case is the date of Petitioner's alleged accident.

Petitioner initially filed an Application for Adjustment of Claim on March 28, 2017 alleging a date of accident on February 20, 2017 while working for Respondent. (AX 2) On June 5, 2017, Petitioner filed an Amended Application for Adjustment of Claim, in which the accident date was changed to February 15, 2017. (AX 3)

Petitioner's testimony

Petitioner testified that on February 15, 2017 he worked for Respondent as a maintenance mechanic or bottling technician. As part of his job duties, he serviced mechanical and electrical failures and fabricated new parts; lifted and carried up to 30 pounds on a normal day and 50 to 60 pounds on a stressful day; and used hand tools, measuring equipment and electrical equipment. Petitioner had worked for Respondent for four years prior to February 15, 2017. Petitioner is right handed. Petitioner worked from 6:00 in the evening to 6:00 in the morning, but his actual workdays changed from week to week and he did not always work from Monday through Friday. Petitioner testified that his supervisor was Yediel Melendez who had been Petitioner's supervisor for about a year prior to February 2017. Petitioner saw Mr. Melendez frequently during his work shift and they communicated about work orders, ordering parts and the condition of broken machinery. The communication with Mr. Melendez would be verbal, in writing or via text message on Mr. Melendez's cell phone. Petitioner's cell phone carrier is AT&T. Petitioner did not and does not have any relationship with Mr. Melendez outside of work.

Respondent's facility is located in Plainfield, Illinois. Petitioner normally worked in the machine shop. The facility had locker rooms. There are two locker rooms in the facility. Petitioner used the locker room in the main building. He accessed the locker room through the main corridor. To get to the locker room, Petitioner would go down the main hallway and then go through another hallway with a pair of double doors. He would opened the first door, go through a small hallway that has lockers and dirty clothes and then into a second hallway that led to the locker room. There is a small hallway that had a utility room and men's bathroom, which were located before the door to the locker room. The distance from the main hall to the first set of doors to the locker room is about 10 to 20 feet.

Petitioner testified that on February 15, 2017 at approximately 6:00 or 6:10 am, he was in the process of opening the door of the men's locker room. He grabbed the door handle with his right hand. The door handle is depicted in Petitioner's Exhibit 7. Petitioner pulled the door open a few inches. As he was pulling the door open, some men were coming out of the locker room. The men opened the door quickly while Petitioner's hand was still on the handle. When the door was pushed open, Petitioner's right arm and elbow were pushed backwards at a 90-degree angle. Petitioner was pushed back so far that he ended up leaning against the lockers. Petitioner let go of the door and tried to get out of the way. Petitioner did

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not know the names of the three individuals who exited through the door in a hurried manner. Following the accident, he noticed pain in his right elbow and biceps. After the accident, Petitioner got his coat from his locker, changed his shoes and went home. Petitioner testified that the accident happened on February 15, 2017.

When asked about the discrepancy in the accident dates as set forth in the original Application for Adjustment of Claim and the initial medical records, Petitioner testified that he was confused about the date of accident since the accident report was not filled out until March 10, 2017. Petitioner also testified that the medical records, which indicated a date of accident of February 20, 2017, were not correct and did not reflect the correct date of accident.

Petitioner testified that he was not scheduled to work on February 16, 2017. He did not report the injury on February 16, 2017 because he did not know what to do and it took him a while to figure out that he should call his supervisor. Although Petitioner confirmed that it was company policy to report accidents immediately (see RX 7), he did not report the accident on February 15, 2017 because he was on his way out of the building when the accident occurred, and he did not know where to find his supervisor at that time. Petitioner testified that he did not notice any bruising on his arm until after he left the work site.

On February 17, 2017, Petitioner noticed that his right biceps was bruised. Petitioner testified that pursuant to Respondent's policy, he was required to report the injury to his team lead Mr. Melendez. On that day, he called the cell phone number that he used for sending text messages to Mr. Melendez and reported the injury. (PX 6) Petitioner greeted Mr. Melendez and then reported the accident to him. He advised Mr. Melendez that there was an incident in the locker room and his arm was bruised. Petitioner said that Mr. Melendez advised that he would take care of it when he came to work. Petitioner did not recall calling Mr. Melendez on any other date.

Petitioner completed an accident report on March 10, 2017. (RX 9) Mr. Melendez was present when he completed the report. Petitioner filled out part of the report and gave it to Mr. Melendez. Petitioner did not complete the date of accident portion of the report. The accident report reflects a date of accident of February 20, 2017. Petitioner testified that the date is incorrect. The accident report was admitted into evidence. (RX 9) The accident report documented a date of accident of February 20 2017 in different handwriting than the rest of the report. (RX 9) The report stated that Petitioner was entering the locker room at the end of his shift when people were coming out. (RX 9) It was dark. (RX 9) As Petitioner reached for the door, he was struck in the arm with the door. (RX 9) Petitioner noticed bruising when he got home that became worse. (RX 9)

Petitioner continued to work for Respondent from February 15, 2017 to the date of the hearing. Petitioner testified that his right arm fatigued easily and he had limited lifting power. Petitioner compensated by using his left arm.

Mr. Yediel Melendez's testimony

Yediel Melendez testified on behalf of Respondent. Mr. Melendez is the operations manager for Respondent. In February 2017, Mr. Melendez was a maintenance team lead. Mr. Melendez's job duties

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included accident investigation. He worked for Respondent for eight years and at the Plainfield facility for four years. Mr. Melendez testified that he knew Petitioner. In 2017, Petitioner reported to Mr. Melendez, who was Petitioner's direct supervisor. He worked with Petitioner on a daily basis. Mr. Melendez testified that on February 22, 2017, Petitioner called him on his cell phone to report a work accident. He testified that Petitioner did not call him prior to February 22, 2017. Mr. Melendez did not recall Petitioner calling him on February 17, 2017 to report an accident. He testified that the first time that he heard about the accident was on February 22, 2017.

Mr. Melendez testified that he started an investigation of Petitioner's accident when he spoke with Petitioner on February 22, 2017. Mr. Melendez testified that he spoke with Petitioner on his cell phone about the accident on that date. The conversation continued at the plant. According to Mr. Melendez, the Petitioner advised him that he sustained an injury on February 20, 2017. Mr. Melendez testified that both he and the Petitioner completed the accident report, with Mr. Melendez completing the top portion of the accident report, including the date of accident, and Petitioner filling out the rest. (PX 9) The accident report was dated March 10, 2017. (PX 9) Mr. Melendez stated that he documented the date of accident of February 20, 2017 because that is what Petitioner told him. Mr. Melendez testified that the accident report was not completed until March 10, 2017 because he had to complete his investigation prior to filling out the report. Mr. Melendez testified that the accident report could have been completed on an earlier date, but he wanted to make sure that Petitioner received medical treatment prior to completing the accident report.

As part of the investigation, Mr. Melendez reviewed security footage from February 20, 2017. Mr. Melendez testified that Petitioner was seen going into the locker room. (RX 8) According to Mr. Melendez the video later shows, Petitioner leaving the locker room carrying something in each hand. (RX 8 at 5:56) Mr. Melendez testified that he was never notified that the date of accident changed from February 20, 2017. The video was viewed during Mr. Melendez's testimony at the arbitration hearing. While being shown the video, Mr. Melendez testified that he was sure the Petitioner was depicted in the video despite not being able to see the face of the individual who was purportedly the Petitioner. The video does not show the door where Petitioner claims to have injured his arm.

Mr. Melendez testified that Petitioner was a good employee and that he did not have any reason to doubt Petitioner's honesty. Mr. Melendez further testified that at the time of the accident his cell phone number was (787) 432-9105, which was a phone number issued in Puerto Rico. When asked whether he received a phone call from the Petitioner on February 17, 2017, Mr. Melendez testified "he was not qualified to answer the question." He later testified that based on his recollection he "know[s] for a fact" that Petitioner called him on February 22, 2017 to inform him of the incident. He did not recall having a conversation with Petitioner on February 17, 2017. Mr. Melendez would recall conversations of extreme importance. He testified that Petitioner contacted him on his cell phone on February 22, 2017 around 4:00 pm. Mr. Melendez testified that Petitioner called him just prior to the shift beginning at 6:00.

Mr. Melendez testified that he took Petitioner to Physicians Immediate Care. He did not recall the date, but it could have been on March 9, 2017. There was some confusion in the testimony of Mr. Melendez about why there was a delay in authorizing treatment for Petitioner. Mr. Melendez testified that he did not take Petitioner to Physicians Immediate Care at an earlier date because it was not recommended that

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the shift manager leave because it would stop work due to the shift schedule. The accident report was completed after Petitioner went to Physicians Immediate Care. He wrote the accident date of February 20, 2017 on the accident report because that is when Petitioner told him the accident occurred. Mr. Melendez agreed that Petitioner's description of the accident was consistent. The only difference was the date of accident.

Petitioner's phone records

Following the testimony of Mr. Melendez and the Petitioner, the Arbitrator granted leave for the parties to produce the Petitioner's complete phone records at a later date. Petitioner's Exhibit 6 is a copy of Petitioner's phone records from AT&T that show the Petitioner's phone activity for the month of February in 2017. The record shows a call to (787) 432-9105 on February 17, 2017. (PX 6) The number is listed at line number 93 and is highlighted on the Exhibit. (PX 6) The call was made at 3:31 pm to a number from Ponce, Puerto Rico. (PX 6) The phone records do not show any other calls made to this cell phone number from Puerto Rico. The parties stipulated that line number 137 of the phone records was a phone call from Petitioner to the Plainfield facility of Respondent on February 22, 2017 at 6:47 am. (PX 6) There is no record of a call being made to the (787) 432-9105 number from Puerto Rico on February 22, 2017.

Medical treatment

On March 9, 2017 Petitioner was initially examined at Physicians Immediate Care, which was arranged by the Respondent's company nurse. Mr. Melendez took Petitioner to this medical provider. The medical records from this provider document that Petitioner complained of right upper extremity pain since February 20, 2017. (RX 4) Petitioner was leaving the locker room in the corridor when three men opened the door and his right upper extremity was hit by the door pushing it backwards. (RX 4) Petitioner had a bruise on his arm and a "charley horse." (RX 4) The physician set forth that he had a spontaneous rupture of the tendon in the right upper extremity. (RX 4) Petitioner was referred to an orthopedic surgeon for the biceps tendon rupture. (RX 4) The records document that Dr. Koehler set forth that the mechanism of accident was not consistent with the MRI findings. (RX 4)

Petitioner underwent MRIs of the right elbow and right shoulder on March 20, 2017 at Naperville Imaging Center. (PX 2) The MRI of the right elbow revealed a complete radial collateral ligament tear, high-grade articular surface tear of the common extensor tendon, punctate interstitial tear of the common flexor tendon and trace olecranon bursitis. (PX 2) The MRI of the right shoulder revealed a full thickness tear of the proximal aspect of the long head biceps tendon with distal retraction of the long head biceps tendon to the level of the middle 1/3 of the humeral diaphysis and associated strain of the long head biceps tendon, the anterior to mid aspects of the distal supraspinatus tendon are not clearly visualized at the humeral insertion suggestive of a full thickness supraspinatus tear, mild subacromial/ subdeltoid bursal inflammation, no right humeral bone marrow edema and T2 hyperintense hepatic lobe lesion which may be a cyst. (PX 2)

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Dr. Chudik examined petitioner on April 7, 2017. (PX 3 & RX 5) Dr. Chudik documented that Petitioner complained of right elbow and right shoulder pain. (PX 3) Petitioner was injured at work on approximately February 20, 2017 when he was entering the locker room at work and his right arm was forced into the shoulder with extension of 90-degree flexion. (PX 3) Dr. Chudik set forth an impression of concern for proximal biceps rupture and rotator cuff tear post work injury of February 20, 2017, biceps rupture long and supraspinatus tear. (PX 3) Dr. Chudik recommended an MRI of the shoulder. (PX 3) Petitioner underwent the recommended MRI study of the right shoulder on January 26, 2018 at Hinsdale Orthopedic. (PX 4) The MRI revealed a full thickness supraspinatus tear, moderate infraspinatus tendinosis, suprascapularis tendinosis and a small undersurface tear, moderate supraspinatus muscle atrophy, long head biceps tendon rupture with retraction into the distal bicipital groove, superior labral degeneration and undersurface tearing and small glenohumeral joint effusion. (PX 4) On February 23, 2018, Dr. Chudik recommended surgery for the right rotator cuff and biceps tendon. (PX 3)

At the request of Respondent, Dr. Marra examined Petitioner on May 10, 2018. Petitioner testified that Dr. Marra agreed with the recommendations for surgery. Respondent did not offer into evidence Dr. Marra's report. However, the report was admitted as a Deposition Exhibit 6 at Dr. Chudik's deposition. (PX 5) Dr. Marra set forth that the mechanism of accident aggravated a pre-existing condition. (PX 5) He further recommended that Petitioner undergo surgery for the right shoulder condition. (PX 5)

Dr. Chudik last examined petitioner on January 7, 2019. (PX 3 & RX 6) Dr. Chudik documented that Petitioner had right shoulder pain, which worsened since the last visit. (PX 3) Petitioner had difficulty opening jars, using screwdrivers and overhead activity. (PX 3) He did not have any new injuries. (PX 3) Dr. Chudik set forth that Petitioner had a gross deformity of the right shoulder with proximal biceps tendon rupture deformity. (PX 3) He stated that Petitioner had right shoulder partial tearing of the undersurface subscapularis, tear of the supraspinatus retracted to the mid humerus and proximal biceps tendon rupture. (PX 3) He recommended surgery and possibly a repeat MRI study. (PX 3)

Dr. Steven Chudik's testimony

The evidence deposition of Dr. Steven Chudik was completed on January 14, 2019. (PX 5) Dr. Chudik documented a history that Petitioner sustained an injury in February 2017 to the right elbow and right shoulder. (PX 5 at 15) Petitioner was entering a locker room by pulling the door open when his shoulder was violently forced back with the elbow in 90 degrees of flexion. (PX 5 at 16) Dr. Chudik explained that Petitioner was opening the door and his right shoulder was forced back abruptly. (PX 5 at 17) If a person is pulling a door and it suddenly jerks the shoulder back, a sharp force is put on the biceps, which would be consistent with a rupture. (PX 5 at 17) It would also put forces on the shoulder, which is detrimental to the shoulder. (PX 5 at 17-18)

Dr. Chudik gave a diagnosis of rupture of the long head of the biceps and a supraspinatus rotator cuff tear. (PX 5 at 20) After reviewing the MRI study of January 26, 2018, Dr. Chudik stated that Petitioner sustained a right shoulder rotator cuff tear involving the supraspinatus and subscapularis and a rupture of the biceps tendon. (PX 5 at 23) Dr. Chudik testified that based on the medical history,

documentation, reports and MRI study, Petitioner sustained a right shoulder rotator cuff tear and biceps tendon injury. (PX 5 at 28) Petitioner had the subjective complaints of pain and limitation related to his right shoulder, which was consistent with the objective findings of the MRI, tears and pathology of the shoulder. (PX 5 at 29) Dr. Chudik recommended surgery for the rotator and biceps tendon tears. (PX 5 at 30) Dr. Chudik stated that the treatment was reasonable and necessary, and he also recommended pre-operative testing, which included an EKG, chest x-ray and laboratory work and a repeat MRI of the shoulder. (PX 5 at 33)

Dr. Chudik testified that the accident of February 15, 2017 directly caused the current condition of ill-being in Petitioner's shoulder and necessitated the need for medical treatment based on the mechanism of accident, reporting of the injury with elements of bruising, biceps deformity and objective findings. (PX 5 at 41) Dr. Chudik explained that when the shoulder is abruptly forced into extension the body will naturally resist and there is an eccentric contraction of the shoulder muscle. (PX 5 at 42) The eccentric contraction causes the tearing of the rotator cuff. (PX 5 at 42) The biceps crosses the shoulder joint when the arm is extended the biceps contracts to try to stabilize the joint and the extension forces cause injury to the biceps. (PX 5 at 43)

Dr. Chudik reviewed the reports of Dr. Marra. (PX 5 at 44) Dr. Chudik testified that Dr. Marra's history that Petitioner sustained an accident on February 15, 2017 was consistent with his history. (PX 5 at 45) Further, Dr. Marra's review of the MRI studies was consistent with Dr. Chudik's reading. (PX 5 at 45) Dr. Marra also agreed with Dr. Chudik's surgical recommendation and that the current condition of ill-being was causally connected to the work-related accident of February 15, 2017. (PX 5 at 46)

Dr. Chudik recommended restriction of minimal repetitive reaching or lifting away from the body. (PX 5 at 47) He further recommended no lifting more than 20 pounds. (PX 5 at 48) Dr. Chudik testified that Petitioner had not reached maximum medical improvement. (PX 5 at 48)

Dr. Chudik stated that he used the date of accident of February 20, 2017 in his medical records. (PX 5 at 51) He clarified that the fact that February 20, 2017 was repeated in his progress notes is not relevant since his office does not generally re-ask a patient the date of accident. (PX 5 at 53) Dr. Chudik stated that the progress note from Physician Immediate Care and Dr. Marra documented different dates of accident in February 2017, but contained a consistent description of the accident. (PX 5 at 59-60) Dr. Chudik testified that not all patients are good historians. (PX 5 at 61) Dr. Chudik testified that the actual date of accident did not change his opinions about medical causation. (PX 5 at 62) He relied on the specific mechanism of accident, which was consistent with the injury. (PX 5 at 62)

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based on the Petitioner's testimony and the preponderance of the documentary evidence, including the medical records and the accident report. All the records and the testimony of all the witnesses confirm that the Petitioner injured his right arm when he was opening a door to the Respondent's locker room at work. The history of Petitioner's mechanism of accident is consistent

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throughout the medical records, accident report and the testimony of all the witnesses. The facts presented at the arbitration hearing do not really dispute that Petitioner injured his right arm and that the incident arose out of and in the course of his employment with Respondent. Although Respondent presented video evidence that does not show any accident occurring on February 20, 2017 - notwithstanding the issue of the accident date - the video is not persuasive because it does not depict the door where the accident allegedly occurred, nor does it clearly show the Petitioner. Even Mr. Melendez's testimony does not refute the Petitioner's description of the mechanism of his accident. As noted at the onset of this decision, the main question is what is the date of Petitioner's accident.

2. Regarding the issue of accident date, the Arbitrator finds that the Petitioner's date of accident is February 15, 2017. This finding is based on the Petitioner's credible testimony and the documentary evidence, including the medical records, accident report and phone records. The Arbitrator notes that this is the main issue in dispute, the basis of the remaining issues, and a question of credibility. Petitioner claims that the initial accident date alleged of February 20, 2017 is incorrect and that due to his confusion, he initially used that date instead of February 15, 2017. The accident report, which was only partially completed by the Petitioner, indicates an accident date of February 20, 2017, and that date was subsequently reflected in the initial medical evidence. Notwithstanding the alleged date of Petitioner's accident, Petitioner's history of how he injured himself at work is consistent throughout the investigative and medical evidence. So the main question posed to the Arbitrator is whether the Petitioner's explanation - of his confusion regarding the date of accident - holds any credibility.

In assessing the Petitioner's credibility on this issue, the Arbitrator looks to the Petitioner's claim that he called his supervisor Mr. Melendez's cell phone on February 17, 2017 to report his February 15, 2017 accident. Mr. Melendez claims that Petitioner called him on his cell phone on February 22, 2017. Petitioner's phone records support Petitioner's claim and refute Mr. Melendez's testimony directly. The Arbitrator further found Mr. Melendez's testimony regarding the video evidence lacked credibility. Mr. Melendez testified that he was sure the Petitioner was shown in the video as he pointed to a certain individual seen in the video. In watching the video, the Arbitrator notes that the face of the individual purported to be the Petitioner is not clear. Furthermore, the video does not depict the area where the Petitioner claims to have been injured. Even assuming arguendo that the video is for the correct date of accident, its failure to clearly depict the Petitioner or the door responsible for Petitioner's injury undermines both the evidentiary weight of the video and the credibility of Mr. Melendez's testimony. The Arbitrator further notes that Mr. Melendez appeared to be evasive during his testimony, as seen when he responded that he "was not qualified to answer" when asked whether the Petitioner called him on February 17, 2017. On the other hand, the Petitioner appeared to be a meek and mild-mannered witness, who was honest in his admission that he was confused and at times did not know what to do in regard to his reporting, or that he could not remember what he may have said to his medical providers.

The Arbitrator further notes that Mr. Melendez initially documented the accident date of February 20, 2017. Petitioner's initial medical treatment was arranged through the company nurse and Mr. Melendez, and the records from the initial medical treatment reflect the date documented by Mr. Melendez. Given this meek and mild-mannered Petitioner's susceptibility to confusion and admitted lack of knowledge regarding the process of accident reporting, it is reasonable to conclude that Petitioner simply acquiesced to the accident date documented by Mr. Melendez, which was then used by the initial medical providers.

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Based on the above, the Arbitrator concludes that the date of Petitioner's accident is February 15, 2017.

3. With regard to the issue of notice, the Arbitrator finds that the Petitioner has met his burden of proof. As indicated above, the main dispute in this case is the date of Petitioner's accident. The testimony established that notice was provided either on February 17, 2017 or February 22, 2017. The Arbitrator finds that notice was provided on February 17, 2017 based on the phone records. However, either way, timely notice was provided since it is undisputed that Respondent had notice of the accident within 45 days, and thus cannot argue any prejudice based on the lack of sufficient notice.

4. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the witness testimony and the medical evidence, which all show that Petitioner sustained an injury to his right arm that has resulted in a rupture of the long head of the biceps and a supraspinatus rotator cuff tear – conditions which require surgical attention. Given the main issue in this case being the date of Petitioner's accident, there was little to no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill being in his right arm and shoulder are causally connected to his work accident from February 15, 2017.

5. With regard to the issue of medical expenses and consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner's medical treatment has been reasonable and necessary in addressing his work related arm injury. Therefore, the Arbitrator concludes that Respondent is liable for payment of the medical bills, subject to the Fee Schedule, from Physicians' Immediate Care in the amount of $168.40 and Hinsdale Orthopedics in the amount of $3,132. The Arbitrator further orders Respondent to make payment of the medical expenses to Petitioner's attorney pursuant to Section 7080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

6. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the prospective medical care recommended by Dr. Chudik - including the proposed surgery to address Petitioner's rupture of the long head of the biceps and a supraspinatus rotator cuff tear – is reasonable and necessary. Given the main issue in this case being the date of Petitioner's accident, there was no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Therefore, the Arbitrator concludes that Petitioner is entitled to payment for medical treatment recommended by his treating physician, Dr. Chudik, including the right arm and shoulder surgery, pre-operative testing and repeat MRI; and Respondent shall authorize and pay for said procedure.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES SHALES,

Petitioner,

vs.

NO: 12 WC 17815
14 WC 18638
16 WC 16860

STATE OF ILLINOIS-IDOT,

Respondent.

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DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical benefits, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner filed three worker's compensation claims which were consolidated for purposes of arbitration hearing – namely 12 WC 17815, 14 WC 18638, and 16 WC 16860. So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties and limit the incorporation of the Arbitrator's Findings of Facts to this extent. The Commission is also not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20

(1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission affirms the Arbitrator's ultimate decision to deny in their entirety Petitioner's claims in 12 WC 17815, 14 WC 18638, and 16 WC 16860. The Arbitrator found that Petitioner failed to prove that an injury arose out of and in the course of employment and that Petitioner failed to prove that his current conditions of ill-being were causally related to a workplace injury. The Commission further affirms the Arbitrator's denial of benefits.

The primary basis for the Arbitrator's denial of Petitioner's claim in 12 WC 17815 was Petitioner's lack of credibility, together with noted inconsistencies between Petitioner's testimony and the medical records, and omissions in evidence and testimony "that would add clarity and corroboration to the events of these claims." (Arbitrator's Decision, pg. 14). The Commission agrees and finds significant the various versions of how Petitioner hyperextended his left knee while in Respondent's parking lot on September 19, 2011, as well as the two-month delay in seeking treatment. The Commission further agrees with the Arbitrator's assessment and finds more persuasive the opinions of Respondent's Section 12 examiner, Dr. Cole, who also found the delay in treatment significant; Dr. Cole opined that he could not state that Petitioner's left knee injury was causally related to the September 2011 injury due to a lack of contemporaneous medical records.

With respect to Petitioner's second claim, 14 WC 18638, the Commission notes the Application for Adjustment of Claim and the Arbitrator's Decision were based on an accident date of March 19, 2014. The Request for Hearing form, the parties' Briefs, and the arbitration transcript refer to a February 22, 2014 accident date. Notwithstanding this, the parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of employment on February 22, 2014. The main issue herein was causal connection.

The Arbitrator found that the mechanism of injury – Petitioner driving Respondent's state vehicle into a hole on the roadway – did not comport with Petitioner's alleged complaints and symptoms to his bilateral shoulders, neck, back, left knee, and buttocks. The Arbitrator again noted that Petitioner did not seek immediate treatment.

The Commission relies upon and finds the opinions of Respondent's Section 12 examiner, Dr. Phillips, more persuasive than Petitioner's Section 12 examiner, Dr. Treister. Respondent had sent Petitioner to Dr. Phillips for an evaluation of the spine. Dr. Phillips also evaluated Petitioner's left shoulder but offered no opinion with respect to causation. Dr. Phillips noted a different date of accident, indicating February 15, 2014, but otherwise stated that after reviewing the records and evaluating Petitioner,

> I am not provided any evidence of this accident as provoking Mr. Shales' symptoms. He does subsequently when he presented to Dr. Montella in October 2014 describe the accident on February 3, 2014 in more detail. Assuming the information regarding the

> accident is actually correct and the accident is documented as occurring with Mr. Shales developing symptoms subsequent to this, I believe this would have at most caused a sprain/strain injury. (RX4).

Dr. Phillips stated that Petitioner's current spinal condition was most likely related to some underlying spondylosis.

On the contrary, Dr. Treister opined that as a result of the second work injury, Petitioner sustained a sprain/strain of the cervical and lumbar spine, a left shoulder rotator cuff tear and/or labral tear, a compensatory injury in the right shoulder, a perirectal abscess, and aggravation of Petitioner's pre-existing left knee condition. The Commission finds Dr. Treister's opinions equivocal and not persuasive. Dr. Treister testified, "I think it's related to the accidents. I can't say 12 percent to one and 70 percent to the other, but all these accidents fit together with this deterioration quite clearly." (PX21, pgs. 35-36).

The evidence demonstrated that the first medical record following the February 22, 2014 accident was from Petitioner's primary care physician, Dr. Gindorf, dated March 14, 2014 – about three weeks after the accident. At that appointment, Petitioner reported only neck and right shoulder pain; on March 21, 2014, Petitioner reported pain in both arms; and, on April 1, 2014, Petitioner reported back and rectal pain. The first time Petitioner's complaints were attributed to a work-related injury was Dr. Gindorf's letter addressed to "Dear Sirs" and dated April 8, 2014; that letter stated: "He reports pain in his shoulder and neck that he attributes to hitting potholes while driving around in his job as an inspector." (PX15).

Petitioner had also sought treatment with Dr. Flatt on March 19, 2014 – his chiropractor of 20 years for the neck and back. The medical record indicated that Petitioner had right arm pain that had been present for 11 days, or March 8, 2014, and the pain traveled from the neck to his wrist; Petitioner denied any trauma. After examining Petitioner's entire spine and right shoulder, Dr. Flatt diagnosed Petitioner with low back and thoracic spine pain, cervical spondylosis without myelopathy, right cervical radiculopathy, and right radial nerve irritation; however, the medical record indicated that the former three diagnoses had been present since June 29, 2012.

On April 4, 2014, Petitioner underwent an incision and drainage procedure for the perirectal abscess. The hospital and physical documentation stated that Petitioner had been experiencing rectal pain for the last week. There was no mention of the work accident. The left arm complaints appeared on April 11, 2014 in Dr. Flatt's records.

As to Petitioner's left knee condition, the arbitration record was void of any evidence of complaints or treatment from September 21, 2012 until Petitioner first saw Dr. Montella on October 6, 2014 – nearly eight months after the February 22, 2014 accident [Dr. Montella also had the wrong date of accident and noted February 3, 2014].

As in all workers' compensation claims, it is Petitioner's burden of proof; although it is the Commission's province to draw reasonable inferences from the evidence, the Commission's Decision must be supported by the record and not based on mere speculation or conjecture. *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)); *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 215 (2003).

The Commission finds that the evidence herein demonstrated a real disconnect between the accident date and the timeline of Petitioner's complaints, and a real disconnect with the medical evidence relating those complaints back to any alleged accident date. The medical records demonstrated a delay in complaints and treatment, and even then, not all of the injuries that Petitioner testified to were documented. Petitioner's complaints appeared in piecemeal over a course of up to eight months – with the injury to Petitioner's left knee finally appearing in Dr. Montella's office visit note dated October 6, 2014. The first time some of Petitioner's complaints were attributed to a work-related injury was on April 8, 2014, when Dr. Gindorf indicated that Petitioner attributed his right shoulder and neck complaints to "hitting potholes while driving around in his job as an inspector." (PX15).

In addition, and despite all the claimed injuries, Petitioner's testimony at arbitration narrowed his complaints following the 2014 accident to his neck and back. Drs. Treister and Phillips both opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease. However, Dr. Phillips found that Petitioner's current spinal condition was most likely related to some underlying spondylosis. This correlates with the record which demonstrated that Petitioner had a 20-year history of chiropractic treatment for his neck and back. The Commission therefore finds that Petitioner's current condition of ill-being with respect to his spine was pre-existing and unrelated to the second work accident in 2014.

For the remaining alleged injuries, Dr. Treister's significant diagnoses and favorable causation opinions related to Petitioner's shoulders, left knee, and perirectal abscess do not comport with the medical records that demonstrated a delayed onset of complaints and no documented work-related injury until months later as noted above. Additionally, with respect to Petitioner's right shoulder, Dr. Treister testified that it was the result of overuse causing irritation and bursitis and/or tendonitis. However, Petitioner testified that he attributed only his neck and back injuries to the 2014 accident; Petitioner did not testify to any overuse injury. He also denied any trauma with respect to any right arm pain [see Dr. Flatt's 3/19/2014 record], and the pain appeared to be related to Petitioner's neck injury.

Finally, as to Petitioner's alleged third injury in claim number 16 WC 16860, the Arbitrator noted that Petitioner reported injury to both shoulders, left knee, neck and back as a result of a collision while driving Respondent's vehicle on May 23, 2016. The Arbitrator found Petitioner incredible and noted the following: Petitioner misrepresented that the collision had been witnessed; there was no significant damage to the vehicle; there was no debris or skid marks on the roadway; Petitioner did not report the accident to his supervisor and misrepresented his conversation with the manager of the motor pool; and, "[h]e sought to deceive investigators

about his job duties and sought to mislead a claims adjuster about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle." (Arbitrator's Decision, pg. 17). The Commission further notes a significant discrepancy during Petitioner's testimony at arbitration. Petitioner testified that the collision occurred as he was turning into Respondent's IDOT parking lot "at the end of the night to return the vehicle." (T.40-41). However, both the Respondent's Employee Accident/Incident report and the Illinois Motorist Report from the Lake Zurich Police Department indicated that the collision occurred at approximately 1:40 PM. (RX7). The Arbitrator additionally noted Petitioner's delay in treatment, that Petitioner refused any ambulance and emergency treatment, and that "[h]e was not truthful in testifying he followed up with David Flatt." (Arbitrator's Decision, pg. 17).

The Commission agrees with the Arbitrator that issues of credibility exist with respect to the alleged accident date of May 23, 2016 and therefore affirms the Arbitrator's Decision denying Petitioner's claim.

In light of the foregoing and based on the evidence in its entirety, the Commission affirms the Arbitrator's ultimate conclusions. For claim number 12 WC 17815, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 14 WC 18638, Petitioner failed to prove that his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 16 WC 16860, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 14, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAR 31 2021
TJT/pm
O: 3/3/21
051

Kathryn A. Doerries

Stephen J. Mathis

21IWCC0149

DISSENT

I respectfully dissent from the Majority Decision for the following reasons:

For the first claim, 12 WC 17815, Petitioner testified to one version of his September 19, 2011 injury at arbitration – that he slipped and hyperextended his knee while in his employer's parking lot. The remaining histories were found in the medical records and reports; many of which had erroneous dates of injuries or dates of tests and treatments. Petitioner argued by his Brief that Respondent did not contest the mechanism of injury, but instead disputed liability based on causal connection. By its Brief, Respondent requests that this panel affirm the Arbitrator's Decision, and indeed made no argument relative to the issue of accident. In fact, there was no cross-examination by Respondent with respect to the September 2011 incident. Respondent instead argued that Petitioner's left knee condition was due to pre-existing osteoarthritis and not the result of any work-related accident in September 2011. (Respondent's Brief, pg. 10).

In reviewing the evidence, the medical records provided slight variations of Petitioner's ultimate testimony that he had slipped and hyperextended his left knee on September 19, 2011; the medical records also indicated that the accident happened in November 2011, but by this date, Petitioner had sought treatment for a left knee injury that was listed as occurring on September 19, 2011. Additionally, Respondent did not contest or rebut Petitioner's testimony that he was at work at 3:00 AM on September 19, 2011 in preparation for a week-long training in Springfield. Respondent also stipulated to notice of the injury. There was no argument against the time and place where Petitioner had alleged he injured his left knee, and no argument with respect to the mechanism of injury. Based on the parties' evidence and arguments, or lack thereof, there is sufficient basis to reverse the Arbitrator's Decision and find that Petitioner sustained a work-related accident on September 19, 2011.

With respect to causal connection, Petitioner testified that he did not seek treatment for his left knee injury until November 2011 – approximately two months after the alleged accident date. I find that the two-month delay in treatment does not defeat Petitioner's 2011 claim; by Petitioner's Brief and testimony, he had just started in his new job position with Respondent and was sorting through new insurance, as well as the worker's compensation process. Respondent eventually sent Petitioner to its company clinic in November 2011. The evidence submitted at arbitration included the Initial Workers' Compensation Medical report dated November 11, 2011 which was signed by a physician from Central DuPage Business Health. Petitioner had been diagnosed with a left knee strain and prescribed Ibuprofen and physical therapy. The next record was a work status from Central DuPage Business Health dated December 6, 2011, allowing Petitioner to return to work full duty without restriction. However, the work status note still indicated that Petitioner required medication and physical therapy for the left knee. Thereafter, Petitioner began treatment with Dr. Elstrom and eventually proceeded with left knee surgery.

The chain of events in this case supports a finding of causal connection in favor of Petitioner. The only prior history related to the left knee was the unrelated procedure that

Petitioner had in 1978 for Osgood-Schlatter disease; thereafter, Petitioner testified that he did not have any problems, limitations, or medical care for the left knee for approximately 30 years. Following the September 2011 injury, Petitioner was rendered symptomatic, necessitated medical care and diagnostic imaging, and underwent a left knee arthroscopy, debridement, and synovectomy on April 30, 2012. Petitioner's post-operative diagnoses were chondromalacia patella and capsular synovial plica. Thereafter, Petitioner completed post-operative physical therapy and received two additional injections [for an overall total of three injections] to the left knee.

Petitioner's Section 12 examiner, Dr. Treister, reviewed the operative report and found that the surgical pathology supported a more recent injury rather than a chronic one. Dr. Treister noted no "kissing legion" which would have been present in long-standing, chronic patellar chondromalacia. He opined that a hyperextension knee injury could cause the patella to strike the femur and cause central cartilaginous damage resulting in residual chondromalacia, inflammation, and secondary adjacent synovitis "which may become manifest as a thickened synovial plica, which by rubbing can be a source of pain. There was no other intra-articular pathology described. The findings at surgery were consistent with symptom production as described and with the time interval as described." (PX4; PX11; PX21, pgs. 9-11; 17-19). Respondent's Section 12 examiner, Dr. Cole, could not state that Petitioner's left knee injury was causally related to the September 2011 accident due to a lack of contemporaneous medical records. However, he conceded that the mechanism of injury described by Petitioner and as indicated in Dr. Elstrom's January 2012 office visit note "certainly represent an injury that might or could incite pain related to preexisting arthritis and cause an aggravation." (RX6).

I find Dr. Treister's opinions more thorough and persuasive than Dr. Cole's. Dr. Treister specifically reviewed and commented on the intra-operative findings for the left knee and noted evidence of a more recent than chronic injury. Dr. Cole also conceded that the history of injury could be an aggravating factor to Petitioner's left knee.

For the second claim, 14 WC 18638, the Majority notes that both Dr. Treister and Dr. Phillips opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease, but nonetheless relied on Dr. Phillips' opinion that Petitioner's current spinal condition was due to a pre-existing condition and unrelated to the second work injury.

I respectfully dissent and instead find that Petitioner sustained a strain/sprain of the cervical and lumbar spine in 2014 as opined by both Petitioner's and Respondent's Section 12 examiners, Dr. Treister and Dr. Phillips. Notwithstanding any pre-existing spinal conditions, the medical demonstrated no significant or active chiropractic treatment to the spine until after the 2014 accident.

I concur with the Majority's decision on the remaining alleged injuries and issues in this second worker's compensation claim. I further concur with the Majority with respect to the third worker's compensation claim, or 16 WC 16860.

21IWCC0149

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **12WC017815**

14WC018638
16WC016860

STATE OF ILLINOIS-IDOT
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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140 S DEARBORN ST SUITE 320
CHICAGO, IL 60603

0639 ASSISTANT ATTORNEY GENERAL
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100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305 / 14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner

v.

State of Illinois-IDOT
Employer/Respondent

Case # **12** WC **17815**

Consolidated cases: **14 WC 18638; 16 WC 16860**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **September 19, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-12-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **14WC018638**

12WC017815
16WC016860

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner
v.

Case # **14** WC **18638**

Consolidated cases: **12 WC 17815; 16 WC 16860**

Illinois Department of Transportation
Employer/Respondent

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **March 19, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**59,717.00**; the average weekly wage was $**1,148.40**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove that his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4-10-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **16WC016860**

12WC017815
14WC018638

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Shales
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **16** WC **16860**

Consolidated cases: **12 WC 17815; 14 WC 18638**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **May 23, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** **not** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**61,230.00**; the average weekly wage was $**1,177.50**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4.10.2020
Date

ICArbDec19(b)

APR 14 2020

James Shales v. State of Illinois-IDOT, No. 12 WC 017815; James Shales v. Illinois Department of Transportation, No. 14 WC 18638; James Shales v. Illinois Department of Transportation, No. 16 WC 16860.

Preface

The parties proceeded to hearing August 28, 2019, recessed and resumed to October 3, 2019, and recessed and resumed to December 5, 2019, on separate Requests for Hearing on these three cases. The hearing on 16 WC 16860 proceeded on a Petition for Immediate Hearing Under Section 19(b) of the Act. The parties, at the beginning of the hearing, indicated the following disputed issues. In 12 WC 017815: whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is related to the injury; what were Petitioner's earnings and average weekly wage; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to a period of temporary total disability of two weeks; and what is the nature and extent of the injury. In 14 WC 18638, the disputed issues are: whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to four and 6/7 weeks temporary total disability; and what is the nature and extent of the injury. In 16 WC 16860, the disputed issues are: whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; and whether Petitioner is entitled to a period of temporary total disability of 161 and 6/7 weeks. James Shales v. Illinois Department of Transportation, Nos. 12 WC 017815; 14 WC 18638; 16 WC 16860 (Cons.) Transcript of Proceedings on Arbitration, August 28, 2019, at 4-7; Shales, October 3, 2019, at 4-5; Arbitrator's Exhibit 1; Arbitrator's Exhibit 2; Arbitrator's Exhibit 3; Arbitrator's Exhibit 4.

Petitioner filed three Applications for Adjustment of Claim: 12 WC 17875 claiming a date of accident of September 19, 2011, injuring a leg; 14 WC 18638 claiming a date of accident of March 19, 2014, injuring his head, neck, and back; and 16 WC 16860 claiming a date of accident of May 23, 2016, injuring his neck and right side of body. Arbitrator's Exhibit 5; Arbitrator's Exhibit 6; Arbitrator's Exhibit 7. Those filings indicate Petitioner is alleging three distinct claims. 50 Ill. Admin. Code Section 9020(b). And so that is how the Applications will be addressed.

Petitioner testified, as well as Joseph Harris, Lauder Hampson, Ken Martin, Greg Williamson and via evidence deposition, Dr. Michael Treister. The parties offered nearly 60 exhibits, and a major obstacle to resolution of these cases was the failure of either party to refer an exhibit to the specific case to which it was applicable, and the repeated attempts of Petitioner, as well as Treister, to conflate the three claims. An Arbitrator can only decide a case on the testimony and evidence before them, and simply cannot make the case for either party, or searching the record and manipulate the testimony and evidence to cobble together a preponderance of evidence for Petitioner.

I also note that many of the exhibits submitted were compromised by underlining, the addition of notations, and other distortions. This is disturbing. None of those pages will be considered. Petitioner's Exhibit 3 is a manufactured medical record, submitted without certification or in response to subpoena. It is a poor attempt at fashioning would be medical evidence. I give it no weight whatsoever. Petitioner's Exhibit 27 is likewise given no weight because of the handwritten notations on the exhibit.

Findings of Fact

Since the time he was hired by the State of Illinois (Respondent), James Shales (Petitioner) was always a Staff Assistant with the Department of Transportation. Those job duties say nothing about vehicle inspections. The job duties of a Staff Assistant such as Petitioner are to be accountable for assisting the overall development and coordination of policies and directives regarding bureau programs for the Division of Traffic Safety. The position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. The Staff Assistant provides policy interpretation and analysis of policy and provides assistance to local agencies, elected officials, and the general public. The Staff Assistant serves as confidential assistant to the Deputy Director, serves as a liaison between the Deputy Director and the Governor's office, a legislator, and other state agencies, and serves as department spokesperson for bureau programs conducting presentations to departments (management), elected officials, and the general public. The Staff Assistant coordinates and assists in implementing policy initiatives, reports on the process to management, develops informational documents presenting background and options for addressing issues of policy concerns and develops appropriate policy recommendations to provide maximum benefits to the division and provides analysis and recommendations policy issues. Petitioner was laid off in September 2016 from the position, along with 40 others. He was hired in 2011. Shales, August 28, 2019 at 12, 44, 109-116; Shales, October 13, 2019 at 32.

Petitioner was apparently one of hundreds of individuals, many with political connections, hired by the Illinois Department of Transportation as Rutan-exempt Staff Assistants from 2003 to 2013. The sordid history of the Staff Assistant position can be found at shakmanillinois.com/special-master-filings1. It is well worth reading all the reports of the Special Master. Petitioner is specifically mentioned as being a candidate sponsored by the Governor's Office and hired between 2009 and 2013. The Special Master noted the lack of experience or qualifications for appointment to Rutan-exempt positions, or not requested by the Department. See Corrected Fifth Report of the Special Master at 23, 24 (Petitioner was candidate for Kane County Board).

Ken Martin, retired after 38 years with Respondent, in positions in which he was familiar with Petitioner, testified the decision was made in 2014 to lay off Staff Assistants and then after working with the unions for two years, the eventual layoff was in 2016. Martin testified there is a federal monitor in the Department of Transportation because of the actions taken with the Staff Assistant program. Shales, August 28, 2019 at 95-96, 110, 116.

Petitioner testified that on September 19, 2011, he was in Respondent's parking lot in Schaumburg at 3:00 a.m. He parked his car in the lot and got the keys to a state vehicle. He got

the vehicle and drove it to his car to unload bags and clothes, ". . . slipped approximately maybe five yards. . . ." Petitioner said he hyperextended his left knee, and heard a pop and a lot of pain. He did not indicate how he knew the knee was hyperextended or give any testimony indicating the mechanics of how his slipping led to a hyperextension. The slip was unwitnessed. Petitioner testified he previously had surgery on his left knee in 1978. Shales, August 28, 2019 at 18-20.

I would note at this point, the Application for Adjustment of Claim for this accident appears to be defective, as it fails to set forth a description of how the accident occurred. Arbitrator's Exhibit 1; 50 Ill. Admin. Code 9020.20(c).

Although Petitioner testified he reported the accident immediately to his supervisor in Springfield, he did not complete the CMS Workers' Compensation Employees' Notice of Injury until November 11, 2011, two months later, failing to detail how the injury occurred or at what time. Shales, August 28, 2019; Petitioner's Exhibit 1.

Petitioner testified he first saw his primary care physician, a Dr. Popli. There are no records from Dr. Popli, and no support for Petitioner's testimony. He did not say when he first sought treatment. Petitioner then testified he saw some doctor at the St. Charles facility. The only records from Central DuPage Business Health/St. Charles is a Work Status dated December 6, 2011, three months after the supposed slip. Petitioner was placed on full duty without restrictions and diagnosed with "left knee strain—delayed recovery." Delayed recovery is left unexplained. Petitioner was prescribed physical therapy and 800 mg Ibuprofen. The CMS Initial Workers' Compensation Medical Report dated November 11, 2011, gives a history of "stepped in a puddle at work slipped and hyperextended left knee." A Dr. Mather diagnosed Petitioner with left knee strain. Dr. Popli was not referenced as giving Petitioner any prior treatment. Shales, August 28, 2019 at 22; Petitioner's Exhibit 1A; Petitioner's Exhibit 2.

Petitioner testified Dr. Popli referred him to a Dr. Elstrom. He did not say when or why. The records of Centegra Health System, referencing Dr. John Elstrom of April 19, 2012, indicate Petitioner was referred January 30, 2012, with left knee pain. Petitioner told Elstrom he slipped in a parking lot while running. The admitting diagnosis was gonoarthrosis of the left knee [a degenerative condition] with meniscal tear. There is no record of diagnostic supporting a meniscal tear. Petitioner, said the note, "decided to go ahead with arthroscopy of the left knee." There are no records of a recommendation for arthroscopy. There is an operative note of April 30, 2012, that an arthroscopy, debridement, synovectomy of the left knee was performed. The post operative diagnosis was chondromalacia patella and capsular synovial plica. Petitioner testified he was off work a week or so following surgery and a couple of days in May 2012 for physical therapy. Shales, August 28, 2019 at 23, 25; Petitioner's Exhibit 4.

The records of Accelerated Rehabilitation Centers from May 8, 2012, in an Initial Evaluation indicate a referral by Dr. Ehlstrom. In a history, Petitioner tells the therapist his knee begins to bother him in "Oct/Nov." It also notes "NA Work Comp claim." This physical therapy is clearly related to Petitioner's knee surgery of April 30, 2012. Petitioner's Exhibit 22.

What is disturbing about a large portion of Exhibit 22 is the manufactured records on pages 13-16, as well as the Leave Request on page 17. Petitioner's Exhibit List refers to Exhibit

22 as "Accelerated Rehab note 5-8-12." That is a misrepresentation of its contents. Pages 13-17 are stricken from the exhibit. The alterations on pages 13-16 are particularly disturbing and unprofessional.

On September 17, 2012, Dr. Elstrom wrote a letter to Dr. Vincent Cannestra referring Petitioner to Cannestra's practice. Elstrom indicates he first saw Petitioner January 30, 2012, complaining of an injury November 10, 2011. He says Petitioner has gonarthrosis of the knee and notes an MRI of June 11, 2012, showed a joint effusion but was otherwise normal regarding the ligaments, joint surfaces, and menisci. What is revealing in the letter is Elstrom's telling Cannestra, Petitioner ". . . wanted to go ahead with arthroscopic evaluation of the knee," not that it was recommended. Petitioner's Exhibit 3A; Petitioner's Exhibit 3B.

It is conspicuous that Petitioner offered no testimony regarding Dr. Cannestra. Cannestra saw Petitioner once, September 21, 2012. During that visit, Petitioner told him he was in an icy parking lot when his left foot slipped into a hole. Petitioner's x-rays and an MRI showed no gross abnormalities. Cannestra's impression was chondromalacia patella of the left knee, commonly called "runner's knee." He noted Petitioner was doing an exercise program on his own at the gym. In the Medical History Form completed by Petitioner September 21, 2012, he indicated he was working, not off work. He omitted answering "Is legal action/litigation pending due to this injury." I note his Application was filed May 23, 2012, four months earlier. Petitioner's Exhibit 5; Arbitrator's Exhibit 5.

At this point, I note the submission of Petitioner's Exhibit 7, a "To Whom It May Concern" document dated March 2, 2017. It has been altered, by whom it is not known. On Petitioner's Exhibit List it is vaguely described and misrepresented as "Dr. Popli-PCP MD." I give this document, obviously prepared for use in litigation, and unsupported by any medical records, no weight whatsoever.

Petitioner submitted to an Independent Medical Examination by Dr. Brian Cole, the Associate Chairman and Professor, in the Department of Orthopedics at Rush University Medical Center, May 1, 2017. Subsequent to his report, he issued an addendum, February 27, 2019, regarding the alleged injury of September 2011. Petitioner told Cole he slipped in a puddle and hyperextended the left knee. Cole noted that there is no medical record validating Petitioner's being seen until January 2012, four months later. He noted Petitioner's Notice of Injury was done over a month later. Cole saw no evidence Petitioner had medical treatment in September to early November. He said the medical records do not support an aggravation of preexisting arthritis. Cole said there did not appear there was any significant trauma incurred to Petitioner's left knee to any large degree. Respondent's Exhibit 5; Respondent's Exhibit 6.

Dr. Cole indicated going by what the Petitioner told him, he thought he hyperextended his knee when stepping into a puddle. But that was not Petitioner's testimony at trial, or told to Dr. Cannestra, or to Accelerated Rehabilitation Centers, or to Centegra Health System. So, Cole's opinion here is based on a false premise. In any event, Cole said the medical records do not support or substantiate Petitioner incurred any significant traumas to his knee as a result of anything that happened in the September 2011 incident. Shales, August 28, 2019 at 20; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Respondent's Exhibit 6.

Dr. Cole noted there was no timely report of the injury or witnesses to those events. He noted Petitioner received no medical evaluation between September 2011 through December 2011. Cole said Petitioner had relatively moderate/advanced preexisting osteoarthritis that manifested symptoms. He diagnosed Petitioner's current condition as left knee osteoarthritis unrelated to workplace expose or workplace event of September 2011. He based that on the medical records and fact pattern as provided. Respondent's Exhibit 6.

Petitioner was evaluated by a non-treating physician, Dr. Michael Treister, selected by his attorney seven years after the alleged accident. Petitioner's Exhibit 11. Treister's evaluation will subsequently be addressed in its entirety.

While back at work with Respondent, Petitioner testified he was injured February 22, 2014. The majority of Petitioner's testimony was spent on irrelevant descriptions of what he did at special events and the 15,000 yard signs assigned for the events, not connected to any accident at all. Petitioner's attorney asked him how he got injured, but Petitioner wanted to continue talking about the events. Finally, Petitioner testified he was traveling back to the Respondent's facility in Schaumburg from an event at Rauner Family YMCA. He was unsure of the time. He then said the vehicle was stationed in one of four places. He then said he was on his way to the Toll Authority in Gurnee. His testimony devolved into a mudded description of where he was going. Petitioner, in a generalized testimony, said he drove into the right lane of a viaduct he was in that was "completely" filled with water. He said he hit the water. His van sunk into construction and that's how he got injured. He said he hit his head on the roof of the vehicle, hit his butt, hit his left knee, hit both shoulders. He said he did not report the accident for two days. Shales, August 28, 2019 at 31, 28-33, 34.

There is no testimony or evidence as to where the accident happened; what damage was done to the van; no employee notice of injury; no witnesses; no police activity; no immediate medical response or treatment; and no explanation as to why Petitioner's Application for Adjustment of Claim for this accident indicates an accident date, a month later, of March 19, 2014. Arbitrator's Exhibit 6.

Where Petitioner allegedly drove his vehicle has been described as either: construction; a sink hole; or a pot hole. Shales, August 28, 2019; Petitioner's Exhibit 15. There is, for the purpose of determining precise origin or cause of any injury, no clear, credible testimony.

Petitioner offered no evidence he sought emergency medical treatment, or even required it. He never testified he felt immediate pain or discomfort. Petitioner testified he saw a Dr. Gindorf following the accident. The records of Dr. Jeffery Gindorf indicate he saw Petitioner March 14, 2014, three weeks after Petitioner said he drove into the hole, complaining of right shoulder and neck pain. Petitioner falsely testified he saw Gindorf for his back, neck, both arms, and left knee. There is no record Petitioner told Gindorf he was in a vehicle accident. Without any diagnostics, Gindorf assessed Petitioner with displacement of cervical intervertegral disc without myelopathy, and prescribed medication. One week later, Gindorf had the same assessment. On April 1 2014, Petitioner saw Gindorf with rectal pain and rectal urgency. He was assessed with an abscess of the anal and rectal regions and given a rectal cream and

medication. On April 4, 2014, Gindorf referred Petitioner to surgery for worsening rectal pain. Shales, August 28, 2019; Petitioner's Exhibit 15.

Petitioner testified he had surgery April 4, 2014, on a rectal abscess. The records of Good Shepherd Hospital, of April 4, 2014, indicate Petitioner had been experiencing rectal pain for the last week. There is nothing in the preoperative history and physical about a motor vehicle accident. Petitioner was diagnosed with perirectal abscess. An Operative Report of April 4, 2014, diagnosed a perirectal abscess. The procedure performed was an examination under anesthesia with incision and drainage of perirectal abscess. Shales, August 28, 2019; Petitioner's Exhibit 35.

At this point, I note an Initial Workers' Compensation Medical Report, largely illegible, but likely by Dr. Gindorf, done four months after the alleged accident and two months after rectal surgery, on June 20, 2014, indicating Petitioner hit his head, neck, and tailbone. It said he had been treated by Dr. Gindorf and David Flatt. Petitioner's Exhibit 36.

Gindorf's records contain an unexplained letter of April 8, 2014, "Dear Sirs." It places Petitioner off work until further notice. He states Petitioner ". . . reports pain in his shoulder and neck that he attributes to hitting pot holes while driving around as an inspector." Petitioner's Exhibit 15. There is no mention of the abscess or surgery. There is no mention of a motor vehicle accident. He is parroting Petitioner's latest story line, not one sink hole or pot hole, but apparently many. Petitioner's misrepresentation to his doctor was contradicted by his trial testimony that by 2013 he was overseeing 50 grantees in the Chicagoland area, in a public relations job. Shales, August 28, 2019 at 28-29.

Petitioner testified he treated with David Flatt, a chiropractor, regarding his neck and back. Petitioner testified Flatt was his chiropractor and he had been seeing him for "adjustments" for neck and back, for 20 years. The records of David Flatt indicate Petitioner saw Flatt a month after he testified he drove into the hole, March 19, 2014. Flatt indicated Petitioner has degenerative arthritis of the cervical spine, as well as ADHD. There is no history of a motor vehicle accident. Flatt specifically noted "Denies antecedent trauma." Flatt treated Petitioner with manipulative therapy, exercise, re-education, and traction nine times through April 30, 2014. He indicates he reviewed x-ray results, but never indicated what they were. Shales, August 28, 2019 at 36-37, 23; Petitioner's Exhibit 8.

Petitioner testified he started treating with Dr. Montella in 2014 for his back and neck. The record of Midwest Sports Medicine and Orthopaedic Surgical Specialists and Dr. Bruce Montella indicate Montella saw Petitioner eight months after he said he drove into a hole, October, 2014. Petitioner complained of pain in his left neck, knee, upper back, forearm, and midback. Petitioner told Montella the onset of his pain was February 3, 2014, a month before he claims to have driven into a hole. Petitioner told Montella he was seen in an emergency room and admitted to a hospital. In the absence of evidence and testimony by Petitioner, that is a fabrication. Petitioner, in a seemingly calculated attempt to obscure his true condition, repeatedly conflates his alleged accident of September 2011, and alleged driving into a hole. Montella, without any noted diagnostics, assessed Petitioner with cervical disc herniation, lumbar disc herniation, and tear in medial meniscus knee. The treatment proposed was

nonoperative management. Montella's records are largely duplicative, and that is troubling. Shales, August 28, 2019 at 36; Petitioner's Exhibit 12A.

Petitioner offered no testimony of his medical treatment from 2014 onward. He said Montella authorized him to be off work May 20, 2015, through June 2, 2015, then December 10, 2015, through December 17, 2015. He did not say why. The records of Midwest Sports Medicine indicate that on January 5, 2015, Petitioner was working full duty without restrictions. On February 13, 2015, Petitioner was diagnosed with osteoarthritis of the knee and advised to consider a total knee replacement. On March 17, 2015, Petitioner was noted to be working full duty without restrictions. On December 9, 2015, almost two years after Petitioner claims to have driven into a hole, Montella, with no noted basis, or complaints of left knee and low back pain, in his treatment plan says "the patient was injured at work due to exertion and a work related accident." In medical terms, exertion is the expenditure of energy by skeletal muscles. It means nothing in this context. What work related accident? Montella does not say. He says Petitioner ". . . is recommended to take off work starting December 10, 2015 . . . to . . . December 17, 2015. He does not say why. On December 16, 2015, Montella's records indicate Petitioner can return to work without restrictions December 16, 2015, full duty, and is able to drive a State vehicle. Shales, August 28, 2019; Petitioner's Exhibit 12B.

In May 2016, James Sterr, a Bureau Chief with Respondent, had a concern about Petitioner that proved prescient. He was concerned, because of Petitioner's two prior denied workers' compensation claims, and because Petitioner was facing a potential layoff as a Staff Assistant, that Petitioner sought to expand his duties to feign injury. Respondent's Exhibit 7. He just misread how.

On May 19, 2016, Petitioner had asked Dan Thompson, Unit Chief of the Vehicle Inspection Program, for a "crawler" that would allow him to inspect the underside of charitable vehicles. Thompson told Petitioner he should not be leaving his vehicle to look for CV plates, simply drive and look at locations. He was advised doing otherwise would put Respondent at risk for a major labor grievance. Petitioner was specifically told many times not to get under buses and do any inspections. Respondent's Exhibit 8.

Nonetheless, Petitioner testified that in May 2016, he was still visually inspecting school buses, crawling and climbing under the buses. This fabrication was contradicted by Ken Martin, a long time official with Respondent who knew Petitioner and supervised him. He testified inspections were not in Petitioner's duties. Those were done by a different union. Shales, August 28, 2019 at 39; 94-100.

Petitioner testified he sustained an injury May 23, 2016. He said he was injured in front of Respondent's facility in Lake Zurich. He said he was turning left into the facility when a vehicle struck his van at "50-60" miles per hour. Despite completing an Illinois Motorist Report indicating the incident happened at 1:40 p.m., as well as an Employee Accident/Incident Report saying the same, Petitioner said it happened ". . . at the end of the night . . ." Petitioner testified his left shoulder hit the windshield, the right got jammed underneath the steering wheel, he banged his left knee, and whiplashed his neck and back. Shales, August 28, 2019 at 39, 40, 41; Respondent's Exhibit 7.

Petitioner testified he filled out a report with the Lake Zurich Police Department and talked to ". . . Kerry, something like that. . . ." He did not call an ambulance. He said, despite testifying he was struck at "50-60" miles per hour, he was not sure of damage to his vehicle. Then he said there was not a lot of damage. Petitioner omitted much about the accident and the aftermath. Shales, August 28, 2019 at 41, 60, 61.

Greg Williamson, an investigator with Respondent, was asked to look into the circumstances surrounding Petitioner's claim that he was in an accident May 23, 2016. He testified at the hearing. He said he interviewed Petitioner at the Lake Zurich facility. Petitioner also had a representative with him. Williamson testified as to his investigation and the subsequent report. Petitioner chose not to cross examine Williamson. Shales, December 5, 2019 at 10, 12, 13, 22.

Petitioner was interviewed two days after he claimed to be hit by a vehicle going "50-60" miles per hour. He was accompanied by his union steward. He admitted his responsibilities included traveling to various locations to locate charitable vehicles and verify their CV plates bore a valid sticker. He mislead investigators by telling them he checks for holes in the floor boards and tire treads. He admitted Ken Martin was his immediate supervisor, and that he was returning to Lake Zurich at 1:40 p.m. Respondent's Exhibit 7; Respondent's Exhibit 8.

Petitioner told investigators a silver older model Mercedes driven by a man struck his vehicle. He said he could hear the tires of the Mercedes screeching immediately before impact. He told investigators the impact caused a loud boom and his vehicle "jerked pretty good to the left." He said he got out and saw the other vehicle drive away, saying he reported the incident, not to his supervisor, but to Kerry Kern, who managed the motor pool. He said Kern was not sure what to do. Petitioner admitted telling Kern he didn't get hurt bad and declined an ambulance, preferring to see his regular doctor. Petitioner told investigators he drove to the Lake Zurich Police Station to report the incident. Kern told investigators he advised Petitioner not to follow the other vehicle, but Petitioner said he did, in attempting to catch him. Kern said he told Petitioner to submit an Employee Accident/Incident Report, and noted Petitioner's vehicle was equipped with a manual detailing actions employee should take in the event of an accident. Pat Kewenakhone, an engineer at the Lake Zurich yard, told investigators Petitioner asked him for directions to the Police Station, and said employees in the facility are able to hear traffic noises, but no one heard a loud boom during the time of the alleged accident. He took the photographs of Petitioner's vehicle. Respondent's Exhibit 7.

Petitioner told investigators the other vehicle should have damage to its right side and door, admitting there was very little damage to his vehicle, and he saw no debris or skid marks in the street after the alleged collision. During the interview, Petitioner admitted he could not give a clear description of the vehicle that hit him, or the driver. He denied initially describing the driver as a man. Petitioner told investigators he received no medical treatment as a result of the alleged accident, but had an appointment for June 8, 2016, 14 days after the accident, and planned to be off work until then. He told investigators he is in pain "24/7" but continues to come to work ". . . because he loves his job." He said he wanted to be on Workers' Compensation and would appreciate it if his claim was approved. Respondent's Exhibit 7.

The vehicle driven by Petitioner had minor scuffs to the bumper and a small semicircular dent to the right of the rear bumper. There was a small crack in the right side of the rear bumper near the bottom with red paint transfer. Petitioner told Lake Zurich Police the rear passenger bumper was struck by a silver four door Mercedes. Petitioner told Dr. Roger Chams he was hit at 50 miles an hour. Petitioner's Exhibit 20. Kern told investigators the dent in the rear bumper of Petitioner's vehicle was very common, and practically all motor pool vans have similar dents.

Williamson testified there were quite a few inconsistencies regarding the circumstances of the accident. Shales, December 5, 2019 at 15-20.

Petitioner testified he was still under Dr. Montella's care and continued to see him after the latest alleged accident. He said he was also seeing David Flatt, but did not say why. Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the 2016 accident. He offered no elucidation of what was done or why. Shales, August 28, 2019 at 42.

The records of Dr. Montella indicate Petitioner was seen June 1, 2016, complaining of motor vehicle related aggravation of pain in the neck and lower back. Petitioner told Montella his symptoms began after an auto accident. This stands in stark contrast to what Petitioner told investigators May 25, 2016, that he is in constant pain "24/7," and telling Kern the day of the accident he was OK, and laughing "just normal back and neck, but that always hurts." Montella, with no new diagnostics, gave an impression of impingement syndrome of right shoulder, impingement of left shoulder, intervertegral disc displacement lumbosacral region, cervical disc disorder with radiculopathy mid cervical region. He suggested conservative treatment, NSAIDs, and a rehabilitation program. Norco tablets were prescribed, even though Montella's records clearly reflect Petitioner was allergic to Norco. Montella falsely represents that "Petitioner had a work related motor vehicle accident in 2011." Petitioner's Exhibit 12C; Respondent's Exhibit 7.

On June 1, 2016, Montella prepared two documents. In an initial Workers' Compensation Medical Report, Montella wrote Petitioner was involved in a hit and run May 23, 2016. He parroted back Petitioner's complaints of neck, back, and shoulder pain and soreness. He indicated Petitioner was to be off work until his next scheduled appointment. That was in three weeks. At the same time, on the same date, Montella completed an Authorization for Disability Leave and Return to Work that was glaringly inconsistent with his treatment of Petitioner and subsequent work pronouncements. Montella signed the Physicians Statement, saying Petitioner had severe limitation of functional capacity and was incapable of minimal (sedentary) activity. He stated in his opinion Petitioner was temporarily totally disabled, and permanently and totally disabled for employment. Petitioner's Exhibit 12C.

Montella's records contain a June 2, 2016, denial of claim for Petitioner and Workers' Compensation from Tristar. Investigators of the alleged accident reviewed an audio recording of Petitioner with Tristar on May 23, 2016, in which he told them he would seek immediate medical attention and would go to the emergency room. He did neither. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

Two weeks after stating Petitioner was totally disabled for employment, June 15, 2016, the records of Montella reveal Montella wrote a Work Restriction Form, saying Petitioner may return to work without restrictions. At the same time, he restricted Petitioner to no lifting over 20 pounds and no climbing, bending, or sitting in a work chair all day. That same day, a laboratory report from Assured Toxicology to Midwest Sports Medicine done for medication monitoring, indicated Petitioner tested positive for cocaine, an illegal drug. Montella never commented on the report, acknowledged it, or confronted Petitioner. Office visit notes of Montella, on June 15, 2016, reveal x-ray findings consistent with glenohumeral joint AC joint arthrosis and spurring. Cervical and lumbar x-rays were consistent with multisegmental degeneration. Petitioner's Exhibit 12C.

Three weeks after stating Petitioner was totally disabled for employment, June 22, 2016, Montella completed a Work Restriction Form indicating Petitioner could return to work without restriction and was cleared to resume full duty as a visual vehicle inspector, and was able to drive a State vehicle. Montella's office notes of June 22, 2016, indicate Petitioner may return to work regular duty without restrictions. Petitioner's Exhibit 12C.

Three weeks later, July 13, 2016, six weeks after stating Petitioner was totally disabled for employment, Montella completed an Authorization for Disability Leave and Return to Work stating Petitioner had no limitation of functional capacity and was capable of heavy work. He wrote that Petitioner was able to resume his duties. His remarks say full duty. He neglected to indicate any response to the extent of disability. Just a week later, July 20, 2016, Montella signed a Work Restriction Form indicating Petitioner could return to work without restriction and must have an ergonomic work station. This is inexplicable in the face of Montella's instruction in a Work Restriction Form of June 22, 2016, indicating Petitioner should ". . . not be sitting at the desk doing paperwork. . . ." Petitioner's Exhibit 12C.

At the same time, June 22, 2016, Montella was clearing Petitioner to resume full duty and drive a State vehicle, a laboratory report by Assured Toxicology to Midwest Sports Medicine indicated Petitioner again tested positive for cocaine, an illegal drug. For the second time, Montella ignored the report. Petitioner's Exhibit 12C.

The depth and breadth of Petitioner's fabricated subjective complaints are laid bare in Progress Notes of ATI Physical Therapy of August 13, 2016, a scant two months after Montella stated Petitioner was totally disabled for employment. Petitioner's physical therapists wrote "Patient's subjective reports of physical pain and limitations are not consistent with patient's activity level. Patient was overheard talking about returning to jet skiing, jogging, bike riding, walking long distances, and working out at the gym. Patient's compliance with HEP has been questionable d/t inability to list exercises when asked are part of his program or frequently forgets how to perform exercises correctly." Astonishingly, Montella signed off on the notes. Just as he ignored Petitioner's cocaine use, he ignored the therapist's observations. The observations were repeated in the Discharge Summary two weeks later, August 25, 2016. Again, signed off on by Montella. Again ignored. Petitioner's Exhibit 12C.

The remainder of Montella's records are completely compromised and sprinkled with fantasy. A State Retirement Systems Temporary Disability Medical Report signed by Montella

indicates a left knee meniscus tear, intervertegral disc disorders, cervical disc disorders with radiculopathy, and left and right shoulder impingement with an onset date of September 14, 2016, four months post the alleged accident. Montella signed a Work Restriction Form September 14, 2016, placing Petitioner off work until further evaluation, less than two months after returning Petitioner to work without restrictions. Petitioner was well aware of his coming layoff as far back as early May 2016, and sought short term disability. By November 2016, Montella had referred Petitioner to Dr. Eugene Lopez for left knee surgery. An x-ray revealed an overgrowth of cartilage and bone, osteochondroma, that does not result from an injury. Lopez recommended excision of the left proximal tibial ossicle/exotosis. One of the most telling entries in Montella's records is an unsigned "To Whom It May Concern" of December 13, 2016, saying "Patient has been off work from 9/13/16-present and until further notice per Dr. Montella's discretion. . . ." As late as December 15, 2016, Montella was still misrepresenting Petitioner as a safety investigator for the Illinois Department of Traffic Safety, stating this is a work injury that happened in September 2011. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

There are no records of treatment by David Flatt to support Petitioner's testimony he was seeing Flatt after the alleged accident. What records of Flatt there are indicate that by June 3, 2019, Petitioner's complaints were chronic neck and back pain. Flatt indicated "treatment for this patient is designed to reduce pain and dysfunction of acute flareups even though the condition is degenerative and chronic in nature." Petitioner's Exhibit 8A.

Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the accident in 2016. That was untrue. The records of Dr. Chams reveal he saw Petitioner on July 24, 2017, almost a year after the alleged accident. Petitioner went to Chams claiming injury in 2014. Chams reviewed an MRI which was negative for rotator cuff pathology. He wrote "The patient was adamant about additional prescription of narcotic medication. The patient requested Percocet which was declined." Petitioner followed up with Chams September 5, 2017. He did "not proceed" with a high field MRI scan of his shoulder as ordered by Chams, nor physical therapy as ordered by Chams. The impression after examination was left shoulder bursitis, ruled out complete rotator cuff tear. Cham indicated "We have in the past declined narcotic medications for the patient." Petitioner never saw Chams again. Petitioner's Exhibit 20; Shales, August 28, 2019 at 42.

In 2017, Petitioner submitted to two independent medical examinations.

On May 1, 2017, Dr. Brian Cole, Associate Chairman and Professor in the Department of Orthopedics, Rush University Medical Center, and Chairman of the Department of Surgery, evaluated Petitioner's left knee, reviewing medical records and examining Petitioner. In his view, Petitioner's impairment and need for treatment are related to the progression of his osteoarthritis. He noted Petitioner's focus on a 2011 injury, and that the medical records do not support the notion Petitioner had persistent and consistent symptoms with consistent care through 2012 to 2014. He diagnosed Petitioner with mild to moderate osteoarthritis of the left knee. He could not state categorically whether Petitioner had a legitimate reaggravation of a preexisting condition. Respondent's Exhibit 5.

On June 29, 2917, Petitioner submitted to an independent medical examination by Dr. Frank Phillips, Director of Spine Surgery at Rush University Medical Center. Phillips performed a cervical, thoracic, and lumbar record review and medical and physical examination of Petitioner. Unlike Montella, he noted Petitioner twice tested positive for cocaine. Petitioner, in describing his treatment and injuries, never mentioned his rectal abscess. Petitioner denied an accident in 2016 aggravated his cervical or lumbar condition. Phillips noted no evidence of acute injury or disk herniation in a cervical MRI from June 22, 2016. He noted no instability or deformity in a lumbar x-ray from June 3, 2016. Dr. Phillips had no evidence of an accident provoking Petitioner's neck and low back symptoms. He did not believe Petitioner was in any current state of ill-being related to the cervical or lumbar spine as a consequence of a 2014 injury. Respondent's Exhibit 4.

Petitioner was referred to 77 year old Dr. Michael Treister for an orthopedic evaluation, by his attorney in 2018, two years after his third claim, four years after his second claim, and seven years after his first claim. Treister was in retired status from two hospitals and had sold his surgical practice four years earlier. He now does medical evaluations, largely for plaintiffs. Petitioner's Exhibit 10; Petitioner's Exhibit 11; Petitioner's Exhibit 21. His evaluation was no Section 12 examination, and he was not a treating physician of Petitioner.

Medical evidence should be treated and weighed as any other evidence. The character of the witness, his professional capacity, skill, and opportunity for observation, and state of mind of the witness himself are all proper factors to be considered in determining the weight to be given testimony. See Peabody Coal Company v. Industrial Commission, 289 Ill. 2d 449, 454 (1919). No doctor, who is not a treating physician, should be an obvious advocate or partisan in legal proceedings.

Petitioner's testimony omitted any reference to giving a history to or having an examination by Treister. Treister's testimony was taken by evidence deposition. He testified he examined Petitioner at the request of his attorney to determine whether or not there was a causal connection between his medical condition and a series of work accidents. He testified he did a report dated March 23, 2018. He got a history from Petitioner of three separate accidents. Petitioner's Exhibit 21 at 8-7. Treister's testimony is largely an uninterrupted narrative, combining speculation, irrelevant verbiage, and pure advocacy. He was seemingly able to run amok without objection, and without regard to the question. It appears he took everything that Petitioner told him as true. He became highly agitated during cross examination, when counsel asked, ". . . you've sort of editorialized throughout your IME, do you normally do that?" She was being polite, as we will see. Treister said, in answer, he was to speak at ". . . a major meeting I'm giving a lecture." He said, ". . . I'm giving a lecture at a major medical meeting about this issue." He said he puts his thoughts in italics. Such are normally used for emphasis, though rarely. He admitted he ". . . got a whole bunch of records. . . ." and did not know where he got portions of his report. He purposely and without being asked, savaged HMO Illinois, saying, "And by the way, HMO Illinois is one of the hardest ones, if there was a workman's comp they wouldn't pay." Treister was critical of Petitioner's initial treating physicians. Treister became agitated when backed into a corner regarding criticism of Dr. Phillips. Petitioner's Exhibit 21 at 65, 66, 67, 69, 70-75.

Treister's 22 page report of March 23, 2018, is repeatedly altered and highlighted, a disturbing and continuing practice by Petitioner.

He first saw Petitioner March 5, 2018, on his left knee and both shoulders. He was specifically told not to evaluate the spine. Treister called Petitioner's counsel and chastised him for not engaging him to evaluate the spine, in an extravagant statement of his purported talent, pushing counsel into expanding his evaluation. His report is based on Petitioner's telling him he had been a school bus inspector, kneeling and crawling under buses, until September of 2016. That was a lie, and that lie formed the foundation of Treister's report. Treister falsely wrote that Dr. Elstrom recommended arthroscopic surgery. That is nowhere in the records. Those records strongly suggest Petitioner told Elstrom he wanted surgery. Petitioner continued his attempted manipulation of Treister by insisting his course of conversation with his doctors no matter the difference in the doctors' records. Treister misrepresented when Petitioner had knee surgery, and misrepresented Dr. Cannestra's conclusions. Petitioner's Exhibit 11 at 1-6.

In his narrative about Petitioner's alleged second accident, all of Treister's information came from Petitioner. Incredibly, Treister wrote "I made no attempt at detailed review of [Petitioner's chiropractic care] records [through April 2, 2018]. If Treister had made even a cursory review of Flatt's records, he would have seen Petitioner denied a trauma, and never mentioned a motor vehicle accident. Treister is woefully misinformed and willfully ignorant of Petitioner's history. Treister admitted he did not have Petitioner's rectal abscess records, but wasted no time relying on Petitioner's medical expertise in connecting his rectal surgery to an accident. No doubt Treister neglected to review Petitioner's Workers' Compensation Medical Report, where he indicated not a sacro-cocygeal injury as Treister noted, but one of his tailbone. Treister is consistently wrong. He relies on Petitioner's story that he received over 50 massage therapy treatments recommended by Montella, at X-Sport Gym. There are no records to support this. Petitioner's Exhibit 11 at 6-8.

Treister continued to base his narrative on what Petitioner tells him over the reports of IME doctors. He questioned the ethics of those doctors and thought Dr. Phillips not fair or reasonable, devolving his examination into an argumentative lecture. Treister consistently falls for Petitioner's description of his job. Petitioner's Exhibit 11 at 10-16.

That is enough time spent on Treister's report. The rest is chatter without reason, facts, or support, highly speculative and designed to justify the 22 page "examination." It isn't an examination at all. Read closely in conjunction with the other exhibits offered and Petitioner's testimony, it is a shocking, empty screed.

There are so many examples of nonsense from Treister, that to catalog them all would push the length of this decision to 100 pages. Suffice it to list these examples of his medical professionalism: Petitioner was " . . . forced to use his private health insurance." As to alleged discrepancy in the medical records, "Was the date wrong so that MRI facility could get paid? Who knows." Then, there's "Mr. Shales continued to have significant discomfort, but since ongoing treatment was declined by Workers' Compensation, he went back to his work and did the best he could with his painful left knee under the circumstances." Shattering the myth of any impartiality--that this was an honest medical evaluation of Petitioner--there is this, ". . . Workers'

Compensation had over and over refused to approve or administer any rational medical care to Mr. Shales, and that as a result he was seeking out the most reasonable symptom relieving treatments that he could arrange and afford. That appears to have been an honorable attempt at symptom relief on his part, and it was not his fault that he could not go elsewhere or perhaps receive more appropriate care." Treister, ever the professional, wrote, "This appears to be a true medical tragedy." His "evaluation" crosses the bounds of medical evaluation into exaggerated testimonial advocacy, at best puffery, at worst deliberate distortion. Treister couldn't even get the date of Petitioner's knee surgery correct, bought the deception of what work Petitioner did before and after the alleged accidents, and concocted a connection between the second alleged accident and rectal surgery.

I give no weight to Treister.

Conclusions of Law

12 WC 017815, alleged date of accident September 19, 2011

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury.

A claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. First Cash Financial Services v. Industrial Commission, 367 Ill. App. 3d 102, 105 (2006). In the course of employment refers to the time, place, and circumstances of the injury. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980). Arising out of the employment pertains to the origin or cause of a claimant's injury. First Cash, supra at 105.

The credibility of a witness is always an issue and relevant. That determination involves the consideration of a witness' ability and opportunity to observe; their memory; manner while testifying; interest; bias; and previous inconsistent statements or actions. See e.g. Illinois Pattern Jury Instructions – Civil No. 1.01[5]. In all of these cases, Petitioner's credibility was repeatedly compromised. These will be discussed *ad seriatim*. There is a pattern that runs through Petitioner's medical records and statements made to examining doctors and medical providers that show he attempted to manipulate his medical treatment. There are glaring omissions in evidence and testimony on subjects that would add clarity and corroboration to the events of these claims. Together these cast a dark cloud over consideration of these claims.

In this claim, I find as a conclusion of law, Petitioner has failed to prove an injury arose out of and in the course of employment, or that his current condition of ill-being is causally connected to a workplace injury.

Petitioner testified that as he was unloading bags and clothes from his personal vehicle into a State vehicle and he ". . . slipped approximately maybe five yards, hyperextended my knee, heard a pop and a lot of pain behind the knee." Five yards. Fifteen feet. Petitioner's claim

of a hyperextension is his repeated creation of his alleged injury. It finds no support in medical records. Petitioner told five versions of his unsubstantiated slip: slipped in a puddle; in an icy [in September] parking lot stepped into a hole and slipped; slipped at work; slipped while running; stepped in a hole. Shales August 28, 2019; Respondent's Exhibit 5; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Petitioner's Exhibit 11. In his Notice of Injury, he completely omits any detail of how the injury occurred. This is also true, although it is required by Rule, in his Application for Adjustment of Claim. Petitioner's Exhibit 1; Arbitrator's Exhibit 5; 50 Il. Admin. Code 9020.20(c) (a description of how the accident occurred). The date of the unwitnessed five yard slip is not even consistently set in the exhibits tendered by Petitioner. Petitioner's Exhibit 5 (November 2011), Petitioner's Exhibit 3A (November 10, 2011); Petitioner's Exhibit 22 (Oct/Nov). The Initial Evaluation of Petitioner by Accelerated Rehabilitation Centers, of May 8, 2012, in its history indicates "Oct/Nov left knee began to bother him." That evaluation, in the history, notes it is not a Worker's Compensation claim. Petitioner's Exhibit 22.

Petitioner did not report any incident for two months. Petitioner's Exhibit 1. He sought no medical treatment for four months. There is no corroboration of Petitioner's story and much to suggest it never happened. Respondent's Exhibit 6.

Petitioner had arthritis in his knee and that is not causally connected to any workplace injury. Respondent's Exhibit 6; Petitioner's Exhibit 3A; Petitioner's Exhibit 4.

Disputed issue **G** is what was Petitioner's average weekly wage. The claimant bears the burden of establishing his average weekly wage under 820 ILCS 305/10. Ricketts v. Industrial Commission, 251 Ill. App. 3d 809, 810 (1983). The evidence presented was less than clear or comprehensive. No pay stubs. No W-2. No documentation of any kind. The sum total of the evidence on this issue was Petitioner's testimony that when he was hired in August 2011, his salary was ". . . approximately $5000 a month, gross." He said it was roughly ". . . 58,000-60,000" a year. Shales, August 28, 2019 at 17. Liability under the Act cannot rest upon imagination, speculation, or conjecture, but out of facts established by a preponderance of the evidence. Lyons v. Michigan Blvd. Bldg. Co. Inc., 331 Ill. App. 482, 501 (1947).

The Act details the calculation of average weekly wage in Section 10. There are four methods to do so. Petitioner chose none of them to calculate his average weekly wage on the date he claimed as the date of accident, September 19, 2011. There is no concrete evidence of his actual earnings. Because I find Petitioner has failed to meet his burden of proof as to earnings and average weekly wage, no calculation can be made under Section 10. Any attempted scenario would be pure speculation.

Because Petitioner failed to prove an accident arose out of and in the course of employment or that his current condition of ill-being was causally connected to a workplace injury, Respondent is not responsible for medical charges; Petitioner is not entitled to a period of temporary total disability or permanent partial disability. Disputed issues **J**, **K**, and **L** are moot.

14 WC 18638, alleged date of Accident March 19, 2014

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and his employment. Navistar International Transportation Corporation v. Industrial Commission, 315 Ill. App. 3d 1197, 1202-1205 (2002). Here Petitioner claims his condition of ill-being involves his head, neck, and back. He testified he sought treatment for his back, neck, both arms, and left knee. Arbitrator's Exhibit 6; Shales, August 28, 2019 at 35.

I find as a conclusion of law, Petitioner has failed to prove that his current condition of ill-being is causally connected to a workplace injury.

Petitioner claimed date of accident is wildly inconsistent, with a month discrepancy. He offered no real mechanism of injury. He didn't report the accident for two days. He sought no emergency medical treatment, or even required it. He did not testify to any immediate pain or discomfort. He saw his primary care physician three weeks after he claimed he drove into a hole, and never told him he was in a vehicle accident. Petitioner misrepresented his job duties to Dr. Gindorf.

In the defining "mic drop" to this issue, when Petitioner saw his chiropractor on March 19, 2014, whom he had been seeing for 20 years, he "denies antecedent trauma." He never told David Flatt about a motor vehicle accident, and specifically denied having an accident. Petitioner told Dr. Montella the onset of his pain was a month before he claims to have driven into a hole.

As to disputed issues **J**, **K**, and **L**, because Petitioner failed to establish the existence of a causal connection between him and his employment, Respondent is not responsible to pay any medical expenses incurred by Petitioner. Petitioner is not entitled to temporary total disability benefits or permanent partial disability benefits.

16 WC 16860, alleged date of Accident May 23, 2016

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. As discussed earlier, a claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. In the course of employment refers to the time, place, and circumstances of the injury. Arising out of the employment pertains to the origin or cause of a claimant's injury. An injured employee bears the burden of proof that there is a causal connection between his condition of ill-being and his employment.

Here Petitioner testified a vehicle struck his State van at "50-60" miles per hour, causing his left shoulder to hit the windshield, jamming his right shoulder under the steering wheel, banging his left knee and whiplashing his neck and back.

In this claim, I find as a conclusion of law, Petitioner was not in a motor vehicle accident and whatever Petitioner's condition, it is not related to his employment.

Petitioner's claimed accident, being hit by a silver Mercedes going "50-60" miles per hour, that jerked his vehicle to the left and caused a loud boom, was unwitnessed and uncorroborated. He misrepresented it being witnessed. No one at Respondent's facility heard a loud boom. There was no damage to his vehicle caused by a silver Mercedes going "50-60" miles per hour. There was no debris or skid marks in or on the roadway. Petitioner fabricated hearing tires screeching. The condition of the State vehicle Petitioner claims to have been in while struck at "50-60" miles per hour was not in any way consistent with being struck. Notably, there was red paint, not silver, transfer where Petitioner vaguely alluded to being hit, and his vehicle had only common motor pool dents.

Petitioner did not report the accident to his supervisor, and misrepresented his conversation with the manager of the motor pool. He sought to deceive investigators about his job duties and sought to mislead a claims adjustor about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle.

Petitioner sought no emergency medical treatment, declined an ambulance, and first saw a doctor long after he claims he was hit. He was not truthful in testifying he followed up with David Flatt. What medical records there are in evidence show Petitioner fabricated complaints of pain and physical limitations.

Because of this finding, Respondent is not responsible for charges for medical services, and Petitioner is not entitled to any period of temporary total disability.

Howard L. Ohr
Arbitrator

4-10-2020
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0150

vs.

No. 14 WC 024705

Radiac Abrasives, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical treatment, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the §19(b) Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. Although the Order portion of the Arbitrator's Decision specifies an award of 68-3/7 weeks of temporary total disability at the rate of $536.05/week, the Conclusion portion of the Decision indicates that the total award equals 73 weeks at $535.99/week. The Commission finds that the correct TTD rate is $536.05/week and the correct duration is 71-4/7 weeks for the periods covered by the Arbitrator's award.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

21IWCC0150

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is modified to reflect the award of $536.05 per week for 71-4/7 weeks for the periods between June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

No monetary award is made in this matter, so no appeal bond is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

o-2/4/21
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **14WC024705**

18WC004741

21IWCC0150

RADIAC ABRASIVES INC
Employer/Respondent

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0150

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **14** WC **24705**

Consolidated cases: **18 WC 4741**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **April 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**536.05** per week for **68-3/7**, commencing **June 17, 2014** through **September 7, 2015**, **February 11, 2017** through **March 14, 2017**, and **September 6, 2017** through **September 26, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Dr. Markarian, and to Dr. Fernandez, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS: 21IWCC0150

The petitioner testified that on May 27, 2014 he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Subsequent to May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner stated that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continues to have swelling and difficulty moving his hands and he indicated that he "can't do much" because activities bother his hands.

In March of 2018, the petitioner was terminated from his employment with Respondent. He was not under any active medical care at the time of his termination.

Following his termination, the petitioner filed an Application for Adjustment of Claim alleging that an injury to his right arm occurred on January 12, 2018. In April of 2018, the petitioner sought treatment for his right arm complaints with Dr. Markarian. That claim is the subject of the Arbitrator's Decision rendered in case number 18 WC 4741.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Respondent did not dispute that an accident arising out of and in the course of the petitioner's employment occurred on May 27, 2014. The Petitioner was first seen for medical care at the Rush Copley Medical Center on April 28, 2014 at which time he was diagnosed with bilateral carpal tunnel syndrome due to an overuse at work.

The petitioner then came under the care of Dr. Markarian who, likewise, diagnosed the petitioner with bilateral carpal tunnel caused by repetitive work activities. Dr. Markarian eventually performed bilateral carpal tunnel surgeries on the petitioner. Dr. Markarian performed the right carpal tunnel release on October 9, 2014 and the left carpal tunnel release on February 5, 2015.

When the petitioner continued to voice complaints, he was seen for a second opinion with Dr. John Fernandez. Dr. Fernandez performed bilateral trigger finger surgery on three of Petitioner's right fingers and three of Petitioner's left fingers. The left hand surgery was performed by Dr. Fernandez

on September 6, 2017 and the right hand surgery was performed by Dr. Fernandez on March 1, 2017.

Dr. Fernandez opined that the petitioner's condition of trigger digits (bilateral thumb index and middle fingers) should definitely be treated as work related. Dr. Fernandez reasoned that if the carpal tunnel syndrome and its surgery were treated as work related the same causative factors would be at stake, i.e. exposure, repetition, or frequency with gripping and grasping particularly of a more forceful nature in the operation of machinery and use of tools, with regard to the trigger digits.

Dr. Patari, Respondent's Section 12 examiner, opined that Petitioner's bilateral carpal tunnel was causally related to his work for the Respondent but he opined that the bilateral trigger fingers were not causally related. Dr. Patari did not find permanent restrictions were warranted.

The Arbitrator finds the opinions of Dr. Fernandez regarding causation and permanent restrictions to be credible and persuasive and to be more persuasive than those of Dr. Patari. Dr. Fernandez reiterated in his evidence deposition that Petitioner's bilateral, "carpal tunnel syndrome as well as trigger digits should be treated as work related reasoning that the petitioner had "reasonable causal factors including exposure to frequent gripping and grasping, including use of machinery and tools which is a very well-known and valid risk factor in the development of both carpal tunnel and trigger fingers." Dr. Fernandez also took issue with Dr. Patari's opinions concerning causation to be strange and wrong because the same causative factors that effect carpal tunnel effect trigger fingers.

Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. With regard to the petitioner's permanent restrictions, Dr. Fernandez opined that the petitioner's condition had not completely resolved. Dr. Fernandez opined that if the petitioner returned back to the activities that caused the problem, his condition could get worse, and at that his prognosis of doing well and returning back to that line of work was relatively poor. Dr. Fernandez felt these restrictions were permanent.

The Arbitrator notes Dr. Fernandez's credentials as an upper extremity specialist and finds his opinions to be credible, reliable, and persuasive. As such, the Arbitrator finds Petitioner's bilateral carpal tunnel and bilateral trigger finger conditions to be casually related to his work activities. The Arbitrator also finds the permanent restrictions imposed by Dr. Fernandez upon the Petitioner to be causally related. The Arbitrator further finds that the petitioner reached maximum medical improvement on January 4, 2018 and that his condition of ill-being as of that date is causally related to the injury of May 27, 2014.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

There was no dispute concerning the bilateral carpal tunnel surgeries and as such the medical expenses related to the petitioner's treatment for those conditions are awarded. While there was a

dispute concerning the trigger fingers treatment that Dr. Fernandez rendered to the petitioner, Dr. Fernandez testified that all of his treatment from May 25, 2016 through January 1, 2018 was reasonable and necessary and causally related. The Arbitrator has found the opinions of Dr. Fernandez to be credible and persuasive and to be more persuasive than those of Dr. Patari. As such, the Arbitrator finds that all the medical care and treatment rendered to the petitioner by Dr. John Fernandez, and the expenses related thereto, are reasonable, necessary, and casually related to the petitioner's accident of May 27, 2014.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The petitioner remained off work from June 17, 2014 through September 7, 2015, while undergoing treatment for his carpal tunnel syndrome. He again was off work from February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, while undergoing treatment for his bilateral trigger fingers. The petitioner was determined to be at maximum medical improvement with regard to these conditions in January of 2018. Petitioner has not received any further treatment in relation to the carpal tunnel syndrome or the trigger finger condition since January of 2018. Although there are disputes with regard to Petitioner's restrictions, it is noted that Petitioner had returned to an accommodated position.

The petitioner has alleged entitlement to additional Temporary Total Disability benefits from March 13, 2018 through the date of hearing. It is noted that the petitioner also claims entitlement to Temporary Total Disability benefits for the same period in the companion filing for the alleged accident of January 12, 2018. (Case No. 18 WC 4741) The Arbitrator notes that the petitioner had reached maximum medical improvement with regard to the bilateral hand conditions prior to January of 2018. As such, Petitioner would not be entitled to Temporary Total Disability benefits thereafter. The Arbitrator finds that the petitioner is not entitled to any Temporary Total Disability benefits after September 26, 2017, relative to the April 27, 2014 accident. As such, the Arbitrator finds that Petitioner is entitled to Temporary Total Disability from June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017.

The Arbitrator finds Petitioner to have been temporarily and totally disabled from June 17, 2014 through September 7, 2015 and from February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017, a total period of 73 weeks, at $535.99 per week.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that Petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2018 companion case. With regard to the 2014 case, Petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of TTD benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr.

Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to Petitioner, Respondent clearly had a good faith basis from which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claim for benefits through that date. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0151

vs.

No. 18 WC 004741

Radiac Abrasives,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability, and penalties and fees, and being advised of the facts and law, modifies the Section 19(b) Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. At arbitration, Petitioner alleged that he was entitled to temporary total disability benefits from March 13, 2018, the date Respondent terminated him, through the date of hearing, March 13, 2019. At the time of his termination, Petitioner was not actively treating for his work injuries, and Respondent was accommodating his restrictions by providing a sedentary position based upon the restrictions ordered by Petitioner's treating physician. Because the Arbitrator found that Petitioner was always capable of performing his sedentary job with Respondent, he declined to award any temporary total disability benefits for Petitioner's right elbow and right shoulder injuries.

On review, the Commission finds that Petitioner was entitled to TTD as a result of his 2018 injuries. However, it finds that the period of total disability did not begin on the date of his

21IWCC0151

termination by Respondent but on the date his treating physician took him off work for his shoulder and elbow injuries, March 21, 2018. From that date onward through the date of hearing, March 13, 2019, first Dr. Kalina and then Dr. Markarian kept Petitioner off work completely. The Commission finds the opinions of Petitioner's treating physicians more persuasive than those of the Respondent's expert and modifies the Arbitrator's Decision by awarding Petitioner TTD from March 21, 2018 through March 13, 2019, a period of 51-1/7 weeks. The Commission further finds that Respondent paid TTD in excess of the award for Petitioner's 2014 injury, which was modified by the Commission in 14 WC 024705, in the amount of $13,139.42, to be applied toward the total TTD awarded herein.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability benefits is reversed. Respondent shall pay Petitioner temporary total disability benefits of $536.05 per week for 51-1/7 weeks, or $27,415.13. for the period commencing on March 21, 2018 through March 13, 2019, as provided by §8(b) of the Act. Respondent is to receive credit for TTD payments totaling $13,139.42, the amount paid in excess of the TTD awarded in the consolidated matter, 14 WC 024705.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

Marc Parker

Barbara N. Flores

o-2/4/21
mp/dak
68

Dissent

I respectfully dissent from the Decision of the Majority. In his decision, the Arbitrator denied Petitioner's request for TTD benefits. The Majority reversed the Decision of the Arbitrator on that issue and awarded Petitioner 51&1/7 weeks of TTD. I would have affirmed and adopted the Decision of the Arbitrator including his denial of TTD benefits.

While Petitioner was on significant work restrictions, Respondent accommodated his restrictions and placed him in a sedentary position. Petitioner testified that he had no difficulty performing his light duty responsibilities and there was no evidence that Petitioner ever complained to Respondent that he was in any way unable to perform his duties. In addition, Petitioner did not demand vocational rehabilitation from Respondent in order to possibly help himself find a more suitable long-term occupation. The Majority appears to rely exclusively on the fact that doctors put Petitioner on no-work status on March 21, 2018 and had not released him from that status until the date of Arbitration, March 13, 2019. However, even though Petitioner was technically taken off work, he actually continued to work. To obtain TTD benefits, a claimant has the burden of proving that he is unable to work his normal job, due to his work-related disability, or that his employer has not been able to accommodate his restrictions. In addition, the Majority reasoning allows the possibility that a claimant could receive both his salary and TTD benefits simultaneously. This result would amount to unjust enrichment for claimants, and not contemplated in the Act. Because Petitioner was clearly able to work, and actually did work, during that period despite any alleged impairment, in my opinion, he is not entitled to TTD for that period.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator. Therefore, I respectfully dissent.

Deborah L. Simpson

DLS/dw
O-

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **18WC004741**

14WC024705

RADIAC ABRASIVES INC
Employer/Respondent

21IWCC0151

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0151

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **18** WC **4741**

Consolidated cases: **14 WC 24705**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **January 12, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** (paid in companion case) for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28** (between both claims).

ORDER

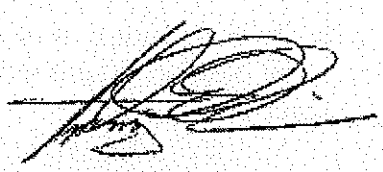
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Physicians Immediate Care, to Presence Mercy Medical, and to Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for reasonable and necessary medical services as prescribed for the petitioner by Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS:

The petitioner testified that he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Following a work related injury of May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. That injury is the subject of the Arbitration Decision issued in case number 14 WC 24705.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner testified that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continued to have swelling and difficulty moving his hands and he indicated that he couldn't "do much" because activities bother his hands.

The petitioner testified that on January 12, 2018, he sustained an injury to his right arm at work when he was withdrawing a mold from a press. The petitioner described that he reached in to the press to free a shim that was stuck, and he burned his right arm. The petitioner testified that he pulled his arm back quickly and felt a sharp "pull" in his right elbow. He testified that he then noticed that his right arm began to swell. The petitioner testified that he reported the work injury to his supervisor "Mike" the next day. On cross-examination, the petitioner testified that no supervisor was present on the day his injury occurred and that he reported the injury on the day that an accident report was completed.

A copy of the accident report that was completed was admitted into the record as Petitioner's Exhibit 12A. The accident report was signed by both the petitioner and his supervisor "Mike" and is dated January 16, 2018. The report describes that, "On January 12, 2018, the employee was completing a wheel and had the mold out of P15 press. The employee then noticed that the shim was still stuck on his upper side of the plate. The employee noted that this is a normal thing that occurs when working in the area. The employee while wearing gloves, reached into the press and placed his hand on the shim when he burned his right arm on the top plate. (350 degrees maximum during process). When the employee turned his arm, he jerked it away quickly from the press. The employee then noted that he had pain from his right thumb and right pinky finger, all the way up to his elbow on both sides of his arm."

The petitioner testified that following the last surgery by Dr. Fernandez, and prior to his injury on January 12, 2018, he did what was asked of him at work. The petitioner testified that on January 16, 2018, his job was changed to that of a production planning clerk.

The petitioner testified that after the accident report was completed, he was sent to Physicians Immediate Care. The records of Physicians Immediate Care demonstrate that the petitioner was seen there on January 16, 2018 and gave a history of injury to his left arm on January 12, 2018 when he was

pulling out a mold and touched the oven causing him to pull his arm away. The diagnoses included a burn of the left forearm, pain in the left forearm, pain in the left wrist, and pain in the left shoulder. It was noted that the forearm burn had healed and that the degree of pain in the left upper arm was not consistent with the mechanism of injury. The petitioner was released to return to work with no restrictions.

The petitioner testified that he then sought treatment at Presence Mercy Medical Center in Aurora and then began treating with Dr. Markarian.

The records of the Emergency Department of Presence Mercy Medical Center demonstrate that the petitioner was seen there on January 20, 2018 and reported pain in the right arm after heavy lifting at work. Examination reportedly revealed pain over the lateral epicondyles into the forearm. The petitioner was diagnosed with a right elbow strain/tendonitis and he was released with restrictions of no lifting over 25 Lbs. with the right arm. The petitioner was directed to follow-up with an orthopedic specialist for further evaluation of right arm pain. (PX 2A)

On March 12, 2018, the petitioner was terminated from his employment with Respondent following a verbal altercation with a supervisor.

The records of Dr. Gregory Markarian demonstrate that the petitioner was seen by Dr. Markarian on April 10, 2018. Dr. Markarian noted an alleged injury from "eccentrically" loading the elbow and shoulder when taking a mold out. Physical exam reportedly showed positive O'Brien Test in the right shoulder and pain with tenderness over the biceps. Dr. Markarian also reported positive Tinel's sign in the right elbow and positive elbow flexion test. Dr. Markarian recommended a CT scan to evaluate an osteochondroma and recommended an EMG for potential ulnar neuritis. On May 29 and June 26, 2018, Dr. Markarian stated that Petitioner had rotator cuff tendonitis and biceps tendonitis and recommended conservative management. On September 6, 2018, Dr. Markarian stated Petitioner was post right elbow lateral epicondylitis and right shoulder rotator cuff tendonitis and also stated that Petitioner had a C7 nerve root issue. At that time, Dr. Markarian injected the shoulder and elbow. The diagnoses remained tendonitis and AC joint arthritis. On October 4, 2018, Dr. Markarian indicated that he would put in a request for right elbow and right shoulder surgery. He described the proposed surgery as right shoulder arthroscopy, biceps tenotomy, arthroscopic distal claviculectomy, sub acromial decompression, possible rotator cuff repair and open sub pectoral biceps tenodesis. He states the right elbow would involve a lateral release, debridement and reattachment. (PX 3A)

Records from Imaging Centers of America demonstrate that MRIs of the petitioner's right elbow, right shoulder and cervical spine were completed on March 28, 2018. The MRI of the elbow reported increased fluid, sensitive hyper-intensity of normal caliber ulnar nerve that may be artefactual and clinical correlation with potential ulnar neuropathy was recommended. The shoulder was interpreted as showing articular sided fraying of the infraspinatus tendon and sessile osteochondroma off the medial aspect of the proximal humerus without cartilage cap. The cervical MRI was interpreted as showing mild spondylosis and mild narrowing of the right foramen at C3-4 without significant stenosis. (PX 4A)

An MRI arthrogram of the right shoulder was completed on April 27, 2018, at Niles MRI. The same was interpreted as showing tendinosis of the supraspinatus and subscapularis tendons, osteochondroma, mild changes of the osteoarthritis in the glenohumeral joint and mild degenerative changes in the acromioclavicular joint. An x-ray of the right shoulder reported an area of hypertrophic

bone at the level of the proximal humerus medially. (Dr. Markarian's interpretation of the imaging is reflected in Exhibit 3 was that the osteochondroma was benign). (PX 5A)

Records from Sage Medical Management reflect that Petitioner saw Dr. Kalina on March 21, 2018, at which time he reported neck and shoulder pain following the alleged injury of January 12. Petitioner alleges that he suffered a sudden onset of right forearm, shoulder and neck pain after the burn to the forearm on January 12. Dr. Kalina diagnosed cervicalgia, pain in the right elbow and pain in the right shoulder. Dr. Kalina prescribed the MRIs and provided work restrictions. Petitioner saw Dr. Lotfi, a chiropractor, on March 29. At that time, Petitioner again reported that he had suffered pain in the shoulder and neck area. Petitioner advised Dr. Lotfi that he had been working his regular duties without problem until the alleged injury of January 12. Dr. Lotfi diagnosed occipital cervico-occipital neuralgia, pain in the right forearm and pain in the right shoulder and recommended chiropractic treatment. Petitioner returned to Dr. Kalina on April 4 at which time he recommended orthopedic treatment. It was noted that Petitioner underwent an EMG on May 2, 2018, which was interpreted as showing very mild right sided C7 radiculopathy with no axonal loss which was also noted to be a sign of a good prognosis for complete and timely recovery. (PX 6A)

Records from Dr. Eugene Lipov reflect that the petitioner was seen on September 21, 2018 at which time it was noted that a cervical injection had been recommended. The petitioner reported that therapy was not helping and Dr. Lipov recommended ending the same. In the initial visit with Dr. Lipov on August 29, 2018, he states, "His complaint is essentially right neck pain radiating to the right shoulder as well as mild radiation to the right elbow." Dr. Lipov diagnosed cervical facet arthropathy. (PX 7A)

At the request of the respondent, the petitioner was examined by Dr. Kenneth Sanders on May 7, 2018. The May 7, 2018 report of Dr. Sanders was admitted into the record as Petitioner's Exhibit 8A and Respondent's Exhibit 2. Dr. Sanders noted normal range of motion in the neck and good range of motion in the shoulder with pain and some limitation in abduction and flexion. The exam was noted to be otherwise relatively normal. Dr. Sanders also noted tenderness over the medial epicondyle. Dr. Sanders diagnosed lateral epicondylitis at the right elbow, medial epicondylitis at the right elbow and mild right rotator cuff tendonitis. Dr. Sanders opined that there was a causal relationship between the alleged injury and Petitioner's symptoms and he recommended an injection to assist in defining the definitive pain generator. Dr. Sanders opined that any restrictions due to any work injury would be temporary. Dr. Sanders stated that Petitioner should avoid use of the right arm until a more definitive diagnosis has been delineated.

The petitioner was examined on September 9, 2018 by Dr. Peter Hopefner also at the request of the respondent. Dr. Hopefner's September 20, 2018 report was admitted into the record as Petitioner's Exhibit 9A and Respondent's Exhibit Number 3. Dr. Hoepfner noted diagnoses of right lateral epicondylitis and myofascial trigger points about the right shoulder without pathology and no positive proactive test involving the right glenohumeral or acromioclavicular joint. Dr. Hoepfner noted inconsistencies in testing Petitioner's grip strength. Dr. Hoepfner stated that there was no specific anatomic abnormality appreciated with regard to the right shoulder that would warrant additional treatment. With regard to the elbow, Dr. Hoepfner indicated that the epicondylitis was self-limited and would gradually subside with time. Dr. Hoepfner indicated that "judicious use" of cortisone injections could be considered. Dr. Hoepfner noted the cervical complaints but further noted that this was outside his area of expertise. Dr. Hoepfner confirmed that Petitioner was able to return to full duty employment.

Alejandra Alarcon, the respondent's human resources manager, testified that on January 16, 2018 the petitioner was moved from a lead role on the shop floor into Respondent's office in an administrative capacity in order to comply with Dr. Fernandez's permanent restrictions. Ms. Alarcon testified that when the petitioner was told on January 16, 2018 about his new light duty position, he reported the January 12, 2018 work injury. Ms. Alarcon also testified that the petitioner thereafter expressed his dislike for his new position. Ms. Alarcon testified that on March 12, 2018 the petitioner was terminated for insubordination. Ms. Alarcon also testified that she believed the petitioner to have been a reliable employee and that she believes that the January 12, 2018 accident described by the petitioner did occur.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

Petitioner testified that he suffered an injury to his right arm when he burned his forearm when removing a mold from an oven and pulled his arm back. This incident was unwitnessed but the petitioner did report the incident four days later. The accident report dated January 16, 2018, which was signed by both the Petitioner and his supervisor "Mike", describes how the accident occurred. The description contained in the accident report is substantially consistent with the petitioner's testimony and the histories of injury provided to the petitioner's treating physicians.

Alejandra Alarcon, the respondent's human resources manager, testified that the petitioner reported the accident to her on January 16, 2018 and that she had no reason to doubt that the January 12, 2018 accident occurred.

In light of the foregoing, the Arbitrator finds Petitioner to have sustained an accident that arose out of and in the course of his employment on January 12, 2018.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner testified that he experienced pain in his right arm following the occurrence. When the petitioner was sent for treatment on January 16, 2018 he reported pain in the upper arm and elbow and forearm beginning January 12. In a follow-up visit of January 20, 2018, Petitioner again reported pain in the right arm that appeared to be localized about the proximal forearm. However, after his termination, Petitioner also alleged cervical complaints. Considering that Petitioner's own testimony and the medical records confirm that Petitioner did not have any complaints involving the cervical spine until after his termination, and in the absence of a credible, persuasive, medical opinion which specifically relates any cervical condition to the January 12, 2018 work injury, the Arbitrator finds that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged occurrence.

With regard to the right shoulder and right elbow conditions, it is noted that the physicians at Physicians Immediate Care Center stated at the initial evaluation that Petitioner's symptoms were not consistent with the mechanism of injury. Dr. Markarian noted that imaging of the shoulder showed an osteochondroma, that Dr. Markarian opined was benign. The imaging also referenced findings suggestive of some tendonitis in the shoulder. The medical opinions are all consistent with a diagnosis of epicondylitis in the right elbow. As such, the Arbitrator finds that Petitioner suffered tendonitis in the right shoulder and epicondylitis in the right elbow as a result of the alleged occurrence.

The Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally relates the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes both Section 12 examiners causally relate both the shoulder and elbow injuries. Also, both Section 12 examiners believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner's current condition of ill being is causally related to the injury of January 12, 2018.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As noted above, the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident. Moreover, the petitioner's diagnosis is limited to shoulder tendonitis and epicondylitis in the elbow. A review of the records and billing submitted show that the treatment from Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute primarily involves the cervical spine. As such, the Arbitrator finds that the treatment rendered to the petitioner by Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute is not causally related to the January 12, 2018 work injury and is not awarded herein. The Arbitrator finds that the treatment rendered to the petitioner at Physicians Immediate Care, Presence Mercy Medical and by Dr. Markarian is reasonable, necessary and causally related to the January 12, 2018 work injury. The respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

As the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident, no prospective medical treatment for the petitioner's alleged cervical condition is awarded herein.

With regard to the proposed surgical treatment for the petitioner's right arm and shoulder, the Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally related the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes that both of the respondent's examining physicians believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner by way of surgery. While the Arbitrator questions the prudence of performing the recommended surgeries on the petitioner, the Arbitrator notes that the petitioner's treating physician is a physician in good standing, licensed to practice medicine in the State of Illinois, and defers to his recommendation.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Petitioner alleges entitlement to Temporary Total Disability benefits from March 13, 2018 through the date of hearing and continuing. It is noted that Petitioner was terminated on March 12, 2018 after a verbal altercation with a supervisor. Although there are conflicting allegations regarding the altercation, the Arbitrator is not charged with assessing the merits of the termination but is simply considering the same in the context of Petitioner's lost time.

Petitioner testified that, at the time of his termination, he was receiving treatment from Dr. Fernandez and Dr. Markarian. However, Dr. Fernandez had determined that the Petitioner was at maximum medical improvement and subject to permanent restrictions as of January 4, 2018. Moreover, Petitioner had last seen Dr. Markarian in December of 2015 after which he pursued treatment with Dr. Fernandez. The evidence demonstrates that the petitioner was not under any active medical treatment at the time of his termination. The evidence further demonstrates that the respondent was accommodating the permanent work restrictions placed on the petitioner by Dr. Fernandez, and there is no evidence that the petitioner was having any difficulty performing any aspect of his job at the time of his termination.

It is noted that Petitioner's job changed to a sedentary position on January 16, 2018 based upon the permanent work restrictions placed on the petitioner by Dr. Fernandez. After being notified of

this change in position, Petitioner then reported his alleged accident from four days prior. The incident itself was relatively minor as Petitioner alleges pulling his arm back after suffering a burn. Petitioner continued working his sedentary position without any apparent difficulty. On January 20, 2018, Petitioner received treatment at Presence Mercy Medical Center and the diagnosis remained right arm pain and tendonitis, and the petitioner continued to work without difficulty until his termination. After his termination, the petitioner's complaints increased, and the Petitioner sought treatment for cervical complaints as well as the right arm complaints. It is noted that while Dr. Sanders suggested that the petitioner refrain from using his arm, Dr. Sanders also noted that a more definitive diagnosis was needed. Additional testing was completed after Dr. Sanders' evaluation and the petitioner was then sent to Dr. Hoepfner as Dr. Sanders had retired. Dr. Hoepfner reviewed all of the notes, including the updated testing, and he noted inconsistencies in the petitioner's examination. Dr. Hoepfner indicated that the petitioner was able to perform his regular work activities with regard to his arm diagnoses. Based upon the above, the Arbitrator finds that the petitioner was always capable of returning to his sedentary position as a production clerk.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that the petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2014 companion case. (14 WC 24705). With regard to the 2014 case, the petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of Temporary Total Disability benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr. Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to the petitioner, the respondent had a good faith basis upon which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claimed benefits through that date. Additionally, the Arbitrator has found that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy D. Little,

Petitioner,

21IWCC0152

vs.

NO: 14 WC 35730 and
16 WC 36913

ADT Home Security,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitration Decision Form, and corrects a scrivener's error. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct one clerical error on the Arbitration Decision Form. In the Order, the Arbitrator mistakenly wrote that Respondent shall pay temporary total disability benefits from September 21, **2104**, through July 1, 2015. This is clearly a scrivener's error. The Commission thus modifies the above-referenced sentence to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of $744.00/week for 40-4/7 weeks, commencing **September 21, 2014,** through **July 1, 2015**, as provided in Section 8(b) of the Act.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

21IWCC0152

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $55,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

d: 2/23/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, RANDY D
Employee/Petitioner

Case# **14WC035730**

16WC036913

ADT HOME SECURITY
Employer/Respondent

21IWCC0152

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1357 RATHBUN CSEVENVAK & KOZOL
LUIS MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60431

2542 BRYCE DOWNEY & LENKOV LLC
JESSE LANSHE
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

21IWCC0152

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Randy D. Little
Employee/Petitioner

v.

ADT Home Security
Employer/Respondent

Case # **14** WC **35730**

Consolidated cases: **16 WC 36913**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 6, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **August 12, 2014 and September 20, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accidents.

In the year preceding the injury, Petitioner earned $**58,032.00**; the average weekly wage was $**1,116.00**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**24,279.32** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**24,279.32**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**744.00**/week for **40 4/7** weeks, commencing **September 21, 2104** through **July 1, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**24,279.32** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.60**/week for **50** weeks, because the injuries sustained caused the **10%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 - 2019

FACTS:

Petitioner, testified that he worked for the Respondent, from 2009 to 2016 installing security products at residential and commercial properties. He would travel to different locations in a truck that contained all necessary installation materials. Prior to 2014, he had not missed any work because of a back injury and had never treated for a back injury. In approximately August, 2014, or shortly before, Petitioner indicated that he began noticing lower back pain that he associated with the work van he was driving. He indicated that his van had been switched from a normal van to a small van shortly before he started noticing problems. He described the new van as, "very tight, cramped, couldn't put the seat back due to the racks in there. They were extremely overloaded with lots of wire. It was kind of like riding in a covered wagon." Petitioner testified that he believed there was a problem with the suspension and indicated driving the van was very rough riding. Petitioner testified that at that time, he was driving about 75 to 125 miles per day doing installations. Petitioner testified that on August 12, 2014, given his ongoing problems with his back and truck, he notified his immediate supervisor, Ms. Rita Last, of his issues. On that date, in a series of text messages, Petitioner stated, "I'm gonna need to see a chiropractor all these hours in this uncomfortable truck" and "my lower back feels like I'm getting hit w a bat daily bc this seat is so uncomfortable and I'm spending 3 he's (sic) a day driving." At hearing, Ms. Last testified that Petitioner made her aware of back pain related to his truck on August 12, 2014.

Petitioner testified that he sought medical treatment for his back pain with a chiropractor, Dr. Van Til on September 8, 2014. At that appointment, Petitioner indicated that he had back pain interfering with his sleep and aggravated by driving a work van for about two months. Petitioner testified he had never noticed lower back pain and symptoms prior to his work truck change. Despite his symptoms, Petitioner continued working until September 20, 2014. On that date, Petitioner testified after a long drive on a very bumpy road, which aggravated his back pain, he lifted a ladder off of the top of his truck and felt a major pinch and a pop in his lower back that caused him to fall over because of pain. Petitioner indicated his lower back symptoms were significantly worse after this incident and he contacted Ms. Last. Ms. Last confirmed that Petitioner texted her on the date of accident complaining about back pain on the way to the job site and then, about 10 minutes later, called her to tell her that he hurt his back getting the ladder off the top of his ADT vehicle.

Following September 20, 2014, Petitioner sought treatment at Silver Cross Emergency Room and then followed up with Dr. Harris Waheed on September 22, 2014. At that examination, Petitioner indicated that the van he travels in is very uncomfortable and he drives a lot causing him lower back pain and numbness. After an examination, Dr. Waheed referred him to a neurosurgeon and give him a referral for physical therapy. Petitioner sought therapy at River Valley Physical Therapy on October 2, 2014. On that date, the therapist, Katelin Fane, indicated that Petitioner was referred from Dr. Waheed, and she recorded a history from the Petitioner. In her history, Ms. Fane documents that Petitioner was suffering from, among other complaints, low back pain that he associated to a change to different work vans and driving for long periods of time. Ms. Fane also documented Petitioner reported lifting his ladder and his back giving out. Petitioner then began a course of physical therapy.

Due to ongoing lower back symptoms, Petitioner testified he followed up with Dr. Anthony Rinella on October 15, 2014. On that date Petitioner gave a history both driving extensively in the newer work truck causing lower back pain and the September 20, 2014 ladder incident. After a physical examination, Dr. Rinella reviewed Petitioner's previously taken lumbar MRI and prescribed another lumbar MRI because he believed Petitioner may have a pars defect in his lumbar spine. Dr. Rinella also prescribed a Medrol Dosepak and indicated Petitioner should remain off work. Petitioner

followed up with Dr. Rinella on November 5, 2014, at which time the doctor reviewed the CT scan of his lumbar spine and confirmed that Petitioner had a bilateral pars defect in his lumbar spine. Despite additional conservative measures such as therapy and epidural steroid injections, Petitioner's lumbar complaints continued and Dr. Rinella recommended an L4-5 transforaminal lumbar interbody fusion. Petitioner underwent the fusion procedure on May 20, 2015 and returned to see Dr. Rinella's physician's assistant, Doug Stevens, on June 3, 2015 at which time he reported being pleased with the results.

Following his fusion, Petitioner testified that his lumbar symptoms decreased and by, July 1, 2015, he returned to full duty work. At hearing, Petitioner testified that after he returned to work for ADT, he began working for another employer in approximately May, 2016. Petitioner further testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, (E.), Was timely notice of the accident given to Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner's diagnosed pars fracture was aggravated by driving his company vehicle after the van was switched to a smaller model. This condition was then aggravated to the point that fusion surgery was necessary after suffering further trauma after lifting the ladder. The evidence presented demonstrates Petitioner had continuous and ongoing lower back pain only after the Respondent changed the work truck that he drove to installation sites. Respondent verified Petitioner's testimony through the testimony of Ms. Last. Ms. Last confirmed Petitioner contacted her about his back pain after he began driving the new truck. Further, Respondent submitted an email between Ms. Last and ADT's area general manager, Mr. Travis Miller that substantiates Petitioner's complaints. In Respondent's Exhibit 5, Mr. Miller wrote, in part, "The tech claimed that his back has bothering (sic) him due to driving the ADT transit vehicle. He has made multiple requests to his manager to be transferred into a full-size van which have been denied due to full size vans no longer being available at ADT." (R5) Additionally, Respondent offered no rebuttal to Petitioner's testimony that the new van was uncomfortable and rode very hard. It appears clear that the breakdown date of accident is August 12, 2014, the date on which Petitioner directly texted his immediate supervisor, Ms. Last, of his back pain that he indicated would necessitate medical care. Petitioner reported to Dr. Van Til that his back hurt when he drove his ADT truck. Although he continued to attempt to work through the pain, Petitioner suffered the second accident on September 20, 2014, when lifting a ladder. Again, this accident was confirmed by Ms. Last and an accident report was filed by Respondent. (R4) In fact, on that day, Petitioner reported both to Ms. Last that his back hurt from driving to the location of the ladder incident and, shortly thereafter, he lifted the ladder that had substantially increased his lower back pain. This incident exacerbated Petitioner's condition to the point that surgery became necessary.

Dr. Rinella discussed both accidents in his testimony taken on August 3, 2016. On that date, he indicated that a pars fracture is a fracture of the bone between, in Petitioner's case, L4 and L5

and that Petitioner had the pars fracture for a period of time. Dr. Rinella testified that, although the pars fracture was present for a long time, it was aggravated by the work injury, specifically, the ladder incident on September 20, 2014. Further, Dr. Rinella considered that that Petitioner was having back pain while driving the ADT truck and stated, "he may have had periodic pain related to these pars fractures; but obviously, he didn't even know he had them, so they never required any specific diagnosis previously" and that the acute mechanism of accident got it to a point of surgical intervention.

The evidence presented supports Dr. Rinella's opinions. It is not disputed that Petitioner had continuous back complaints while driving his new ADT truck but that he continued to work until after the September 20, 2014 ladder incident. It is clear Petitioner had back pain caused by his work truck and the second accident involving the ladder aggravated his pars fracture symptoms to the point that surgery was necessary. Additionally, despite Respondent's contention, Petitioner reported the ladder incident. Ms. Last testified that Petitioner called her about the ladder incident on the day of accident and an accident report was created. Further, the ladder incident was recorded by Petitioner's therapist at River Valley Therapy even prior to Petitioner seeing Dr. Rinella.

Respondent relies on the testimony of Dr. Steven Mather who saw Petitioner for the purposes on an independent medical examination on March 25, 2013. Dr. Mather also offered opinions in an addendum report dated January 23, 2018. Dr. Mather opined that Petitioner's condition was pre-existing and not caused by the ladder incident or riding uncomfortably in his van. Dr. Mather further indicated that Petitioner's accident had no relation to the need for surgery. Dr. Mather's testimony ignores the facts of the evidence presented. Petitioner clearly had lumbar spine complaints that began only after driving his smaller ADT truck. There is no evidence that Petitioner had any low back complaints of any kind predating this. These symptoms got worse after he lifted the ladder on September 20, 2014. As discussed, Ms. Last confirmed that Petitioner called her immediately and reported that he hurt his back again after lifting the ladder off the roof of his truck. Petitioner then goes on a course of treatment that resulted in fusion surgery. Dr. Mather offers no explanation why Petitioner's symptoms only began with the change in his work truck and were worse after lifting the ladder on September 20, 2014. It is not simply coincidence that Petitioner's preexisting pars fracture was asymptomatic his entire life prior to the truck change and ladder accident.

Based on the greater weight of the evidence, the Arbitrator finds that both Petitioner's August 12, 2014 and September 20, 2014 work accidents arose out of and in the course of his employment with the Respondent.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's condition of ill being regarding his lumbar spine is causally related to both his August 12, 2014 and September 20, 2014 work accidents. The Arbitrator finds the testimony of Dr. Rinella sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner gave proper notice of both his August 12, 2014 and September 20, 2014 work accident. This was confirmed by the testimony of Ms. Last.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for payment of reasonable and necessary medical bills. During his deposition, Dr. Rinella was asked if he believed Petitioner's lumbar spine including surgery was reasonable and necessary based on the symptoms indicated. To this, Dr. Rinella responded, "I think all treatment for cervical, thoracic and lumbar was very reasonable and necessary." Respondent offered no evidence to the contrary.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's treatment was reasonable and necessary. The Arbitrator awards Petitioner unpaid medical bills as outlined in Petitioner's Medical Bills Exhibit submitted as exhibit 1, pursuant to the fee schedule.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for temporary total disability. Petitioner was given an off work notes from Silver Cross emergency room on September 20, 2014, then by Dr. Waheed on September 22, 2014 and finally from Dr. Rinella when treatment began on October 15, 2014.) Petitioner was continuously off work by Dr. Rinella's order until he returned to Respondent to work on July 1, 2015.

Based on the greater weight of the evidence, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 21, 2014 until July 1, 2015, a period of 40 4/7 weeks. The Arbitrator awards Respondent credit of $24,279.32 for paid Temporary Total Disability benefits.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered an aggravation of his pre-existing back condition which led to the necessity of an L4-5 transforaminal lumbar interbody fusion. The Petitioner testified that he currently continues to experience occasional muscle pain and stiffness in his lower back and has difficulty bending over. Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and

* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a residential alarm installer, and that the Petitioner has returned to that same type of work without much apparent difficulty. The Arbitrator therefore gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 30 years old at the time of the accident. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less likely to fully recover from his injuries. The Arbitrator therefore gives significant weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work with earnings that are the same. Because there is no evidence of any impairment to future earnings, the Arbitrator gives significant weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over. The Arbitrator notes that the Petitioner's current complaints are relatively minimal and evidence a good result from the treatment rendered to him. These complaints are corroborated in the medical records of the Petitioner's treating physicians. The Petitioner's complaints as supported by the medical records, evidence some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), and the Petitioner's relatively minimal current complaints, the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 10% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse: Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANATOLY DAVYDOV,

Petitioner,

21IWCC0153

vs.

NO: 16 WC 23007

SUPERIOR BROKERAGE SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner sustained his burden of proving he sustained a work-related accident on April 28, 2016 which caused his current condition of ill-being in the right shoulder and awards benefits.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner worked for Respondent as a truck driver for eight years and had been a truck driver his entire life. During his employment with Respondent, the medical records reflect that Petitioner previously suffered a work-related injury to his left foot and ankle while working for Respondent on September 16, 2015. Petitioner underwent treatment with Dr. Sergey Kachar and Dr. Thomas Tingle, who are in the same practice, for that injury.

Petitioner then saw Dr. Kachar at Northwest Orthopedic Surgery for evaluation of the right shoulder on November 3, 2015. He reported some mild intermittent pain for many months, maybe up to a year. About three months previously, Petitioner reported that he was swatting a bee and felt a sharp pain in the shoulder and had been having some increasing pain recently. Petitioner had some pain with reaching, lifting, overhead activities as well as pain with activities of daily living. Dr. Kachar ordered x-rays, which showed mild degenerative changes of the

glenohumeral joint. Dr. Kachar diagnosed Petitioner with a right shoulder injury, pain, and impingement. He administered an injection, prescribed physical therapy, and ordered an MRI.

Petitioner acknowledged that he had shoulder pain prior to his first visit to Dr. Kachar in November of 2015. He first reported shoulder pain while on light duty for his ankle and in physical therapy for his ankle. Petitioner did not recall reporting the mechanism of injury or all of the symptoms identified in Dr. Kachar's record because it was long ago, but testified that he would not dispute the medical records indicating that he made those statements. Petitioner testified that the cortisone injection decreased his pain and he was feeling pretty good, working his job until the time of the injury.

Petitioner underwent the recommended MRI on November 5, 2015. The interpreting radiologist found a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant muscle atrophy. More specifically, the radiologist noted a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. He also found that a majority of the tendon is increased in signal and thickened likely related to fraying and tendinosis, and there is also tendinosis of the infraspinatus tendon. The radiologist further noted findings of external impingement and degenerative changes at the glenohumeral joint space with abnormal appearance of the majority of the labrum likely degenerative in origin.

Petitioner also underwent an initial physical therapy evaluation on November 5, 2015 for his right shoulder. The evaluating therapist, Dorota Kus, P.T. (PT Kus), noted an onset of right shoulder pain on August 21, 2015 while sleeping and driving his truck. He reported that he was swatting a fly with his right arm and that it hurt a lot and had been more sore now. Petitioner also underwent his continued physical therapy for the left ankle.

Petitioner returned to Dr. Kachar the following day reporting persistent right shoulder pain and 30% relief from the injection. Dr. Kachar noted that Petitioner had the MRI and recommended continued conservative treatment including physical therapy. Dr. Kachar diagnosed Petitioner with a superior glenoid labrum lesion of the right shoulder and a rotator cuff tear. He indicated that they would consider arthroscopic surgery if he was not improving.

On November 19, 2015, Dr. Kachar noted that Petitioner was doing well with improvement of his right shoulder symptoms. He recommended continued physical therapy. On December 28, 2015, Petitioner was discharged from physical therapy after deciding to go to a facility closer to home. PT Kus noted that Petitioner felt minimal soreness after exercises and no pain.

The following day, December 29, 2015, Dr. Kachar noted that Petitioner was improving overall and functionally better, but he still had some persistent pain. Dr. Kachar continued physical therapy for another six weeks.

On February 25, 2016, Dr. Kachar noted Petitioner's "follow up for work-related injury, right shoulder rotator cuff tear." Petitioner reported that his pain was worse, describing pain at night, and he reported difficulty lifting heavy objects. Petitioner denied any recent traumatic

21IWCC0153

injuries. On physical examination, Dr. Kachar noted positive impingement signs. He administered another injection and referred Petitioner to Dr. Tingle for evaluation of right shoulder rotator cuff tear and released him from treatment to follow up as needed.

Petitioner testified that he continued to work through this treatment and that his shoulder felt "better, much, much better" after the injection. He was able to do some home therapy and exercise. Petitioner testified that he did not believe that he needed to see Dr. Tingle and continued to work.

Then, on April 28, 2016, Petitioner testified that he sustained an accident affecting his right shoulder at work, which Respondent disputes. While decoupling a trailer from the cab and pulling on the handle with his right arm he hurt himself and almost fell down when he pulled on the handle. Petitioner testified that "[i]t's really pain, like almost crying, you know, it's so painful." He explained that the pain was worse, "20 times more[,]" than the pain he had previously.

B. Medical Treatment

Petitioner was sent for treatment that day and presented to Dr. Reese at Alexian Brothers' Medical Group. The medical records reflect Petitioner's report of right shoulder pain while pulling on a trailer hitch earlier that day. He reported some shoulder pain a year ago, physical therapy, and improved symptoms. Dr. Reese noted that Petitioner now complained of pain over the side of the shoulder. On physical examination, Petitioner had tenderness of the right deltoid, full range of motion, and normal sensation. Dr. Reese diagnosed a right shoulder sprain, especially over the right deltoid. An ice pack was applied and Dr. Reese prescribed Naproxen and restricted Petitioner from lifting/pushing/pulling over 10 pounds. Petitioner was instructed to follow up on May 4, 2016.

On April 29, 2016, Petitioner presented to Dr. Tingle for an initial orthopedic consultation for right shoulder pain status post work-related injury. The following history was noted:

> The patient is a 68-year-old right-hand-dominant male presents today for an orthopedic consultation regarding right shoulder injury sustained yesterday on 04/28/2016. He works as a truck driver. Apparently, he was pulling on a trailer when he developed a sharp pulling tearing sensation over the anterior aspect of his shoulder. He developed immediate pain. He reported the injury to work, was seen by an occupational medicine physician. He was given work restrictions, placed on naproxen and recommended ice his shoulder. He describes pain and weakness with reaching, lifting and overhead activity. Pain localized primarily over the anterior aspect of his shoulder, but some discomfort feels deep inside, has some clicking or popping sensation with motion of his shoulder. He denies any neck pain, numbness and tingling and radicular symptoms. Symptoms are worse with activity, improved with rest. The pain was initially severe. Now, it is mild to moderate with treatment and rest.

On physical examination, Dr. Tingle noted nearly full passive range of motion with discomfort at end ranges, 4/5 strength in scaption, and positive Neer and Hawkins impingement signs. He diagnosed Petitioner with right shoulder pain, placed him on light duty work restrictions, and ordered an MRI.

The MRI was performed the same day. The interpreting radiologist's impression was of a large full-thickness rotator cuff tear and degenerative arthritis. Specifically, he found the following:

> There is mild to moderate glenohumeral and acromioclavicular degenerative arthritis. There is marginal spurring from the inferomedial humeral head. There is thinning of the glenoid labral cartilage.
>
> There is a large full-thickness rotator cuff tear involving the supraspinatus tendon with portions of the tendon retracted over a length of 3.5 cm. The tear extends to the most anterior band of the infraspinatus tendon. There is considerable coexistent supraspinatus and infraspinatus tendinopathy.
>
> The teres minor and subscapularis tendons are intact. The superior labrum is not ideally visualized probably due to chronic degeneration although a SLAP tear cannot be completely excluded. Visualized portions of the labrum otherwise unremarkable.
>
> Minimal joint effusion. Small to moderate subacromial bursal effusion.

On May 3, 2016, Petitioner returned to Dr. Tingle reporting some improvement in his overall comfort level, with some pain with overhead-type motion, and some continued weakness. Dr. Tingle noted the MRI results and diagnosed Petitioner with a massive rotator cuff tear as well as probable superior labral tear significantly worse after work-related activity. Dr. Tingle discussed non-operative and operative treatment options noting there did not appear to be any musculature atrophy, and the natural history of a rotator cuff-deficient shoulder and likelihood of progression of arthrosis. He recommended an arthroscopic rotator cuff repair, and restricted Petitioner from any lifting or carrying over 20 pounds but allowed him to drive a truck. Dr. Tingle noted that Petitioner was going to consider his options and report whether he wished to proceed with surgery.

Petitioner returned to Dr. Tingle on June 10, 2016 reporting difficulty lifting his arm above shoulder level, 6/10 pain, and 10/10 pain with sleep. He also reported that Respondent had not been able to accommodate his restrictions. Petitioner attended the session with his son-in-law and indicated that he wished to undergo surgery. Petitioner reported a previous shoulder problem "which was completely resolved with rehabilitation prior to his work injury." Dr. Tingle noted his review of a previous MRI dated November 5, 2015. He found that it showed a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant atrophy. The tear measured 1.5 cm with a 2 cm retraction, tendinosis of the infraspinatus tendon, findings of external impingement, and degenerative changes at the glenohumeral joint and labrum. Dr. Tingle noted that Petitioner "had a previous rotator cuff tear

managed conservatively with rehabilitation managed by another physician, which was aggravated and increased in size after work injury. The tear increased in size from 1.5 cm to 3.5 cm in length after the work injury. The rotator cuff tear now extends in[] the infraspinatus tendon when comparing MRI's." He noted that Petitioner wished to undergo the right shoulder arthroscopy with rotator cuff repair and subacromial decompression surgery, which might involve implantation of instrumentation to be determined intraoperatively. Dr. Tingle maintained Petitioner's work restrictions of no lifting with the right arm.

On August 30, 2016, Petitioner returned to Dr. Tingle who noted "some apparently insurance issue[] in regards to the approval from the Workman's Comp versus his private insurance carrier. He is here for repeat evaluation." Petitioner reported pain ranging from 3-5/10 with overhead reaching and at night, and continued discomfort with any overhead lifting or reaching as well as some weakness. Dr. Tingle noted their discussion about the large size of his tear which has enlarged after once again an occurrence at work. Dr. Tingle noted that they would proceed with surgery at Petitioner's earliest convenience and the possibility of inability to repair the tear if he waits too long. He recommended continued home exercises and no lifting or carrying over 10 pounds or overhead lifting.

Petitioner underwent a third MRI on October 4, 2016, which was compared to the April 29, 2016 MRI. The interpreting radiologist noted no significant change compared to the prior MRI. He again found a full-thickness supraspinatus tendon tear as well as moderate infraspinatus and mild subscapularis tendinopathy with small interstitial tears in both tendons. The radiologist also noted mild glenohumeral and acromioclavicular joint osteoarthritis, a small glenohumeral joint effusion, and an abnormal signal in the superior glenoid labrum, for which a tear cannot be excluded. The radiologist issued an addendum report the same day specifying that the supraspinatus tendon tear measured 2.1 cm in anteroposterior dimension and retraction of the tendon stump by 3.5 cm.

On October 6, 2016, Petitioner underwent the recommended surgery with Dr. Tingle. Pre-operatively, he diagnosed a right shoulder rotator cuff tear and impingement syndrome. Dr. Tingle performed an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, he diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome.

Petitioner returned to Dr. Tingle for post-operative follow up care beginning on October 7, 2016. Petitioner remained in an immobilizer for a time and was then referred to physical therapy, which he underwent at AthletiCo. Use of the right arm sling was discontinued on November 23, 2016. Additional physical therapy was ordered on December 20, 2016 and January 20, 2017.

By February 24, 2017, Dr. Tingle noted that Petitioner was doing extremely well and had been discharged from physical therapy. Petitioner reported that he felt very good and very pleased with his progress, and quite functional. However, Petitioner still had some occasional

mild weakness. Dr. Tingle recommended a continued home exercise program for functional strength, and Petitioner was released from treatment to follow up on an as-needed basis. Petitioner testified that he last saw Dr. Tingle on February 24, 2017, at which time he was released to full work and from treatment.

C. Deposition Testimony – Dr. Tingle (Petitioner's Orthopedic Surgeon)

Petitioner called Dr. Tingle as a witness and he gave testimony at an evidence deposition on August 29, 2018. He discussed his treatment of Petitioner and gave opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Tingle testified that he was a board-certified orthopedic surgeon and performed surgery on a regular basis. He first saw Petitioner on April 29, 2016 for severe right shoulder pain after hurting it at work. Dr. Tingle understood the mechanism of Petitioner's injury to be that he was pulling a trailer when he developed a sharp, pulling, tearing sensation over the anterior aspect of his shoulder. Dr. Tingle was aware that Petitioner had a right shoulder problem and that he had received treatment prior to seeing him from his partner [Dr. Kachar] in the same practice, and those notes were available for his review.

Dr. Tingle reviewed all of Petitioner's MRI films from his 2015 and 2016 scans. In comparing the November 2015 MRI to the April 2016 MRI, Dr. Tingle felt that it was significantly worse because the large tear was now a massive tear, the centimeter findings of retraction [changed], and there was involvement of another tendon (the infraspinatus) that was not present of the 2015 films according to the radiologist's readings, which he felt had enlarged. Dr. Tingle opined that the findings in the April 2016 MRI were consistent with Petitioner's symptoms and his exam, and also with the mechanism of injury as described.

Dr. Tingle issued a narrative report at the request of Petitioner's counsel. Therein, he referred to a report of Dr. Hennessy on behalf of the employer dated July 27, 2016. Dr. Tingle disagreed[1] with Dr. Hennessy's opinion explaining that "I don't think the literature necessarily

[1] The Commission notes that there were no express rulings made on either parties' objections or motions at either Dr. Tingle or Dr. Hennessy's depositions. Here, Respondent objected to Dr. Tingle's testimony regarding any medical literature on which he relied based on *Ghere* asserting that it had not been provided with such literature 48 hours in advance of the deposition. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). Respondent made additional objections, maintained a "standing" *Ghere* objection, and moved to strike various portions of the doctor's testimony. The Commission finds the Arbitrator implicitly overruled both parties' objections at both depositions, as well as Respondent's *Ghere* objection and explicitly overrules it here. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, *16-17 (2011) (*citing In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003)). The Court went on to specify that such opinions are "only as valid as the reasons for the opinion." *Id.* (citing *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998)). Dr. Tingle's reference to medical literature at the time of his deposition is the type of testimony that can be expected from a medical expert when explaining the reasoning for causal connection opinions particular to a patient. Moreover, Respondent suffered no harm as a result of the testimony. Respondent's Section 12 examiner, Dr. Hennessy, was later deposed and even agreed with some of the propositions set out by Dr. Tingle regarding the medical standards identified. In addition, both physicians reviewed the other's written reports and had the opportunity to explain any disagreement and the bases therefore. As such, the Commission finds no harm to

supports that that's the natural progression of a rotator cuff tear in a 69-year-old gentleman over five months. I mean there was - - I mean there's literature out there that basically had studied this and for a full thickness tear the incidence of increased retraction, about 22 percent of those full thickness tears will increase at the two-year mark, so I followed these patients for an extended period of time, and 50 percent will increase over a five-year period. And the other thing they noted, the main thing was someone had progression of a tear was that their pain increased significantly." Dr. Tingle identified this as a JBJS article by Keenan and Ken Yamaguchi from Washington University in St. Louis.

Dr. Tingle maintained his opinion that the tear in the April 2016 MRI was larger and there appeared to have some more retraction compared to the 2015 MRI. He opined that the accident aggravated Petitioner's previous condition and was a factor leading to his treatment and surgery. Dr. Tingle maintained his opinion regarding the MRIs from 2015 to 2016 explaining that he reviewed the MRIs himself, but he would defer to the radiologists that read the MRIs that are board-certified and have better software to interpret films. He also maintained his opinion, throughout his testimony, that Petitioner's pre-existing condition was aggravated by the accident.

On cross-examination, Dr. Tingle testified that Petitioner was referred to him by Dr. Kachar, another orthopedic surgeon, for a surgical consultation for the diagnosis of rotator cuff tear. He was asked about Petitioner's prior treatment with Dr. Kachar, and he acknowledged that Petitioner underwent a previous injection, physical therapy, and was taking anti-inflammatories. He agreed that Petitioner was symptomatic at that time, and he reported that he was asymptomatic when he first saw Dr. Tingle. Dr. Tingle acknowledged that Petitioner's prior symptoms were not documented in his "history of present illness" at his initial visit. However, Dr. Tingle pointed out that Petitioner's prior symptoms were "already documented in the chart."

Dr. Tingle agreed that the 2015 and 2016 MRIs both showed a large full thickness tear of the rotator cuff, degenerative joint disease in the glenohumeral joint space, and degenerative tears in the labrum. He agreed that the small to moderate bursal effusion noted in his initial note could possibly be related to degenerative changes and could be read either to indicate an acute injury or not. The November 5, 2015 MRI showed tendinosis, which are changes caused by chronic inflammation and could be a precursor to tearing of the tendon. Dr. Tingle testified that there was also some degenerative joint disease.

Dr. Tingle acknowledged that rotator cuff tears do not heal on their own. When asked whether one can employ conservative treatment to "calm it down," Dr. Tingle answered in the affirmative. He also agreed that the rotator cuff tear is always going to be there, and injections typically wear off eventually. However, he testified that not all rotator cuff tears are symptomatic and he disagreed with the proposition that a 69 year-old man with a previous rotator cuff tear and arthritis would have continued progression of the tear because he has some arthritic findings in the shoulder. With regard to the onset of Petitioner's rotator cuff tear before the November 5, 2015 MRI, Dr. Tingle believed it would have begun a year or two prior because there was not much muscle atrophy.

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either party by the Arbitrator's consideration of the testimony of the physicians in its entirety and, likewise, considers the testimony of both physicians in its entirety assigning appropriate weight, if any, to the physicians' opinions as explained in the conclusions of law.

Dr. Tingle acknowledged that patients with asymptomatic rotator cuff tears are not referred for a surgical consultation. He agreed that when he first saw Petitioner, he reported pain and difficulty with reaching, with lifting, and with overhead activities. Petitioner also reported difficulty with lifting heavy objects when he saw Dr. Kachar on February 25, 2016. Petitioner also had impingement signs both before and after the accident, as well as some weakness. However, Dr. Tingle pointed out that at Petitioner's November visit [with Dr. Kachar] Petitioner had a negative drop test, which was "significantly different from [his] exam from April 29, 2016, when [Petitioner] had difficulty with active motion above 90 degrees so basically [he] did not have full range of motion actively, his strength was four out of five which is a specific test to evaluate the rotator cuff strength" in addition to the positive Neer and Hawkins impingement signs. Dr. Tingle also acknowledged that is was possible for a degenerative SLAP tear to lead to progression of a rotator cuff tear over time absent trauma.

On redirect examination, Dr. Tingle testified that Petitioner presented to him as an emergency add-on appointment for severe shoulder pain. He explained that they get as much information as possible but may not cover every single detail of the patient's complete care. Notwithstanding, Dr. Tingle testified on direct, cross-examination, and re-direct examination that Petitioner's prior right shoulder problems and treatment were documented in the office file and he was aware of it. Dr. Tingle maintained the opinion that there was change in Petitioner's November 2015 and April 2016 MRI findings, and those findings were consistent with his opinion that the accident aggravated Petitioner's condition. Dr. Tingle testified that is was possible for Petitioner to have become asymptomatic from February to April 2016.

D. Section 12 Reports and Deposition Testimony – Dr. Hennessy (Respondent's Section 12 Examiner)

On July 27, 2016, Dr. Ryon Hennessy performed a records review and rendered various opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work. At the time, Dr. Hennessy did not have MRI films to review. In his report, he diagnosed Petitioner with a large, full thickness rotator cuff tear with 3.5 cm retraction and a supraspinatus tear likely at 1.5 cm and found the remaining pathology to be degenerative in nature. He diagnosed progression of a rotator cuff tear with regard to retraction as well as persistent tendinopathy of supraspinatus and infraspinatus and degeneration of the labrum. Dr. Hennessy opined that Petitioner's condition was degenerative, that the retraction was consistent with the natural progression of a full thickness rotator cuff tear in a nearly 69 year old man, and that the incident of pulling on a trailer at work would not cause retraction. He further opined that the alleged incident at work did not cause any new pathology. In the remainder of his report, Dr. Hennessy maintained that there was "clearly no acute injury."

On June 1, 2018, Petitioner submitted to a Section 12 examination with Dr. Hennessy at Respondent's request. Dr. Hennessy reviewed various records including Petitioner's post-accident treatment records, and examined Petitioner. He was provided with Petitioner's MRI scans, but was "unable to open the disc however on three separate computers." Dr. Hennessy stated "[b]riefly, the opinions I generated in my chart review in July 2016 remained unchanged."

He added that "[a]fter review of further records as well as interview with Mr. Davydov, my opinions were strengthened."

On June 23, 2018, Dr. Hennessy issued an addendum report in which he noted his review of November 3, 2015 x-rays, and all three of Petitioner's right shoulder MRIs. Dr. Hennessy was also provided with Dr. Tingle's narrative report. Dr. Hennessy's ultimate opinions did not change after reviewing diagnostic films. He found the November 2015 MRI to reflect a 23 mm [2.3 cm] by 36.6 mm [3.66 cm] rotator cuff retraction. He found the April 2016 MRI to be "essentially the same as the 11/5/2015 film" reflecting a 22.4 mm [2.24 cm] tear. He then found the October 2016 MRI to be "unchanged from April 2016[]" and again reflect a 22.4 mm [2.24 cm] tear with a 36 mm [3.6 cm] tear on one image and a 38 mm [3.8 cm] on another image. Dr. Hennessy believed that the radiologist had underread the films. He agreed that the treatment rendered by Dr. Tingle was appropriate, but unrelated to an accident at work.

Dr. Hennessy also disagreed with Dr. Tingle's narrative report and noted that Dr. Tingle made no comparison between the November 2015 MRI and the April 2016 MRI. He also stated that Petitioner made no mention of his prior right shoulder complaints, which were "directly refuted" by Dr. Kachar's February 2016 note. Dr. Hennessy reiterated his belief that the radiologist that read Petitioner's November 2015 MRI under-read the films, which were in his opinion "essentially identical" to the October 2016 MRI. He also indicated that "regarding retraction of rotator cuff tears over 18 months to 5 years" his "personal review of the MRI films would be consistent with the literature Dr. Tingle cited."

Respondent called Dr. Hennessy as a witness and he gave testimony at an evidence deposition on October 2, 2018. He discussed his Section 12 reports and opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Hennessy testified that he was a board-certified orthopedic surgeon. About 70% of his practice involved general orthopedics and about 30% involved treatment of the spine. He sees 80 to 90 patients, performs 4-10 surgeries, and performs about one to two Section 12 examinations a week. He reviewed Petitioner's medical records and issued three reports.

Initially, Dr. Hennessy only had the MRI reports and not the actual films. He noted that the November 5, 2015 MRI report showed a full-thickness rotator cuff tear measuring 1.5 cm with 2 cm of retraction, moderate infraspinatus and mild subcapularis tendinosis, with fluid along the supraspinatus muscle and subacromial without atrophy, moderate AC joint arthritis with anterior acromial spurring and thickened coracoacromial ligament, and labral degeneration/tearing of the superior, anterior, posterior and anterior inferior aspects. The MRI report from April 29, 2016 indicated a full-thickness rotator cuff tear with 3.5 cm retraction, supraspinatus and infraspinatus tendinopathy, degeneration of the labrum, and a small amount of subacromial fluid. Otherwise, the labrum was considered normal.

Dr. Hennessy noted that based on the November 2015 MRI report, the labrum tearing and rotator cuff tear pre-dated April 2016. The second MRI just noted labrum degeneration. However, the labrum would not have repaired itself in the interim. In interpreting the MRI reports, Dr. Hennessy the rotator cuff "tears were likely similar." While there was some

progression of the retraction, "it would have been more due to the pre-existing condition and the natural history of that pre-existing condition as full thickness rotator cuff tears could progress or can progress with further retraction." Both he and Dr. Tingle agree about Petitioner's diagnosis, however, Dr. Hennessy believed the retraction represented a natural progression of the underlying pre-existing disease. Based on the MRI reports, Dr. Hennessy opined "that it would be highly unlikely there would be a 1.5 centimeter change in retraction in just six months. That's highly unlikely." When asked why, Dr. Hennessy testified that "[i]n six months, retraction happens a little more slowly over years. It doesn't happen acutely like that. Actually it was a five-month interval. That would be highly unlikely." Dr. Hennessy explained that retraction is a generally degenerative rather than an acute process.

Dr. Hennessy found no acute findings in either of the MRI reports. There had been persistent weakness when Petitioner was discharged from physical therapy in December 2015. He did not appreciate any new rotator cuff injury in the second MRI and the pre-existing rotator cuff tear was symptomatic prior to the accident. Therefore, he found no exacerbation, acceleration, or aggravation of the pre-existing condition. Dr. Hennessy believed that all treatment provided to Petitioner was appropriate, though he believed the need for surgery was the underlying condition and not the work injury.

Two years after his initial records review, Dr. Hennessy examined Petitioner, reviewed additional records, including records from before the accident, and issued another report. It was noted that on November 3, 2015, Petitioner reported to Dr. Kachar that he had shoulder pain for up to a year with associated difficulty lifting heavy objects, and positive impingement signs. Petitioner also reported that the pain increased when he swatted at a bee three months earlier. Petitioner treated with Dr. Kachar through February 25, 2016, at which time he referred Petitioner to Dr. Tingle for a surgical consultation.

Dr. Hennessy reviewed the operative report. Dr. Tingle noted that the rotator cuff tear was 3.4 cm by 3 cm, which he agreed was massive. Dr. Tingle also noted that the tendon was mobile and therefore, in Dr. Tingle's opinion, more consistent with an acute, rather than chronic, injury. Dr. Tingle also noted some granulation, which he posited was more consistent with an acute injury than a chronic one. He also debrided an old biceps rupture injury. When asked whether he agreed with Dr. Tingle's assessment that the injury appeared acute, Dr. Hennessy responded that the biceps injury was clearly an old one and he was "not sure the granulation would necessarily tell us acute versus chronic;" he really hadn't seen that. "But as far as the size of the tear, [it] would be documented by [Dr. Tingle's intraoperative] pictures. He said it was 3.4 by 3. That's probably what it was."

When asked whether he would "agree or disagree that these were acute injuries as opposed to chronic injuries[,]" Dr. Hennessy responded that "[w]ithout seeing the actual pictures I have to take [Dr. Tingle's] report on its face value. Pictures of the surgery, except for the biceps which everyone seems to say which was old." Nevertheless, he concluded that the rotator cuff injury was chronic and not an acute injury. Petitioner had an uneventful postop recovery and was released from treatment within five months.

At the time of Dr. Hennessy's physical examination of Petitioner, he reported to Dr. Hennessy that he did not remember his February 2016 visit to Dr. Tingle and therefore could not relate whether he had pain at that time, but reported that his right shoulder was pain free at some point. At the time of his exam, Petitioner had returned to work driving a truck with a manual transmission but did have to load/unload the truck. He had stopped that about 10 years earlier, though he still had to pull the pin of the trailer and operate the fifth wheel of the trailer. Petitioner complained of 1-3/10 shoulder pain with occasional tingling in right fingers.

On examination, Dr. Hennessy found that Petitioner was pleasant and cooperative the entire visit, and never gave any undue behaviors. Petitioner had full strength in his rotator cuff but showed some reduced range of motion and mildly positive impingement signs on the right shoulder. He had very little decreased motion considering the size of the tear. In Dr. Hennessy's opinion, Petitioner had a good surgical result.

Dr. Hennessy was eventually able to read the actual MRI films. His examination of Petitioner and his review of the additional medical records did not change his original opinions. Dr. Hennessy noted that the infraspinatus remained intact and it would be highly unlikely that the rotator cuff tear could widen that much without also affecting the infraspinatus. There just is not that much width of the supraspinatus, and it would be highly unlikely for such worsening to occur in that time frame. Petitioner also had a long history of right shoulder pain. In February 2016, Dr. Hennessy noted that Petitioner was being actively treated for his right shoulder, had another cortisone injection, and was assessed as having failed conservative treatment and had been referred for a surgical option. In his opinion, it was very common to see rotator cuff tears in patients of Petitioner's age (70-71) and the probability of developing rotator cuff tears increases with age. The rotator cuff would not have healed between February 2016 and the work accident.

Dr. Hennessy also thought it was significant that the April 2016 MRI report did not include a comparison to the November 2015 MRI. "You had two markedly different measurements of films, and yet it would have been nice at the onset of all this had they just looked at the two films and made a direct comparison contemporaneously." Dr. Hennessy ascribed "some of the difference in terms of the width to me could just be observer error."

Dr. Hennessy diagnosed symptomatic large full-thickness rotator cuff tear documented in a November 2015 MRI with long-standing rupture of the long-head biceps tendon both of which predated April 2016. Dr. Hennessy testified that surgery had been "recommended" just over a month prior to his accident. Petitioner was at maximum medical improvement and did not need any additional medical treatment.

Dr. Hennessy testified that June 23, 2018 was the first time he was able to see the actual MRI films, and he testified consistent with the measurements and opinions rendered in his addendum report. To him, the MRI from April 2016 was almost identical to the November 2015 film; he "did not appreciate any significant progression or retraction." The three films were all almost identical.

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Dr. Hennessy also reviewed the statement of Dr. Tingle, in which he opined that prior to the instant accident Petitioner was essentially pain free, had full functionality of his right shoulder, and the accident caused permanent aggravation of his condition and made it symptomatic again. He disagreed with Dr. Tingle's opinion that Petitioner suffered increased retraction. Initially, Dr. Hennessy opined that it would be extremely unlikely that Petitioner would show such increased retraction in such a short time span. After he saw the films, he found there was no retraction. He also questioned Dr. Tingle's conclusion that Petitioner was pain free in February 2016, because he administered an injection at that time.

On cross examination, Dr. Hennessy agreed that he saw no treatment records between February 25, 2016 and April 28, 2016. He acknowledged that, while Petitioner told him he could not remember the February 2016 visit to Dr. Tingle, he reported that at some point he was pain free. Dr. Hennessy also admitted that while the condition itself would not cure itself, [the patient] could be asymptomatic.

On cross-examination, when asked whether he disagreed with the opinions of the radiologists, Dr. Hennessy testified that "I would say in terms of magnitude and the size of the tears on the different films, I think we all, Dr. Tingle, myself, and the radiologist all agreed on the basic premises that he had a full thickness rotator cuff tear and biceps tendon rupture from 2015 and as well as the two MRI's that he had in '16. So my disagreement was more in the magnitude … and the fatty atrophy being present in 2015." He had no reason to question Dr. Tingle's intraoperative measurements, but he added that they were consistent with his reading of the MRI. He did not agree that the tear went from large to massive.

On redirect examination, Dr. Hennessy agreed that the cortisone injection administered on February 25, 2016 was intended to relieve pain and their lasting effects are highly variable ranging from very little relief to sometimes relief for months.

E. Additional Information

Petitioner testified that he had no other accidents affecting his shoulder other than the one on April 28, 2016.

Regarding temporary disability related to this accident, Petitioner testified that he worked light duty until May 18, 2016 and was then off work until he was released back to full duty work on February 24, 2017.

Regarding his current condition of ill-being, Petitioner testified that currently he had pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects. Sometimes he takes over-the-counter pain medication, which helps a bit.

Regarding his medical bills, Petitioner testified that they were paid by Medicare and through a Medicare supplemental insurance policy, which Petitioner paid for.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner proved he sustained a work-related accident on April 28, 2016. The Commission agrees.

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Moreover, the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828 further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment. *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny and found that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner gave uncontroverted testimony that on April 28, 2016 he sustained an accident affecting his right shoulder at work while decoupling a trailer from the cab and pulling on the handle with his right arm. He explained that the pain he experienced was 20 times worse than the pain he had previously experienced in his shoulder. Respondent sent him for treatment at an occupational health clinic that day. The records of the examining physician, Dr. Reese, at Respondent's designated occupational health clinic corroborate Petitioner's testimony about the acute mechanism of injury and severity of his symptoms following the traumatic incident earlier that day. It is plausible that Petitioner, a truck driver, would decouple a trailer from his truck. No evidence was presented that he was precluded from doing so. Regardless, it was an act that Petitioner might reasonably be expected to perform incident to his assigned duties as a truck driver. *McAllister*, 2020 IL 124828, ¶ 46. Moreover, Petitioner's reported mechanism of injury and immediate onset of symptoms were clinically correlated by the most contemporaneous medical evaluation performed at the occupational health clinic.

Thus, the Commission affirms the Arbitrator's conclusion that Petitioner has met his burden of proof and established that he suffered a compensable accident at work on April 28, 2016 as claimed.

B. Causal Connection

While finding that Petitioner had suffered an accident at work, the Arbitrator found that Petitioner did not sustain his burden of proving that the accident caused his current condition of ill-being of his right shoulder. Accordingly, the Arbitrator denied compensation and, in so doing, gave greater weight to the opinions of Dr. Hennessy over those of Dr. Tingle. In reviewing the record, the Commission is not similarly persuaded.

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also *a* causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981). A claimant may rely on the "chain of events" in his or her case to demonstrate the aggravation or acceleration of a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC, ¶¶ 25-29.

In this case, Petitioner was an older, long-time truck driver that suffered an acute accident causing a breakdown in his condition due to an occupational cause when he pulled a pin to decouple his truck from a trailer. There is no question that Petitioner had a pre-existing right shoulder condition. Indeed, he was receiving treatment from Dr. Kachar after an onset of symptoms prior to November 2015 affecting his right shoulder. He first sought treatment for a right shoulder condition with Dr. Kachar, the physician treating him for an unrelated left ankle and foot injury, on November 3, 2015. He underwent a right shoulder MRI two days later that confirmed a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. Dr. Kachar treated Petitioner's right shoulder condition conservatively with injections and physical therapy thereafter noting that surgery might be an option if his condition did not improve. Petitioner continued physical therapy through January 6, 2016. Petitioner returned to Dr. Kachar on February 25, 2016 at which point he was released from care and referred to his colleague, Dr. Tingle, for a surgical consultation. Petitioner did not undergo treatment after February 25, 2016 until the date of accident or see Dr. Tingle. He testified that he was able to work and did not feel that he needed to see Dr. Tingle at that time.

Respondent asserts that "[w]hile there was *some* controversy about the size and magnitude of the tear (i.e.[,] a large tear versus a massive tear), all doctors agree [P]etitioner had a rotator cuff tear that was objectively sympto[ma]tic and present on radiographs several months before the work accident." (Emphasis added). In sum, Respondent urges the Commission to find that the presence of an objectively symptomatic rotator cuff tear prior to the accident at work with a surgical consultation referral should preclude recovery of benefits, finding the opinions of its Section 12 examiner to be persuasive. The Commission cannot so find given the objective medical evidence in this case.

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The pre-accident MRI and post-accident MRIs were read by three different radiologists who measured the size and extent of Petitioner's rotator cuff tear and retraction. The radiologists' measurements indicate a significant increase in tear size from 1.5 cm to 3.5 cm as well as significant retraction increase from 2 cm to 3.5 cm. In order to find the opinions of Dr. Hennessy persuasive in this case, the Commission would have to ignore the interpretation of three different radiologists regarding the magnitude of Petitioner's right shoulder tears as reflected in the 2015 and 2016 MRIs. Such a finding would also require the Commission to ignore Dr. Tingle's interpretation of the pre- and post-accident MRI films, which he had access to in his chart at the time of Petitioner's initial visit with him, contrary to Dr. Hennessy's assumption. Indeed, Dr. Tingle testified that Dr. Kachar's records were in his chart, so he was aware of the entirety of Petitioner's treatment with his partner and he could compare Petitioner's reports to him with the prior treatment records.

Conversely, the Commission would further have to accept Dr. Hennessy's opinion that it was "highly unlikely" that Petitioner's MRIs would show such a significant increase in retraction between November 2015 and April 2016 solely to degeneration, and the change should be attributed to human error, not only by the radiologists, but also by Dr. Tingle. The Commission finds it more likely that Dr. Hennessy refused to detach from his initial opinions regardless of any objective evidence to the contrary. Dr. Hennessy's initial records review, in which he had no access to the MRI films, resulted in the opinion that Petitioner's condition was degenerative. Years later, after overcoming technical difficulties with the initial MRI films provided, Dr. Hennessy ultimately opined that his reading of all three films only strengthened his initial opinions and that the marked differences observed by other professionals in this case were due to observer error. Dr. Hennessy's final opinion after seeing the MRI films that there was no difference whatsoever among them undercuts the reliability of all of his opinions.

In sum, the Commission does not find the opinions of Dr. Hennessy to be persuasive given the objective diagnostic findings of four different physicians, including Petitioner's orthopedic surgeon who always had access to all of Petitioner's prior treatment records and films, to the contrary. Rather, we find that the opinions of Dr. Tingle, which are corroborated by the diagnostic interpretations of three radiologists, to be persuasive and based on a complete and accurate understanding of Petitioner's presentation at his initial visit and thereafter.

In addition, the "chain of events" in this case support's Petitioner's claim of causal connection. Petitioner was able to perform his work activities prior to the accident whereas he was not after the accident. Petitioner needed no treatment from the last injection on February 25, 2016 until the instant accident, but experienced pain and symptoms that prevented him from working immediately after the accident as corroborated by Respondent's occupational health clinician immediately thereafter.

The Commission observes that in denying compensation, the Arbitrator questioned Petitioner's credibility. As noted above, the Commission finds ample objective medical evidence to corroborate Petitioner's medical condition contemporaneous to his reported accident at work and complaints to the various evaluating physicians. While Petitioner did not require a translator at the hearing, a cursory evaluation of the transcript reflects that Petitioner had

21IWCC0153

difficulty expressing himself and understanding questions posed on direct and cross-examination. The Commission does not find Petitioner's testimony to be evasive and notes that, while he did not recall certain reports as specifically as posited on cross-examination, he readily admitted that he had a pre-existing shoulder condition, treatment for the condition, and periods of repose where he felt no debilitating symptoms. The Commission finds Petitioner to be credible overall.

Thus, the Commission finds that Petitioner's pre-existing right shoulder condition was aggravated and is causally related to the traumatic incident at work on April 28, 2016.

C. Temporary Total Disability

On the issue of temporary total disability (TTD), Petitioner seeks benefits from May 18, 2016 through February 24, 2017. Petitioner claims that Respondent was no longer able to accommodate his restrictions as of May 18, 2016 and he did not return to work until he was released to full duty as of February 24, 2017. The medical records reflect that Petitioner was either placed off work or on restrictions during the claimed period, and Dr. Tingle noted Petitioner's report in June 2016 that Respondent did not accommodate the restrictions. No evidence was presented to the contrary. Therefore, the Commission awards Petitioner TTD benefits as claimed totaling 40 and 3/7ths weeks.

D. Medical Expenses

As explained above, the record reflects that Petitioner sought immediate care and treatment of the right shoulder after his accident at work, and the Commission finds the opinions of Petitioner's treating physician, Dr. Tingle, to be persuasive in this case. On the issue of medical expenses, the evidence establishes that Petitioner's right shoulder treatment after the accident at work was reasonable and necessary to alleviate Petitioner of the effects of his occupational injury. Indeed, while finding that Petitioner's condition was wholly degenerative, Dr. Hennessy testified that all of the treatment that Petitioner received after April 2016 was appropriate. Thus, the Commission finds Respondent responsible for the payment of Petitioner's charges for reasonable and necessary medical services related to his right shoulder injury pursuant to §8(a) and §8.2 of the Act and the fee schedule.

E. Permanent Partial Disability

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i) because there is no impairment report. The Commission places some weight on factor (ii), noting that Petitioner continues to work as a

truck driver. Regarding factor (iii), the Commission places greater weight to Petitioner's age (68) at the time of his injury, given that Petitioner likely will remain in the workforce for a less prolonged period. The Commission places some weight on factor (iv) due to the lack of evidence regarding Petitioner's future earnings capacity compared to his pre-injury position.

The Commission places significant weight on factor (v). Petitioner ultimately underwent an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, Dr. Tingle diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome. Petitioner testified that he continues to experience pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects and sometimes takes over-the-counter pain medication to manage his symptoms.

Having considered all of the statutory factors, the Commission finds that Petitioner suffered a permanent partial disability representing a 10% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $574.02 per week for a period of 40 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses under the fee schedule and pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $516.62 per week for a total of 50 weeks because the injuries sustained resulted in the permanent loss of the use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0153

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 5 - 2021

Barbara N. Flores

BNF-MP/dw
O-2/4/21
46

Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. The Arbitrator found that Petitioner did not prove that his alleged work-related accident caused his current condition of ill-being, his rotator cuff tear, and denied compensation. The Majority reversed the Decision of the Arbitrator, found causation, and awarded benefits. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

First, while the Arbitrator found accident, he did so "with hesitation." He found Petitioner's testimony lacked credibility because his testimony was at odds with the medical records. His skepticism of Petitioner's veracity forced him to question whether Petitioner even had an accident, despite the fact that there was no evidence specifically rebutting his testimony. The Arbitrator specified that "Petitioner's demeanor changed dramatically between direct examination and cross examination." His memory appeared selective in nature. His recollections became much more complete on direct than cross, and "almost in all instances where Petitioner did not remember [or] recall an event favored his case." Most notably, Petitioner appeared to be evasive and untruthful about the extent of his symptoms and treatment prior to the instant accident. I find no reason for the Majority to substitute its assessment of credibility for that of the Arbitrator who actually observed the Petitioner's testimony.

Prior to the instant accident, Petitioner treated with Dr. Kachar for his right shoulder condition since November 3, 2015. At that time, he reported that he had shoulder pain for at least a year and had aggravated it a couple of months earlier "swatting a bee." He reported "some pain with reaching, lifting, overhead activities as well as pain with activities of daily living." Dr. Kachar administered an injection, prescribed physical therapy, and ordered an MRI. The MRI dated November 5, 2015 showed a large, full-thickness tear of the rotator cuff. Petitioner last saw Dr. Kachar before the instant accident on February 25, 2016, only two months before the alleged accident. At that time, Dr. Kachar administered another injection and referred Petitioner for a surgical consultation.

The Arbitrator also found the opinions of Respondent's Section 12 medical examiner, Dr. Hennessey, more persuasive than those of Dr. Tingle. Contrary to the Majority, I concur with

the Arbitrator's assessment of the persuasiveness of the doctors' opinions. Dr. Tingle, one of Petitioner's treaters, based his opinion that Petitioner's condition was causally related to the accident on his assumption that Petitioner was pain free from February 25, 2016 up to the date of the accident. That assumption is not sustainable because on that date Dr. Tingle's partner, Dr. Kachar, administered an injection and referred him to surgery because he had failed conservative treatment for his large rotator cuff tear. Dr. Tingle agreed that injections are not provided, and surgery is not indicated, for patients with asymptomatic rotator cuff tears. Therefore, it is clear that Petitioner was substantially symptomatic for a large rotator cuff tear prior to the accident.

The Majority relies mostly on the radiologist's report that the rotator cuff tear grew from 2 cm to 3.5 cm from November 5, 2015 to March 29, 2016. This interpretation was at odds with that of Dr. Hennessey. He explained that retraction is degenerative in nature and he would find it difficult to believe that a rotator cuff tear could retract that much is such a short period of time, that such retraction was not consistent with the mechanism of injury reported, and explained how an error in the calculation of retraction could have happened. I agree with Dr. Hennessey that it does seem unlikely that there could have been such dramatic increase in retraction over a few months, especially because the injury Petitioner described cannot be considered extremely traumatic. Finally, Petitioner's testimony about the accident itself was sketchy. He did not testify as the amount of force necessary to decouple the trailer and he simply testified that he pulled the handle and felt pain.

The Majority accepted Petitioner's questionable testimony that his symptoms resolved completely after the injection on November 3, 2015. As Dr. Hennessey explained it is extremely unusual for an injection to completely resolve rotator cuff pain. In this instance, I find it much more conceivable that Petitioner's prior symptoms returned as the effects of the injection wore off. That was why the second injection was administered. Petitioner had his first injection on November 3, 2015 and the second on February 25, 2016. The fact that Dr. Kachar referred Petitioner to a surgeon on February 25, 2016 shows that he did not believe Petitioner's treatment for Petitioner's shoulder condition was completed and that surgery was indicated. In addition, Dr. Hennessey noted that the MRIs showed "fatty atrophy" which indicated the chronicity rather than acuity of Petitioner's condition.

Because the Arbitrator observed Petitioner's testimony and found him not credible, because Petitioner had extensive pre-accident treatment for the same shoulder condition prior to the accident, because Petitioner had actually been referred for a surgical consultation prior to the accident, and because Dr. Hennessey explained that the presence of fatty atrophy points to a chronic rather than acute shoulder condition I would have affirmed and adopted the Decision of the Arbitrator, found Petitioner did not sustain his burden of proving that a work-related accident caused his current condition of ill-being and denied compensation. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

DLS/dw
O-2/4/21
46

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY DAVIS,

Petitioner,

vs. NO: 18 WC 18489

TYSON FOODS,

Respondent.

21IWCC0154

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: APR 5 - 2021

Christopher A. Harris

Barbara N. Flores

Marc Parker

CAH/pm
d: 4/1/21
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DAVIS, TIMOTHY
Employee/Petitioner

Case# **18WC018489**

TYSON FOODS
Employer/Respondent

21IWCC0154

On 9/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0656 GLASS & KOREIN LLC
MICHAEL H KOREIN
7012 W MAIN ST
BELLEVILLE, IL 62223

0000 WIEDNER & McAULIFFE LTD
JUAN ARIAS
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Timothy Davis
Employee/Petitioner

v.

Tyson Foods
Employer/Respondent

Case # 18 WC 18489 .

Consolidated cases: n/a

21IWCC0154

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 26, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Did Petitioner exceed two choices of medical providers**

FINDINGS

On the date of accident, May 25, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $10,607.04; the average weekly wage was $505.10.

On the date of accident, Petitioner was 49 years of age, single with 0 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $33,440.07 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $33,440.07.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary partial disability benefits of $512.09, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $336.73 per week for 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, January 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the fusion surgery recommended by Dr. David Raskas.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

September 21, 2020
Date

SEP 24 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 25, 2018. According to the Application, Petitioner "slipped and fell on banana in the employee only breakroom" and sustained an injury to his "low back and right ankle" (Arbitrator's Exhibit 2). Petitioner sought an order for payment of medical bills, temporary total disability benefits and temporary partial disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. Respondent also disputed liability for a portion of Petitioner's medical expenses on the basis Petitioner had exceeded two chains of medical providers (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018; January 8, 2019, through July 21, 2020; and August 22, 2020, through August 26, 2020 (the date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits of 75 4/7 weeks, commencing June 8, 2018, through October 23, 2018; and January 8, 2019, through January 30, 2020 (Arbitrator's Exhibit 1).

In regard to temporary partial disability benefits, Petitioner claimed he was entitled to temporary partial disability benefits of 15 2/7 weeks, commencing October 24, 2018, through January 7, 2019; and July 22, 2020, through August 21, 2020. Respondent claimed Petitioner was entitled to temporary partial disability benefits of 10 6/7 weeks, commencing October 24, 2018, through January 7, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a crane operator in the shipping department. Petitioner's job duties included pulling and picking up pallets and scanning them. Petitioner was also required to lift items which weighed 15 to 50 pounds. Prior to the accident of May 25, 2018, Petitioner had no low back or leg pain.

On May 25, 2018, Petitioner was in the employee breakroom and he slipped/fell when he stepped on the skin of a banana. Petitioner testified he fell at an angle and experienced left lower back pain and pain in his right leg/ankle.

At the direction of Respondent, Petitioner was evaluated at Midwest Occupational Medicine by Dr. Bradley Breeden on May 25, 2018. When seen by Dr. Breeden, Petitioner complained of left lower back and right ankle pain. Dr. Breeden diagnosed Petitioner with a lumbar contusion and right ankle strain. He directed Petitioner to use an Ace wrap on his ankle and use over the counter medications for pain. He authorized Petitioner to return to work the following day, May 26, 2018. This was the only occasion Petitioner sought Dr. Breeden (Petitioner's Exhibit 1).

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. Dr. Stark saw Petitioner on May 29, 2018. At that time, Petitioner advised Dr. Stark that he had sustained an injury at work when he slipped on a banana. Petitioner stated he hurt his right ankle and fell on

the left side of his lower back. Dr. Stark treated Petitioner through June 18, 2018, and imposed work restrictions (Petitioner's Exhibit 2).

At trial, Petitioner testified he went to the ER of SLU Hospital on June 10, 2018, because he was having severe low back pain and pain/numbness in his right leg. According to the medical record, Petitioner sustained a work-related injury and was seen by the company's physician who "did nothing." Petitioner complained of low back pain and burning pain down the right leg. Petitioner was diagnosed with low back pain with sciatica, given pain medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently seen in the ER of Touchette Regional Hospital on June 14, 2018. At trial, Petitioner testified that on June 14, 2018, he had a work restriction of doing a sit down job, but Respondent assigned him to work duties inconsistent with his restriction. Petitioner said he worked for about an hour and, because his back pain became intense, he went to HR. Petitioner was informed he could leave and went directly to the ER of Touchette Regional Hospital.

The ER record of Touchette Regional Hospital noted Petitioner had sustained a work injury on May 26, 2018, and had low back and right leg pain. Petitioner was diagnosed with a lumbosacral sprain with sciatica, prescribed medication and discharged (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. David Raskas, an orthopedic surgeon, on June 19, 2018. At that time, Petitioner advised Dr. Raskas of the work-related accident of May 25, 2018, and that he had low back pain which radiated into the right lower extremity. Petitioner also complained of numbness/tingling in the right leg. Petitioner advised Dr. Raskas he was seen in an ER on June 16, 2018 because of severe low back pain (Petitioner's Exhibit 5).

Dr. Raskas authorized Petitioner to be off work and ordered an MRI scan. The MRI was performed on July 10, 2018. According to the radiologist, the MRI revealed disc bulges at multiple levels and a right paracentral protrusion at L5-S1 resulting in a mass effect on the right S-1 nerve root. Dr. Raskas saw Petitioner on July 17, 2018, and reviewed the MRI. At that time, Dr. Raskas recommended Petitioner undergo a right epidural steroid injection, but Petitioner declined to undergo same. Dr. Raskas ordered physical therapy and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Petitioner received physical therapy at Touchette Regional Hospital from July 27, 2018, through September 17, 2018. According to the physical therapy records, Petitioner was diagnosed with lumbar radiculopathy (Petitioner's Exhibit 4).

When Dr. Raskas saw Petitioner on October 16, 2018, he noted Petitioner still had complaints of low back and right leg pain. He again reviewed the MRI and opined it revealed a herniated disc at L5-S1. He referred Petitioner to Injury Specialists for an epidural steroid injection on the right at L5-S1 (Petitioner's Exhibit 5).

Petitioner was seen at Injury Specialists on December 21, 2018, and January 2, 2019. On those occasions, Dr. Tong Zhu administered epidural steroid injections on the right at L5-S1 (Petitioner's Exhibit 6).

On January 3, 2019, Petitioner was driving his car in St. Louis and his back "locked up" on him. At that time, Petitioner was a couple of blocks from Barnes-Jewish Hospital. Petitioner went to the ER of Barnes-Jewish Hospital. According to the ER record, Petitioner sustained an injury approximately six months prior and had a steroid injection about one week ago. On January 3, 2019, Petitioner experienced an "acute worsening" of his low back pain with radiation in to the right buttock/leg. Petitioner was diagnosed with an acute exacerbation of chronic low back pain and sciatica on the right side (Petitioner's Exhibit 8).

Dr. Raskas again saw Petitioner on January 8, 2019. At that time, Petitioner advised Dr. Raskas that Respondent required him to perform work duties inconsistent with his restrictions. Petitioner continued to work until the pain became so severe he sought treatment at the ER of Barnes-Jewish Hospital on January 3, 2019. Dr. Raskas ordered various lab tests and indicated that if they were abnormal, he would order a new MRI with and without contrast. He also authorized Petitioner to be off work (Petitioner's Exhibit 5).

Petitioner underwent the lab tests which were ordered by Dr. Raskas. Based upon the number of abnormal test results, Dr. Raskas ordered the MRI with and without contrast (Petitioner's Exhibit 5).

The MRI with and without contrast was performed on March 25, 2019. According to the radiologist, the MRI revealed central broad-based protrusions at L3-L4 and L4-L5 and a central focal protrusion at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on April 29, 2019. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and diagnostic studies provided to him by Respondent. Dr. deGrange opined Petitioner had a herniated disc at L5-S1 which was caused by the accident of May 25, 2018. He recommended Petitioner undergo a microdiscectomy at L5:S1; that Petitioner could work with restrictions and was not at MMI (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Raskas saw Petitioner on May 6, 2019, and Petitioner continued to complain of low back and right leg pain. Dr. Raskas reviewed the MRI and opined it revealed a protrusion at L5-S1. He opined Petitioner had a herniated lumbar disc with lumbar radiculopathy. Given the fact Petitioner had back problems for over a year and did not get improvement with injections, therapy and activity modifications, he recommended Petitioner undergo discography at L3-L4, L4-L5 and L5-S1 with a CT scan to determine if an annular tear was the cause of his pain symptoms (Petitioner's Exhibit 5).

In a narrative report dated June 10, 2019, Dr. Raskas noted Respondent had authorized a microdiscectomy for Petitioner. He opined this procedure would likely fail and renewed his recommendation Petitioner undergo discography. Dr. Raskas also opined that, in all likelihood, Petitioner would need either a fusion or disc replacement at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included the records of Dr. Raskas in which he recommended Petitioner undergo discography. In a report dated July 11, 2019, Dr. deGrange opined that there was no "reasonable medical basis" for

Petitioner undergoing the discography recommended by Dr. Raskas. Dr. deGrange referenced a number of authoritative studies/articles which concluded discography had a high error rate and increased the risk of disc problems in patients (Respondent's Exhibit 3; Deposition Exhibit E).

Dr. Raskas saw Petitioner on August 13, 2019. At that time, Petitioner informed him the "other physician" had recommended a microdiscectomy and did not believe in discography. Dr. Raskas noted there were some shortcomings of discography, but there were positive attributes in the treatment and diagnosis of chronic low back pain. Dr. Raskas specifically noted the North American Spine Society's Coverage Policy recommendations regarding discography which noted it could be used effectively in diagnosis and treatment of chronic back pain (Petitioner's Exhibit 5).

On September 16, 2019, Petitioner underwent a discogram at L3-L4, L4-L5 and L5-S1. According to the radiologist, the study was negative at L3-L4 and L4-L5, but positive at L5-S1. At L5-S1, Petitioner complained of severe central low back pain and the study revealed annular tears into the epidural space. A post discogram CT scan was performed which revealed a fissure/protrusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas subsequently saw Petitioner on November 15, 2019, and reviewed the diagnostic studies. He opined Petitioner should have surgery, either disc replacement or a fusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas again saw Petitioner on December 27, 2019. At that time, Petitioner informed him he wanted to undergo fusion surgery. Dr. Raskas noted this would be a "staged" surgical procedure which would consist of two separate surgeries. The first surgery would be a lumbar discectomy and fusion with cage/plating. The second surgery would be a facet fusion with decompression (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included reports of the discography and CT scan as well as Dr. Raskas' surgical recommendation. Dr. deGrange opined there were "confounding results" and inconsistencies in Petitioner's complaints. He opined the discography and CT scan were medically unnecessary and disagreed with the recommendation Petitioner undergo fusion surgery. Further, Dr. deGrange opined that it was not clear that any surgery would benefit Petitioner and he rescinded his prior recommendation Petitioner undergo a microdiscectomy (Respondent's Exhibit 3; Deposition Exhibit F).

Petitioner was last seen by Dr. Raskas on March 30, 2020. At that time, Dr. Raskas reviewed Dr. deGrange's report of January 30, 2020. Petitioner's complaints and findings on examination were consistent with what they had been previously. Dr. Raskas noted he disagreed with Dr. deGrange's opinion that surgery would not benefit Petitioner. He continued to impose light duty/sedentary work restrictions (Petitioner's Exhibit 5).

Dr. deGrange was deposed on June 2, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. deGrange's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. deGrange testified that when he examined Petitioner on April 29, 2019, he diagnosed Petitioner with a

herniated disc at L5-S1 and recommended Petitioner undergo a microdisectomy (Respondent's Exhibit 3; pp 16-19).

In regard to the discography and CT scan, Dr. deGrange testified these were not medically necessary. He also stated a staged fusion was not medically necessary and recanted his prior surgical recommendation (Respondent's Exhibit 3; pp 24-27, 34-37).

On cross-examination, Dr. deGrange agreed that the treatment and diagnostic studies Petitioner underwent prior to his examination of him were medically appropriate. He also agreed Petitioner's subjective complaints were consistent with the objective findings on examination and diagnostic studies. Dr. deGrange was questioned about the "inconsistencies" of Petitioner's symptoms in what he told him and what he read in the records; however, he could not specifically identify what they were. Dr. deGrange reaffirmed his opinion that surgery was not appropriate for Petitioner, but he had no treatment recommendations (Respondent's Exhibit 3; pp 70-74, 82-83).

Petitioner testified that Respondent terminated his employment on March 16, 2020. However, Respondent continued to pay Petitioner temporary total disability benefits through June 8, 2020. When Petitioner's temporary total disability benefits were terminated, he subsequently obtained a part-time job on July 22, 2020, with Hire Level, a temporary employment agency. Hire Level provided Petitioner with work which conformed to his work restrictions until August 21, 2020. At that time, Petitioner stopped working because being on his feet too long and bending aggravated his back symptoms to the point to where he could no longer work.

Petitioner testified he has had low back pain since he sustained the accident. Petitioner continues to have right leg pain as well as numbness and shock type sensations. Petitioner stated he is fallen several times because of his right leg symptoms. Petitioner wants to proceed with the fusion procedure as recommended by Dr. Raskas.

Petitioner worked for Respondent with restrictions from October 24, 2018, through January 7, 2019. Respondent did not dispute its liability for temporary partial disability benefits during this period of time; however, Respondent did not pay any temporary partial disability benefits to Petitioner. Petitioner tendered into evidence Petitioner's wage records for that period of time as well as a computation of the temporary partial disability benefits owed which were $154.77.

From July 22, 2020, through August 21, 2020, Petitioner worked for Hire Level. Petitioner tendered into evidence his paycheck stubs for that period of time as well as a computation of the temporary partial disability benefits owed to him which amounted to $357.32.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of May 25, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on May 25, 2018.

The Arbitrator acknowledges that when Petitioner initially sought medical treatment following the accident, he complained of left lower back pain. It was not until Petitioner was seen in the ER of SLU Hospital on June 20, 2018, that Petitioner complained of right leg pain.

The fact that Petitioner did not experience right leg pain immediately after or shortly after the accident, does not, in and of itself, constitute a basis to dispute causal relationship.

There was no dispute Petitioner was diagnosed with a herniated disc at L5-S1 by Dr. Raskas, Petitioner's treating physician, and Dr. deGrange, Respondent's Section 12 examiner.

Further, Dr. deGrange agreed the herniated disc at L5-S1 was causally related to the accident of May 25, 2018.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The dispute regarding the reasonableness and necessity of medical services is primarily limited to the discography and CT scan ordered by Dr. Raskas.

Dr. deGrange, Respondent's Section 12 examiner, opined that discography was not appropriate and referenced authoritative studies/articles which concluded that there was a high error rate and increased risk of disc problems in patients.

Dr. Raskas, Petitioner's treating physician, acknowledged there were some shortcomings with the use of discography, but there were positive attributes in their use for the treatment and diagnosis of chronic back pain. Dr. Raskas specifically noted the North American Spine Society Coverage Policy recommending the use of discography.

The discography at L5-S1 was positive, which was a finding consistent with the prior diagnosis of disc pathology at that level.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (K) Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment, including, but not limited to, the fusion surgery recommended by Dr. Raskas.

In support of this conclusion the Arbitrator notes the following:

Dr. Raskas has treated Petitioner for approximately two years. Dr. Raskas initially treated Petitioner conservatively with physical therapy and injections. Ultimately, Dr. Raskas recommended Petitioner undergo either disc replacement or fusion surgery. Petitioner has decided to undergo fusion surgery.

Respondent's Section 12 examiner, Dr. deGrange, opined Petitioner had a herniated disc at L5-S1 and recommended a microdiscectomy. However, Dr. deGrange subsequently recanted that recommendation and presently has no recommendation whatsoever for treatment.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (L) Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary partial disability benefits of $512.09.

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, June 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020.

In support of these conclusions the Arbitrator notes the following:

Respondent did not dispute Petitioner's entitlement to temporary partial disability benefits of 10 6/7 weeks and Petitioner's computation of temporary partial disability benefits owed was unrebutted.

Petitioner was under active medical treatment and either authorized to be off work completely or subject to work restrictions which were not accommodated by Respondent.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not exceed his two choices of chains of medical providers.

In support of this conclusion the Arbitrator notes the following:

Following the accident, Petitioner was directed by Respondent to go to Midwest Occupational Medicine where he was evaluated by Dr. Bradley Breeden. While Dr. Breeden apparently provided some treatment, he was not a medical provider chosen by Petitioner.

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. This was Petitioner's first choice of a medical provider.

As noted herein, Petitioner later sought medical treatment at three emergency rooms. At trial, Petitioner testified he sought treatment on those occasions because of his severe low back and right leg symptoms.

Section 8(a) of the Act, excludes "emergency treatment" as one of the medical providers "chosen by the employee."

In the case of *Wolfe v. Industrial Commission*, 416 N.E.2d 280 (Ill. App. 4th Dist. 1985) the Appellate Court held that Petitioner's seeking treatment at an ER constituted a choice of a medical provider. In that case, Petitioner testified he went to the ER because his treating physician was not available to see him. However, Petitioner was, in fact, seen by his treating physician the same day he went to the ER and made no effort to contact his physician prior to going to the ER. Under these circumstances, the Arbitrator ruled Petitioner's seeking treatment at the ER was a "choice" of a medical provider. This ruling was then upheld by the Commission, Circuit Court and Appellate Court. *Wolfe* at 286.

The factual circumstances in the *Wolfe* case are clearly distinguishable from the circumstances in the instant case. On all three occasions, Petitioner sought "emergency treatment" because of his severe low back and right leg pain.

None of the three ER visits made by Petitioner constituted a choice of a medical provider under Section 8(a) of the Act.

When Petitioner sought treatment from Dr. Raskas, this was the second choice of a medical provider.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse no occupational disease	☐ Second Injury Fund (§8(e)18)
X NO CC, compensation denied	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DALE BASIL,

Petitioner,

vs. NO: 16 WC 16172

PATTON MINING, LLC.,

Respondent.

21IWCC0155

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, causal connection, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner is 61 years old, married and resides in Kincaid, Illinois. After he graduated from high school, he enrolled at Lincoln Land Community College studying to become an arborist. He did not receive a degree or certificate. Petitioner testified he worked in the coal mines for 33 years, all underground. He testified that he had regularly been exposed to coal dust, silica dust and roof bolting glue fumes. (T.7-9)

Petitioner was employed as a mine shuttle car operator for Respondent since 2011. Petitioner first started working in coal mines in 1977 at Peabody Coal Company in Pawnee, Illinois. He was hired as a supply-man. This entailed loading supplies and transporting them to certain sections. In that position he went all over the mine; he did that job for a couple of years. (T.12-13)

21IWCC0155

Petitioner also worked as a recovery-man. After the coal was mined, they went in and removed everything out of a section and transported it to the belt section. This included removing I-beams which caused it to cave in. Petitioner testified that that was a very dusty job. When they recovered the belt line, there was coal mine dust left on the fan line. They flipped it to take it somewhere else, which was a very dusty job. They had to pull the pillars and the air would hit you in the face. Petitioner performed that job for about 6-7 years. (T.13-15)

At Peabody Mine, Petitioner also performed roof bolting which involved drilling into the top and anchoring a bolt in at least a foot of rock. He would place the bolt in, secure and tighten it. In the 1980's, they just had a "cob" which spread and tightened it up. At that time, they were not using glue pins. Roof bolting was the last position he held at Peabody. (T.15-16)

Petitioner next worked at Crown III, owned by General Dynamics, starting in 2000-2001, as a shuttle car operator. In that position, he ran a ram car, a shuttle car without a cable. The car was battery operated and he would run the car up to the miner, get a load of coal, return to the belt and drop it off. He would go up to the face where they were cutting out the coal. Petitioner testified the dust level was pretty bad as the coal was coming off of the tail of the miner and coming right at him. Petitioner performed that job for 4-5 years. (T.16-17)

Petitioner then obtained a job hauling rock dust in a ram car. The dust was hauled and spread to make the coal mine white and prevent fires. When he went to the location, he would hit a lever and it paddled the dust, slinging it everywhere. Petitioner had to keep pushing the dust to the paddles until it was empty and then return for another load. Petitioner described this as driving the car in the middle of a dust storm. Petitioner held that position for 4-5 years. Petitioner also performed roof bolting when people were not there. (T.17-19)

When Petitioner performed roof bolting at Crown, it was different than at Peabody. Times changed, he testified, and they started using glue pins. Petitioner had to drill the hole and get to a foot of rock. Before he put the pin in, he put in a stick of glue and pushed and spun it. He stated that would mix the glue and tighten it for about 90 seconds. Petitioner testified the glue sticks would break open emitting a very strong odor. At times the odor would take your breath away. He had performed all 3 jobs at Crown. (T.19-20)

Petitioner next worked at mine Federal #2 in West Virginia for about 11-12 months to get his medical card. In the mine, Petitioner performed the roof bolting job. Petitioner testified the mine there was very similar to the Illinois mines. Petitioner then returned to Illinois. (T.20-21)

Petitioner started at Respondent's mine, Patton Mining or the Deer Run Mine, as a shuttle car operator in 2011. This entailed driving the machine to the miner, loading the coal and taking it to the belt. He did not perform roof bolting there because they thought he was getting too old for that job. (T.21-23) Petitioner last worked at Deer Run Mine on March 25, 2015. He was 58 at that time. Petitioner testified that he was exposed to coal mine dust on that date. On that day, they had a hot spot/fire and the mine had ceased operating. He chose not to seek other mining employment after that time. He ran a tree service, Midland Tree Service, after that with his son where he trimmed trees, took down trees and ground tree stumps. He did not climb; he worked out of a bucket. He earned between $20,000 and $50,000 annually. The decline in business was because

he did not have stamina any longer. He testified he was "getting too old or something." Petitioner has had no other jobs since that time. (T.9-12)

Petitioner testified that in the early 1990's, he started noticing breathing problems. At that time, he noticed he was not able to walk as far, and testified it was "just my stamina." When he went back into the mine, the breathing problems started to get worse. Since the time he left mining up until the Arbitration hearing, Petitioner testified, his breathing problems have gotten a little worse. (T.23-24)

Petitioner does not take any medications for breathing. With activities of daily living, he stated he likes to walk and exercise, but he is not able to go as far; he can probably walk about a mile. When asked how many stairs he is able to climb before he has to rest, Petitioner testified he does not really know, and he tries to stay away from using stairs. When asked if there were other things specifically in life that breathing affects, he responded, "No." Petitioner testified he used to be able to cut a big tree and clean it up with no problem. Petitioner stated he now tries to leave the big trees for his son to do as he does not have the energy to do it like he used to. (T.24-25)

Petitioner treated with Dr. Manson, his family doctor, until Dr. Manson's retirement. Since then, Petitioner has seen Dr. Del Valle. Petitioner testified he did not really talk to his doctors about his breathing issues. His main concern was his throat and acid reflux. Petitioner testified that his doctors were aware he was a coal mine worker. He testified that he has never been a smoker. (T.25-26)

Petitioner indicated his acid reflux began when he had problems swallowing and he had gone to West Virginia. He had his throat stretched 5 times since his return from West Virginia. He was on a pill for acid reflux and cholesterol. Aside from the breathing issues, acid reflux and throat issues, Petitioner testified that he has had no other health issues. Petitioner was still taking a cholesterol pill, but his doctor wanted to take him off it soon. Petitioner was taking no other medications. (T.26-28)

On cross examination, Petitioner testified that he was hired by Respondent around November 14, 2011. He agreed he had left Respondent's mine as a result of a mine fire. He was laid off. Had he not been laid off, Petitioner would have reported to his next shift as he had a mortgage and still needed to keep going. The mine had been sealed off around January 2016 and he was let go at that time. (T.28-29)

Petitioner agreed he had worked for Peabody and Freeman Coal or General Dynamics at Crown III. They were both UMWA mines. Petitioner did receive his pension from his mine employment. He received credit for 27 years. He testified they took 48% as he was not yet 55 years old. (T.29)

Petitioner testified he had gone to West Virginia for the medical card. With UMWA if you had 20 years you could get a medical card. When he left Farmersville mine he did not have the card so he had to go elsewhere for it. Petitioner was on the Peabody panel so he went to West Virginia and got his medical card locked in before he returned home. The medical card pays for everything less a $20 co-pay. The pension he received was for his years with UMWA. He had not

yet applied for social security but would do so in June given his age. (T.29-31)

Petitioner agreed his attorney sent him to Dr. Suhail Istanbouly for an examination. He had also gone to Methodist Hospital located in Henderson, Kentucky, for testing at Respondent's counsel's request. Other than those two sites for testing, Petitioner had not seen anyone else regarding this case. (T.31-32)

Petitioner agreed he treated with Dr. Manson and Dr. Del Valle in Taylorville, Illinois. He testified that he had been honest with the doctors about his complaints. (T.32-33)

Petitioner agreed over the years, from time to time, he had x-rays, screening by NIOSH for Black Lung. He believed he had been told the x-ray results, but it had been a long time ago and he did not recall the results. He did not bring any letters to the hearing. (T.33)

Petitioner testified the tree trimming business is a very physical job. He stated he has a 60-foot bucket truck and you start trimming trees and as you go up, taking off limbs. Then you "chunk" it as you come back down and clean up with a woodchipper and backhoe. Petitioner testified he does not have a CDL and it is not required because the bucket truck is not that big or heavy. Petitioner testified the work requires quite a bit of lifting and carrying and that is why he has a backhoe. He testified some of the logs can weigh in the tons, but he does not personally lift those. He does not lift over 50 pounds. The time it takes to take down a tree depends on the size and situation. He stated some can be 2-3-day jobs. (T.33-36)

Petitioner testified he tries to walk regularly for exercise in the summer. He used to walk 2-3 miles, but he cannot walk that far anymore. He has a small dog that he does not walk. He stated he walks and does the tree service business. He no longer has hobbies. He did some woodworking, making small things like baby rockers as his specialty. In his shop he was doing a little bit of woodworking and he watches TV when not doing tree service. (T.36-37)

Medical Records

The medical records of Springfield Clinic (RX 4) show numerous visits beginning in 1994. On January 25, 1994, Petitioner's chest x-ray showed an essentially normal chest radiograph. During 1998, Petitioner returned regarding ear problems. At that visit, a respiratory exam revealed good air bilaterally and no adventitious sounds. No complaints related to breathing were noted. Petitioner was seen on April 22, 2004, for an evaluation of a right inguinal hernia. Physical examination of the chest revealed the lungs were clear to auscultation. The chest x-ray performed on that date showed no active cardiopulmonary disease. No complaints related to breathing or cough were noted.

On February 7, 2006, Petitioner complained of purulent productive deep cough associated with sore throat. Tremendous amount of nasopharyngitis and oropharyngitis was noted. The chest was noted as clear on examination. Petitioner returned on November 8, 2008, for an elevated blood pressure issue and complaining of light headedness. Physical examination of the chest revealed lungs were noted as clear to auscultation. No rales or wheezes were noted. No complaints related to breathing or cough were noted. (RX4)

On March 25, 2012, Petitioner returned complaining of a sore throat, headache, body ache, temperature, and fatigue. He was noted to have a productive cough of brown sputum. No complaints related to breathing were noted. (RX 4)

Petitioner was seen on July 6, 2012, complaining of choking and difficulty swallowing. The assessment was dysphagia. He returned on August 16, 2012 and underwent a chest exam revealing normal findings. A review of systems revealed no pulmonary symptoms.

On November 19, 2013, Petitioner complained of fever and aches. A productive cough with yellow sputum was noted. Petitioner denied chronic respiratory illness. No shortness of breath or chest discomfort was noted. It was noted Petitioner is a non-smoker. Lungs were noted as clear. Petitioner had multiple procedures over time regarding dysphagia. (RX 4)

Petitioner returned to the Springfield Clinic on July 29, 2014, complaining of dysphagia and choking. Petitioner denied shortness of breath, chest pain or chest tightness. Petitioner was diagnosed with GERD. Petitioner had a past history of bronchitis it was noted and never smoked. Respiratory exam revealed clear to auscultation bilaterally, no wheeze. No complaints related to breathing or cough were noted. An esophagogastroduodenoscopy was performed. (RX 5)

Petitioner was seen on October 25, 2014, complaining of headache, sinus drainage, sore throat, and a productive cough for 4 days with occasional colored sputum. Petitioner had reported then that several miners had similar symptoms. The record notes Petitioner has a history of sinus infections in the past. No history of asthma or allergies. Positive history of GERD; no other chronic illnesses. No breathing complaints were noted. (RX 4) A November 12, 2014, emergency room visit was noted regarding his back. No complaints related to breathing, cough were noted. (RX 4). Petitioner returned on December 29, 2014, for unrelated stomach issues. No complaints related to breathing or cough were noted. (RX 4).

On September 18, 2015, the Springfield Clinic medical records indicate Petitioner has a long history of GERD and dysphagia. An EGD was performed on that date which showed a tremendous amount of inflammation and scarring at the gastroesophageal junction. (RX 4) In 2016, Petitioner presented at Springfield Clinic regarding an eye issue. No complaints related to breathing or cough were noted. (RX 4) Petitioner returned on May 4, 2017 and completed a new patient questionnaire. He denied lung disease, asthma and shortness of breath.

He returned on November 2, 2018, for an EGD consult reporting problems swallowing and GERD. Physical exam of the chest revealed the lungs were clear to auscultation and percussion. Review of systems revealed no shortness of breath or cough. (RX 4) An operative report dated November 12, 2018, showed Petitioner underwent esophageal dilation. The 12/18/18 record notes a history of dysphagia. Petitioner's problems were listed as Barrett's esophagus, dysphagia, pre-op GI exam, hyperlipidemia, and GERD. No history of breathing complaints was noted. (RX 4)

Petitioner was seen on May 13, 2019, for EGD. He denied shortness of breath, dyspnea on exertion or proximal nocturnal dyspnea. His review of systems showed he had good exercise tolerance. Physical examination showed the lungs were clear to auscultation bilaterally without

any wheezing. (RX 4)

Petitioner underwent an x-ray examination on May 2, 2016, which was interpreted by Dr. Smith, a B-reader. His interpretation was mild interstitial fibrosis p/p, bilateral mid to lower zones involved, profusion 1/0. No chest wall plaques or calcifications. Simple CWP with small opacities, primary p, secondary p mid to lower zones involved bilaterally. The film quality was noted to be 1. (PX 2)

Spirometry was performed for Black Lung screening on October 4, 2016 and found to be within normal limits. (RX 3)

Testimony of Dr. Istanbouly

Dr. Istanbouly is a physician specializing in pulmonary and critical care medicine. He is board certified in internal medicine, pulmonary medicine and critical care medicine. He has been in practice in southern Illinois for 11 years. His practice is mixed between inpatient and outpatient. In the course of his practice, he has had numerous occasions to treat coal miners and former coal miners. The lung diseases he treats include emphysema, COPD, chronic bronchitis, asthma, CWP, and lung cancer patients. He is affiliated with numerous hospitals and holds privileges at many others in the area. (PX 1, p. 5-7)

Dr. Istanbouly examined Petitioner on August 30, 2016, at Petitioner's attorney's request. He authored a report of his findings of that exam and he identified RX 2 as a copy of his report. He testified he obtained a detailed history from Petitioner, including occupational history. He reviewed the x-ray and spirometry testing. He did a detailed physical exam before he made his conclusions. He noted Petitioner had been a coal miner for 33 years and worked underground. He noted Petitioner had no history of smoking. Petitioner had mentioned that he had a long history of intermittent occasional coughing triggered by strenuous activity or brisk walking. Petitioner reported the cough as mild to moderate in intensity and used to produce milky, mild dark black sputum. But at the time he saw Petitioner, it was clearing up. (PX 1, p.7-9)

Dr. Istanbouly testified the cough and data qualified as chronic bronchitis. He noted Petitioner reported he had the ability to walk 3 miles without breathing problems and had not noticed any decline in respiratory capacity in the prior 6 months. Petitioner had noted wheezing and runny nose on occasion and Petitioner had reported a history of GERD, but that was apparently now under control with medication. As to a runny nose, he testified Petitioner had postnasal drip which was perennial rather than seasonal. He stated wheezing indicated bronchospasm. Chronic bronchitis (cough) is a manifestation of bronchospasm as well, so there was a correlation. The sinus drip indicated inflammation of the nasal mucosa. The mucosa was the same lining affected when you have chronic bronchitis, except further into the bronchial area. (PX 1, p.9-10)

Dr. Istanbouly agreed Petitioner had pulmonary function testing performed and it was within normal range. The FEV1 was 3.65 liters, 144% predicted. The FVC was 4.72 liters, 112% predicted. The FEV1/FVC was 78%. Dr. Istanbouly testified the x-rays revealed mild interstitial changes bilaterally consistent with mild CWP. He stated the profusion, per the B-reader, Dr. Smith, was 1/0. He had decided whether it was positive or negative before he looked at Dr. Smith's report.

He does not use the same terms as a B-reader he stated. Dr. Istanbouly testified, within a reasonable degree of medical certainty, that Petitioner has chronic bronchitis. He stated the cause in this case, or "main culprit", was the long-term coal dust inhalation. (PX 1, p.10-12)

Dr. Istanbouly testified further that per Petitioner's occupational history, chest x-ray, and symptoms, he has CWP caused by long-term coal mine dust inhalation. Dr. Istanbouly testified the Petitioner had normal spirometry, but that is not uncommon, especially with early to mild cases of CWP. Chronic bronchitis is one of the chronic obstructive pulmonary diseases. With the normal pulmonary function test, it did qualify Petitioner to have early stage COPD, which he would put under CWP. (PX 1, p.12-13)

Dr. Istanbouly testified that in light of Petitioner's diagnoses of chronic bronchitis, CWP and COPD, Petitioner should have no further exposure to that environment as it would subject Petitioner to high risk of progressive lung damage. (PX 1, p.13-14) He testified it is medically advisable for Petitioner to permanently avoid further coal dust inhalation. (PX 1, p.14)

Dr. Istanbouly testified that after 33 years of coal dust exposure, a certain percentage of the coal dust Petitioner had inhaled will stay inside his lungs permanently. He agreed the weight of a coal miner's lungs can be accounted for by the trapped coal mine dust in his lungs but was unsure if it was 50% of the weight of the lungs. He agreed the trapped coal dust would be exposed to the lung tissue for the rest of his life. There is still the coal dust trapped in Petitioner's lungs and that, though not active current exposure, could still lead to further lung damage. Lung function and lung damage keeps getting worse despite quitting the coal mining career. (PX 1, p.14-15)

Dr. Istanbouly testified that the most accurate way to diagnose CWP would be pathologic versus radiologic. He agreed that the combination of a positive x-ray for CWP along with sufficient exposure to cause CWP, was sufficient for him to diagnose CWP. He testified a negative x-ray would not necessarily rule out the existence of CWP. He would agree a recent study showed that 50% of long-term coal miners were found to have CWP on autopsy, even though it was not found on x-ray during their life. He stated the pattern of progression of CWP may vary. He agreed over decades, miners have died from advanced CWP. At some point they would have had CWP seen at a pathogenic level. It possibly would have progressed to 1/0 level, early radiologic significant CWP and possibly continued to progress to be at the life-threatening stage and eventually took their life. (PX 1, p.15-18)

On cross examination, Dr. Istanbouly agreed he had seen Petitioner one time at Petitioner's attorney's request. He does 5-7 such exams per month, for state Black Lung claims, always at the request of claimants' attorneys. He has been doing that for about 7 years. (PX 1, p.18.)

Dr. Istanbouly agreed Petitioner relayed no past history of respiratory disease. Petitioner had relayed an occasional cough that had only been triggered by strenuous activity or brisk walking, not dust, smoke or fumes. He agreed currently the cough produced little sputum. Petitioner had reported no significant dyspnea. Petitioner had suffered from a runny nose on a perennial basis; it could be associated with cough. He agreed Petitioner was not taking any medications for breathing and he had no history of ever taking breathing medications. Petitioner was taking medication for GERD and that condition is associated with cough. (PX 1, p.18-20)

Dr. Istanbouly testified that he had reviewed medical records regarding Petitioner. He reviewed the exam and narrative report of Dr. Smith, a B-reader, before he examined Petitioner. He agreed Petitioner's O2 saturation was normal at 96%. He agreed Petitioner's chest exam revealed no adventitious sounds, including wheeze. Dr. Istanbouly agreed there was no sign of disease on the physical examination of Petitioner's chest stating, "It was within normal range." He agreed Petitioner's Forced Vital Capacity, evaluated by spirometry, was 112% of predicted which was normal. He did not perform lung volumes on Petitioner which, he agreed, would be the best test. He agreed Petitioner's Forced Expiratory Volume was 114% of predicted, which was normal. He agreed FEV1/FVC ratio was 78%, which was greater than predicted, and was normal. This ruled out obstruction. (PX 1, p.20-22)

Dr. Istanbouly testified he subscribes to the GOLD (Global Initiative on Obstructive Lung Disease) standard to diagnose COPD. He agreed the GOLD standard states that spirometry is required to make a clinical diagnosis of COPD. He stated spirometry ruled out COPD per PFT criteria, but not on a clinical basis. On a clinical basis, the diagnosis was made per the history indicating long-term coal dust inhalation and a long history of intermittent coughing and wheezing. He stated it was early stage because the spirometry test was normal. The clinical diagnosis was based on what Petitioner told him, Petitioner's occupational history and the x-ray findings. (PX 1, p.22-24)

Dr. Istanbouly testified if one comes to him as a coal miner, he does not necessarily have a higher suspicion of the presence of COPD. He stated he does not diagnose COPD frequently, but he does know they have a risk factor for COPD. Dr. Istanbouly agreed Petitioner did not report he left work due to respiratory problems or symptoms. He further agreed Petitioner did not tell him he had difficulty performing the duties of his last job in the mine. (PX1, p.24)

Dr. Istanbouly testified he does not possess the standard ILO films used to interpret chest x-rays for Black Lung. He agreed he was neither an A-reader nor B-reader. Dr. Istanbouly agreed when he interprets films for Black Lung, he classifies them as early, moderate or severe and he classified Petitioner's films as early Black Lung. He agreed with Dr. Smith who noted the only opacities present in Petitioner's lungs were in the mid and lower lung zones. Dr. Istanbouly agreed he did not provide profusion ratings for the films and he could not say whether this film had a 1/0 or 0/1 profusion. (PX 1, p.24-25)

Dr. Istanbouly agreed his sole diagnosis listed in his report was coal worker's pneumoconiosis, early stage. (PX 1, p.26)

Testimony of Dr. Meyer

Dr. Meyer is a board-certified radiologist and certified B-reader, through 12/31/18. He graduated from the University of Virginia in 1983 with a BS in chemical engineering, graduated with honors, the highest distinction. He attended Washington University School of Medicine in St. Louis and obtained his M.D. in 1987; he is a member of Alpha Omega Alpha the medical honor fraternity. He did an internship from July 1987 to June 1988 at Tripler Army Medical Center in Honolulu and he completed his residency in diagnostic radiology at Walter Reed Army Medical

Center in D.C. (RX 1, p.4-8)

Dr. Meyer was Chief Resident at Walter Reed from 1991 to 1992. He became board certified in radiology and has been certified since 1992. He became Chief of Thoracic Imaging at Madigan Medical Center in Tacoma in 1992. There he was in charge of all imaging procedures related to the chest, which included chest x-rays, CT scans and all biopsy procedures. He was also in charge of training Army residents in thoracic imaging and preparing them for their boards. He remained at Madigan until 1996 when he became an Assistant Professor of Radiology at the University of Maryland Medical System in Baltimore. (RX 1, p.8-10)

Dr. Meyer testified that at the University of Maryland, the subjects were fairly diverse in chest imaging, including interpretation of conventional chest radiograph, interpretation of films in the intensive care unit, high resolution CT of the chest, and some subspecialty in high resolution CT, like small airways. He was also the primary interventional chest radiologist, teaching residents how to perform biopsy procedures. There, he often reviewed articles and manuscripts for various professional journals for possible publication. He served and continues to serve on several journals as a manuscript reviewer with his expertise in thoracic imaging. (RX 1, p.10-11)

Dr. Meyer became an Associate Professor of Radiology at University Hospital in Cincinnati in 1998. His area of subspecialty was thoracic imaging. He taught interventional chest radiology, interpretation of chest x-rays, CT scans, and high-resolution CT scans. He had received the Spitz award for excellence in teaching residents. (RX 1, p.11-12)

Dr. Meyer became an Associate Professor of Radiology at Indiana University Hospital in Indianapolis in 2000. He also taught at Indiana University. He returned to Cincinnati in 2003 and for a time was in private practice and then joined University Hospital. (RX 1, p.12-14)

Dr. Meyer remained there until 2010 when he accepted his current position as Vice Chair of Finance and Business Development and Professor of Diagnostic Radiology at the University of Wisconsin Hospital in Madison. He had been contacted by Wisconsin University and recruited to join them in his current position. He works in clinical radiology about 50% of the time, interpreting x-rays and CT scans 2-3 times per week. About 20% of his time is academic and he also performs administrative work. He reviews 200-250 chest x-rays per week and 20-40 chest CT scans per week. (RX 1, p.14-18)

Dr. Meyer agreed when he was in Cincinnati in 2008-2009, he was recognized with the Benjamin Felson Medical Student Teaching award, an honor for teaching medical students. He noted Dr. Felson was considered the father of chest radiology and one of the originators of the B-reading classification system. (RX 1, p.19-20)

Dr. Meyer stated B-reading is an epidemiologic evaluation of the chest x-ray. He stated there is a very specific form developed to evaluate the chest x-ray for the presence or absence of occupational lung disease. They describe the quality, limitations of the x-ray and the classifications of the abnormalities. They describe any small nodular opacities or linear opacities and based on size and appearance of the small opacities, assign them a letter score. He stated P, Q, R are nodular opacities; S, T, U are linear opacities. They describe the distribution of the findings. Different

pneumoconiosis are seen in different regions of the lung. He stated it was important as CWP is typically predominantly an upper zone process and other idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. It is very important to show small opacities and their distribution on the form. (RX 1, p.23-24)

Dr. Meyer stated the last component of the lung involvement piece for small opacities is the extent of lung involvement, the so-called profusion. That is the most difficult component of the classification system for most radiologists and varies from 0/0 (normal) to 3/+ which is the most abnormal. The large opacities are separate categories for pleural disease. There are also miscellaneous findings like atherosclerotic calcifications (granulomas). (RX 1, p.24-25)

Dr. Meyer indicated the P, Q, R opacities are for progression of size. The S, T, U opacities are for progression of the linear. He agreed the film must be graded first. He indicated on a regular camera it is easy to over or under expose and the same was true for analog x-ray. If underexposed, they are extremely white and have a tendency to artificially increase the look of opacities in the lung parenchymal. If overexposed, it is too dark and this can artificially make the small opacities disappear. If there is mottle on the x-ray, the film may look grainy and that can simulate small opacities. When underexposed it tends to accentuate pulmonary vasculature and you have to be careful not to mistake that for a nodule or opacity. If a film is graded as UR, or unreadable, they do not complete the rest of the form. (RX 1, p.26-29)

Dr. Meyer indicated it was important to identify opacities as specific opacity types. Silicosis and CWP are characteristically small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, are described by small linear or small irregular opacities. The B-reader describes primary and secondary, to decide which the predominant shape is. Often they are mixed. You can see 2 different sizes of round opacities. Sometimes a primary could be Q and secondary R. (RX 1, p.29-30)

Dr. Meyer testified the distribution of dust exposure depends on the particles involved. Small particles like silica and coal are upper zone processes. He stated they expect CWP and silicosis early in disease to be upper zone predominant. (RX 1, p.30-31)

Dr. Meyer agreed profusion is the hardest definition. It is trying to define density of the small opacities in the lung. If normal, it is profusion "0". The most abnormal would be 3. Threshold implies mild amount of disease. A "2" would be medium profusion and "3", severe involvement of the lung. He indicated 0/1 he would say normal, but may be a little abnormal. He indicated a 1/0 would be borderline between abnormal and normal. (RX 1, p.31-32)

Dr. Meyer stated it was important to be able to recognize simple variations between normal and abnormal. Radiologists who are used to chest x-rays can compensate for over or underexposure on x-rays. (RX 1, p.36-37)

Dr. Meyer reviewed the digital PA chest radiograph from Harrisburg Medical Center, dated 5/2/16. He stated the film was quality 1. He stated the film revealed the lungs were clear. There were no small or large opacities. There were some mild degenerative changes in the thoracic spine, but the exam was essentially normal. Dr. Meyer testified there was no evidence of CWP on

Petitioner's chest x-ray. (RX 1, p.41-42)

On cross examination, Dr. Meyer agreed that, notwithstanding Petitioner having a negative reading, he could still have CWP. He agreed CT scans have not been accepted by NIOSH for purposes of B-reading. They do not need contrast CT scan to evaluate interstitial lung disease like CWP. (RX 1, p.42-45)

Dr. Meyer agreed most B-readers prefer not to know anything about the patient, they just want to look at the films for anything consistent with abnormalities of CWP. He assumes when asked to interpret a chest x-ray for B-reading that there was appropriate exposure history and he looks for evidence of CWP. He agreed two B-readers can disagree whether they're seeing small opacities or not. He stated distinguishing between 1/0 and 0/1 opacities is one of the most difficult processes for a B-reader. He stated the issue is making sure the person interpreting the exam has ample experience reading them and can sort out what is a normal variation. Dr. Meyer testified you have to recognize the spectrum of normal. He spent his career as a chest radiologist looking at chest x-rays all day to establish a spectrum of normal. (RX 1, p.47-50)

Dr. Meyer agreed it is possible for one to appreciate the existence of CWP on a CT scan that may have been missed on an analog x-ray. CT scans have a high opportunity to identify abnormalities. He stated symptomatic disease should be evidenced on analog chest x-rays. Dr. Meyer testified pulmonary function testing would not change his opinion of what he read on x-ray, nor would patient complaints of shortness of breath. He testified he treats the x-rays as a piece of hard data and symptoms can vary by individual. (RX 1, p.51-52)

Dr. Meyer agreed long-time coal miners are going to come out with some dust deposits in the lungs; the majority will not have changes in the lungs that qualify for CWP. He stated the manifestation of CWP is based on the body's ability to clear the dust. Dr. Meyer stated there is actually very little inflammation reaction to pure coal dust. He stated what occurs is there is a buildup of dust over time to the point, depending on level of exposure, the amount of dust can be as much as half the total weight of the lungs. A large component is the dust that fails to clear. He stated the presence of coal macule is the pathologic lesion that defines CWP. The coal macule is a conglomerate of white blood cells with the coal dust in it. It may be emphysema on the edges. He stated there may be some mild fibrosis around the coal macule. He stated the lung reacts to coal dust because the dust is typically fairly inert. He stated you see an immunologic response and collection of the white blood cells, some associated with mild fibrosis, adjacent to the macule. (RX 1, p.53-56)

Dr. Meyer agreed whether measurable or not there would be some change in the function of the lung. He agreed that with mixed dust exposure (i.e., coal and silica dust), there may be more toxicity to lung tissue. The macules then may be different shapes, sizes and locations in the lungs. It is called coal workers pneumoconiosis (not coal pneumoconiosis) as there are mixed dusts in the mine, not just coal dust. (RX 1, p.56-57)

Dr. Meyer agreed the macule of CWP is a permanent abnormality. It can progress depending on the individual macule or more dust. He testified that to his knowledge, there is no medication to stop or reverse the progression; however, it may improve by removing the exposure.

He agreed CWP can be considered a chronic progressive disease in some coal miners, and it can progress after leaving the mine exposure. Dr. Meyer agreed if a miner had CWP in their lifetime, they probably had it at some level when they left the mine. He agreed a susceptible host can progress to progressive massive fibrosis; it can impair pulmonary function. It can progress to involve the heart with cor pulmonale, which can be life threatening if significant enough. (RX 1, p.57-59)

Dr. Meyer agreed x-rays can be interpreted as demonstrating findings of emphysema or COPD. On chest x-ray they often look for secondary signs of emphysema, often directly seeing the lung destruction on CT scan. A finding of COPD or emphysema can be consistent with hyperinflation. Often the diaphragm will flatten. CWP may first appear radiographically and then become more significant, affecting pulmonary function. (RX 1, p.59-61)

Dr. Meyer agreed CWP is a chronic, slowly progressive disease; not acute, sudden onset. Not all coal miners develop a tissue reaction to the dust. Some may be sensitive and have extreme reaction; it depends on composition of the dust itself. Dr. Meyer agreed it was possible for a miner to work 30-40 years and develop radiographically significant CWP after they leave the mine. (RX 1, p.73-76) Dr. Meyer agreed it is possible for a miner to have CWP determined by pathology and not appreciated radiographically. It is possible a miner can have differing radiograph B-reader opinions and found CWP on autopsy/biopsy. He stated it shows radiograph has limitations relative to looking at tissue samples. (RX 1, p.86-87)

On re-direct examination, Dr. Meyer agreed pathologic basis would mean looking at lung tissue under a microscope. Dr. Meyer stated typically simple CWP will not progress once exposure ceases. He testified that Petitioner has neither progressive massive fibrosis nor cor pulmonale. He testified the films did not show evidence of bulla or hyperinflation. (RX 1, p.89-90)

Dr. Meyer's 11/9/16 B-reader report noted film quality 1. He noted no radiographic findings of CWP. He disagreed with Dr. Smith's interpretation. (Dep. Exhibit 3)

Testimony of Dr. Castle

Dr. Castle is a pulmonologist. He is board certified in internal medicine and his subspecialty is in pulmonary disease. He graduated from West Virginia School of Medicine in 1969. He completed his first-year internship at Charlotte Memorial Hospital and later attended University of Florida for internal medicine. He completed his residency in 1972. He joined the Navy Reserve in medical school and deferred entry to the military until finishing school. He went in the Navy as a pulmonary physician at Naval Regional Medical Center in Philadelphia and then Roanoke and opened his practice in 1977. He had been in practice there for 30 years. (RX 2, p.4-7)

Dr. Castle stated his practice is limited to pulmonary disease and chest disease, including critical care medicine, and he later became involved in sleep medicine. He saw usual things like COPD, asthma, pneumonia, interstitial lung disease, and occupational lung disease. He had some patients who had CWP, some simple, some complicated CWP. The biggest group of occupational disease cases were asbestos exposure cases from a railroad engine company. He had older patients

who had significant exposure to asbestos and many had asbestosis. He also did pharmaceutical studies over the years and taught medical students regarding lung disease. (RX 2, p.7-10)

Dr. Castle stopped seeing patients in 2007 and remains semi-retired. He continues with occupational lung disease to the present time. Dr. Castle testified that he became a B-reader in 1985 was certified to 6/30/17. (RX 2, p.10-14) He started doing medicolegal work around 1985 as a minor part of his practice. He performs a complete physical with chest x-ray, spirometry, blood gas, and EKG, sometimes CT scans also. The majority of the cases are federal cases. He may perform 5-6 forensic exams per month. He has performed exams for the Department of Labor. (RX 2, p.14-19) Dr. Castle indicated his forensic reviews of records and films was done primarily for coal mines or employers rather than employees.

Dr. Castle reviewed medical records and films regarding Petitioner at Respondent's counsel's request. He reviewed records of the Springfield Clinic. He reviewed a radiographic report of 1/25/94, indicating the lungs were clear of infiltrates, negative x-ray. He noted there were a number of office notes pertaining to the cardiorespiratory system. There were records of unrelated conditions. He noted records reflected that Petitioner did not smoke and had worked in coal mining and tree trimming. Dr. Castle noted the x-ray report of 4/22/04 that noted no cardiopulmonary abnormality and lungs clear with no mass or effusion. Petitioner had other treatments for lacerations and respiratory infections. The records dated 3/25/12, noted Petitioner was seen for sudden onset of sore throat, headache, body ache, and cough producing brown sputum; lungs were noted clear. Assessment was bronchitis. Dr. Castle stated the 8/6/14 record noted various issues and there was minimal infiltrate or atelectasis in lung bases, more left. He noted various records indicating pain and symptoms of choking and Petitioner had an esophagus issue with dilation. (RX 2, p.21-25)

Dr. Castle reviewed the medical records of Dr. Istanbouly who examined Petitioner on 8/30/16. Those records noted Petitioner had worked in coal mines, underground, for 33 years to 3/15. Petitioner's last job in the coal mine was noted as roof bolting machine operator. Petitioner never smoked. Petitioner's wife smoked, but outside. He had no history of asthma. Petitioner reported cough occasionally and his cough was triggered by strenuous activity or brisk walking. Petitioner had some sputum but recently started to clear. He had nocturnal dyspnea but denied exertional dyspnea. The record noted Petitioner was able to walk three miles without breathing problems and he had not noticed any decline of respiratory capacity in the prior six months. Petitioner did wheeze occasionally. He had frequent heartburn and Petitioner had a normal spirometry test. (RX 2, p.25-26)

Dr. Castle noted Dr. Istanbouly had reviewed a chest x-ray of 5/2/16 and said it indicated interstitial changes bilaterally consistent with simple CWP, profusion 1/0, per Dr. Smith a B-reader. The chest exam revealed normal respiratory effort and lungs clear to auscultation. Dr. Castle noted Dr. Istanbouly's assessment was CWP early stage related to long history of coal dust exposure and had noted spirometry was valid and normal. The record included Dr. Smith's report that indicated p/p opacities in mid to lower lung zones with 1/0 profusion. Diffusing capacity was noted as valid, normal. (RX 2, p.26-28)

Dr. Castle reviewed the records of Dr. Meyer. This included the report of Dr. Meyer on

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the 5/2/16 film indicating no parenchymal abnormalities consistent with CWP, lung fields clear. Dr. Castle testified that cough is not considered to be an objective determinant of pulmonary impairment. He stated chronic bronchitis is a chronic cough productive of sputum, on most days, for 3 consecutive months for 2 years per the definition of the American Thoracic Society. Dr. Castle testified that chronic bronchitis does not appear anywhere in the treatment records he reviewed. (RX 2, p.28)

Dr. Castle agreed Petitioner was diagnosed with GERD and dysphasia with choking. He stated that is associated with a cough, particularly with GERD. Dr. Castle stated it does not have to get up into the lungs or laryngeal area, but it can stimulate the lower esophagus and cause a cough. The same would be true with sinus congestion and drainage. Dr. Castle testified that pulmonary function testing was normal. He stated there was no evidence of obstructive or restriction whatsoever. Dr. Castle agreed the gold standard on obstructive lung disease requires FEV1/FVC to be below 70% to make a clinical diagnosis of COPD. He questioned how you can have chronic obstructive pulmonary disease if there is no obstruction. (RX 2, p.28-30)

Dr. Castle testified, within a reasonable degree of medical certainty, that Petitioner does not have COPD. That diagnosis was nowhere in treating records. He agreed diffusing capacity was 103%, which is normal. Dr. Castle testified there was no evidence of impairment in gas exchange. (RX 2, p.30)

Dr. Castle is familiar with the AMA Guidelines to the Evaluation of Impairment, 6th edition. He indicated that applying table 5-4 of the guides to results obtained in pulmonary function, Petitioner would fall in a class "0". Dr. Castle testified that, in his opinion, Petitioner was capable of heavy manual labor. (RX 2, p.30-31)

Dr. Castle agreed he stated that he had reviewed the chest x-ray, dated 5/2/16, on CD-ROM from Harrisburg Medical Center. Dr. Castle stated that in his opinion there was no parenchymal abnormalities consistent with CWP. In his opinion Petitioner did not have radiographic evidence indicating the presence of CWP or any coal mine dust induced lung disease. (RX 2, p.31-34)

Dr. Castle testified there was no lung pathology in the medical he reviewed. He found no clinical significance to sub radiographic pneumoconiosis stating, "The term simply means that you have an individual that may have pathological evidence of pneumoconiosis but the x-ray doesn't show anything." He stated there was no clinical significance of any scarring in the lung based on Petitioner's diffusion capacity. (RX 2, p.34-35)

Dr. Castle stated it was unlikely for simple CWP to progress once exposure has ceased. (RX 2, p.35-36).

Dr. Castle testified that, within a reasonable degree of medical certainty, based on a thorough review of all the data, including medical history, physical exams, radiographic evaluation, physiologic testing, hospital records and other data, that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust while working in the mining industry. Dr. Castle stated Petitioner certainly did work in the coal mining environment for a sufficient amount of time to have developed CWP, if he was a

susceptible host. (RX 2, p.36-37)

Dr. Castle testified that Petitioner did not demonstrate any consistent physical findings indicating the presence of interstitial pulmonary process. He did not have any consistent findings of rales, crackles or crepitation. Dr. Castle stated the majority of radiographic reports indicated no findings of CWP. Dr. Castle stated only Dr. Smith noted the minimal changes consistent with CWP and had described the film showing p type opacities in middle and lower lung zones with 1/0 profusion. He stated that would seem to mean Dr. Smith also considered the film as negative. (RX 2, p.37)

Dr. Castle stated Dr. Meyer, a radiologist and B-reader, found no parenchymal abnormalities consistent with CWP. Dr. Castle stated that he had personally reviewed the same film and, in his opinion, within a reasonable degree of medical certainty, there were no changes indicating presence of CWP. He had only reviewed one spirometry test and that study was entirely normal. His function was exactly what would be expected for his age, height, race, and sex. Dr. Castle stated Petitioner's diffusion capacity was also entirely normal. Dr. Castle opined Petitioner had no evidence of respiratory impairment occurring as a result of his occupational exposure to coal mine dust. In his opinion, Petitioner does not suffer from any pulmonary disease or impairment occurring as result of his occupational coal mining exposure during his employment. (RX 2, p.37-39)

Dr. Castle agreed no matter what he saw or did not see on an x-ray, it did not rule out the possibility Petitioner could have CWP pathologically or on autopsy. He agreed recent studies indicate as many as 50%+ of autopsies performed on long term coal miners found pathology significant for CWP that was not appreciated on x-ray exams during their life. (RX 2, p.44-45)

Dr. Castle agreed if a person has CWP they would have impairment of the function of the lung at the site of scarring and emphysema. He stated the scar tissue can restrict or obstruct causing measurable pulmonary impairment. He testified the onset is slow and insidious. (RX 2, T.50)

On re-direct examination, Dr. Castle agreed he had opportunity to review records of Dr. Istanbouly. He agreed Dr. Istanbouly took a history of Petitioner regarding cough and sputum and he did take that into consideration as to whether Petitioner suffered from chronic bronchitis. Dr. Castle testified that Petitioner did not suffer from asthma, hyper airways disease, or emphysema. Dr. Castle testified none of the B-readers interpreted Petitioner's films to find evidence of emphysema. (RX 2, p.80-81)

Dr. Castle testified that Petitioner does not suffer from progressive massive fibrosis nor cor pulmonale. He stated it would be extremely unlikely Petitioner would develop those conditions.

Conclusions of Law

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 999 N.E.2d 382, 389, 376 Ill. Dec. 499, 506 (5th Dist. 2013); citing *Anderson v. Industrial Comm'n*, 321 Ill. App.

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3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Where conflicting medical testimony is presented, it is for the Commission to determine which testimony is to be accepted. *Martin v. Industrial Comm'n*, 91 Ill. 2d 288, 294, 437 N.E.2d 650, 63 Ill. Dec. 1 (1982).

§1(d) of the Occupational Diseases Act ("ODA") states, in pertinent part:

> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists... If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

§1(e) of the ODA states, in pertinent part:

> "Disablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body.

§ 1(f) of the ODA states, in pertinent part:

> No compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease.

In the present case, the experts differed as to whether chest x-rays performed on 5/2/16 proved the presence of coal worker's pneumoconiosis ("CWP"). While it is true that Dr. Meyer agreed that a negative x-ray does not necessarily rule out CWP, that is not the same as saying that Petitioner in fact suffers from the disease. Instead, Petitioner bears the burden of proving by a preponderance of the credible evidence all the elements of his claim, including the threshold consideration of whether he has an occupational disease, including CWP.

Furthermore, while it is true that Petitioner worked as a coal miner for 33 years, the provisions set forth in Section 1(d) of the Occupational Diseases Act – wherein a rebuttable presumption exists that a coal miner's pneumoconiosis arose out of such employment if he or she was employed for 10 years or more in one or more coal mines -- does not apply, by a plain reading of the statute, unless and until it is shown that the claimant has CWP.

The evidence shows Petitioner last worked in the mine on 5/25/15. Petitioner is a non-smoker, but his wife does smoke, albeit outside. Petitioner testified that in about the early 1990's he started noticing breathing problems. At that time, he testified, he noticed he was not able to walk too far; he had a lack of stamina. Petitioner testified when he went back into the mine his breathing problems started to get worse. Petitioner testified from that time on, his breathing problems had gotten a little worse. (T.23-24)

Petitioner testified he does not take any medications for breathing. He testified he liked to walk and exercise, but he could no longer go as far, and he tried to stay away from stairs. He could not say other things in life it affected. Petitioner was able to cut big trees and clean up with no problem before and now he leaves the big trees for his son stating he did not have energy as he did before. However, a review of the record of primary care physician Dr. Manson who retired and then Dr. Del Valle during the period leading up to Petitioner's last day of work in the mines (5/25/15), reveals no references to any breathing complaints, other than to several episodes of GERD and having dilation of his throat several times because of swallowing issues.

It is noted there were some complaints with headaches, sinus drainage, sore throat, and a productive cough on a few occasions, as well as some fatigue. However, in 1998, his respiratory exam was normal. An exam in 2008 found no rales or wheeze and Petitioner presented no complaints related to breathing or cough. No history of any allergies or asthma was noted. Petitioner denied any chronic respiratory illness, there was no shortness of breath, and no chest discomfort in November 2013. Other than complaints of sinus drainage and productive cough for 4 days in October 2014, there were no complaints noted regarding breathing issues or cough through December 18, 2018. A November 6, 2018 visit regarding his esophageal condition exam noted as lungs clear to auscultation bilaterally, non-labored respiration.

The Commission finds significant that Petitioner stopped working for Respondent after a mine fire that closed the mine. Petitioner did not cease mining work because of any respiratory issues but he ceased because he was laid off. Petitioner opted to pursue his tree trimming business rather than seek further mining work.

Petitioner also claims that his breathing has gotten worse since he left Respondent's employ and that it affects his daily activities. The medical records fail to reflect any ongoing complaints relative to a diagnosis of CWP or any other chronic respiratory ailments during this period, and, in fact, much of his current complaints voiced at Arbitration could just as easily be explained by the limitations with fatigue, his chronic esophageal condition and GERD.

Dr. Istanbouly, a pulmonology and critical care doctor, not a B-reader, testified Petitioner's chest exam was within normal range. His Forced Vital Capacity, tested by spirometry, was normal. Petitioner's Forced Expiratory Volume was likewise normal. His FEV1/FVC ratio was also normal, ruling out obstruction. Dr. Istanbouly did not perform lung volumes testing on Petitioner which he admitted would be the best test. He indicated Petitioner's cough and the data he reviewed qualified as chronic bronchitis. Dr. Istanbouly indicated it was not uncommon with early CWP to have normal spirometry and he also indicated the pulmonary function test qualified Petitioner to have early stage COPD, related to long-term coal dust inhalation. He opined Petitioner had CWP,

early stage, but, as he was not a B-reader, he stated profusion was 1/0 per the B-reading of Dr. Smith (5/20/15). Dr. Istanbouly and Dr. Smith both believed Petitioner had simple CWP.

Dr. Smith, board certified radiologist and B-reader, interpreted the May 2, 2016 chest x-ray as positive for pneumoconiosis, profusion 1/0 with p/p opacities in bilateral mid to lower zones involved. No chest wall plaques or calcifications were noted.

In contrast, Dr. Meyer and Dr. Castle both read the 5/2/16 chest x-ray as normal, finding no evidence of CWP or other pulmonary condition. They had also noted that with CWP, the opacities would be found in the upper lung zones which was not the case here. Also, a profusion finding of 1/0 is considered open for interpretation by equally qualified B-readers. Petitioner had had normal chest exams over the years and did not report breathing issues from 1998 through 2018 at Springfield Clinic.

Furthermore, Petitioner has failed to prove he suffers from any obstructive respiratory disease given his normal pulmonary function test with which all doctors agree.

Therefore, upon a thorough review of the evidence, including the deposition testimony of the Drs. Meyer, Castle and Istanbouly, the Commission finds the opinions of Respondent's §12 physicians, Drs. Meyer and Castle, to be more persuasive and worthy of greater weight than those offered by Petitioner's §12 physicians, Drs. Istanbouly and Smith.

Based on the above, and the record taken as a whole, particularly the opinions of Drs. Meyer and Castle, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffers from an occupational disease that arose out of and in the course of his employment on or about 3/25/15, and failed to prove that said condition was causally related to his employment.

The Commission further notes that even if Petitioner had proven the presence of an occupational disease, he failed to prove disablement within two years of the date of last exposure, as required by the Act. More to the point, while Dr. Istanbouly agreed that patients with CWP should avoid the coal mining environment, there is no evidence that any physician specifically restricted Petitioner from returning to work due to an occupational disease. In fact, Petitioner chose not to seek other mining employment and operated his own tree trimming service. Indeed, Dr. Castle opined that from a respiratory standpoint, Petitioner was capable of heavy manual labor. Thus, disablement has not been shown to have occurred within two years of the date of last exposure, and as a result Petitioner's claim would likewise be denied.

Accordingly, Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated 5/5/20 is vacated and Petitioner's claim for compensation is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

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DATED: APR 5 - 2021
o-2/9/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BASIL DALE
Employee/Petitioner

Case# **16WC016172**

PATTON MINING LLC
Employer/Respondent

21IWCC0155

On 5/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
JULIE A WEBB
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

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STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

DALE BASIL
Employee/Petitioner

Case # **16** WC **16172**

v.

Consolidated cases_____

PATTON MINING, LLC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **February 20, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Disease/Exposure, Causation and Sections 1(d)-f of the Occupational Disease Act**

FINDINGS

On **03/25/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$57,551.52**; the average weekly wage was **$1,106.76**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**N/A** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

- The respondent shall pay the petitioner the sum of $664.05/week for a further period of 30 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 6% MAW.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/29/20
Date

MAY 5 - 2020

STATEMENT OF FACTS

Petitioner, Dale Basil of Kincaid Illinois was 61 years old at the date of arbitration with the birth date of June 18, 1958. He is married to Debra Basil. He graduated high school from South Fork Community high school in Kincaid Illinois. After high school he took a couple years of schooling at Land of Lincoln College to become an arborist. He did not obtain a certificate or a degree. He worked 33 years in the coalmine industry all of which were underground. In addition to coal dust he was regularly exposed to and breathed silica dust and roof bolting glue fumes.

His last day of employment in the coalmines was March 25, 2015. He was working for Patton Mining at the Deer Run mine in Hillsboro, Illinois. He was 58 years old with the job classification of a shuttle car operator. He was exposed to coal dust on that day. That was his last day of employment because there was a fire in the mine and the mine was shut down. Since leaving the mine he has continued employment running his own tree trimming service that is called Midland Tree Service. Petitioner indicated that he had made as much as $50,000 a year in the tree trimming business but now is down to under $20,000 a year. The reason for this is that he just does not have the stamina that he once did to do the job. That is the only job he has had since he left the mine.

Petitioner began his mining career in 1977 working in Peabody Coal Company. This mine is located in Pawnee, Illinois. He was hired in as a supply man. Petitioner describes this job as taking supplies to all of the sections of the mine. He then became a recovery man. A recovery man takes the equipment and things that are left in a section that has been mined out and move it to another section of the mine. Petitioner describes this as a very dusty job. When you recover the belt line all the coal dust that was left on the line falls off it when you flip the belt. Petitioner did this job for about six or seven years. Petitioner also roof bolted at Peabody. Roof bolting is when you drill into the top of the mine until you hit one foot of rock then a bolt is placed in and anchored to help secure the ceiling. Petitioner next worked at Crown III and that would have been around 2000 or 2001. He was hired in as a shuttle car operator. A shuttle car operator operates the shuttle that takes the coal from the face of the mine and runs it back to the belt and dumps it off. Petitioner described how the coal dust coming off the tail of the continuous miner would come right into the ram car and create quite a bit of dust. Petitioner did this job for four or five years. Petitioner then began hauling rock dust in the ram car and taking it to all the sections in the mine. While he would haul the dust there would be paddles on it that would sling the dust everywhere so that it would cover the mine. This was done to prevent fires. Petitioner did this job for around four or five years. Petitioner also roof bolted for Crown III. He described the process as being somewhat different than the previous roof bolting, that they used glue pins to secure the bolts into the roof. Petitioner described these glue pins breaking and admitting a very strong odor that at times would take your breath away. Petitioner then went out and took a job at a coalmine in West Virginia for approximately a year. This mine was called Federal Number 2, which was close to Morgantown, West Virginia. Petitioner roof bolted for this mine and did this for approximately twelve months before moving back to Illinois. Petitioner took a job at Patton Mining in Hillsboro he was hired back into the shuttle car operator and stayed in that position until he retired.

Petitioner first started noticing breathing problems back in the early 1990's. He noticed that he just wasn't able to walk as far and his stamina wasn't the same as it use to be. From the first time he noticed breathing problems in the mine until he left the mine his breathing seemed to get worse. Since the time he left mining up to the time of this trail his breathing has continued to get a little worse. He does not take any breathing medication Petitioner describes not being able to walk as far for exercise as he once did. He testified that he can walk probably about a mile before becoming short of breath. He also testified that he tries to stay away from climbing stairs Petitioner also described how his breathing has slowed down his tree trimming business.

Petitioner's family doctor is now Dr. DelValle. It was Dr. Manson before his retirement. Petitioner was never a smoker. In addition to his breathing difficulties Petitioner has described how he has had to have his throat stretched several times because he has trouble swallowing. He also suffers from acid reflux. Petitioner also described breaking his jaw in the 1980s and having hernia surgery in the 1990s. He also takes a cholesterol pill.

Deposition of Dr. Suhail Istanbouly

At Petitioner's attorney request Petitioner was examined by Dr. Suhail Istanbouly Dr. Istanbouly is board certified in internal medicine, pulmonary medicine, and critical care medicine. (rx1, p5) He is currently affiliated with SIH hospitals including Herrin Hospital, Memorial Hospital of Carbondale, and St. Joseph Hospital (rx1, p6) Petitioner gave a history of no smoking. He mentioned a long history of intermittent occasional coughing triggered by strenuous activities or brisk walking and according to Petitioner, the cough is mild to moderate in intensity and used to be productive of milk duct – mild dark black sputum, but recently, close to the time that he was seen by Dr. Istanbouly it was clearing up. (rx1, p8-9) Petitioner also mentioned a history of occasional wheezing. He does have history of acid reflux disease, but apparently that was well controlled by taking pantoprazole. Petitioner mentioned a history of runny nose, postnasal drip, which was perennial rather than seasonal. (rx1, p9-10) Dr. Istanbouly testified that Petitioner's wheezing indicates bronchospasm. And chronic bronchitis, which means chronic cough, is a manifestation of bronchospasm as well. (rx1, p10) Petitioner's pulmonary function testing is within a normal range. FEV1 365 liters, 114% predicted. FVC 4.72 liters, 112% predicted. FEV1/FVC 78% (rx1, p10-11) Dr. Istanbouly testified that the x-ray he reviewed did reveal mild interstitial changes bilaterally consistent with simple coal worker's pneumoconiosis. Dr. Istanbouly testified to reasonable degree of medical certainty that Petitioner has chronic bronchitis with the main culprit being long-term coal dust inhalation. (rx1, p11) Dr. Istanbouly went on to testify to a reasonable degree of medical certainty that he feels Petitioner has coal worker's pneumoconiosis, which was caused by long-term coal dust inhalation. (rx1, p12) In light of his diagnosis of chronic bronchitis and coal worker's pneumoconiosis Dr. Istanbouly testified that the Petitioner could no longer have any further exposure to the environment of a coal mine without endangering his health. (rx1, p13) That would be permanent medical preclusion (rx1, p14)

Dr. Henry Smith

At Petitioners request, B-Reader, Dr. Henry Smith, who reviewed a grade one chest x-ray dated May 2, 2016. Dr. Smith found an interstitial fibrosis of classification p/p, bilateral mid to lower zones involved, or a profusion 1/0. There are no chest wall plaques or calcifications. His impression was finding a simple coal-worker's pneumoconiosis with small opacities, primary p, secondary p, mid to lower zones involved bilaterally, profusion 1/0.

Charges of Dr. Castle

Petitioners exhibit 3 shows the charges for Dr. Castle are $3,850.00.

Deposition of Dr. Castle

At Respondents request Dr. James Castle did a records review of Petitioners case. Dr. Castle testified within a reasonable degree of medical certainty, the Petitioner has no evidence of any respiratory impairment occurring as a result of his occupational exposure to coal mine dust in the mining industry. (rx1, p38-39) On cross examination Dr. Castle acknowledge that recent studies have shown that as many as 50% of long-term coal miners have pathological coal workers pneumoconiosis that was not appreciated by a radiographic study during their life. (rx1, p45) Dr. Castle admitted that to have the most accurate assessment of a patient he would always want to do his own examination if possible. (rx1, p47) Coal workers pneumoconiosis is basically a trapped coal dust in a part of the lung, which ends up wrapped in scar tissue and can be accompanied by emphysema around it. (rx1, p49) Dr. Castle confirmed that the affected tissues there of the scar and the emphysema, that tissue itself cannot perform the function of healthy normal lung tissue. (rx1, p49-50) Therefore by definition of a person who has coal worker's pneumoconiosis, they would have an impairment in the function of the lung at the sights of the scarring and emphysema. (rx1, p50) Dr. Castle also answered affirmatively to the fact that a person can have radiographically significant coal worker's pneumoconiosis yet have normal spirometry, normal pulmonary function in all areas, normal blood gases, normal physical exam of the chest, and maybe even no complaints. (rx1, p50-51) If they do have complaints shortness of breath is the most likely one. (rx1, p51) A person can have mixed dust pneumoconiosis from coal mining, which could include silica. Silica is toxic to the surrounding lung tissues. (rx1, p55) Dr. Castle testified that the coal dust that is trapped within the lungs is always going to be there for the rest of the coal miners life. (rx1, p55-56) The only treatment for coal worker's pneumoconiosis is to remove the miner from any further exposure. (rx1, p56) Dr. Castle agreed that the scarring of coal worker's pneumoconiosis does not return to normal healthy lung tissue. (rx1, p57)

Deposition of Dr. Christopher Meyer

At Respondents request Dr. Christopher A. Meyer read a PA Chest Radiograph from Harrisburg Medical Center dated May 2, 2016. (rx1, p41) Dr. Meyer testified that it was a quality 1. The lungs were clear. There was no small or large opacities. There was some mild degenerative changes of the thoracic spine. The examination was essentially normal. (rx1, p41-42) Dr. Meyer did not find any pneumoconiosis. (rx1, p42) On Cross-examination Dr. Meyer

testified that to his knowledge there is no medicine or anything modern medical science can do to stop or reverse the progression of coal workers pneumoconiosis. Removing the worker from the exposure is the best response. (rx1, p57) Dr. Meyer testified affirmatively under cross-examination that coal worker's pneumoconiosis can be considered a progressive chronic disease that can progress even after the coal miner leaves the exposure. (rx1, p58) If a person has coal workers pneumoconiosis at any time in their life it would be true that they probably had coal worker's pneumoconiosis at some level when they left the coal mine. (rx1, p58) Dr. Meyer testified that it is true that when a coal worker has coal workers pneumoconiosis the rate of progression would vary from miner to miner rather than be exactly the same in all miners. (rx1, p62) The silica in the coal mine generally comes from the rock that's associated or intermixed with the coal that's being mined. (rx1, p63-64) It is Dr. Meyer's understanding that certain occupations in the mines such as roof bolting or drilling or shooting where you disturb the coal and where there may be rock involvement those occupations in the coal mine would tend have greater silica exposure. (rx1, p64) Dr. Meyer agreed that it would be fair to say that a miner who has 1/0 pneumoconiosis probably won't even know he has it, probably won't complain to his doctors until he gets a B-reading that tells him he has it, he probably just won't know. (rx1, p66) It is possible that a coal miner would find the first manifestations of coal workers pneumoconiosis toward the end of his career or even the first year after. (rx1, p75-76) Dr. Meyer agreed that there are studies that show autopsy as much as 50 percent of coal miners are found to have abnormalities of coal workers pneumoconiosis when they might not have been apparent radiographically during their life. (rx1, p88)

Medical records of Methodist Hospital

This is a pulmonary function report dated 10/4/2016.

Springfield Clinic records

Medical records of Springfield Clinic dated June 23, 2017. He has history of bronchitis. (rx1, p50) On an office note dated October 25, 2014, under chief complaint patient presents with headaches, sinus drainage, sore throat, productive cough x 4 days. Under subjective Dale is a 56 year old coal miner who presents to Prompt Care with complaints of a headache and sinus congestion and drainage, sore throat and cough, occasional productive colored sputum. He has had symptoms for about 4 days. … Dale has had a history of sinus infections in the past. (rx1, p108) Office note dated March 25, 2012, under subjective a 53 year old white male presents with sudden onset of illness a day and a half ago. He has had sore throat, headache, body aches. He has had cough productive of brown sputum. He has mild sinus congestion. He is not a smoker he does wok in a coalmine. (rx1, p156) An office note dated February 7, 2006, patient presents complaining of a purulent productive deep cough associated with a sore throat. (rx1,p186)

Updated Springfield Clinic records

Medical records of Springfield Clinic dated November 7, 2019, these medical records pertain to an esophagogastroduodenoscopy procedure that was done on May 13, 2019.

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), which was caused by his exposures as a coal miner. He worked as a coal miner for 33 years, all of which were underground. He is a lifelong never smoker of cigarettes. The Arbitrator found Petitioner to be a candid and credible witness.

At Petitioner's request, he was examined by Dr. Istanbouly on 8/30/16. Dr. Istanbouly reported that Petitioner coughs occasionally and intermittently, and that his cough is triggered by strenuous activity or walking. It is mild to moderate in intensity. It was formerly productive of mild, dark black sputum but recently had begun to clear up. Dr. Istanbouly reported that Petitioner denied significant exertional dyspnea, and is able to walk three miles without breathing problems. Petitioner wheezes occasionally and complains of a runny nose and postnasal drip, which is perennial rather than seasonal. Petitioner's spirometry was within the range of normal. Dr. Istanbouly reviewed Petitioner's chest x-ray, and found it to reveal mild interstitial changes bilaterally, consist with simple CWP. He reported that the same film was read as 1/0 by Dr. Smith. Dr. Istanbouly found that Petitioner's long-term coal dust exposure is a significant contributor to his current respiratory symptoms of intermittent and exertional-related cough, wheezing and occasional nocturnal dyspnea. From a medical standpoint, he advised Petitioner to avoid any further coal dust exposure to prevent progression of his pneumoconiosis. The Arbitrator assigns significant weight to Dr. Istanbouly's complete examination and conclusions.

Dr. Castle did not examine Petitioner, but performed a records review at the request of Respondent. The evidence reviewed consisted of medical records from the Springfield Clinic and evidence developed for this claim as well as the reports of Dr. Istanbouly, Dr. Meyer, and a diffusion capacity study performed at Methodist Hospital on 10/4/16 at Respondent's request. Dr. Castle also read Petitioner's chest x-ray of 5/2/16. The Arbitrator notes that the Springfield Clinic records apparently contained three radiographic studies; two chest x-rays from 1/25/94 and one from 4/22/04, and one CT scan of the abdomen and pelvis dated 8/6/14. While the x-rays from 1994 and 2004 were not apparently read by any expert witness, Petitioner continued to work as an underground coal miner for 21 years following the 1994 x-ray and 11 years following the 2004 x-ray. As such, they are given no weight in resolving the question of whether Petitioner suffered from CWP by 2017, within two years of his date of last exposure. It is not clear whether or not Dr. Castle reviewed the CT scan of the abdomen and pelvis of 2014; however, the Arbitrator notes that the report in the medical records indicates there were abnormalities in the lung bases. Neither Dr. Meyer nor Dr. Castle noted any abnormalities in the lower lungs; however, both Dr. Smith and Dr. Istanbouly did find abnormities which they assigned to CWP. The Arbitrator considers this significant in assigning greater weight to the readings of Dr. Smith and Dr. Istanbouly than to those of Dr. Meyer and Dr. Castle. In addition, while Dr. Castle did not find that Petitioner suffered from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust, he did report that Petitioner's 33 years of coal

mining was sufficient exposure to cause CWP in a susceptible host. He also confirmed that Petitioner is a lifelong never smoker.

Dr. Castle reported that Dr. Smith found minimal changes of p-type opacities in the middle and lower lung zones in a profusion of 1/0. He surmised that Dr. Smith's description of the CWP abnormalities meant that Dr. Smith also considered that the x-ray may be negative. He further confirmed that Dr. Meyer found no parenchymal abnormalities consistent with pneumoconiosis. The Arbitrator believes that a competent reader who finds an x-ray to be positive at the threshold level of 1/0 also considered the possibility that it might not be negative. The Arbitrator also believes that a competent reader who finds an x-ray to be negative would consider that it could possibly be positive before arriving at a final conclusion that it is negative. Such would only be prudent and thorough in making such determination of positive versus negative. Regarding the testimony or reporting of either Dr. Meyer or Dr. Castle that they disagree with contrary conclusions of other witnesses to be self-serving and unnecessary. The conflicting reports speak for themselves.

Dr. Castle also reported that Petitioner's pulmonary function testing was within the range of normal; however, the Arbitrator notes that it is the unrebutted testimony that with simple CWP, it is expected that the pulmonary function testing will be normal, as will the physical examination of the chest. It is also not necessary that there be respiratory complaints for there to be CWP.

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of treatment records and the other medical data developed by the parties for this claim. Dr. Castle, who performed the records review, has been retired for a number of years, and his practice consists of records reviews and depositions such as he did here. He did not examine, speak to, nor see Petitioner. In addition, Respondent sent Petitioner to Methodist Hospital in Kentucky for a diffusing capacity measurement on 3-24-16, but did not have any other pulmonary function testing administered. The Arbitrator considers the fact that Respondent limited the scope of the evidence it developed to be significant.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. He cited studies that show that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. And there are older studies that show a much higher incidence than that. The Arbitrator notes that Petitioner worked as an underground coal miner for 33 years. This qualifies him as a long-term coal miner. Based on the studies cited by Dr. Meyer, having no medical evidence at all, it could still be likely that Petitioner could have CWP. The Arbitrator is not speculating that Petitioner would be one of the miners found to have

CWP if an autopsy were taken at his death. However, this evidence regarding the nature of CWP and the likelihood of its existence is a significant fact to be considered along with the rest of the evidence regarding CWP, particularly since it was offered by Respondent's witness.

According to Dr. Meyer, it is possible for a miner to work 30 to 40 years in a mine, develop radiographically-significant CWP, but not have it manifest itself until the last year or even the first year after he leaves the mine. Further, when a miner has CWP that progresses, the rate of that progression could vary from miner to miner, as could the exact shape, size, and location of the macule. These things could also vary within an individual miner.

Dr. Meyer defined the difference between a positive x-ray and a negative x-ray when looking for CWP. He testified that if he has read an x-ray to be positive and the miner has a sufficient history of exposure to cause CWP, such would warrant a diagnosis of CWP; however, if he finds the x-ray to be negative, such could never rule out the possibility that the miner has CWP. Further, regarding the nature of pathologic CWP, he testified that the abnormalities found pathologically, which were not found radiographically, would have the same constitution as the macules or nodules that would be apparent on x-ray, just perhaps smaller. They would still be subject to potential progression as any other CWP abnormality might be. He added that not all miners have the same reaction to coal mine dust.

In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He compared it to prostate cancer or colon cancer: most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lungs of a miner can be as much as one-half the total weight of the lung itself. He said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle did not disagree with Dr. Meyer.

The Arbitrator notes that while none of the above-mentioned evidence may determine the outcome by themselves, each adds weight to Petitioner's case and is significant. In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. Petitioner has met his burden.

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court.

Issue (L): What is the nature and extent of the injury?

The Arbitrator finds Petitioner to be disabled to the extent of 6% MAW. In arriving at this conclusion, the following factors were taken into consideration:

(i) Impairment rating. Petitioner's pulmonary function testing was within the range of normal. As per the universal testimony, such does not rule out CWP. No weight is given to this factor.

(ii) Occupation of Injured Employee. The Arbitrator notes that coal mining involves daily exposure to coal mine dust, and that the unrebutted testimony of Petitioner was that he was also regularly exposed to silica dust. The clear preponderance of the evidence, as well as a ruling of the Appellate Court establish that when a miner has CWP, he has an impairment in the function of his lungs whether such can be measured or not. It also establishes that there is no safe level of coal mine exposure for a miner who has been diagnosed with CWP. Based on the evidence in this case, the coal mine environment contains many exposures in addition to just coal dust, which present a significant risk to the miner's pulmonary health. The Arbitrator finds this to be significant.

(iii) Petitioner's age. Petitioner was in his mid-50's when he ended his coal mine employment with Respondent. The Arbitrator considers it significant that he was not precluded from further coal mine work because of his age.

(iv) Petitioner's future earning capacity. Petitioner's determination to end his coal mine employment has caused a reduction of his earning capacity. By the universal testimony, a miner with CWP is medically precluded from further coal mine work, and such was the only type work Petitioner engaged in since his early 20's. The Arbitrator finds this to be significant.

(v) Evidence of disability. The Arbitrator concludes that Petitioner's CWP provides sufficient evidence of disability to result in the award of 6% person as a whole as described above.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Ratfield,

Petitioner,

21IWCC0156

vs.

NO. 17WC002176

Ventra Plastics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical, permanent disability, temporary disability being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2021

Stephen J. Mathis

Thomas Tyrrell

SJM/sj
o-3/3/21
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0156

RATFIELD, JERRY
Employee/Petitioner

Case# **17WC002176**

VENTRA PLASTICS
Employer/Respondent

On 6/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0522 THOMAS MAMER & HAUGHEY LLP
ERIC CHOVANEC
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

21IWCC0156

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD
Employee/Petitioner

v.

VENTRA PLASTICS
Employer/Respondent

Case # **17** WC **2176**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **1/14/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0156

FINDINGS

On **2/2/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,968.00**; the average weekly wage was $**634.00**.

On the date of accident, Petitioner was **57** years of age, ***single*** with dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act. Respondent is entitled to credit for all bills paid by its group health care plan.

ORDER

Arbitrator finds that Petitioner did not sustain and accident that arose out of the course of his employment for the Respondent. All compensation is hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Jason C. Myatt

Signature of Arbitrator

6/10/19
Date

JUN 14 2019

STATE OF ILLINOIS)
)ss
COUNTY OF WINNEBAGO)

21IWCC0156

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD, Employee/Petitioner)
)
v.)
)
VENTRA PLASTICS, Employer/Respondent)

Case # 17-WC-2176

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified he began working for Respondent in 2012, having worked there for approximately 4-5 years as a full-time material handler and forklift driver, working 10-15 hours a day, 4 days a week. He testified his duties included operating a standing forklift, pulling boxes of parts from bins in the stock room and transporting the boxed parts to the assembly line. The parts were for the assembly of bumpers and cars for Chrysler. Petitioner testified he loaded the boxes onto a pallet, transported them to the assembly line and then removed the boxes from the pallet on the forklift and placed them into racks on the assembly line. The boxes weighed about 60 pounds. On the assembly line, the materials were placed waist height or slightly higher than waist height. He testified that he did that all day long as the assembly line constantly needed more material to continue. (Trans. 6-9)

Petitioner's application for adjustment of claim alleges a work accident that took place on 2/2/2016. Petitioner testified that at some point he started having problems doing his job. He woke up one morning with a sore back and he don't know what had happened. He didn't remember the exact date. (Id.,12).

Petitioner was asked by his attorney, "Were you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id., 14).

Petitioner testified that he went to work and talked to his supervisor, Jason Funkman, about it and was told to try to work through the day. He continued working that day, then had two days off work, and sought treatment the day after his days off.

Petitioner testified he did have some back treatment prior to 2016. In 2013, he had undergone physical therapy and returned to work without restrictions as of May 2013. Petitioner testified that he did not experience any back problems between May of 2013 when he returned to work without restrictions and February of 2016. He was able to do his regular job, on a full-time basis, without pain or limitations.

On 2/6/16, Petitioner presented to his primary care provider, Dr. Shobha Iyengar, who noted a history of pain in the right lateral lower back and right anterior area groin area for the last 2 weeks. The doctor further noted Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night". (PX.1, p. 22). Dr. Iyengar referred Petitioner to Dr. Borchard. (Id.).

On 2/16/16, Dr. Iyengar noted Petitioner's complaints of persistent lower back pain. X-ray was significant for wedge compression deformity and osteopenia in L4 with and L5 S1 lumbar disc changes and facet arthritis.

(Id., p. 20). Dr. Iyengar noted she would try to obtain MRI results from "a few years ago" . (Id.) . Petitioner was referred to Dr. Borchard. (Id.)

On 3/23/16 Petitioner presented to Dr. Robin Borchard at OrthoIllinois with a history of back pain since around January of 2016. (PX.2) Additionally, the doctor noted Petitioner has had lower back pain for the last couple of years. Dr. Borchard reviewed a 2013 MRI and recommended Petitioner obtain further imaging. (*Id.).*

On 3/30/2016 Petitioner presented for MRI which was reviewed by Dr. Borchardt on 4/6, 2016 at which time the doctor noted a large disk herniation at L4-5 that was a "new finding" not present on the 2013 MRI. (Px. 2)

Dr. Borchard recommended an epidural steroid injection which Petitioner underwent approximately a week a later. (*Id.).* Petitioner returned to see Dr. Borchard on 4/20/16 reporting that although his pain level had improved, he was still experiencing symptoms. (*Id.).* At this point, Petitioner was working without restrictions. Petitioner underwent one additional epidural steroid injection on 6/1/2016. (*Id.).*

On 8/9/16 Dr. Richard Broderick at OthoIllinois noted Petitioner presented with a history of low back pain beginning in 2/16. Petitioner reported low back, bilateral radiating pain aggravated by any movement. He was taking Gabapentin, Mobic/Meloxicam, and Norco. (Id.).

Dr. Broderick reviewed lumbar MRI from 2013, noting herniated nucleus pulposus ("HNP") right L/5 S1 with degenerative disc disease ("DDD") at L4/5. (Id., 144). The doctor compared the 2013 MRI to one taken on 3/30/2016 noting, a large herniation at L4/5 with central stenosis. (Id., p. 145). Regarding the mechanism of injury, the doctor noted "unknown". It was noted Petitioner was still working without restrictions for Respondent and had undergone 2 injections by Dr. Mackenzie, the last injection had improved his pain according to the medical records. (*Id.).* Dr. Broderick recommended a trial of physical therapy ("PT") noting Petitioner's past PT had been very effective. (Id). If PT proved to be ineffective surgery would be considered. (Id.).

On 8/18/16, Petitioner presented for initial evaluation at Belvidere Physical Therapy with Tim Seppelt PT, DPT, who noted a history of low back pain beginning in February of 2016. (PX 2, p. 184) Petitioner reported being a "stand up forklift driver at Ventra Plastics in Belvedere, IL." The therapist further noted Petitioner "is required to stand for 2 hours at a time without a rest break. His work duties include lifting 10-20# from floor to waist frequently and pushing/pulling 40-50 pounds occasionally." (Id.). Petitioner reportedly could not perform his work duties without pain. He noted 5/10 resting low back pain although at the end of his work shift, his pain increased to 8/10. (Id.). Petitioner reported his pain was aggravated by standing, walking, ascending stairs, and work activities." (Id.). Petitioner reportedly was unable to stand or walk for more than 15 minutes without pain. A one month, three times per week PT plan was proposed. (Id.).

On 10/4/16, Dr. Broderick again reviewed MRI imaging of Petitioner's lumbar back noting "a large central herniated disc with superior extrusion at the L4-5 level causing sever central stenosis and bilateral lateral recess stenosis." (Id., p. 139). Dr. Broderick recommended a microscectomy left L4/5, "possibly bilateral". (Id.).

Following some additional conservative treatment, Petitioner underwent surgery consisting of right L4-5 hemilaminotomy, microdiscectomy, and foramenotomy on 10/20/2016. (Px. 2). Petitioner ceased working for Respondent as of the date of surgery. Petitioner testified that the surgery did decrease his pain, but did not resolve it. He underwent physical therapy postoperatively from 12/20/2016 through 12/30/2016. On December 28, 2016, it was noted he had slipped going up the steps and was experiencing left hip pain. (Px. 2). He went to the emergency room on January 2, 2017 due to low back and left leg symptoms after slipping and catching himself on the railing of the stairs. (Px. 4). Dr. Broderick recommended additional injections on January 18, 2017 due to Petitioner's ongoing symptoms, which were provided on January 24, 2017, February 7, 2017, and February 14, 2017. (Px. 2). Due to ongoing symptoms, another surgery was recommended. (Px. 2).

On March 16, 2017, Petitioner underwent a lumbar fusion from L4-S1. (Px. 2). Petitioner testified that the fusion relieved some of the numbness in his leg. Physical therapy was started on June 9, 2017 and performed through July 21, 2017. On September 19, 2017, Dr. Broderick recommended a Functional Capacity Evaluation to assess his ability to return to work. (Px. 2).

On 10/16/2017 Petitioner saw Dr. Broderick reporting pain and numbness. Petitioner noted a history of being on the floor "cleaning some tile on his hands and knees and had difficulty getting back up." (*Id.)*.

On 10/19/17 Petitioner saw Dr. Broderick who told him to follow up in approximately 6 months. (*Id.)*. On 4/3/2018 Dr. Broderick noted Petitioner was ambulating without difficulty. An x-ray showed a stable fusion. (*Id.)*. Petitioner was told to return in one year. No discussion of work restrictions are contained in this note. (*Id.)*.

Petitioner consulted with Dr. Jeffrey Coe, board certified in occupational medicine who rendered an expert opinion in this case. Dr. Coe is a Pediatrician and practices occupational medicine. Petitioner saw Dr. Coe on 10/10/2017. (PX.5) It was Dr. Coe's opinion that a causal relationship existed between Petitioner's repetitive work activities and his current lower back and lower extremity symptoms. Dr. Coe noted the repetitive strain injuries were a factor aggravating or accelerating pre-existent degenerative disc disease and degenerative arthritis and causing break down of the L4-5 disc. (*Id.)*. It was Dr. Coe's understanding that Petitioner was a forklift operator who used a forklift described as poorly sprung. (*Id.)*. Petitioner reported he frequently lifted weights of 50 pounds or more and occasionally lifted 100- pound weights while working for Ventra Plastics. Petitioner noted his job was fast paced and required twisting and bending. (*Id.)*.

Dr. Coe agreed that it was a possibility that Petitioner's back condition may have simply progressed to this point as a result of age and not in connection to his work for Respondent. (*Id.)*.

Respondent sent Petitioner to Dr. Carl Graf for an Independent Medical Examination on June 13, 2018 and he testified via deposition on October 15, 2018. (RX. 1) Dr. Graf is a board certified Orthopedic Spinal Surgeon.

Dr. Graf noted Petitioner claimed a single traumatic accident on February 2, 2016 when he was moving some empty totes by hand, indicating they had to be done in order to get them for the standup forklift. Petitioner noted that he twisted and felt a stabbing pain in the low back on that date. Petitioner denied any previous back pain to Dr. Graf. (*Id.)*.

It was Dr. Graf's opinion that Petitioner's current condition of ill-being was not causally related to his alleged work accident. Dr. Graf opined that while Petitioner claimed and described a specific injury to him, the medical records did not reflect that specific injury. (*Id.)*. Dr. Graf stated that until Dr. Coe's independent medical examination, there was no comment regarding a work-related injury in any of the medical records. In addition, Dr. Graf opined that further there was no evidence of a repetitive injury, according to the medical records, and no scientific basis for any repetitive type injury causing this lumbar disk herniation. Dr. Graf stated that, regardless of causation, he believed Petitioner was at MMI as he had essentially been released by his treating physicians and wasn't undergoing any care at that time. Lastly, Dr. Graf stated that based upon his physical examination, he believed Petitioner could return to work with no restrictions. (*Id.)*.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner has failed to sustain his burden with respect to the issues of accident and causal connection.

According to Petitioner's application for adjustment of claim. He is alleging a work accident that took place on 2/2/2016. During his testimony Petitioner's description regarding his injury was extremely brief:

Q. At some point you started having problems doing the job?
A. Yes.
Q. What kind of problems were you having?
A. I woke up in the morning, and my back was really sore, and I don't know what had happened.
Q. Do you recall around when that was?
A. No, I don't remember the exact date. (Trans.12).

Additionally, he testified that he wasn't having any problems doing his actual job. (*Id.).* Petitioner was asked by his attorney, "[W]ere you having any problems doing your actual job?" to which he replied "No". (Id.,13-14).

Petitioner was also asked by his attorney "[W]ere you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id.,14). That is all the information Petitioner provided during his testimony to support his alleged claim.

Petitioner gave the Arbitrator insufficient information during his testimony as to what caused his back condition.

Dr. Iyengar's records from the alleged accident date, 2/6/2016 note a history of right lower back and groin pain for 2 weeks. It was noted that Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night", however, Petitioner does not report he believes his pain was caused by his work duties. (PX1

A careful review of Petitioner's medical records shows that Petitioner routinely denied any known injury. Every report from Dr. Borchard and Dr. Broderick state that Petitioner's pain began in January or February of 2016 with no known injury. (PX2,3)

Contrary to the history reported in his treating medical records, Petitioner told Respondent's IME doctor that he did have a specific and concrete accident on February 2, 2016 which is the alleged accident date from Petitioner's Application for Adjustment of Claim. (RX1) This statement to Dr. Graf puts Petitioner's testimony in doubt as he told two different stories about how his back condition and its relation to work. During this visit, Dr. Graf notes Petitioner denied that he had experienced a previous back condition which was clearly false based upon his treatment with Dr. Borchardt prior to the accident. (RX3)

During all of Petitioner's treatment, including two different surgeries over the course of two and half years, he repeatedly denies any work injury which is documented in note after note. Petitioner doesn't obtain a causal opinion from either of his treating doctors and instead, consults Dr. Coe, a pediatrician and occupational medicine doctor. He then sees Dr. Graf at the request of the Respondent and reports a specific injury on the alleged accident date.

While Petitioner described the duties of his job, he gave the Arbitrator scant information as to how those duties bothered his back or whether anything he did at work actually gave him discomfort while he was working. Petitioner testified that he woke up in the morning and his back was sore and he had no idea of when that happened. (*Id.).*

The evidence contained in the record with respect to an alleged accident is inconsistent and unreliable. The Arbitrator finds Petitioner has failed to sustain his burden with respect to this issue.

Assuming Petitioner did prevail on the issue of accident, the Arbitrator would find that he failed to prove his current condition of ill-being was causally related to his alleged work injury, adopting the opinion of Dr. Graf.

In conclusion, all claims for compensation are denied based upon both a failure to prove a compensable accident and failure to prove his current condition was causally related to the alleged accident.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the arbitrator's decision issue J. is herby denied.

K. Is Petitioner entitled to any prospective medical care?

Based upon the arbitrator's decision issue K. is hereby denied.

L. What temporary benefits are in dispute?

Based upon the arbitrator's decision issue L. is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IVETTE PEREZ RODRIGUEZ,

Petitioner,

21IWCC0157

vs.

NO: 18 WC 17917 18 WC 17792

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitioner for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

On June 10, 2018 Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right hand and thumb with a manifestation date of April 16, 2018. On June 15, 2018 Petitioner filed an application for benefits asserting that she sustained injury to her left thumb on November 13, 2017 that occurred while carrying GPS equipment. The matters were consolidated for trial.

Petitioner had been employed by IDOT as a land surveyor for 18 eighteen years and is 53 years of age. She testified that in her work she utilizes a device known as a controller. This is a GPS device attached to a pole which combine to weigh 10-15 lbs. and is carried from one

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location to another over the course of her workday. Petitioner uses both hands to type and rotates her wrists continually while recording data which measure roads, buildings, sidewalks and trees on the controller.

On November 13, 2017 Petitioner consulted Dr. Michael Birman for symptoms of numbness, tingling and pain in both hands. Dr. Birman diagnosed Petitioner with left carpal tunnel syndrome, trigger finger in the left thumb and right de Quervain's tenosynovitis. Dr. Birman administered a steroid injection in Petitioner's left thumb.

Petitioner returned to Dr. Birman in follow up on December 20, 2017 at which time a recommendation was made for surgery on Petitioner's left hand. On April 16, 2018 Petitioner underwent a bilateral EMG of the upper extremities which revealed moderate to severe bilateral median neuropathies at the wrist. The left wrist was more symptomatic. Petitioner elected to proceed with surgery. Throughout this time Petitioner continued to work full duty.

On May 1, 2018 Dr. Birman performed a left carpal tunnel release and left trigger finger release. Post-operatively Petitioner had work restrictions which included no forceful grip and no lifting, pushing or pulling. On June 12, 2018 Petitioner had surgery on her right hand which included trigger thumb release, carpal tunnel release, and first extensor tunnel release. Petitioner was off work and undergoing occupational therapy. She returned to full-duty work on August 27, 2018 and was discharged from care by Dr. Birman in September 2018.

Petitioner testified that she continues to experience occasional numbness and pain in both thumbs which she treats with Tylenol. She also experiences a loss of hand strength overall which is more pronounced on the right.

Dr. Birman, Petitioner's treating physician authored a report on August 5, 2019 which was received in evidence (PX4) which expressed the opinion that her described work activities "could have" aggravated the condition in her hands. He notes that an EMG performed on April 16, 2018 which was diagnostic for bilateral carpal tunnel syndrome. He additionally diagnosed right and left trigger thumbs, right de Quervain's tenosynovitis, and right and left thumb carpometacarpal joint arthritis.

In his report Dr. Birman comments that Petitioner's description of her work activities which include forceful and sustained use of her thumbs could be aggravating factors in her symptomatology. Petitioner's testimony at hearing describes work activities that would support causal connection.

Respondent retained Dr. Andrew Zelby as a Section 12 expert who examined Petitioner on May 22, 2019. Dr. Zelby characterized the EMG study as "equivocal" and did not believe that her subjective complaints could be ascribed to any kind of neurological condition of her neck or upper extremities. He maintained that Petitioner had undergone bilateral carpal tunnel releases

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and had "essentially normal motor and sensory exams of both hands" and failed to demonstrate causal connection. The Commission finds it notable that Dr. Zelby did not offer any opinion concerning Petitioner's de Quervain's tenosynovitis or trigger fingers.

The Arbitrator denied Petitioner's claims on both hands finding that the medical opinion on causal connection stated by Dr. Birman was equivocal and ambiguous. He found the opinions expressed by Dr. Zelby to be persuasive. The Commission views the evidence differently and finds that the causation opinion expressed by Dr. Birman concerning Petitioner's condition of ill-being in her right and left thumbs supports the claim. Petitioner has met her burden of proof and the Commission hereby reverses the Arbitrator's Decision on the causal connection concerning injury to Petitioner's thumbs and affirms all else.

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as he considered the issue of nature and extent moot. The Commission having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner 30% loss of the use of the right thumb and 30% loss of the use of the left thumb.

(i) Impairment rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of the Injured Employee:
(iii) Petitioner's Age:
(iv) Petitioner's Future Earning Capacity:
(v) Evidence of Disability:

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards 30% loss of the use of the right thumb and 30% loss of the use of the left thumb for Petitioner's bilateral hand condition.

For the foregoing reasons the Commission reverses the Decision of the Arbitrator filed on January 28, 2020 in claim numbers 18 WC 17792 and 18 WC 17917 with regard to the condition of ill being in Petitioner's right and left thumbs and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is reversed in part for the reasons stated above, as to the causal

21IWCC0157

connection of the condition of ill-being in Petitioner's right and left thumbs and is affirmed in all else.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 17 weeks, commencing May 1, 2018 through August 27, 2018, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses detailed in Petitioner's Exhibits 1 & 2, namely the bill from Alexian Brothers Medical Center totaling $11,685.43, and Hand to Shoulder Medical Associates totaling $4,696.00, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for amounts paid on behalf of Petitioner on account of said accidental injuries under its group health plan pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8 (e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the right thumb. Respondent shall also pay Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the left thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

DATED: APR 6 - 2021
SJM/msb
D: 2-26-21
44

Stephen J. Mathis
Stephen Mathis

Marc Parker
Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs. NO: 12 WC 25446

Elgin Police Department and
City of Elgin,

21IWCC0158

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0158

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **12WC025446**
15WC021342

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0158

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0158

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **12** WC **25446**

Consolidated cases: **15 WC 21342**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **December 17, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,516.20**; the average weekly wage was $**1,586.85**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BLOOD ON DECEMBER 17, 2011, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 – 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 15 WC 21342 (DOA: August 12, 2012). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Rick Demierre testified that he has worked for Respondent Elgin Police Department for 18 years. He is currently a sergeant and supervisor of the Community Initiative Division which coordinates community events for officers to attend.

On December 17, 2011, he was working as a patrol police officer in the gang crime unit. He was wearing plain clothes. He and three other officers responded to a male subject with a weapon on E. Chicago Street. The subject was in the middle of the roadway, covered in blood, and pretty much naked. The subject was aggressive and resisted arrest. The officers took him to the ground as he struggled for several minutes. Petitioner was exposed to a significant amount of blood on his hands, arms, and legs while restraining the subject. Petitioner had no open cuts or sores. Petitioner completed an employee's injury report stating he was exposed to a large amount of blood on his legs and hands. The subject's name was Marvin Finklea (PX 2). Petitioner testified that the subject died about a week after December 17, 2011. Petitioner did not know if Respondent tested him for HIV or Hepatitis. Respondent completed an exposure report documenting a December 17, 2017 exposure to blood on intact skin. Petitioner was wearing leather gloves and blue jeans as protective barriers. He removed the leather gloves and blue jeans, and placed them in a bio hazard bag at the police department jail (PX 3).

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). He reported that he was involved with an individual who was extremely bloody. He was wearing gloves at that time, but he got some blood on his pants and on his wrist areas just proximal to the gloves. He had no open areas at the time. He had no symptoms since the exposure. Physical examination noted no physical findings. The handwritten exam notes small healing abrasions on his wrists which were not there when exposed. The impression was body fluid exposure 15 days ago. Blood was drawn for testing for hepatitis B, C, and HIV. Petitioner could continue with regular work. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination. Petitioner testified he believes he was vaccinated for Hepatitis B. He does not recall if he had or was vaccinated for Hepatitis A.

Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner testified that he had an additional exposure to the saliva of an infant, as more fully detailed in the decision in the consolidated case 15 WC 21342 decided in conjunction with this matter.

Petitioner underwent additional blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner

appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr. John J. Koehler, performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on December 17, 2011 when he was required to restrain a subject. Petitioner admits he suffered no physical injury in doing so, but came in contact with the subject's blood. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to blood from the subject on December 17, 2011. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. Petitioner presented no evidence that the subject tested positive for a blood borne disease such as HIV or Hepatitis. He does not know if the subject had an infectious disease.

Petitioner's blood tests performed at Sherman Health on January 11, 2012, February 6, 2012, August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding

Hepatitis C testing. Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the blood exposure on December 17, 2011. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of December 17, 2011.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), our supreme court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related incident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any documented exposure and the negative blood testing, the

Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to blood on December 17, 2011.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the December 17, 2011 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs.

NO: 15 WC 21342

21IWCC0159

Elgin Police Department and
City of Elgin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0159

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **15WC021342**

12WC025446

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0159

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0159

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **15** WC **21342**

Consolidated cases: **12 WC 25446**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **August 12, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,149.99**; the average weekly wage was $**1,618.25**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BODILY FLUIDS ON AUGUST 12, 2012, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 - 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 12 WC 25446 (DOA: December 17, 2011). A single transcript was prepared although the Arbitrator is entering separate decisions.

is currently a sergeant and supervisor of the Community Initiative Division which coordinated community events for officers to attend.

On December 17, 2011, Petitioner was involved in an incident that resulted in exposure to blood as more fully described in the decision in the consolidated case 12 WC 25446 decided in conjunction with this matter.

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). Blood was drawn for testing for Hepatitis B, C, and HIV. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner had an additional exposure as an initial responder for an infant in cardiopulmonary arrest. He initiated CPR before the paramedics came. He was an emergency medical technician and CPR EEG instructor licensed in the State of Illinois. He opened the infant's mouth with his hands to check for an impeding airway and for resuscitation. His fingers were exposed to the infant's saliva. He was not exposed to the infant's blood. He performed chest compressions. The postmortem autopsy for the infant was positive for HIV and Hepatitis A (PX 4, PX 5, RX 20). The Petitioner testified that Respondent contacted him and advised him to undergo blood testing because the infant had diseases. Petitioner did not know if the infant had HIV.

Petitioner was seen at Sherman Health on August 21, 2012. He had no fevers, chills, sweating, weaknesses, fatigue. He had no recent illnesses, sore throat, chest pain, shortness of breath, cough, abdominal pain, nausea, vomiting. He had no jaundice or scleral icterus. He had no loose stools, numbness, tingling, or focal weakness. His physical exam revealed a well-developed, nourished male, in no acute distress. His skin was without any lesions and he had no rashes or ulcers. The assessment was bodily fluid exposure. The doctor ordered tests for Hepatitis C and B, and HIV 1 and 2. Petitioner was returned to work without restrictions. Petitioner underwent blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months.

Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr John J. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on August 12, 2012 when he initiated CPR and opened the infant's mouth with his hands to check for an impeding airway and for resuscitation, exposing his fingers to the infant's saliva. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to the infant's saliva on August 12, 2012. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. While the infant did test positive for HIV, Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. Petitioner's blood tests performed at Sherman Health on August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3--4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing. Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed Petitioner to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the fluid exposure on August 12, 2012. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of August 12, 2012.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), the Supreme Court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related accident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any likely exposure and the Petitioner's negative blood testing, the Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to bodily fluids on August 12, 2012.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the August 12, 2012 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYLVIA MORALES,

Petitioner,

vs. NO: 12 WC 37862

STAFFMARK,

Respondent.

21IWCC0160

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, medical, temporary total disability, permanent partial disability, penalties and fees and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed March 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back, and right elbow. All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she also proved, in part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner failed to establish her condition of ill-being after January 2013 is causally related to work incident. Further medical benefits and TTD benefits are denied.

21IWCC0160

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 5% loss of use of the person-as-a-whole..

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties and attorney's fees is denied. The Commission finds no basis to award any attorney's fees to the Vrydolyak Law Group.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury including a credit of $3,960.00 for temporary total disability benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 1.19.21

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Stephen Mathis

Thomas J. Tyrrell

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on January 19, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

21IWCC0160

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MORALES, SILVIA
Employee/Petitioner

Case# **12WC037862**

STAFFMARK
Employer/Respondent

21IWCC0160

On 3/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
30 N LASALLE ST SUITE 1750
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
LILIA Y PICAZO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21IWCC0160

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
****CORRECTED****
ARBITRATION DECISION

SYLVIA MORALES
Employee/Petitioner

v.

STAFFMARK
Employer/Respondent

Case # **12** WC **37862**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JANUARY 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other: **Former attorney's fee petition**

FINDINGS:

On **OCTOBER 9, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**18,720.00**; the average weekly wage was $**360.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**3,960.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**11,019.89** for other benefits, for a total credit of $**14,979.89**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER:

ACCIDENT/CAUSATION:
Based upon the evidence considered in its entirely in this matter, the Arbitrator finds Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back and right elbow because All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

ACCIDENT/CAUSATION: MID-BACK
Petitioner has proven by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she has also proven in-part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner has failed to establish her condition of ill-being after January 2013 is causally related to the work incident. Further medical benefits and TTD benefits are denied.

Respondent shall pay Petitioner the sum of **$220.00 per week** for a further period of **25 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a **5% loss of use of the person-as-a-whole**.

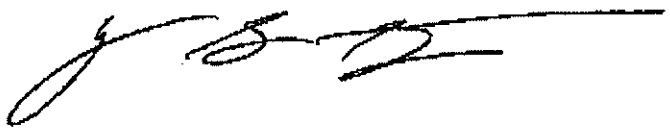
Respondent is entitled to a credit of $3,960.00 for TTD benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Petitioner's claim for penalties and attorney's fees is denied.

The Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

March 13, 2019
Date

MAR 14 2019

SILVIA MORALES v. STAFFMARK

12 WC 37862

****CORRECTED DECISION****

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on January 29, 2019. The issues in dispute were accident, causal connection, medical bills, TTD, penalties and attorney's fees, attorney's fees for the Petitioner's former attorney, and the nature and extent of the injury, if any. Arbitrator's Exhibit 1. The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. Arbitrator's Exhibit (*hereinafter*, AX) 1.

FINDINGS OF FACT

Petitioner testified she began working for Staffmark on August 25, 2012. Tx at 15. Petitioner first started working as a trimmer and later worked in quality control. Id. at 15-16. Petitioner testified she was required to pull a cart with uniform-filled boxes and place it near a desk. Id. She then would place the boxes on a desk. Id. Petitioner testified the heaviest box she would lift on her own weighed between 30-35 pounds. Id. at 17. Petitioner testified the carts were heavy and taller than her. Id. at 17-18.

On October 9, 2012, Petitioner testified she was getting ready to take her break and leave her cart between two desks when a co-worker threw her cart to make it go in place. Id. at 20. Petitioner testified the cart came back and she felt impact in her back. Id. She testified the cart was empty. Petitioner testified she was not able to breathe but managed to grab onto a desk. Id. at 21, 23. Petitioner testified she felt pain throughout her back. Id. at 25. She was transported to the company clinic and MacNeal Hospital by taxi. Id. at 25-26.

The medical records indicate Petitioner was seen at MacNeal Hospital on October 10, 2012. An interpreter was present, and a good history was taken from Petitioner. She stated she was bumped in the back with a metal cart. She complained of generalized midback pain as well midback pain upon moving her left shoulder. She reported the cart did not touch her shoulder. She did not fall, hit her head or lose consciousness. She denied numbness and tingling

throughout her body, headaches and neck pain. X-rays taken of the lumbar and thoracic spine revealed very mild degenerative changes. X-rays of the left shoulder revealed unremarkable findings. Petitioner was diagnosed with a backache and contusion of the back. She was prescribed hydrocodone. PX 3.

On October 11, 2012, Petitioner presented to Rehab Dynamix by referral from MedLegal. Tx. at 30. She was seen by chiropractor Krysten Kuk. Petitioner reported she was struck in her back by a heavy metal cart weighing 300 pounds and approximately five feet tall and three feet wide. Petitioner testified she reported pain in her entire back. Tx. at 30 She complained of mid back pain, low back pain without radiation, and left shoulder pain. On a symptom survey sheet, Petitioner checked approximately 50 of the 76 symptom boxes listed on the survey, stating she was also feeling nervous, irritable, depressed, fatigued, and generally run down. She was diagnosed with lumbar intervertebral disc syndrome without radiation, thoracic strain, internal derangement of the left shoulder, and muscle spasms. PX 2.

On October 18, 2012, Petitioner presented to Dr. Paul Marsiglia of Chicago Pain and Orthopedic Institute. Petitioner reported she was pushing a cart full of uniforms with a height of 6ft and boxes of 50 pounds each when she noticed she was struck from behind by another cart being pushed by another employee. Petitioner stated she was almost sandwiched in between the two carts and noticed immediate back pain. She did not report falling forward or hitting a table. She reported she was undergoing physical therapy, but she was unsure if she made any significant gains. She complained of pain in the cervical, thoracic and lumbar spine with radiation down the left lower extremity over the left lateral calf. Straight leg raise was positive bilaterally. No significant radicular components were noted. She was diagnosed with cervicalgia, lumbar radiculopathy, and myofascial pain syndrome. A lumbar MRI was recommended, and continued physical therapy was prescribed. PX 5.

Petitioner continued to undergo treatment with Rehab Dynamix. She reported consistent improvement with exercises. On November 8, 2012, Petitioner stated she temporarily discontinued therapy due to personal issues. She stated she was seen in the hospital where she was worked up and discharged with unremarkable findings.

On November 8, 2012, Petitioner returned to MacNeal Hospital complaining of back and neck pain. Pain was rated 1 out of 10. She testified she was transported by ambulance due to her panic attacks. Tx. at 33. Her son served as an interpreter. The report indicates a good history was obtained from Petitioner. Petitioner gave a history of left-sided neck pain from a prior work accident where a box fell on her back. Petitioner denied the statement at trial. Tx. at 35. On exam, Petitioner denied significant complaints of low back pain. She denied symptoms of radicular numbness in the lower and upper extremities. X-rays taken of the cervical spine revealed normal findings. Petitioner was diagnosed with a trapezius strain and torticollis. PX 3.

She testified she was given a pill which made her feel out of this world and was discharged for the day. Tx. at 35.

On November 12, 2012, Petitioner underwent an MRI of the lumbar spine. The radiologist discerned diffuse lumbar spondylosis and multilevel degenerative disc disease along with a small focal superimposed left lateral recess disc protrusion at L5-S1. PX 8.

On November 16, 2012, Petitioner underwent an MRI of the left shoulder. The radiologist discerned a full thickness tear involving the supraspinatus insertion, a one-centimeter ganglion cyst adjacent to the superior aspect of the distal clavicle and acromioclavicular joint, mild subacromial/subdeltoid bursitis, and diffuse osteoarthritic changes.

On November 19, 2012, Petitioner presented to Dr. Jain. She reported worsening pain. She complained of severe left-sided neck pain extending into the left upper extremity with numbness and tingling along the left upper extremity. She also complained of pain down the thoracic and lumbar spine with radiation and paresthesias into the left lower extremity. She reported ongoing panic attacked requiring a recent trip to the emergency room where she was diagnosed with benign positional vertigo. Dr. Jain diagnosed cervical facet syndrome, lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. A left L5-S1 facet injection and cervical MRI was recommended. Petitioner was prescribed Prozac for her anxiety, and tramadol. PX 5. Then, on November 24, 2012, Petitioner underwent an MRI of the cervical spine. The radiologist discerned disc bulges at C3-5 and left foraminal narrowing along with bulges at C5-T1. PX 8.

On November 26, 2012, Petitioner returned to Rehab Dynamix. She reported 40% improvement with overall activities. On December 4, 2012, the chiropractor indicated continued improvement overall. Petitioner was able to handle new exercises. Petitioner reported she was recommended shoulder surgery. On December 19, Petitioner reported a palpable mass along the lower ribs on the left. X-rays findings were unremarkable. On January 7, 2013, Petitioner reported pain over the weekend due household chores such as washing and sweeping. On January 30, Petitioner reported 50% improvement with exercises. She was discharged from care pending left shoulder surgery. PX 2.

On December 3, 2012, Petitioner presented to Dr. Steven Sclamberg. She reported she was struck in the back, left side, and left shoulder by a metal pallet while at work on October 9, 2012. She complained of pain in her shoulder radiating down her deltoid without numbness or tingling. On exam, she exhibited mild lateral deltoid tenderness. Left shoulder was negative for SC clavicular or AC tenderness. She was able to forward flex with extension to 140 degrees.

Passive range of motion was near full. Dr. Sclamberg noted a left full-thickness supraspinatus tear. PX 5.

On December 7, 2012, Petitioner underwent an x-ray of the left shoulder which revealed unremarkable findings. PX 8. Petitioner then returned to Dr. Sclamberg and Dr. Jain from December 10, 2012 to February 13, 2013. Petitioner complained of ongoing left lumbar and leg pain, neck pain and left upper extremity pain. On February 13, 2013, she complained of new onset of right chest wall pain with spasms in her neck. Her diagnosis remained unchanged. Cervical and lumbar injections were recommended along with continued physical therapy. PX 5.

A Section 12 examination with Dr. Zelby was scheduled for December 19, 2012. Petitioner failed to attend the appointment. RX 10.

On March 1, 2013, Petitioner underwent arthroscopic left shoulder rotator cuff repair, subacromial decompression, and synovectomy with debridement. PX 5 and 6. Subsequently, on March 20, 2013, Petitioner returned to Rehab Dynamix for post-surgical chiropractic care. On April 9, Petitioner stated she was in a lot of pain due to activities performed over the weekend. On April 11, Petitioner was seen by Alix Crone, DC. She reported severe pain was causing extreme anxiety. Alix Crone noted psychosomatic manifestations of pain. On May 8, 2013, active flexion of the left shoulder was 150 degrees. On June 3, 2013, abduction was at 160 degrees. PX 2.

Petitioner also continued to undergo treatment with Dr. Jain and Dr. Sclamberg. Petitioner complained of worsening pain, dizziness and shortness of breath to Dr. Jain. She was continuously recommended cervical and lumbar epidural injections and to follow-up with her primary care physician. She reported improved pain in her left shoulder to Dr. Sclamberg. Exams revealed good range of motion and she was able to walk with ease. On May 13, 2013, Petitioner began complaining of right shoulder mild motion restriction. On June 21, 2013, Petitioner complained of significant pain in the right shoulder and down the deltoid. On exam she exhibited positive impingement signs on the right. Dr. Sclamberg diagnosed right shoulder impingement syndrome and gave her an injection. PX 5.

On May 31, 2013, Petitioner saw Dr. Axel Vargas. She complained of cervical axial pain, low back pain, and bilateral upper extremity and lower radicular pain. On exam, Petitioner walked with a limp favoring her left lower extremity. Dr. Vargas diagnosed cervical discogenic radiculopathy, cervical facet syndrome, lumbar discogenic radiculopathy, lumbar discogenic pain syndrome, lumbar facet syndrome, and right shoulder derangement. On June 28, 2013, Dr. Vargas reviewed and disagreed with IME opinions of Dr. Zelby. PX 5.

Petitioner continued chiropractic care at Rehab Dynamix from June 4, 2013 to July 3, 2013. Petitioner reported continued improvement of left shoulder symptoms. She did not

complain of right shoulder symptoms. On July 3, 2013, Petitioner reported 60% improvement. She was released to Dr. Sclamberg. PX 2.

On July 23, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6. Petitioner then continued treatment with Dr. Vargas and Dr. Sclamberg. On August 5, 2013, Petitioner stated both her left and right shoulders were improving. On August 9, 2013, Petitioner reported improvement following the previous injection, but she continued to complain of distal lower back pain with intermittent left-sided L5-S1 radiculopathy, neck pain, upper extremity radiculopathy, and right shoulder pain. PX 5. Thereafter, on August 27, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6.

On September 13, 2013, Petitioner returned to Dr. Vargas. She stated there was no improvement after the second injection, and her symptoms worsened. At trial, she testified she heard a buzzing sound after the injection. Tx. at 39. The doctor recommended a provocative lumbar functional discogram with post CT prior to a neurosurgical evaluation for surgical decompression and possible fusion of the lumbar spine. Dr. Vargas also recommended a neurosurgical evaluation for cervical spine surgery. PX 5.

On September 20, 2013, Petitioner followed up with Dr. Sclamberg. She complained of left shoulder and right elbow pain. Dr. Sclamberg diagnosed right medial epicondylitis, and he administered an injection in each area. PX 5.

On December 13, 2013, Petitioner returned to Dr. Sclamberg. She noted she had not been doing any physical therapy, was awaiting neurosurgical evaluation, and had been to the County clinic. On exam, Petitioner had negative impingement signs. Dr. Sclamberg recommended starting physical therapy again for the left shoulder. PX 5.

On December 20, 2013, Petitioner returned to Dr. Vargas. The doctor noted Petitioner presented previously with clear signs of congestive heart failure and he had recommended she seek treatment before moving forward with any procedures. Petitioner was instructed to follow up with Dr. Sclamberg and a neurologist at Cook County Hospital to discuss a cyst visualized on a November 2012 cervical spine MRI. PX 5.

On January 15, 2014, Petitioner presented to Cook County Health and Hospital Systems. She was diagnosed with low back pain, migraines, obstructive sleep apnea and obesity. On January 29, 2014, she returned complaining of headaches, only. On April 8, 2014, Petitioner was diagnosed with depressive disorder, low back pain and obesity. PX 9. However, prior to that diagnosis, on March 7, 2014, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg placed Petitioner at MMI for the left shoulder with no mention of right shoulder symptoms. PX 5.

On April 25, 2014, Petitioner returned to Dr. Vargas. Dr. Vargas noted Petitioner saw an internist at Cook County Hospital for congestive heart failure. Dr. Vargas also recommended Petitioner see a neurologist for her persistent headaches. Petitioner reported she saw one, but the neurologist dismissed the findings as emotional in origin. Petitioner also noted this doctor told her she had nothing going on and should return to work, but then referred her to the Cook County pain clinic for further evaluation and injections. Dr. Vargas again recommended a lumbar discogenic provocative functional discogram before referring her to neurosurgery. PX 5.

Petitioner did not return for care from April 25, 2014 to October 10, 2014 when she presented to Dr. Amish Patel. She complained of neck pain left greater than right, occipital headaches, thoracolumbar pain, and lower extremity radicular pain left greater than right. She stated she tried going back to work but her pain was too significant. Petitioner also stated she saw her primary care physician in July of 2014. No issues arose at that time. Diagnosis remained unchanged from prior visits. Dr. Patel noted Petitioner showed symptoms of possible autoimmune disease and recommended follow up with her primary care physician. PX 5.

On October 14, 2014, Petitioner presented to Dr. Amit Mehta who performed bilateral L5-S1 transforaminal epidural steroid injections and trigger point injections at the bilateral trapezius, splenius capitus, and paracervical erector spinae muscles. PX 6.

On November 10, 2014, Petitioner was examined by Dr. Thomas Pontinen. She reported the injections provided some relief, but she was experiencing increased left leg pain. Petitioner was diagnosed with lumbago, radicular low back pain, neck pain and cervical radiculopathy. PX 5.

On December 15, 2014, Petitioner returned to Dr. Pontinen. She reported she was recently told by a GI doctor and rheumatologist that had gastritis and osteoarthritis. Petitioner did not provide the names of the GI doctor or rheumatologist. On exam, she exhibited a positive left straight leg exam, but she had a normal gait and no sensory deficits. Dr. Pontinen recommended bilateral L3-S1 medial branch nerve blocks followed by bilateral L3-S1 radiofrequency ablation for her back pain. He also recommended a surgical consult. Petitioner underwent the procedures on February 10, 2015 and March 24, 2015. PX 5 and 6.

On April 20, 2015, Petitioner followed up with Dr. Pontinen. She complained of neck pain and continued radicular pain down the left leg. The doctor recommended repeat cervical and lumbar MRIs and referred Petitioner to neurosurgery. PX 5. Shortly thereafter, on April 22, 2015, Petitioner underwent an MRI of the lumbar spine. The MRI revealed chronic and very minor L3-L4 disc bulge narrowing the right foramen, and chronic very minor L4-L5 disc bulge minimally narrowing the foramina. PX 8.

Petitioner also underwent an MRI of the cervical spine. The MRI revealed progressive mild diffuse C4-C5 disc bulge and chronic C3-C4 minimal disc bulge with disc-osteophyte complexes narrowing the left-side foramina; and chronic minimal bulging of the C6-C7 and C7-T1 discs, with residual C5-C6 disc bulge. Facet joints were unremarkable throughout with no significant foraminal narrowing. PX 8.

Petitioner did not return for care from April 22, 2015 to September 14, 2016 when she presented to Dr. Ignas Labanauskas at Holy Cross Hospital. Petitioner complained of low back pain and neck pain. She reported she had not worked since 2012 because of her pain. Petitioner reported her left shoulder was recovered. She complained of right shoulder pain. Dr. Labanauskas recommended and Petitioner MRI of the right shoulder on September 16, 2016. PX 10.

On September 21, 2016, Petitioner returned to Dr. Labanauskas. Petitioner reported right shoulder symptoms beginning three years prior, but she was told the right shoulder was not related to her work injury. Petitioner was recommended right shoulder surgery, which she underwent on March 16, 2017. Petitioner last presented for follow up on June 20, 2017. She was 70-80% improved in her right shoulder. PX 10.

Section 12 examinations with Dr. Arbindi and Dr. Zelby

On March 20, 2013, Petitioner was examined by Dr. Ram Aribindi at Respondent's request pursuant to Section 12 of the Act. Dr. Aribindi performed a physical exam, took a history and reviewed Petitioner's medical records. Dr. Aribindi diagnosed a back contusion. He opined Petitioner did not need any further medical and placed Petitioner at MMI as it related to the neck and back. He also opined Petitioner's left rotator cuff condition not related to the October 9, 2012 work injury. Dr. Aribindi specifically opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. He recommended left shoulder surgery if the MRI showed a full thickness tear. He opined the surgery was unrelated to the work injury. RX 2.

Petitioner returned to Dr. Aribindi for a second IME exam on January 6, 2016. Petitioner reported she was not working due to her back and right shoulder pain. Petitioner denied specific injury to her right shoulder. Dr. Aribindi opined Petitioner reached MMI for the unrelated left shoulder condition on March 7, 2014. She could return to work without restrictions. Dr Aribindi assigned a 0% impairment rating. RX 3.

On May 22, 2013, Petitioner was examined by Dr. Andrew Zelby at Respondent's request. Dr. Zelby took a history from Petitioner, performed a physical exam, and reviewed medical records. Dr. Zelby opined Petitioner sustained a soft tissue spinal strain or contusion at

most. He noted mild degenerative spondylosis in the cervical and lumbar spine but opined there was no evidence the conditions were caused, aggravated, exacerbated, accelerated, or even made symptomatic because of Petitioner's reported injury. Dr. Zelby opined Petitioner did not require any further treatment including narcotics, medications, or injections. He opined Petitioner was able to work full duty without restrictions and reached MMI by January 2013 at the latest and required no more than 3-4 weeks of physical therapy. RX 4.

Petitioner returned to Dr. Zelby for a second IME on January 11, 2016. Petitioner complained of pain from the top of her head to the tip of her toes. She stated her symptoms were exacerbated by anything and nothing gave her relief. Dr. Zelby diagnosed mild cervical spondylosis without radiculopathy, mild lumbar spondylosis without radiculopathy, and spinal strain. Dr. Zelby noted Petitioner's complaints did not follow any neurologic or dermatomal distribution. The complaints inconsistent with a condition of the spine or the nervous system. Dr. Zelby opined Petitioner's subjective complaints were unrelated to the October 2012 work injury. He maintained medical treatment was unreasonable, irrespective of cause, and Petitioner could have returned to full duty work by January 2013. PX 5.

At trial, Petitioner testified she felt initial pain throughout her entire back. She testified she reported pain in her back to MacNeal Hospital and Rehab Dynamix. Tx. at 27. Petitioner testified she was recommended a discogram by her providers, but it was never performed because the procedure was too dangerous. Id. at 40. She testified she was never advised of heart concerns. Id. Petitioner recalled left shoulder pain upon questioning from her attorney.

Petitioner also testified she worked as her son's caregiver and was paid by the State of Illinois from January 2015 to August 2015. Tx. at 43. She testified she would assist him with taking medication, assist him getting into a bath, washing clothes and cooking. Id at 43-44. Petitioner testified she also worked for Ron's Staffing packing boxes of Jell-O. Id. at 45. She testified she was unable to complete her work because of pain in spine and left leg. Id. Petitioner testified she was offered a job as a dishwasher during St. Joseph's carnival. Id. She testified she was required to wash plastic containers. Id. Petitioner testified she did not have the strength to continue performing the job. Id. at 46. As of the date of trial, Petitioner testified to continued pain in her spine, hands and below her bilateral legs. She also complained of swelling in her left shoulder. Id. at 50-51.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue C: *Accident*

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, ***Edward Don v Industrial Commission,*** (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** 44 Ill.2d 207. When an employee has a pre-existing condition, he must "show that a work-related accident injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connect to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition. ***Sisbro Inc. v Industrial Comm'n,*** 207 Ill. 2d at 205, 797 N.E.2d at 7473.

Petitioner testified a co-worker threw a cart, which hit her back and caused pain throughout. She testified she reported back pain to her company clinic and MacNeal Hospital. In review of medical records entered into evidence, initial medical records from MacNeal Hospital corroborate Petitioner was hit in the mid-back area by a cart. The cart did not hit her left or right shoulder, lower back, neck or right elbow. PX #3. The Arbitrator notes Petitioner did not testify to left shoulder pain until led by her attorney. Further, Petitioner did not complain of right shoulder or right elbow pain until after she underwent left shoulder surgery in 2013. An Application for Adjustment of Claim and Employee Incident Report signed by Petitioner further support a mid-back injury.

After carefully considering Petitioner's testimony and medical records entered into evidence, the Arbitrator finds Petitioner sustained a minor mid-back injury which arose out of and in the course of her employment with Respondent.

The Arbitrator finds Petitioner's testimony as it relates to the left shoulder, right shoulder, low back, neck and right elbow not supported by initial accounts of Petitioner's work incident. As such, Petitioner's injuries as it relates to the left shoulder, right shoulder, low back, neck and right elbow did not arise out of her employment and her claim for compensation is denied. All other issues relating to these body parts are therefore moot.

Issue F: *Causal connection*

The Arbitrator finds Petitioner's current condition of ill-being as it relates to the mid-back causally related through January 30, 2013. Petitioner's condition of ill-being after January 30, 2013 is not causally related to the work incident of October 9, 2012. In so finding, the Arbitrator relies on the Application for Adjustment of Claim signed on October 10, 2012 and filed on October 31, 2012, Employee Incident Report signed on October 12, 2012, the unrebutted medical records of MacNeal Hospital from October 10, 2012, as well as the opinions of Dr. Aribindi and Dr. Zelby. Further, Petitioner lacks credibility. Accordingly, her claim for benefits is denied and all other issues are moot.

As discussed above, Petitioner testified she was hit by a cart that was thrown forward by a co-worker. The cart came back and hit her back due to the speed of the cart. Petitioner caught herself on a desk. While the Arbitrator does not question a cart bumped into Petitioner's back, the Arbitrator notes inconsistencies.

First, the Arbitrator notes Petitioner reported the metal cart was heavy. Medical records entered into evidence suggest the cart may have weighed 300 pounds. The Arbitrator cannot reason a 300-pound metal cart could be thrown so easily and return back to hit her. Additionally, Petitioner testified she was placing her cart in an aisle near her work station desk when she was hit from behind. Petitioner did not testify she turned her body to the side to catch herself from falling or losing her balance. Petitioner reported she "noticed" a cart had hit her.

Second, Petitioner indicated injury to her mid-back, only, in an Application for Adjustment of Claim. RX 6. She also claimed injury to her back in an Employee Incident Report. RX 8. The documents were in English. During direct examination, Petitioner affirmed she was able to read and speak some English. Tx. at 49.

At trial, it was stipulated, and Petitioner testified she signed the Application for Adjustment of Claim on October 10, 2012. Tx. at 55-56. Petitioner also testified she completed and signed an Employee Incident Report. She testified she signed the document on October 12, 2012. The incident report indicates Petitioner was placing a metal cart back in place when she felt something hit her back. Petitioner did not indicate pain or injury to her shoulders, head, neck or right elbow. She did not indicate she caught herself on a desk. RX 6.

Contrary to her prior testimony during direct examination, Petitioner was no longer able to recall the contents of the Application for Adjustment of Claim or Employee Incident Report despite previously confirming her signature. Tx. at 58. Petitioner reasoned she was unable to understand the English statements. Id.

Third, Petitioner testified she was sent to MacNeal Hospital on October 9, 2012. The medical records entered into evidence affirm she was seen on October 10, 2012. Petitioner complained of pain in her back. While Petitioner complained of some arm pain, Petitioner specifically denied the cart hit her shoulders. She did not lose consciousness or report injury to her neck or head. During direct examination, Petitioner was only able to recall left shoulder pain upon direction from her attorney. Petitioner did not question the validity of the history provided in the MacNeal Hospital records until she was questioned regarding her specific denial of a cart hitting her shoulders during cross examination. Tx. at 59. The record indicates Petitioner was diagnosed with a contusion of the back, only. She returned to MacNeal Hospital on November 8, 2012 complaining of panic attacks. She denied any specific pain to her low back. Again, the note is absent any indication of left or right shoulder pain or injury. Petitioner was diagnosed with a trapezius strain and wry neck.

Fourth, the Arbitrator notes inconsistent histories of pain amongst the various providers from Rehab Dynamix, and Chicago Pain and Orthopedic Institute. Specifically, chiropractic notes from Rehab Dynamix indicate continued improvement, while records from Chicago Pain & Orthopedic Institute indicate severe complaints of pain to the left shoulder, low back and neck. Electric stimulation and hot packs were further administered to the low back throughout chiropractic care, despite Petitioner complaining of pain mostly in her upper back. The Arbitrator notes MRIs of the lumbar spine and cervical spine revealed normal degenerative findings. On December 3, 2012, near full passive range of motion of the left shoulder was noted; however, Dr. Sclamberg maintained a surgical recommendation. PX 5.

The Arbitrator also notes medical records from Alix Crone, DC indicate psychosomatic manifestations of pain. PX 2. Medical records from Dr. Vargas indicate Petitioner had seen a neurologist and was advised her complaints were emotional in origin. PX 5 Medical records from Dr. Patel indicate Petitioner showed signs of an autoimmune disease. PX 5. Medical records from Dr. Pontinen indicate Petitioner was seen by a rheumatologist in 2014 and

possibly diagnosed with osteoarthritis. PX 5. The Arbitrator finds it difficult to understand how a cart hitting Petitioner's mid-back area could result in bilateral rotator cuff tears, cervicalgia, lumbar radiculopathy, myofascial pain syndrome and epicondylitis.

Lastly, the Arbitrator notes Petitioner did not complain of any right shoulder or right elbow pain until seven months after the October 9, 2012 work incident. Petitioner specifically stated she did not have any pain complaints until after the left shoulder surgery in March 2013. Petitioner's statements are corroborated by normal right shoulder exams in 2012.

The Arbitrator ultimately finds the causation opinions of Dr. Vargas, Dr. Jain, Dr. Sclamberg, Dr. Patel and Dr. Pontinen were based on questionable statements and material misrepresentations made by Petitioner. The Arbitrator places greater weight on the IME opinions of Dr. Aribindi and Dr. Zelby

Specifically, Petitioner inconsistently reported pain complaints to her treating providers. Petitioner also reported she was unable to work since October 9, 2012. However, she testified she obtained employment with Ron's Staffing and at a pizzeria. She also testified she applied and was approved by the State of Illinois to work as a caregiver for her adult son over a period of nine months in 2015. Tx. at 62. Petitioner's son was 25-26 years old at the time and weighed around 170 pounds. Tx. at 63-64. While employed by Staffmark, Petitioner testified the heaviest box she lifted on her own weighed 30-35 pounds. She was assisted by co-workers if the boxes weighed greater than 30-35 pounds. She did not testify to any assistance while serving as her son's state-appointed caregiver.

Dr. Aribindi and Dr. Zelby opined Petitioner sustained a contusion to her back. Dr. Zelby opined Petitioner required no more than 3-4 weeks of directed physical therapy. Dr. Zelby opined Petitioner could return to full duty work without restrictions by January 2013. Dr. Aribindi also opined Petitioner reached MMI for her back condition in 2013. He opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. The Arbitrator notes Petitioner was able to recall attending the IMEs with Dr. Aribindi and Dr. Zelby when questioned by her attorney during direct exam. Tx. at 50. During cross examination, Petitioner was no longer able to recall seeing either doctor. Tx. at 61.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being as it relates to the mid-back is causally related in part to the accidental injury of October 9, 2012 up to January 30, 2013.

The Arbitrator finds Petitioner's condition of ill-being as it relates to the mid-back after January 30, 2013 is not causally related to the accidental injury of October 9, 2012. The Arbitrator also finds Petitioner has not proven by a preponderance of the evidence that her

condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow are not relates to the accidental injury of October 9, 2012. As such, all other issues as it relates to these body parts are moot.

Issue J: *Medical bills*

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and are determined to be required to diagnose, relieve or cure the effect of a Petitioner's injury. The Petitioner has the burden of providing that the medical services were necessary, and the expenses incurred were reasonable. ***City of Chicago v. Illinois Workers' Compensation Commission, 409 Ill. App. 3d 258, 267 (1st Dist., 2011).*** In determining the reasonableness and necessity of medical treatment, the Commission also considers whether the records demonstrate subjective or objective improvement or whether the treatment undertaken failed to provide a benefit. ***Hugo Alvarez v AMI Bearings, 16 IWCC 0408***.

Petitioner in this case has presented unpaid medical bills from Soma Rehab totaling $2,563.65 (PX 11); Gray Medical totaling $29,395.48 (PX 12); La Grange Memorial Hospital totaling $2,179.41 (PX 13), IWP for $3,391.98 (PX 14); Rx Development totaling $6,052.02 (PX 15); Rehab Dynamix totaling $31,593.47 (PX 16); Preferred Open MRI totaling $8,520.00 (PX 17); Accredited Ambulatory Care totaling $103,146.02 (PX 18); Chicago Pain and Orthopedic Institute totaling $33,608.32 (PX 19); Dr. Ignas Labanauskas totaling $12,950.00 (PX 21); Prescription Partners totaling $6,129.01 (PX 22); Essential Testing totaling $311.28 (PX 23); Metropolitan Advanced Radiological totaling $944.92 (PX 24); and Walgreens Out-of-Pocket Expenses totaling $84.23 (PX 26). *See also* AX 2.

As discussed above, Petitioner's current condition of ill-being as it relates to the mid-back is causally related in part through January 30, 2013. The Arbitrator agrees a maximum of 3-4 weeks of physical therapy would have been appropriate to treat Petitioner's condition. The Arbitrator notes Respondent paid $11,019.89 in medical expenses through April 2013. RX 7.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, as well as her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds Respondent has paid all reasonable and necessary medical treatment pursuant to Section 8(a) and 8.2 of the Act. The remaining issues of Respondent's liability of outstanding Section 8 medical benefits are moot. Accordingly, benefits are denied. Irrespective of any causation opinion, the Arbitrator further denies payment of any medical bills not presented at trial.

The Arbitrator also highlights for further discussion Petitioner's Exhibits 11, 13, 23 and 25, medical bill statements from Soma Rehab, La Grange Hospital, Walgreens and Essential Testing.

The Arbitrator notes Petitioner did not present any medical evidence aside from medical statements to support treatment undertaken at Soma Rehab or La Grange Memorial Hospital. In addition to the Arbitrator's findings regarding causation, the Arbitrator denies medical charges from Soma Rehab or La Grange Memorial as no medical record evidence was presented at trial to support this medical treatment. PX 11 and13.

With respect to Petitioner's Exhibit 23, medical bills from Essential Testing. The Arbitrator notes a description of charges indicates "quantitative" and "qualitative" procedures. The Arbitrator is unable to determine what the charges refer to. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Essential Testing as no medical record evidence was presented at trial to support medical treatment from Essential Testing.

With respect to Petitioner's Exhibit 25 prescription refills from Walgreens, the Arbitrator notes medications were dispensed to treat bacterial infections. The Arbitrator cannot reason the medications were prescribed to treat Petitioner's questionable low back, neck or bilateral shoulder pain complaints. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Walgreens as no medical record evidence was presented at trial to support the medications were prescribed to treat any of Petitioner's claimed injuries.

Issue K: *TTD*

Petitioner argues TTD benefits are owed from October 10, 2012 through December 31, 2014 and September 1, 2015 through January 29, 2019. The Arbitrator notes Respondent paid TTD benefits from October 10, 2012 to December 18, 2012. Respondent also paid TTD benefits from March 20, 2013 to May 14, 2013 totaling $3,960.00. RX 7. The Arbitrator notes TTD benefits were suspended in December 2012 after Petitioner failed to attend an IME with Dr. Zelby. RX 10.

While a job log was presented at trial, the Arbitrator notes Petitioner sought employment on five separate occasions between July 23, 2014 and August 24, 2014. PX 26. At trial, she testified she was hired by two employers, but she voluntarily quit. She also testified

she applied with the State of Illinois and was accepted to work as a caregiver for her adult son. Petitioner worked in this position for nine months and did not seek any other employment during this time. She performed this task on her own. The Arbitrator cannot reason Petitioner put in effort into finding employment. As discussed above, Petitioner testified she was required to lift boxes weighing 30-35 pounds while employed with Staffmark. She was assisted by co-workers if she was required to lift heavier items. The Arbitrator reasonably infers Petitioner's adult son weighed more than 30-35 pounds and was capable of returning to 100% of her prior job demands.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, and her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds all remaining issues of Respondent's liability of TTD benefits moot. Accordingly, further TTD benefits are denied.

Issue L: *Nature and extent of injury*

In light of the Arbitrator's determination regarding Petitioner's credibility and based on the totality of evidence entered at hearing, the Arbitrator finds there is some residual pain of back pain, only, that is part of permanent disability. The Arbitrator finds Petitioner has not provided evidence of a left shoulder, right shoulder, neck, low back or right elbow injury related to the October 9, 2012 work incident.

In determining permanency, the Arbitrator considers multiple factors. The mere existence of testimony does not require its acceptance. ***Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983).*** To argue to the contrary would require that an award be entered or affirmed whenever Petitioner testified to an injury no matter how much testimony might be contradicted by the evidence, or how evident it might be that a story is fabricated afterthought. ***U.S Steel v. Industrial Commission, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).***

First, under subsection (i) of Section 8.1b(b), an impairment rating considers loss of range of motion, loss of strength, measured atrophy of tissue mass consistent with the injury, and any other measures that establish the nature and extent of the impairment. No impairment rating was assigned as it relates to the mid-back. There is no impact on the permanency based upon this factor.

As it relates to the left shoulder, Dr. Arbindi opined Petitioner's condition off ill-being was not causally related to the October 9, 2012 work incident. Regardless of his causation opinion, Dr. Aribindi provided an impairment rating as Petitioner had reached MMI. RX #3. Based on AMA guides to the Evaluation of Permanent Impairment 6th Edition, given a resolved rotator cuff tear with no significant objective findings status-post surgical intervention, a final impairment of 0% whole person impairment was given. Petitioner corroborated fully resolved left shoulder symptoms in September 2016 when she presented to Dr. Labanauskas. The Arbitrator finds the opinions of Dr. Aribindi credible and agrees Petitioner's left shoulder condition is not causally related to the October 9, 2012 work incident.

Second, with regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, Petitioner testified she worked in quality control for Respondent since August 2012. Her job required her to check orders, places boxes in carts and then onto a desk. Petitioner lifted no more than 30-35 pounds on her own. Petitioner was released to return to work at 100% of her job demands by IME experts, Dr. Aribindi and Dr. Zelby. RX #2-5. Petitioner testified she found employment with two companies, but voluntarily left after 1-2 days because she was unable to perform her work. However, she was able to work as a caregiver for her adult son for a period of nine months. Her position was approved by the State of Illinois. Petitioner's ability to work as a caregiver with approval by the State of Illinois lowers any impact on the permanency based upon this factor.

Third, under subsection (iii) of Section 8.1b(b), Petitioner was 56 on the date of accident. Petitioner complained of pain throughout her body and reported to her providers that she had not worked since 2012. As discussed above, Petitioner was fully capable of finding employment during July-August of 2014 when she was hired by two companies. Petitioner was also capable of working as a caregiver for nine months in 2015. While Petitioner obtained the position to care for her son, the caregiver position allows for greater future earning potential for other employers. This again lowers any impact on the permanency based upon factor (iii).

Fourth, under subsection (iv) of Section 8.1b(b), evidence regarding any impact to future earning capacity, Petitioner presented wages earned from January 2015 to September 2015 while working as a caregiver for the State of Illinois. PX 27. Petitioner was earning almost identical pay while employed by Staffmark. Petitioner's capability to work was corroborated by IME experts Dr. Aribindi and Dr. Zelby. Petitioner was and is capable of returning to 100% of her job demands. This again lower any impact on the permanency based upon this factor.

Fifth, with regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the medical records, Petitioner has continued with pain complaints throughout her entire back and body. However, initial medical records, incident reports and an Application for Adjustment of Claim indicate mid-back pain, only with a contusion diagnosis. Petitioner

testified to pain in her back and did not claim any other pain until directed by her attorney. Further, chiropractic medical records indicate reports of improvement and negative sensory deficits despite undergoing various injections, medial branch blocks and ablations. Dr. Aribindi and Dr. Zelby also opined Petitioner's back condition had resolved. RX 2-5. Petitioner did not seek any medical care from 2015 to 2016 when she returned complaining of severe right shoulder pain. This factor is given greater weight.

Although one of many factors may not be the sole determinant of disability, the Arbitrator notes inconsistent statements and misrepresentations of material facts to Petitioner's various medical providers and at trial. At the time of hearing, Petitioner testified to pain in her back. She did not recall any shoulder pain until directed by her attorney. Petitioner also affirmed signing an Employee Incident Statement and Application for Adjustment of Claim, though she later denied understanding the contents of the documents. The medical records from MacNeal Hospital also clearly indicate Petitioner specifically denied a cart hit her shoulders. Petitioner later disagreed with the history she provided to the hospital. She testified she was capable of returning to work in 2014 and 2015.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole at a PPD rate of $220.00 pursuant to Section 8(d)2 of the Act.

Issue M: *Penalties and attorney's fees*

As noted above, the Arbitrator has found Petitioner's current condition of ill-being as it relates to the mid-back after January 2013 is not causally related to the work incident of October 9, 2012. The Arbitrator has also found Petitioner's condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow is not causally related to the work accident of October 9, 2012. As such, further benefits are denied. As will be discussed below, Penalties and fees are also denied as provided in Section 16 of the Act; Section 19(k) of the Act; and Section 19(l) of the Act.

There is adequate evidence to validate Respondent relied upon Petitioner's own reporting of initial mid-back pain only in her Application for Adjustment of Claim, Employee Incident Report and initial medical records from MacNeal Hospital to deny payment of medical care and TTD benefits after the respective IMEs of Dr. Aribindi and Dr. Zelby in March 2013 and May 2013. Further, while Respondent did suspend TTD benefits on December 12, 2012, the Arbitrator notes TTD benefits were suspended after Petitioner failed to attend a scheduled IME

with Dr. Zelby in December 2012. Medical records into evidence support Petitioner reported her IME was being rescheduled. The Arbitrator notes TTD benefits were reinstated on March 20, 2013, when Petitioner attended the first rescheduled IME. RX #7. The language of the Act confirms a failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, ***Avon Products, Inc. v. Industrial Commission, 82 Ill.2d 302, 412 N.E.2d 470 (1980).***

Additionally, the Arbitrator notes Petitioner presented various medical bills from Soma Rehab, LaGrange Memorial Hospital, Essential Testing and Walgreens for treatment that was not presented into the record. The Arbitrator cannot reason penalties are warranted when the Arbitrator is unable to ascertain the type of treatment offered during any of the visits alleged by the providers. The Arbitrator further notes various medical bills presented at trial were addressed to Petitioner, directly. There is no indication the medical bills were issued to Respondent. As discussed above, Respondent paid $11,019.89 in medical bills to various providers through April 1, 2013.

Where Respondent's actions are consistent with the Act, Respondent's nonpayment, underpayment, or delayed payment cannot be deemed vexatious or without just cause, and Section 19(k) and 19(l) penalties must be denied. RX 9. Where Respondent has acted in accordance with the Act, it also should not be held liable for Petitioner's attorney's fees in his effort to establish otherwise, and Section 16 fees also must be denied. RX 9.

Issue N: *Respondent's credit*

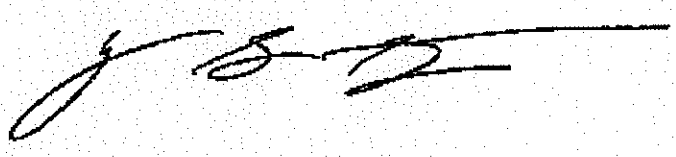
As noted above, Respondent paid $3,960.00 in TTD benefits and $11,019.89 in medical expenses. AX 1, AX 3, and RX 7. Based upon the opinions of the arbitrator regarding causal connection, the Arbitrator finds Respondent shall have a credit for all amounts paid for TTD to or on behalf of Petitioner in the amount of $3,960.00. Respondent shall also have a credit for all amounts paid towards medical treatment in the amount of $11,019.89.

Issue O: *Former attorney's fee petition*

The parties stipulated a petition for attorney's fees by a former attorney for the Petitioner was pending at the time of trial and the Petitioner's current attorney "has notified

the former attorney of the date of this hearing." AX 1 and Tx. at 7. The IWCC case file for this matter contains a September 24, 2014 order from Arbitrator Kane continuing The Vrdolyak Law Group, LLC's Petition for Fees to the disposition of this case.

However, the Petition for Fees covered by Arbitrator Kane's order does not itemize any time spent by The Vrdolyak Law Group in the prosecution of this claim. This Petition also does not list any incurred expenses and/or costs by The Vrdolyak Law Group during its representation of the Petitioner. Furthermore, no testimony or documentary evidence was entered into evidence during the January 29, 2019 hearing to support the Petition for Fees. As such, the Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.



Signature of Arbitrator

March 13, 2019
Date

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF LAKE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN DELGADO,

Petitioner,

vs.

NO: 17 WC 23580

21IWCC0161

PNR PAINTING PLUS, INC., and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, and workers' compensation insurance coverage, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.67 per week for a period of 60 2/7 weeks, representing July 16, 2017 through September 10, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $456.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 25% loss of use of the person as a whole.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General. This award is hereby entered against the IWBF to the extent permitted

21IWCC0161

and allowed under §4(d) of the Act. Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF. The award or findings in this matter in no way limit or modify the Respondent-Employer's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Stephen Mathis

mck

O: 3/3/21

Thomas J. Tyrrell

43

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JUAN
Employee/Petitioner

Case# **17WC023580**

PNR PAINTING PLUS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0161

On 9/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1361 BARRY STEWART SILVER
302 SAUNDERS RD
SUITE 200
RIVERWOODS, IL 60015

0000 PNR PAINTING PLUS, INC
22850 W ILLINOIS ROUTE 173
ANTIOCH, IL 60002

0143 ASSISTANT ATTORNEY GENERAL
KRISTIN LEASIA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Juan Delgado
Employee/Petitioner

Case # **17** WC **023580**

v.

PNR Painting Plus, Inc.; Illinois State Treasurer as *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **July 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Insurance**

FINDINGS

On **July 15, 2017**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent-Employer.
On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
Timely notice of this accident ***was*** given to Respondent-Employer.
Petitioner's current condition of ill-being ***is*** causally related to the accident.
In the year preceding the injury, Petitioner earned **$39,520.00**; the average weekly wage was **$760.00**.
On the date of accident, Petitioner was **30** years of age, ***single*** with **1** dependent children.
Respondent-Employer shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.
Respondent-Employer is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent-Employer shall pay Petitioner Temporary Total Disability benefits of $506.67/week for 60-2/7 weeks, because Petitioner remained off work due to his injuries during the period from July 16, 2017 through September 10, 2018.

Respondent-Employer shall pay Petitioner permanent partial disability benefits of $456.00/week for 125 weeks, because the injuries sustained caused the Petitioner 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

Injured Workers' Benefit Fund

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General's Office. This finding is hereby entered as to the IWBF to the extent permitted and allowed under §4(d) of the Act. No party shall seek or have a right to any recovery from the IWBF. The award or findings in this matter in no way limit or modify the Employer-Respondent's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn M. Doherty

9/23/19
Date

Signature of Arbitrator

SEP 25 2019

FINDINGS OF FACT

An Application for Adjustment of Claim was filed by Petitioner, Juan Delgado, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, PNR Painting Plus, Inc. This action sought further relief from the Illinois Workers' Benefit Fund (IWBF) because Respondent-Employer allegedly did not maintain workers' compensation insurance. A hearing was held on July 29, 2019 in Waukegan, Illinois. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio custodian* of the IWBF, and participated in the proceeding. No appearance was made by the Respondent-Employer at trial, despite proper notice.

Petitioner testified that his name is Juan Jose Delgado. In July 2017, he was 30 years old with one dependent minor child, though he currently has two minor dependent children. In May 2017, Petitioner saw an ad on Facebook for a painter, posted by PNR Painting Plus, Inc. ("Respondent-Employer"). He responded to the ad, and made arrangements to meet Rick Jones, owner of Respondent-Employer. Upon meeting Mr. Jones, Petitioner was hired as a house painter. He completed his first job for Respondent-Employer in May 2017 in Antioch, Illinois.

While working for Respondent-Employer, Petitioner made $20.00 per hour, and worked 40 hours per week. Petitioner placed into the record a copy of a paycheck, written from Respondent-Employer's business account, paying $760.00 for one week of work in June 2017 (Petitioner's Exhibit "Pet. Ex." 1). The reason the check did not reflect the full $800.00 he would be owed for a week of work is that some of the money was held over for the next paycheck.

As a painter Petitioner tracked the time he worked. He marked down the hours worked on a timesheet, which he was required to complete before leaving a specific job. Petitioner's Exhibit 2 reflects the time Petitioner clocked for the pay period ending on June 29, 2017, and shows that Petitioner worked 40 hours during that pay period. (Pet. Ex. 2).

Petitioner received his job assignments via telephone calls from Rick Jones. Jones would provide instructions for Petitioner to report to Respondent-Employer's headquarters, which were located at Jones's home in Antioch, Illinois. Once at Respondent-Employer's office, Jones informed Petitioner regarding the day's job assignment, including where Petitioner was to report and what supplies were needed. Jones transported Petitioner and anyone else working the assignment to the job site in a company van. Jones also provided the supplies and equipment needed for an assignment, including the ladders.

In June 2017, Petitioner received notice that he would be placed on a crew to paint a house in Lake Geneva, Wisconsin. Prior to beginning the job, Petitioner went with Jones to look at the site. Petitioner took photographs of the home to be painted. (Pet. Exs. 6-7). One of the photographs shows the type of extension ladder used at the job site. (Pet. Ex. 6). Petitioner took these photos on his personal cell phone about a week prior to the accident. At any job, there was a daily exchange of photographs between himself and Jones to report progress on the assignment and receive additional instructions regarding what still needed to be completed.

On July 15, 2017, Petitioner was working at the assignment in Lake Geneva with a crew of four people. He was painting a "peak" section of the home – a high point on the building requiring a ladder to access. He was standing on an extension ladder by himself, although one of his coworkers was at the bottom of the ladder holding it for stability. Around 4:00pm that evening, Petitioner was working to finish a few last spots needing more paint on the peak. He climbed the ladder to the peak; about two to three minutes later, while he was painting, the ladder gave way. Petitioner does not know if his spotter had abandoned his post and was no longer spotting at the time of the accident, but essentially the ladder began sliding down with Petitioner still on it. Petitioner fell, hitting his head and sustaining an open fracture to his right ankle. At the time that the accident occurred, Jones was at the job site. An ambulance was called. The paramedics secured Petitioner, provided him with medication and first aid treatment, and transported Petitioner to Mercy Hospital in Janesville, Wisconsin.

Upon arrival at the hospital, Petitioner's bone was exposed out of his ankle and skin, and the foot was turned 360 degrees. Petitioner did lose consciousness for a period of time while he was first being treated. They diagnosed Petitioner with a dislocated fracture of the right ankle, and fractures to the 3rd through 5th metatarsals of the right foot. Petitioner underwent ankle surgery. He was ultimately released home after five days.

Following his release from Mercy Hospital, Petitioner followed up with his primary care physician, Dr. Bains. Dr. Bains referred Petitioner to an orthopedic surgeon at Illinois Bone and Joint Institute, Dr. Weatherford. Dr. Weatherford determined that Petitioner needed further surgery to his right ankle, which was undertaken at St. Francis hospital in Evanston, Illinois. Petitioner was placed on non weightbearing restrictions for his right foot, which remained in effect for eight weeks. While recovering at home from surgery, Petitioner had to convert the first floor of his home into a bedroom. He used a knee scooter or crawled to get around.

Petitioner followed up with Dr. Weatherford for several months. He began physical therapy three weeks after the surgery. Physical therapy lasted several months, and took place in Schaumberg, Illinois, about 60 miles from Petitioner's home. Dr. Weatherford released Petitioner from care and back to work with a 10-pound carrying restriction and no standing for more than five minutes. Petitioner must be able to lift or elevate his leg at work and is not to engage in excessive climbing.

Petitioner is no longer under Dr. Weatherford's care. Dr. Weatherford referred Petitioner to a rheumatologist, Dr. Morris, due to concerns over early-onset arthritis developing in Petitioner's right ankle.

Prior to the accident, Petitioner worked as a professional painter for 15 years. Due to his permanent restrictions, Petitioner is unable to return to work in that capacity. Petitioner now works for another company, Epsco Industries, 40 hours per week and earns $15.00 per hour. Petitioner submitted several exhibits, including tax returns and Year-to-Date earnings statements from Epsco, confirming same. (Pet. Ex. 3-5). His work at Epsco is sedentary in nature.

Petitioner still feels pain in his foot and ankle from the moment he wakes up in the morning, and when completing everyday tasks. How long he can stand in a day depends on the amount of pain

he experiences. He uses a knee scooter for long distances, and also has a cane. He can drive, but has difficulty doing so. He feels pain with breaking, and cannot drive more than 10 to 15 minutes without having to stop. He cannot drive long distances. Petitioner experiences pain during most of his day-to-day activities including taking his kids to the park, grocery shopping, cooking, and picking up his kids at daycare. Petitioner testified he feels his whole life has "done a total turnaround" since his fall.

On cross exam, Petitioner testified that Jones was the co-owner of Respondent-Employer, and that Petitioner received his paychecks from Jones. When Jones hired Petitioner, he did not give Petitioner an employment contract to sign. The van used to transport crew members to job sites was a company van that had the company's name painted on the side. Petitioner clarified that the photo he submitted showing an extension ladder (Pet. Ex. 6) did not depict the actual spot where he fell, but rather the front door of the same property, and was taken a week prior to the fall. Petitioner further clarified that he called the ambulance following the fall after speaking to Jones about the accident. Petitioner testified that Mr. Jones refused to call an ambulance.

Petitioner reported to Mercy Janesville Hospital in Janesville, Wisconsin, on July 15, 2017. (Pet. Ex. 10). He reported that he fell from a ladder while working on a roof, and hit his head. Petitioner presented with an open fracture with displaced bones sticking out of his right lower extremity after a 15-foot fall. (Pet. Ex. 10). X-rays of his right ankle revealed an open subtalar fracture dislocation with medial dislocation of the right foot. The x-rays also showed a fracture of the shaft of the 5th metatarsal. X-rays taken of the right foot as a whole displayed a stable alignment with a complex fracture. (Pet. Ex. 10). CT scans taken of Petitioner's head, lumbar spine, cervical spine, and chest/abdomen/pelvis area were unremarkable and showed no signs of acute trauma. A CT scan of Petitioner's right ankle revealed a complex open fracture of the hindfoot, midfoot, and proximal forefoot, as well as an interval reduction of the previously-seen subtalar joint dislocation. (Pet. Ex. 10). Petitioner underwent laceration repair with sutures. The fracture was reduced and splinted. (Pet. Ex. 10). On July 18, 2017, Petitioner underwent irrigation of the open wound, incisional and excisional debridement of the wound with wound repair at both the ankle and subtalar region. (Pet. Ex. 10). Petitioner was discharged from Mercy Hospital on July 19, 2017 with crutches and prescriptions for ibuprofen, oxycodone, and cephalexin. He was placed on non weightbearing status along with crutches and a walker. (Pet. Ex. 10).

Petitioner saw his primary care physician, Dr. Rushin Bains, on July 20, 2017. (Pet. Ex. 11). Dr. Bains diagnosed degenerative joint disease of the ankle and foot, namely primary osteoarthritis to the right ankle and foot. (Pet. Ex. 11). He also noted the unspecified fracture to the right lower leg. Dr. Bains noted good sensation in the right foot. He opined that Petitioner needed a referral to an orthopedic surgeon, which was given. (Pet. Ex. 11).

On July 23, 2017, Petitioner presented to Northshore University Health System/Highland Park Hospital with an open nondisplaced fracture of the fourth metatarsal bone of the right foot, which displayed routine healing. (Pet. Ex. 12). Dr. Stacey Becker attended to Petitioner. X-rays of his right foot were taken, which confirmed the comminuted fracture of the 5th metatarsal, the nondisplaced fracture of the 4th metatarsal, and a suspected avulsion fracture of the cuboid. (Pet. Ex. 12). He presented for evaluation of the injury, as he reported that the posterior mold he was

given from his stay at Mercy Hospital was digging into his leg. (Pet. Ex. 12). A shorter posterior mold (splint) was applied and Petitioner was discharged home with antibiotics. (Pet. Ex. 12).

Petitioner first saw Dr. Brian Weatherford, an orthopedist at Illinois Bone and Joint Institute, on July 26, 2017. (Pet. Ex. 13). Dr. Weatherford noted with concern the presence of active drainage at the wound site and a lack of healing. He placed Petitioner in a compression wrap and a Cam boot. (Pet. Ex. 13).

Petitioner followed up with Dr. Weatherford on July 28, 2017. (Pet. Ex. 13). Dr. Weatherford confirmed a diagnosis of a right-side type 3 open subtalar dislocation with delayed wound healing and continued drainage, an intraarticular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. Dr. Weatherford opined that Petitioner should proceed to surgery to repeat debridement. (Pet. Ex. 13).

Dr. Weatherford performed repeat surgery on Petitioner on July 31, 2017. The surgery occurred at St. Francis Hospital in Evanston, Illinois. (Pet. Ex. 14). Petitioner's pre-and-post-operative diagnosis was right open subtalar dislocation, open wound with delayed healing, cuboid fracture, displaced intra-articular 5th metatarsal fracture, and equinus contracture. (Pet. Ex. 14). Petitioner underwent a right gastrocnemius recession; irrigation and debridement associated with an open fracture dislocation including skin and subcutaneous tissue, muscle, and fascia; open reduction internal fixation of the right cuboid; open reduction internal fixation of the right 5th metatarsal; and application of negative pressure wound therapy. (Pet. Ex. 14). Synthes implants including two 2mm plates with screws were used. Petitioner was placed on non weightbearing status for his right lower extremity for eight weeks, and was given compression wrapping. (Pet. Ex. 14). He was discharged on August 2, 2017 with a prescription for Norco. (Pet. Ex. 14).

Following surgery, Petitioner followed up with Dr. Weatherford on August 2, 2017; August 7, 2017; August 15, 2017; August 22, 2017; September 5, 2017; September 26, 2017; November 17, 2017; March 2, 2018; and May 5, 2018. (Pet. Ex. 13). At the August 22 appointment, Dr. Weatherford recommended that Petitioner begin physical therapy and gave him a referral. (Pet. Ex. 14). Petitioner's records indicate that he underwent physical therapy at Physical Therapy-Team Rehab under the direction of Kristin Dryden. (Pet. Ex. 16). He attended physical therapy approximately two times per week from September 27, 2017 through May 7, 2018. (Pet. Ex. 16).

At the November 17, 2017 appointment, Dr. Weatherford opined that Petitioner would likely develop activity limitations secondary to the severe nature of his injury; in particular, Dr. Weatherford stated that Petitioner would likely form subtalar arthritis due to the injury. (Pet. Ex. 13). By December 7, 2017, Petitioner could only walk for 2 hours and was unable to sit without swelling. (PX16, 12/7/17, p.2-3). A new long-term goal of improving his ability to squat and kneel to permit child care was identified but unmet at that time. By the end of January 2018, Petitioner was unable to stand or walk for more than 3-4 hours for job duties, unable to fully squat to reach and lift painting supplies, unable to travel stairs at home reciprocally or climb ladders at work, and unable to fully assist with cooking and cleaning tasks at home. (PX16, 1/29/18, p.2-3). Petitioner was still experiencing pain levels between 6 and 8 out of 10, which were caused by joint and tissue hypomobility, lower extremity weakness and decreased dynamic balance. To increase function and reduce pain, Petitioner's plan of care included manual therapy,

therapeutic exercise, neuromuscular reeducation and therapeutic modalities. Petitioner's newest round of therapy would be three times weekly for 6 weeks to yield improvements.

One month later, on February 26, 2018, Petitioner had completed 8 therapy sessions. (PX16, 2/26/18, p.1-3). His pain levels had improved to a range of 2-6/10 and had partially met the goals of squatting and kneeling and increasing standing/ambulating to unlimited time periods to permit work activities. Deficits from the functional analysis in January remained.

At the March 2 appointment, Dr. Weatherford noted Petitioner was weightbearing as tolerated in a standard shoe and continuing with physical therapy 3x/weekly. He had intermittent pain particularly along the plantar aspect of the foot which was relieved with anti-inflammatories. Petitioner was not yet able to return to his heavy labor job. Petitioner's gait still demonstrated a slight external rotation and shortened stride length on the right hand side. The slight dysesthesias in the sural nerve distribution remained as did the diminished range of motion of the right ankle though it had improved markedly since the November visit. The peroneal tendon strength also improved though the focal tenderness over the plantar fascia remained. X-rays revealed appropriate alignment on all views. Dr. Weatherford noted that Petitioner continued to do well and stated that Petitioner could make office visits as needed. (Pet. Ex. 13).

On April 11, 2018, Petitioner underwent a reevaluation at Team Rehabilitation which noted a 60-70% improvement at that time. (PX 16, 4/11/18, p.1). Petitioner noticed gains in standing, ambulation tolerances, ability to turn directions and flexibility in his foot and ankle. However, he remained hypomobile and lacked the eccentric lower extremity strength / endurance needed to perform full work duties and felt full squatting, descending stairs and prolonged standing were the most challenging. Pain levels had not improved, and Petitioner reported prolonged walking and standing on vacation exacerbated his pain levels. Dr .Weatherford ordered another 4 weeks of twice weekly physical therapy. (PX 16, 4/11/18, p.3).

By the re-evaluation on May 7, 2018, Petitioner noticed less frequent pain and was able to squat to reach the floor with minimal difficulty but when pain appeared, it completely limited his ability to stand or walk. (PX 16, 5/7/18, p.1). Most challenging was using stairs while carrying weighted objects and prolonged standing. Petitioner was relatively pleased with his overall improvement and gains in strength and range of motion, though he stated that if the pain lessened, he would be able to do a lot more on his feet. Progress towards long term goals and current deficits were the same as the previous month's evaluation. (PX 16, 5/7/18, p.2). Dr. Weatherford again recommended another month of twice weekly physical therapy. (PX 16, 5/7/18, p.3).

On May 18, Dr. Weatherford provided Petitioner with a referral to a rheumatologist in order to explore the potential for a long-term prescription for THC medication. (Pet. Ex. 13). At this appointment, Dr. Weatherford also allowed Petitioner to return to work with appropriate restrictions and limitations. (Pet. Ex. 13). In his records, Dr. Weatherford stated, "...He was also given a repeat referral to physical therapy today, which will help with assisting him with day to day walking. He is allowed to return to work from my standpoint with appropriate restrictions or limitations. I discussed with him that I would expect lifelong limitations secondary to the severity of his injury. Further surgery may even be necessary. I do suspect he will develop

progressive subtalar arthrosis. ... I would be happy to see him in the office on an as-needed basis." PX 13, p. 41.

Petitioner next treated for this injury on July 9, 2018, with Dr. Bains. (Pet. Ex. 11). Dr. Bains reported that post-surgery, Petitioner was still experiencing pain and discomfort, and had been participating in physical therapy. (Pet. Ex. 11). He gave Petitioner one final prescription for Norco, and suggested the possibility of treatment with medical THC under the care of a rheumatologist. (Pet. Ex. 11).

Petitioner followed up at the rheumatology department at Northshore University Health in Evanston, Illinois on August 3, 2018. (Pet. Ex. 15). At this time, Petitioner was still using the knee scooter, and reported having been participating in physical therapy through mid-June. (Pet. Ex. 15). He reported experiencing burning sensations in his foot and big toe that shot up his leg and into his back. Since the surgery, his right foot would turn bright red and swell, with a burning hot sensation. He reported that the pain became worse with weightbearing, and that it was sometimes so painful that he could not walk. He also reported some swelling and pain in his left foot due to having to use the scooter. (Pet. Ex. 15). An EMG was ordered to evaluate Petitioner's condition and check his A1c levels. (Pet. Ex. 15). He was given a new physical therapy referral and prescriptions for gabapentin and Naprosyn. (Pet. Ex. 15).

Petitioner followed up with rheumatology on September 6, 2018. (Pet. Ex. 15). He reported experiencing warmth, swelling, and a "weird" sensation in his right foot triggered by activity. (Pet. Ex. 15). He stated that the prescribed medications were not helping with the pain. He stated that he did not want to do the EMG, and had been performing self-trials with medical marijuana. (Pet. Ex. 15). The treating physician opined that Petitioner could have Complex Regional Pain Syndrome (CPRS), and indicated that they would refill the gabapentin. (Pet. Ex. 15). Petitioner was also certified as treating for a qualifying condition for medical THC. (Pet. Ex. 15)

On September 10, 2018, Petitioner began working for Ebsco Industries as a sales representative for Luxor furniture in the education sector. Petitioner testified this position is a phone-bank desk job where he processes incoming sales orders, makes cold calls and works a 40-hour week earning $15/hourly. (PX4B, PX5).

Petitioner's final appointment at rheumatology occurred on November 29, 2018. (Pet. Ex. 15). At this time, Petitioner was still taking gabapentin and naproxen. He reported that he had yet to send in the paperwork to qualify for medical THC treatments. (Pet. Ex. 15). He reported experiencing baseline pain in his right foot, but that "really bad" pain was not as frequent but was still debilitating when it occurs. He reported increased mobility in his right foot with his new job and that he was exercising at his stand up desk. He reported that his overall pain was better and that he did not attend the physical therapy but was doing his at home exercises. (Pet. Ex. 15). He reported wearing a compression sock on his right foot but that he felt as if the sock was cutting off his circulation. Dr. Morris renewed the opinion that Petitioner could be experiencing CPRS, and renewed his certification for medical THC as gabapentin did not help.

On December 17, 2018, Petitioner returned to Dr. Bains for follow up and medication refill. He reported continued ankle pain (PX11, 8-9). He told Dr. Bains that Dr. Morris recommended a

medical marijuana program, but was hoping for a refill on Norco prescription in case there was a delay in authorization. (PX11, 8). Dr. Bains informed Petitioner that would be the final prescription issued as he did not prescribe them chronically. (PX11, 9).

On July 15, 2019, Petitioner returned to Dr. Bains for follow up. Dr. Bains ordered Petitioner to resume physical therapy with Team Rehabilitation in Libertyville or another in-network facility. (PX11, 10-11).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent-Employer operating and subject to the Illinois Workers' Compensation Act?

Petitioner testified that Respondent-Employer, PNR Painting Plus, Inc., engaged in the work of residential home painting. As part of this operation, employees, including Petitioner, regularly used extension ladders and worked on the "peaks" of homes. The Arbitrator finds these conditions sufficient to subject Respondent-Employer to the automatic coverage provisions of Section 3 of the Illinois Workers' Compensation Act.

B. Was there an employer-employee relationship?

Petitioner testified that he met Rick Jones, owner of Respondent-Employer, in response to an employment ad placed through Facebook. After this meeting, Jones hired Petitioner as a painter. Jones assigned job sites via telephone and directed Petitioner where to report and which supplies to use. Jones would transport Petitioner and other crew members to job sites in a van marked with the company's name. Jones provided all the supplies and equipment needed to complete an assignment. Petitioner was required to complete and submit timesheets upon leaving a job site. Petitioner received his pay via checks that were written from Respondent-Employer's business account. PX 1, PX 2. The Arbitrator finds that the above conditions sufficiently establish that an employee-employer relationship existed between Petitioner and Respondent-Employer.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent-Employer?

Petitioner testified that on July 15, 2017, he was working at a job site in Lake Geneva, Wisconsin, that had been assigned to him by Rick Jones. Petitioner had climbed up on a ladder in order to finish painting spots on the home's "peak." A coworker was acting as a spotter. While Petitioner was on the ladder, it slid down, causing Petitioner to fall. Petitioner hit his head on the ground and sustained fractures to his right foot and ankle. Medical records submitted by Petitioner corroborate this mechanism of injury. The Arbitrator therefore finds that on July 15, 2017, Petitioner sustained an accident that arose out of and occurred in the course of Petitioner's employment with Respondent-Employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 15, 2017. Petitioner's testimony is supported by medical records and there is no evidence to the contrary. Thus, the Arbitrator finds the accident occurred on July 15, 2017.

E. Was timely notice of the accident given to Respondent-Employer?

Petitioner stated that Rick Jones was present at the job site at the time of the July 15, 2017 accident. Petitioner testified that after the fall, he asked Jones to call an ambulance, to which Jones refused. Petitioner called an ambulance, and was transported to the hospital from the job site. As such, the Arbitrator finds that Respondent-Employer had timely notice of the accident.

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he fell from a ladder while working to paint a house. The fall caused Petitioner to sustain a right-side type 3 open subtalar dislocation, an intra-articular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. There is no evidence that Petitioner's right foot or ankle were fractured prior to the fall. Petitioner's medical care was immediate and continuous. The Arbitrator finds that Petitioner's current condition of ill-being is casually related to the July 15, 2017 accident.

G. What Were Petitioner's Earnings?

Petitioner testified that while employed with Respondent-Employer, he earned $20.00 per hour for 40 hours of work during a week. In support thereof, Petitioner tendered into evidence a copy of a paycheck issued to him by Respondent-Employer, showing a week's pay of $760.00 (Pet. Ex. 1). Petitioner explained that a portion of his weekly pay would be held over to the next paycheck/pay period. The Arbitrator therefore finds that Petitioner's average weekly pay while employed with Respondent-Employer was $760.00.

H. What Was Petitioner's Age at the Time of Accident?

Petitioner testified that he was born on August 12, 1986. Medical records submitted by Petitioner corroborate this testimony. As such, the Arbitrator finds that on July 15, 2017, Petitioner was 30 years old.

I. What Was Petitioner's Marital Status at the Time of Accident?

Petitioner testified that at the time of the accident, he was not married. Petitioner's testimony remains unrebutted, and is supported by information contained in Petitioner's medical records. As such, the Arbitrator finds that on July 15, 2017, Petitioner's marital status was "single." Petitioner has one dependent. ARB EX 1.

J. Were Medical Services Received by Petitioner Reasonable and Necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical care received by Petitioner following this injury was reasonable, necessary and causally related to the injury sustained as a result of the work accident on July 15, 2017. The Arbitrator notes that Petitioner is not requesting an award of any medical expenses, paid or unpaid. ARB EX 1. Accordingly, no finding that Respondent shall pay for or reimburse for paid medical expenses is made by the Arbitrator. To the extent Petitioner requests a finding of a specific prospective medical treatment, the Arbitrator notes that no such finding was requested by Petitioner on the stipulation sheet and the nature and extent of Petitioner's injuries was placed at issue at trial. Thus, no specific award of prospective medical is made under Section 8(a).

K. Temporary Total Disability

Following the accident on July 16, 2017, Petitioner was placed off work and in a non weightbearing status for eight weeks. Throughout his treatment for the injury, Petitioner remained off work. His work restrictions are permanent. On September 10, 2018, Petitioner returned to work for Epsco industries in a sedentary capacity within his work restrictions. Therefore, the Arbitrator finds that Petitioner is entitled to 60-2/7 weeks of Temporary Total Disability at the applicable rate of $506.67 per week.

L. What Is the Nature and Extent of Petitioner's Injury?

Pursuant to Section 8.1(b) of the Illinois Workers' Compensation Act, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b). The criteria to be considered include: (i) the reported level of impairment pursuant to the physician's findings per the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Regarding criterion (i), no AMA Impairment Rating was rendered, and therefore, this factor is given no weight in determining the nature and extent of Petitioner's disability.

Regarding criterion (ii), Petitioner testified that he was a professional house painter at the time of the accident. Petitioner testified that he had operated in this occupation for 15 years prior to the date of accident. Petitioner is not able to return to this profession due to his physical disabilities resulting from the work related accident. The Arbitrator gives this factor great weight.

Regarding criterion (iii), Petitioner was 30 years old at the time of the injury. The Arbitrator gives this factor great weight given that Petitioner has many years left in the work force to contend with his injury which limits his abilities in certain physical labor work fields.

Regarding criterion (iv), Petitioner testified that following the accident, he was unable to return to work as a painter due to the permanent restrictions placed on him by his treating physician. Petitioner testified that he was able to successfully secure work in sales at Epsco Industries beginning about September 2018. Petitioner works in a sedentary capacity, and earns $15.00 per hour. In support thereof, Petitioner submitted 2017 and 2018 tax returns (Pet. Exs. 3-4), as well as 2019 Year-to-Date earnings (Pet. Ex. 5). There is no additional evidence to indicate the range or type of job pay available to Petitioner to evaluate Petitioner's future earning capacity. However, based on his current job in a different work arena and the demonstrated decrease in pay, the Arbitrator gives this factor great weight.

Regarding criterion (v), Petitioner testified that he still feels pain in his foot and ankle when he wakes up in the morning and when completing everyday tasks. Post-surgical follow up visits and x-rays revealed Petitioner was healing and his internal fixation was well-aligned. (PX13). Nevertheless, his pain, stiffness and deficits persisted. (PX13, PX16). On May 18, 2018, ten months after the injury and eight months after surgery, Dr. Weatherford released Petitioner from his care, and told him he could return to work with permanent restrictions. (PX13, 40-42). Petitioner testified that orthopedically, there was nothing more that could be done for him at that time. (PX11, 7). Dr. Weatherford believed Petitioner would eventually develop subtalar arthrosis given the shear nature of the injury and the intraoperative damages noted to the subtalar joint, particularly the posterior facet of the calcaneus. He warned Petitioner might need subtalar joint injection under fluoroscopy in the future. (PX13, 37).

Petitioner testified he was told not to carry anything over 10 pounds, no standing for more than 5 minutes, no climbing ladders or stairs and to elevate his leg at work. Petitioner testified that based on these restrictions, he was unable to return to painting, which had been his profession for 15 years. Petitioner found a sedentary job within his restrictions. The Arbitrator notes that Petitioner request an award under Section 8(d)(2) of the Act and is not requesting an award under Section 8(d)(1) for wage differential.

Petitioner testified as to the daily pain and stiffness he still experiences, now over two years after his injury. He testified that he cannot drive more than 10-15 minutes, struggles to perform daily tasks including playing with his children and regular household chores. Petitioner requires the use of a scooter or cane for walking longer distances. The Arbitrator gives this factor great weight.

Upon consideration of all factors as noted above, the Arbitrator finds that Petitioner has sustained a loss of his trade as a painter based on and in addition to his severe and permanent injury to his right foot and ankle. Accordingly, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

M. Other: Insurance and Liability of the IWBF

The Arbitrator finds that the evidence submitted by Petitioner is sufficient to establish that Respondent-Employer did not maintain active workers' compensation insurance on July 15, 2017. Petitioner submitted a "Request for Information on Employer's Insurance Coverage," (Pet.

Ex. 18), which Petitioner's counsel stated he received from the Illinois Workers' Compensation Commission. The exhibit contains a hand written notation dated 2/6/18 stating "no insurance coverage found on NCCI database." While noting that the NCCI search may have been conducted under the incorrect name of "PN Painting Plus," the search was also performed using the correct address of P N R Painting Plus which was the same address listed on the paycheck given to Petitioner admitted as PX 1. The search using the correct address also revealed no insurance for a business at the address. The Arbitrator's findings are not dissuaded by the disclaimer placed on the address search option, presumably by NCCI. Taken as a whole, the Arbitrator finds these records provide a sufficient basis on which to find the Respondent failed to maintain the appropriate Workers' Compensation insurance.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES GOMEZ,

Petitioner,

vs. NO: 18 WC 32003

ADVANCED DISPOSAL SERVICES,

Respondent.

21IWCC0162

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, prospective medical, and temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification below.

The Arbitrator incorrectly stated that the first mention of Petitioner's shoulder pain was three days after the accident on October 19, 2018. The Arbitrator noted that the record states only "pain in unspecified shoulder." *Arbitration Decision* at p. 6. The Commission's review of the record shows that the note referenced by the Arbitrator appears in records for an office visit on November 1, 2018, which is more than two weeks after the accident at bar. PX5 at 20-24.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8(a) of the Act with credit to be given for any payment made directly by respondent or pursuant to §8(j) of the Act. All medical expenses incurred, or to be incurred, after February 28, 2019 are denied.

21IWCC0162

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of $1,062.37 per week for 21-2/7 weeks, for the period from October 17, 2018 through March 14, 2019 per the stipulation, and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 3.3.21

43

Stephen Mathis

Thomas J. Tyrrell

21IWCC0162

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 11, 2021, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GOMEZ, JAMES
Employee/Petitioner

Case# **18WC032003**

ADVANCED DISPOSAL SERVICES
Employer/Respondent

21IWCC0162

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5094 SKLARE LAW GROUP LYD
MICHAEL R TRYBALSKI
20 N CLARK ST SUITE 1450
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

21IWCC0162

21IWCC0162

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

James Gomez
Employee/Petitioner

v.

Advanced Disposal Services
Employer/Respondent

Case # **18** WC **32003**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of Wheaton on **December 18, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident **October 16, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$82,880.20;** the average weekly wage was **$1,593.35.**

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$22,754.76** for TTD, **$0** for TPD, $**0** for maintenance, and **$4,069.35** (PPD Advanced) for other benefits, for a total credit of **$26,824.11**

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act. All medical expense incurred, or to be incurred, after February 28, 2019 is denied.

Temporary Total Disability

Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of **$1,062.37 per week for 21-2/7weeks**, for the period from **October 17, 2018 to March 14, 2019** per the stipulation.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Christine M Ory

Signature of Arbitrator

January 26, 2020

Date

IC ArbDec19(b) p. 2

JAN 28 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Gomez	)	
Petitioner,	)	21 IWCC0162
vs.	)	**No. 18 WC 32003**
Advanced Disposal Services	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Geneva on December 18, 2019. The parties agree that on October 16, 2018, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent. They agree that in the year predating the accident, petitioner earned $82,880.20 and his average weekly wage calculated pursuant to §10, was $1,593.35.

At issue in this hearing is:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills
3. Whether petitioner is entitled to payment for prospective medical treatment.
4. Whether petitioner is due temporary total disability

FINDINGS OF FACT

Petitioner testified that he had worked for respondent for 5 years as a rolloff driver. He started work at 4:00 AM on October 16, 2018. While on his route later that day at about 2:45 PM, his truck was pulled over to the side of the road, and he was outside of it tarping a rolloff container when he was struck by the passenger-side mirror of a passing vehicle.

Petitioner testified that the mirror hit his left shoulder blade and spun him around. The driver pulled over and petitioner went up to talk with him, then petitioner called his supervisor and reported the incident.

Paramedics were dispatched to the scene, and the history they took from petitioner was that he was in the process of securing his load "when he felt a side mirror of a vehicle hit him in his back." Petitioner confirmed that he was ambulatory the entire time and did not fall down. He also reported that the vehicle tire grazed his boot, but did not run over his foot. "Crew noted no redness, bruising, or swelling to the pt's back or foot." (PX1, p.6).

Petitioner was transported to Alexian Brothers Hospital and was seen in the emergency room. There, petitioner reported that a vehicle going 10 to 15 miles per hour struck his left side and ran "over the edge of his left foot slightly." He was wearing steel toed boots and denied pain and swelling to the toes or the foot. He did complain of pain radiating to the neck and left lateral ribs on a level of 8/10 associated with a slight headache. He confirmed that he did not fall from the occurrence. (PX3, p.13).

The physical examination showed diffuse tenderness to palpation in the neck with no vertebral tenderness, normal range of motion and no bruising or swelling. He had mild diffuse thoracic and lumbar vertebral pain, likewise with no edema or hematoma. His extremities all had normal range of motion with no swelling, open wounds or bruising. (PX3, p.14)

X-rays were taken of the ribs and all levels of the spine, but not the shoulder or the foot. The rib x-rays showed no fractures or deformities. Findings in the cervical, thoracic and lumbar spine studies showed no evidence of acute fracture or malalignment, along with "interval progression of arthritic changes since previous x-rays" at all three levels, with the cervical spine studies specifically noting "multilevel arthritic changes." (PX3, pp.15, 27-30).

Petitioner was discharged in stable condition, with noted improvement in his pain complaints. The "Impression and Plan" section upon discharge actually only noted "Acute pain of the left foot," though petitioner was also provided education materials on back pain. He was provided pain medications and instructed to follow up with Dr. Scholl in two days (PX3, p.16).

According to Petitioner's Exhibit 5, records from Alexian Brothers Medical Group, petitioner reported being hit by a car mirror on the left side "a few days ago." His emergency room visit was recorded, as were his current complaints of headaches, neck pain and pain in his left foot. The physical examination noted that petitioner was ambulating with a mild limp from discomfort on his left hip, he had left side of paraspinal muscle tightness in his back and pain with external rotation of the left hip and on palpation of the joint. No specific examination of the upper extremities is noted, and the cervical spine showed normal flexion and extension, but with spasms on the left side of the posterior cervical region.

The assessment included cervicalgia, pain in the left hip for which an MRI was ordered and pain in the left foot, which was to continue to be monitored. There is also an indication of "pain in unspecified shoulder." (PX 5, p. 25). The MRI of the left hip was performed on November 16, 2018, and showed no obvious tear of the acetabular labrum, no evidence of joint effusion or avascular necrosis of the femoral head. All hip muscles appeared normal and the joint spaces were maintained bilaterally. (PX 5, p.29).

There is then record of a November 1 visit and a history that petitioner reported no improvement since his work accident. Petitioner had undergone two physical therapy sessions at that point, which only helped him temporarily. His primary complaint again was left hip pain, which he felt was aggravated during therapy. He also reported left upper back and neck pain with no numbness or tingling in the left arm, and he was able to move all of his extremities. (PX 5, p.24).

By November 15, 2018, petitioner had improvement in his headaches but no significant improvement in neck pain or hip pain despite additional therapy sessions. The summary of the work accident again notes only that petitioner was "hit by a car mirror on the left side." The physical examination findings with regard to the neck, left hip and cervical spine were all similar to the November 1 visit, once again with no indication of any specific examination on either shoulder. The assessment following this visit is only of neck pain and left hip pain. (PX 5, pp. 17-21).

At his follow-up visit on November 27, petitioner brought in the CD of the hip MRI, and noted that he was told that there was nothing wrong in the hip, though he still complained of pain. He also complained of a knot in his neck. The assessment again included only neck pain and left hip joint pain. Dr. Scholl referred petitioner to Dr. Odell due to petitioner's lack of subjective improvement. (PX 5, pp.13–17).

Petitioner was last seen by Dr. Scholl on January 22, 2019 for what appears to be a general checkup. His only subjective complaint on this date was "back pain." The examination of the neck showed full range of motion, the musculoskeletal examination was negative as to motor strength, tone, joints, bones and muscles, and normal movement was noted of all extremities. Petitioner had a normal gait and his pulses were normal as well. The assessment at this time was an examination without abnormal findings, along with uncontrolled type II diabetes, which had been noted on petitioner's prior medical history. He was scheduled for a follow-up examination in three months. (PX 5, p.13).

According to the records of Midwest Sports Medicine, Dr. Odell first saw petitioner on December 11, 2018. (PX 11, p.7). Petitioner's history at that time was that he was standing outside next to his work truck when he was hit by the mirror of the car, "which spun him and he then hit the quarter panel of the car. He states his left foot was run over by the car," though petitioner confirmed that he was wearing steel toed shoes. Petitioner complained of pain in his left hip, left shoulder and cervical spine. Following his examination and review of the diagnostic studies, Dr. Odell's impression was left hip pain, exacerbation of cervical spondylosis, C4–C7 disc herniations and left shoulder pain and biceps tendon injury. (PX 11, pp.12–15).

Dr. Odell saw petitioner on three more occasions through February 12, 2019, and petitioner's complaints, examination findings and assessments were essentially the same. He ordered MRIs of the left shoulder and the lumbar spine, and kept him off of work (PX 11, pp.26-55).

At that point, respondent scheduled an IME with Dr. Michael Lewis at Illinois Bone & Joint. According to his history to Dr. Lewis, petitioner was outside of his truck on October 16, 2018 when a passenger mirror hit him on his left shoulder while the car was moving. This is the first indication of the vehicle mirror striking petitioner's shoulder, as opposed to his left side or the left side of his back. The impact resulted in a twisting motion to his lower back and the car running over his left foot.

Petitioner reported no pain in the foot, but did have pain in the low back area with radiation into the left thigh. He also complained of pain in the posterior cervical spine with radiation to the left shoulder. Petitioner noted a prior injury to his low back in 2008, for which he had received an injection into his sacroiliac joint.

Examination showed petitioner walking with a normal gait, and normal range of motion of the cervical spine. Range of motion of the shoulders was equal bilaterally as was strength, sensation and reflexes. Examination of the left shoulder was negative for apprehension and impingement signs.

The examination of the lumbar spine showed no spasm in the paravertebral muscles with equal range of motion bilaterally, and normal muscle strength sensation and reflexes in the lower extremities bilaterally. (RX 2, pp.1-2).

Dr. Lewis reviewed the ER records, the October 19, 2018 examination note as well as the MRIs of the left hip, cervical spine, left shoulder and lumbar spine. He also had the off work notes from Dr. Odell and petitioner's physical therapy records.

Following his examination of petitioner and review of the records, Dr. Lewis concluded that there was no objective evidence of orthopedic pathology in regard to the left foot, left hip, cervical spine, lumbar spine or left shoulder. This was confirmed by his review of the diagnostic studies, including all of the MRI films. He specifically stated that there was no evidence of acute pathology on any of those studies, nor objective evidence of orthopedic pathology from his

examination. Therefore, he found that petitioner did not sustain even an aggravation of any underlying conditions.

He did state that the treatment rendered to date, including that by Dr. Odell had been appropriate and causally related to the conditions from the work accident, but that no further treatment was necessary. He felt that petitioner could resume working with no restrictions. (RX 2, pp.3-5).

Petitioner returned to Dr. Odell on March 12, 2019 and according to his work restriction form of that date, the list of diagnoses now takes up nine lines, ranges from the cervical to the lumbar spine and includes the left shoulder and left hip conditions. He was already contemplating surgery to address petitioner's left shoulder complaints, but referred him to Dr. DiGianfilippo for exploration of possible cervical spine surgery. (PX 11, pp.57-60).

Petitioner saw Dr. DiGianfilippo on April 3, 2019. Petitioner's history is recorded almost simultaneously as "he was hit on the left side of his hip" and "He was hit with car mirror behind left shoulder blade." He complained of pain on the left side of his neck and shoulder, but noted that the knot in his neck had improved. "He apparently also developed a rotator cuff tear, along with tingling down his left arm to his last two fingers." (PX 13, p. 9).

Following physical examination findings that are alternately noted as "no neck pain or swelling in the extremities" followed almost immediately by "neck pain, back pain, arm pain, and leg pain," along with buttock and groin pain radiating down the left leg to the knee, the assessment is "significant cervical spinal canal stenosis with spinal cord compression" along with indications of a spinal cord injury and low back pain with mild L4–5 stenosis. He also includes cervicalgia and headache in his diagnoses. (PX 13, p.10).

His proposed treatment was a C3–C6 decompressive laminectomy due to what he deemed a tight canal and cord compression with possible spinal cord injury. Dr. DiGianfilippo was told that the IME doctor had suggested petitioner could go back to work, but he disagreed with that (PX 13, p.11).

Four weeks later, on May 2, 2019, Dr. DiGianfilippo performed a decompressive laminectomy from C3 to C6. He was seen on two occasions through May 22, at which time he was still authorized off of work. (PX 13, pp.12–15). There is no indication petitioner has returned to Dr. DiGianfilippo since May.

Petitioner has continued to follow-up with Dr. Odell, however. Through his visit on August 6, 2019, Dr. Odell took petitioner off of work and charted his complaints regarding his left hip and his left shoulder. The examination noted tenderness to palpation over the subacromial area of the left shoulder, but range of motion to 150°. Positive impingement signs were also noted. The examination of the left hip revealed mild trochanteric tenderness. (PX 11. Pp.82-101).

The assessment and plan were a left shoulder partial thickness rotator cuff tear and biceps tendinitis versus partial tear and impingement, along with left leg lumbar radiculopathy and "disc bulges/herniations" from L2 through S1. Petitioner was released to light duty as of August 12, 2019 with a 20-pound lifting restriction. It was noted that he would continue following up with Dr. DiGianfilippo (PX 11, pp.98-99), though there are no further records from that physician in evidence.

Based on the ongoing complaints and treatment petitioner was undergoing, and particularly after the cervical spine surgery, respondent forwarded petitioner's updated records to Dr. Lewis for an addendum opinion. Specifically, the initial paramedic and emergency room records were provided, along with additional notes of examination from Dr. Scholl, Dr. Odell and Dr. DiGianfilippo, including his operative report of May 5, 2019.

Following his review of these additional records, Dr. Lewis stated in an August 31, 2019 report that while petitioner may have had continued subjective complaints, there was no objective evidence of orthopedic pathology as of the IME on February 28, 2019. Therefore, his opinions as to the need for treatment after that date, the diagnosis of strains and contusions that had resolved, and petitioner's ability to work after that date were unchanged. He acknowledged that petitioner may have made subjective complaints to the other doctors that he did not make during his IME, but this did not impact his opinion with regard to Petitioner's objective physical condition, either as of February, 2019, or thereafter. (RX 3, pp.1-2).

Consistent with this opinion, and despite the most recent diagnosis of multiple herniated lumbar discs by Dr. Odell, a repeat MRI of the lumbar spine dated August 12, 2019 revealed diffuse disc bulges, not herniations, with no resulting spinal stenosis at L2-3, L3-4 and L4-5, and specifically "no disc herniation or spinal stenosis" at L5-S1. The report further notes normal alignment of the lumbar spine without evidence of subluxation, and normal vertebral body heights and disc spaces. (PX 11, pp.102–103).

Petitioner returned to Dr. Odell on September 5, 2019 and the listed diagnoses were now left bicipital tendinitis, osteoarthritis of the left shoulder, and muscle and tendon strains in the rotator cuff of the left shoulder, along with pain in the left hip. These were essentially maintained following his October 5, 2019 visit, at which time, petitioner agreed to proceed with a left shoulder arthroscopy with subacromial decompression, rotator cuff repair, open distal clavicle excision and open biceps tenodesis.

That surgery took place on November 6, 2019, and the postoperative diagnoses were right [sic] shoulder traumatic partial thickness rotator cuff tear, partial-thickness long head biceps tendon rupture, impingement syndrome, anterior superior labral tear and AC joint osteoarthritis. (PX 11, pp.141–143). He followed up on a couple of occasions through November 19, 2019, which was the last examination before trial. Petitioner was authorized off of work and was undergoing therapy at the time.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The petitioner bears the burden of proving every element of his claim by a preponderance of the evidence. Arbuckle v. Industrial Commission, 32 Ill.2d 581 (1965). The arbitrator is asked herein to determine whether petitioner met his burden of proving by a preponderance of the credible evidence that he required treatment from the effects of the October, 16, 2018 work injury following the February, 28, 2019 examination with Dr. Lewis, whether he was unable to return to work without restrictions after that date and at the time of trial, and whether the two surgeries that followed were in fact medically necessary and causally related to the injuries from the October 16, 2018 work accident.

Shoulder surgery

The arbitrator addresses the shoulder surgery first, as this was most recent in time, and the issue of causal connection, or lack thereof, is perhaps more obvious. The extensively recorded summary of the accident histories above that petitioner provided to the paramedics, to the emergency room and to Dr. Scholl early on in the case, and even to Dr. Odell and Dr. DiGianfilippo, establish by overwhelming evidence that the passenger side mirror of the vehicle

that struck petitioner did not strike him in the left shoulder, contrary to his trial testimony. Every history petitioner provided until his IME with Dr. Lewis and his trial testimony referenced only being struck in the back or on the left side of the back. The history to Dr. DiGianfilippo actually records being struck both in the hip and the shoulder.

Corroboration of the absence of a direct impact on petitioner's left shoulder in the accident is further found by the fact that x-rays were done of every area of the body that petitioner reported being injured in the accident, and every area of concern to the emergency room doctors, yet no x-rays were taken of either shoulder.

Likewise, there are no directed examinations of the left shoulder, and to the extent that there is reference to musculoskeletal examinations of petitioner's extremities at all in the early records, no positive objective findings are recorded. There is thus no contemporaneous, objective evidence that petitioner was struck in the left shoulder blade at the time of the accident, or that he in any other way injured his left shoulder in the accident.

Although the first reference to shoulder pain appears three days later at petitioner's follow-up examination on October 19, 2018, that record is devoid of any complaints of pain or injury to either shoulder, or evidence of examination to the upper extremities. In addition, the assessment does not specify which shoulder is involved as it literally states, "pain in unspecified shoulder." (PX 5, p.25).

The focus of petitioner's complaints, examination, findings and treatment thereafter were to the cervical spine on the left side and the left hip. By January 22, 2019, petitioner's only subjective complaints were unspecified back pain, he had full range of motion in the neck, and the musculoskeletal examination was negative. (PX 5, p.13).

The MRI of the left shoulder revealed tendinopathy with a partial-thickness articulating undersurface tear, along with hypertrophic spurring and possibly some mild impingement (RX 2, p.3). None of petitioner's treating doctors have indicated that any of these findings were either acute or represented an aggravation of the underlying findings by the work accident.

Neither Dr. Odell nor Dr. DiGianfilippo have explained or implied in their records how a rotator cuff tear arose from the described accident of petitioner being struck in the back by the rearview mirror of a vehicle passing him at about 10 miles an hour. Dr. Lewis specifically found no evidence of any acute pathology on the shoulder MRI, or any of the other MRIs. (RX 3, p.4).

As a result, the Arbitrator adopts the opinion of Dr. Lewis in his February 28, 2019 report (RX 2), as amplified in his August 31, 2019 report (RX 3), that petitioner was not in need of any further treatment to any body part, much less the left shoulder, after that date as the more credible medical opinion on this issue.

Thus, whether petitioner actually needed the shoulder surgery that Dr. Odell performed on November 6, 2019 or not, the record is devoid of credible, objective evidence that the need for that procedure had anything to do with the October 16, 2018 work injury.

Based on the above, the arbitrator finds that petitioner failed to prove that his medical treatment after February 28, 2019, his lost time beginning with the November 6, 2019 left shoulder surgery, the medical bills for the surgery itself, any prospective treatment, as well as any disability that may later be found to result from the left shoulder surgery, were causally related to or necessitated by the October 16, 2018 work injury.

Cervical spine surgery

The issue of causal connection between the cervical surgery petitioner underwent and the work accident is less obvious than with regard to causal connection between the shoulder surgery and the work accident. As it remains petitioner's burden to prove by a preponderance of the credible

evidence, however, that the cervical spine surgery was causally related to the work accident, the arbitrator finds that petitioner likewise failed to meet his burden of proof on this issue.

Once again, the diagnostic studies, specifically the cervical spine MRI and x-rays, along with petitioner's initial presentation to the paramedics, emergency room and Dr. Scholl all point to a soft tissue contusion/strain injury, and point away from a traumatic injury or aggravation of an underlying condition necessitating surgery.

Although petitioner did have neck and cervical spine complaints, and diagnostic studies were undertaken of the neck and cervical spine (unlike with regard to the left shoulder) in the emergency room, it is significant that the x-ray findings of all three areas of petitioner's spine all noted merely "interval progression of arthritic changes since previous x-rays," with the additional, and significant, detail in the report of the cervical spine x-rays noting "*multilevel* arthritic changes." (PX 3, pp. 27–30).

The arbitrator thus finds that the objective evidence from the diagnostic studies as well as the examination findings in the emergency room and by Dr. Scholl thereafter fail to support any reasonable conclusion that petitioner was a) actually in need of multilevel repairs in his cervical spine or b) that such a procedure, even if medically necessary, was at all causally related to the October 16, 2018 work accident.

Dr. Lewis' reports substantiate this finding, (RX 2,3) and are more credible on the issue than Dr. Odell or the one visit and quick surgery performed by Dr. DiGianfilippo.

In further support of the arbitrator's decision that petitioner failed to meet his burden of proving that the cervical spine surgery was causally related to the work accident, petitioner testified at trial of ongoing stabbing pain from his neck into his left arm, despite the fact that both his neck and his shoulder have undergone surgical procedures, allegedly to alleviate his symptoms. The fact that petitioner has not had any resolution of his symptoms now after two surgeries supports the opinion of Dr. Lewis that petitioner was actually not in need of any further treatment to any body part as of February 28, 2019.

While a surgical result is not always a reliable indicator of medical necessity or causal connection, both surgeries were clearly fueled by petitioner's subjective complaints rather than the objective diagnostic and examination findings. The fact that Dr. Odell references four levels of *herniated* discs in petitioner's lumbar spine as late as August, 2019 (PX 11, pp.98-99), and only backtracks from that diagnosis after yet a second lumbar MRI fails to substantiate this, provides a further basis for the Arbitrator to find his opinions, and those of Dr. DiGianfilippo, less credible on this issue than Dr. Lewis'.

Lastly, the arbitrator notes that a history of being struck by a moving vehicle as a pedestrian, the history relied upon by Drs. Odell and DiGianfilippo, suggests that significant injuries can result. There is no doubt that while working on the side of his truck in the road on October 16, 2018, petitioner was struck by the rearview mirror of a vehicle going about 10 miles per hour or so. The potential severity of that impact, however, is diminished in this case by the factual evidence that petitioner was not knocked down, and walked on his own power over to the offending car, which had pulled over to the side of the road, to advise the driver.

Petitioner then called his supervisor, and when the paramedics showed up, they noted that petitioner was ambulatory the entire time, and their initial examination showed no redness, bruising or swelling to the petitioner's back and foot (PX 1, p.6).

This, of course, does not impact the compensability of the claim, but does confirm the relatively minor nature of the impact on petitioner's body. The resulting absence of findings in the

emergency room records and the initial visits to Dr. Scholl of any swelling in any of the body areas petitioner complained of lends further credence to this conclusion.

In short, petitioner was injured in a work-related accident on October 16, 2018, but fortunately for him, the nature of the resulting injuries was essentially strains that took a couple of months of follow-up visits and physical therapy to resolve. Thereafter, petitioner's subjective complaints led to his ongoing treatment, and eventually surgeries, performed by Dr. Odell and Dr. DiGianfilippo, but the objective evidence and credible opinions in the record do not establish that any of that was causally related to injuries sustained on October 16, 2018.

For the foregoing reasons, the arbitrator finds that petitioner failed to prove that respondent is liable for the costs of the petitioner's cervical spine surgery and its follow-up since July 6, 2019, failed to prove that petitioner was both in need of medical treatment and incapable of working after February 28, 2019, and has failed to prove that any disability that is found to be related to the cervical spine surgery is causally related to the work injury.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator determined petitioner's extensive treatment after February 28, 2019 was not causally related to the work accident of October 16, 2018. Furthermore, based upon the lack of objective findings, the Arbitrator finds all treatment after February 28, 2019 was not reasonable or necessary as required in §8 of the Act and denies petitioner's claim for all medical treatment incurred after February 28, 2019

Specifically, the Arbitrator awards payment to Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act.

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

As the Arbitrator determined no further treatment was causally related, or reasonable and necessary, after February 28, 2019, the Arbitrator denies the claim for prospective medical treatment.

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner was temporarily totally disabled from October 17, 2018 only to March 14, 2019 as stipulated by respondent, based upon the opinion of Dr. Michael Lewis. Petitioner is awarded TTD from October 17, 2018 to March 14, 2019, which is 21-2/7 weeks at the rate of $1,062.57 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICKI MITCHANER,

Petitioner,

vs. NO: 11 WC 5574

SYNGENTA SEEDS, INC,

Respondent.

21IWCC0163

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident, notice, causal connection, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification noted below.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $439.80 per week for a period of 200 1/7 weeks, representing August 19, 2010 through Juy 1, 2013 and August 11, 2015 through July 28, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the amount of $439.80 per week for a period of 75 6/7 weeks, representing April 3, 2017 through June 30, 2018 and April 15, 2019 through June 30, 2019, as provided in §8(a) of the Act

21IWCC0163

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the vocational service expenses of Bob Hammond, CRC, in the amount of $7,649.73, pursuant to section 8(a) of the Act. PX18.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $466.13 per week for life, representing the minimal permanent total disability rate for Petitioner's date of accident, commencing on July 16, 2019, as provided in §8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses pursuant to the fee schedule, relating to the treatment Petitioner underwent for bilateral carpal tunnel syndrome. Respondent is not liable for medical expenses for treatment of Petitioner's left cubital tunnel syndrome.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Commencing on the second July 15th after the entry of the Arbitrators award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 2.16.21

43

Stephen J. Mathis

Stephen Mathis

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MITCHANER, VICKI
Employee/Petitioner

Case# **11WC005574**

SYNGENTA SEEDS INC
Employer/Respondent

21IWCC0163

On 12/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0874 FREDERICK & HAGLE
JEFFREY D FREDERICK
129 W MAIN ST
URBANA, IL 61801

0000 RUSIN & MACIOROWSKI LTD
TERRY SCHROEDER
2506 GALEN D SUITE 102
CHAMPAIGN, IL 61821-7047

21IWCC0163

STATE OF ILLINOIS)
)SS.
COUNTY OF **CHAMPAIGN**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [x] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VICKI MITCHANER
Employee/Petitioner

v.

SYNGENTA SEEDS, INC.
Employer/Respondent

Case # **11** WC **5574**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, former Arbitrator of the Commission, in the city of **Urbana**, on **July 16, 2019**. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the case to Arbitrator Mason for the purpose of reviewing the transcript and exhibits and issuing a decision. The parties agreed to proceed in this fashion. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. xx Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. xx Was timely notice of the accident given to Respondent?
F. x Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. xx Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. x What temporary benefits are in dispute?
   [ ] TPD x Maintenance xTTD
L. x What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **June 14, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to her current post-operative bilateral carpal tunnel syndrome condition of ill-being but did not establish causation as to her claimed left cubital tunnel syndrome.

In the year preceding the injury, Petitioner earned $**57,078.44**; the average weekly wage was $**659.70**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**10,920.21** under Section 8(j) of the Act for payments made under Respondent's short-term disability policy. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against her by reason of having received such payments, pursuant to Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $439.80 PER WEEK DURING TWO INTERVALS, FROM 8/19/10 THROUGH 7/1/13 (THE DATE DR. OAKEY RELEASED PETITIONER TO FULL DUTY) AND FROM AUGUST 11, 2015 (THE DATE OF THE RIGHT CARPAL TUNNEL RELEASE) THROUGH 7/28/16, AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $439.80 PER WEEK FROM 4/3/17 (THE DATE OF PETITIONER'S FIRST RECORDED JOB CONTACT, PX 20) THROUGH 6/30/18 AND FROM 4/15/19 THROUGH 6/30/19, AS PROVIDED IN SECTION 8(A) OF THE ACT. IN ADDITION, RESPONDENT SHALL PAY VOCATIONAL EXPENSES OF BOB HAMMOND, CRC, IN THE AMOUNT OF $7,649.73, PURSUANT TO SECTION 8(A) OF THE ACT. PX 18.

RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $466.13 PER WEEK FOR LIFE, REPRESENTING THE MINIMUM PERMANENT TOTAL DISABILITY RATE IN EFFECT AT THE TIME OF PETITIONER'S INJURY, COMMENCING 7/16/19, AS PROVIDED IN SECTION 8(F) OF THE ACT.

PETITIONER CLAIMS THE MEDICAL EXPENSES ENUMERATED IN PX 21. SOME OF THESE EXPENSES RELATE TO TREATMENT PETITIONER UNDERWENT FOR LEFT CUBITAL TUNNEL SYNDROME. THE ARBITRATOR DID NOT FIND CAUSATION AS TO THIS CONDITION. RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL EXPENSES, PURSUANT TO THE FEE SCHEDULE, RELATING TO THE TREATMENT PETITIONER UNDERWENT FOR HER LEFT AND RIGHT CARPAL TUNNEL SYNDROME.

COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(G) OF THE ACT.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason

Signature of Arbitrator

12/23/19
Date

DEC 23 2019

Vicki Mitchaner v. Syngenta Seeds, Inc.
11 WC 5574

21IWCC0163

Procedural History

Former Arbitrator Hemenway conducted a hearing in this case on July 16, 2019. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the matter to Arbitrator Mason for the purpose of reviewing the transcript, exhibits and proposed findings and issuing a decision. The parties agreed to proceed in this manner.

Summary of Disputed Issues

Petitioner, a longtime "supply tech" who worked in Respondent's lab, claims left carpal tunnel syndrome manifesting on August 18, 2010 secondary to repetitive trauma. She also claims left cubital tunnel syndrome, secondary to the left carpal tunnel surgery, and right carpal tunnel syndrome secondary to overuse. [At the beginning of the hearing, Petitioner amended her Application to clarify she is not alleging injuries to her neck, back or shoulder. T. 7.]

The disputed issues include accident, notice, causal connection, medical expenses, temporary total disability from August 19, 2010 through July 28, 2016, maintenance from March 13, 2017 through the hearing of July 16, 2019 and nature and extent. The parties agree that Respondent paid $10,920.21 in non-occupational benefits. They also agree that, as of the hearing, Petitioner would be earning $22.95 per hour if she still worked for Respondent. Arb Exh 1. T. 5.

Arbitrator's Findings of Fact

Petitioner testified she was born on August 26, 1954. She is right-handed. She graduated from high school in 1972. She did not attend college. Her first job out of high school was for a maid service. She then worked as a stock clerk for Colwell Systems and in the office at United Waste Systems. T. 21-22.

Petitioner testified she began working as a supply tech for Respondent in 1990. She was 37 years old at that time. She continued to work as a supply tech, on a full-time basis, through August 18, 2010. She typically worked overtime from September through January. She testified that overtime was required. Her employment at Respondent ended in February 2011. At that point, her hourly rate was $15.57. T. 22-23.

Petitioner identified PX 16 as a description of the various tasks she performed as a supply tech. She created PX 16 and provided it to Dr. Fletcher. She provided a verbal, less complete description to Dr. Kohlmann, an examining physician she saw at Respondent's direction. She testified she made an unsuccessful attempt to provide Dr. Kohlmann with a more complete description. T. 26-28.

Petitioner testified that Respondent operates a soybean production plant. Respondent contracted with soybean growers. After a harvest, the growers brought their seeds to the plant. She worked in Respondent's lab, performing quality assurance testing on these seeds.

Petitioner testified she initially tested "bin samples." Co-workers placed these samples on a pallet outside the lab. The samples were in white bags. Each bag weighed 5 pounds. Petitioner testified she would carry 5 or 6 bags at a time into the lab. She untied the bags, poured the seeds into trays, performed a two-minute visual inspection and then poured the seeds into metal pans. The pans were 11 x 20 inches in size. Each pan had a hole in the end. She then had to pour the seeds back into the bags. She testified she put her hands over the end of the hole to avoid spillage. She estimated she tied and untied each bag 4 to 6 times during the testing process.

Petitioner also described the "purity checks" she performed. She had to ensure that the seeds were all the same variety. T. 33. She would place a seed on a rough wooden board that was 20 x 20 in size. The surface of the board was carpeted so that the seeds would not roll too quickly. She poured seeds onto this surface and inspected them, using a magnifying glass that lit up. She testified she rested her wrists at an angle on the wooden part of the board as she pulled the magnifying glass down and inspected the seeds. She then used a pencil to roll 500 seeds slowly, while checking their size, shape and coat. She held the pencil in her right hand. She used her index finger and thumb to remove any seeds that seemed questionable. Some seeds were pea-sized while others were smaller. T. 36-37. It took her 10 to 15 minutes to inspect 500 seeds. She rested her wrists against the wooden board during this time period. T. 38.

Petitioner also described a process known as "rag dolls." She started this process by retrieving a 50-pound box of paper from a warehouse, carrying it 200 feet to the lab and using a utility knife to cut it open. The box contained 2000 sheets of paper. She used both hands to remove about three inches of paper at a time. She placed the paper on a baker's sheet and then wet the paper, using water from a plastic container. She then used both hands to flip the paper over and wet the other side. The paper swelled as she wet it. She placed the wet paper into storage containers that had snap-close lids. If the sample was classified as a "round up," she used "round up" solution, rather than water, to wet it down. She made this solution. She then took a sheet of wet paper and folded it halfway down. She then poured seeds into a 10-inch triangular plastic pan and, from there, into a "planting board" that was about 4 x 22 inches in size. She held the "planting board" in both hands and rolled it around until the seeds filled 50 holes. She then poured off the excess seeds into the pan. She then set the "planting board" onto a wet piece of paper and released the seeds, using her thumb. She then used both hands to flip the folded half sheet of paper up onto the seeds. She then used her fingers and thumbs to roll the paper from left end to right end until she "had that rag doll rolled." T. 41. Once it was rolled, she folded it into two, put a rubber band around it and put it into a wired bucket that had holes in it. Her goal was to plant 400 seeds. She repeated the process eight times, put plastic over the bucket and affixed it with a rubber band. In the busiest part of the year, she

might do "300 a day in rag dolls." T. 42. During "bin sampling", she might stand there for five hours in a row, "just doing rag dolls." T. 43.

Petitioner identified PX 22 as a photograph of a gallon jug that co-workers would bring to her. The jugs were referred to as "truck samples." They would be filled with five pounds of seed. There would be a ticket at the top, identifying the grower. She would hold the lid with her left hand and try to twist the lid off, using her right hand. She would alternate if she was not able to untwist the lid on the first try. The lid was 4 inches in diameter. The jug was made of plastic but was sometimes slick due to being covered with bean dust. T. 45. After she removed the lid, she would write out an envelope, using the information from the ticket. She would then grasp the lip of the jug, using her left hand, use both hands to lift the jug to the height of her head and pour the contents into a copper divider. She then put the lid back on the jug and threw the jug into a box. She would have to unscrew and screw jug lids between 20 and 50 times per shift, depending on the number of truckloads that arrived. T. 48.

Petitioner then described the screening process. She handled three types of screens: 12 slotted, 11 ½ slotted and 11. After she poured the seeds into the copper divider, they went down into two brass pans. The pans had 4-inch handles at the top. She would pour 250 grams out of one, using her right hand, and 250 grams out of the other, using her left hand. She poured the seeds onto screens and then started shaking down the seed. She had to use her thumbs and forefingers to pick out all foreign material, including pods, bugs and mice, "whatever the grower picked up in the seed." She used both hands to rub over the screens to get any spilt seeds to fall down through the screens. The screening process could take between 10 and 30 minutes, depending on how dirty the seeds were. T. 51.

Petitioner explained that she did not work one seed sample through all of the stages because it "wasn't productive." Instead, she would take a stack and do the two-minute check, take a stack and do the test weights, take a stack and do the testing and then do the planting and screening. She would never have been able to keep up the pace if she had taken one sample and run it through. T. 52-53.

Petitioner testified that, in May or June, she also performed tasks in locations other than the lab. Out in the field, she would take a post and put a sign on it, indicating the variety of seed that was planted in that area. She would then take a two-handled post hole driver and "slam that down over the top of the post to drive the post into the ground." T. 54. She placed one hand on each handle. She had to slam three or four times to drive the post down. She also put out plastic signs. This involved placing plastic rivets and clips in the signs. In the warehouse, she and a co-worker would sort through old pallets that were stacked 100 feet long. She would be on one side and her co-worker on the other. Together, they would flip each pallet to see whether it needed to be repaired. If they encountered a pallet that needed to be worked on, they would throw it off to the side. T. 56. The "good" pallets had to be "slip sheeted." This involved grabbing stacks of cardboard and using a heavy stapler to "slap" the cardboard onto the pallet. Petitioner testified she had to "slap" pretty hard to get the staple to go through the pallets because the pallets were made of oak or other hard material. T. 56-57.

She used a crowbar to "bust up" the broken boards on pallets that required repair. She then used a pry bar to "pop" the broken boards off so that new boards could be put on. A pneumatic tool was used to affix the new boards but she did not use this tool. T. 57. She also used a push broom in the warehouse to clean the area where the pallets were sorted. This area was 100 x 100 feet in size. She also used a "scoop shovel" while cleaning up. She would put the debris into a wheelbarrow, maneuver the wheelbarrow out to the dumpster and pour the contents into the dumpster. T. 58-59.

Petitioner testified she sometimes worked with sand during the "rag doll" process. If she planted "rag dolls" and they did not meet the germ requirements, she had to replant on sand. Co-workers would bring in sand, using wheelbarrows. She had a bucket that held 50 pounds of sand. The sand could be wet or dry. She used her right hand to scoop the sand from the wheelbarrow into the bucket. She used her left arm to "hoist" the bucket and carry it to her work station. She would typically fill the bucket about ¾ full so that it weighed between 30 and 40 pounds. Once she got the bucket to her work station, she pushed it onto the counter. She would take 600 milliliters of water from her water container and pour that onto special "Kinpack" paper that resembled the lining of a plastic diaper. She then used her hands to flatten the paper. She then poured seed into a pan and then onto a planting board. She would roll it around until she got 100 seed in the holes. She would then pour off the excess and lay that down on each corner of the Kinpack paper. She would release the spring load, press it down and pour sand over the seeds, using the scoop, until the seeds were covered. She then used her hands to "smooth that out" and carried it over to the germ room. She would slide the planted board into racks in that room. T. 60-62.

Petitioner testified that each task she performed throughout each shift required her to use her hands. T. 62.

Petitioner denied performing any hand-intensive activities outside of work. She does not knit. T. 63-64. She does not have any problems with her thyroid. She is 5 feet, 9 inches tall. T. 64.

Petitioner denied having any problems with either of her hands before she started working at Respondent. She first noticed problems with her hands in the spring of 2010. She noticed problems with grip and strength. She also noticed that her hands would shake when she lifted things. She began dropping objects. T. 65.

Petitioner testified she had experienced problems with her neck for several years before the spring of 2010. T. 65.

Petitioner testified she first saw a doctor for left hand and wrist problems on June 14, 2010. She went to the office of her primary care physician and saw that physician's assistant, Bill Kilpatrick. She informed Kilpatrick that she was experiencing pain, tingling and numbness in her left hand. She also told Kilpatrick that she had noticed a knot on the top of her wrist. T. 66.

She discussed her job duties with Kilpatrick. He provided her with a cock-up splint for her left hand and wrist.

Records in PX 1 and RX 5 reflect that Petitioner saw William Kilpatrick, a nurse practitioner, at Christie Clinic on June 14, 2010. Kilpatrick noted a complaint of left wrist and hand pain that had worsened over the previous three days. He also noted a knot on the posterior aspect of Petitioner's left hand near the wrist. Petitioner denied having anything similar in the past. Petitioner reported being "busier at work" and doing "a lot of repetitive movement with her arms and hands on a daily basis." She also reported taking one Aleve daily for ongoing neck discomfort. She denied any specific injury but reported doing a lot of lifting throughout the day. Kilpatrick described her as right-handed.

In addition to the knot, Kilpatrick noted mildly positive Tinel's and Phalen's testing to the left wrist. His impression was: 1) ganglion cyst; 2) wrist strain; and 3) early carpal tunnel syndrome. He placed Petitioner in a left wrist cock-up splint. He recommended that Petitioner take Aleve twice daily for four to five days. He directed Petitioner to return in two to three weeks if she did not improve. RX 5, p. 24/113.

Petitioner testified that, as of her visit to Kilpatrick, she understood that she had left carpal tunnel syndrome that was due to her repetitive work duties. T. 68. She returned to work the same day she saw Kilpatrick. T. 68. She was wearing the splint. The splint was visible. It was dark blue with white trim. She went to the office of Kevin Kaiser, the plant manager, and spoke with Kaiser that day. [She identified Kaiser in the hearing room. T. 69-70.] Kaiser was her supervisor. From where she was standing, the splint was within Kaiser's view. Kaiser asked her what the splint was for. She told him she was having issues with her hand. She also told him she had just come from the doctor's office, where she had learned she had carpal tunnel syndrome. Kaiser then asked her whether she had any work restrictions. She said "not at this time." Kaiser replied, "okay, keep me posted." T. 70-71. During this same conversation, she told Kaiser that she understood the carpal tunnel syndrome was related to her job duties. T. 71.

Petitioner testified she performed full duty at Respondent during the following two weeks and then returned to Kilpatrick. She wore the splint during this time. When she saw Kilpatrick, he sent her to Dr. Freeman, an orthopedic surgeon affiliated with Christie Clinic. T. 71-72.

Records in PX 1 reflect that Petitioner saw David Freeman, PA-C, a certified physician's assistant affiliated with the Christie Clinic, on July 2, 2010. Freeman noted that Petitioner complained of dull, achy left wrist pain of several months' duration that increased with usage of "overuse while at work." He also noted that Petitioner complained of numbness and tingling in all of her fingers, worse on the left. On left wrist examination, he noted a palpable cyst to the dorsal aspect, positive Phalen's testing, negative Tinel's testing, 5-/5 strength and some thenar eminence atrophy. He obtained left wrist X-rays which showed no bony abnormalities. He

diagnosed a left wrist dorsal ganglion cyst and bilateral carpal tunnel syndrome. He referred Petitioner to Dr. Thatcher for bilateral upper extremity EMG/NCV testing. PX 1, pp. 7-8.

Dr. Thatcher performed the prescribed EMG/NCV testing on July 14, 2010. He found the results to be consistent with mild to moderate left carpal tunnel syndrome and mild bilateral cervical radiculopathy. He found no evidence of right carpal tunnel syndrome or ulnar neuropathy. PX 1, pp. 9-11.

Petitioner testified she returned to Dr. Freeman on July 21, 2010. The doctor referred her to Dr. Love, a surgeon. T. 72-73. PX 1, p. 12.

Petitioner testified she went to work the following day, July 22, 2010, and spoke with Kevin Kaiser in his office. Two of her co-workers, Tom Condron and Mike Thomas, were present when she spoke with Kaiser. She told Kaiser that her doctor had referred her to a surgeon and so "more than likely [she] was going to be having a carpal tunnel release." Kaiser then asked her whether she was going to file this under workers' compensation. She told him no, that she was going to file it under her own insurance and take short-term disability. He asked whether she was sure about this. She replied yes. He then said, "well, let me know when you find out the date of the surgery so I can start the paperwork." T. 74.

Petitioner testified she told Kaiser she was going to use her health insurance rather than workers' compensation based on interaction she had had with her previous supervisor, Lou Rhodes, around 1996, in connection with a work-related injury involving her right shoulder. She had gone to Rhodes after seeing her doctor and had told him her doctor had prescribed medication. While she was in Rhodes' office, he called her doctor and asked whether Petitioner could take Ibuprofen instead of prescription medication so he could avoid having to file a recordable accident. T. 75. Based on Rhodes' reaction, she knew how Respondent was about work accidents so she concluded it would be easier to use her health insurance to cover the carpal tunnel surgery and file for short-term disability. T. 76. It was her understanding that the carpal tunnel surgery took only 15 to 20 minutes to perform, that she would need some physical therapy afterward and that she would be back to work within two to three weeks, in time for Respondent's busy season. T. 76.

Petitioner testified that, when she spoke with Kaiser on July 22, 2010, she again told him that her work duties had caused the carpal tunnel. T. 76-77.

Petitioner first saw Dr. Love on August 3, 2010. The doctor described Petitioner as a "55-year-old right-handed woman who has worked for 20 years doing repetitive work with her hands." She noted that Petitioner worked as a lab technician at a seed company. She noted complaints of left hand numbness and tingling, along with pain that increased with lifting, gripping, grasping and twisting. After examining Petitioner and reviewing the X-rays and EMG/NCV results, Dr. Love diagnosed left carpal tunnel syndrome and "double crush" syndrome. She recommended a left carpal tunnel release but cautioned Petitioner that the results would be "tempered by her double crush with the cervical radiculopathy." PX 1, p. 13.

Petitioner testified she underwent carpal tunnel surgery with Dr. Love. [This surgery took place on August 19, 2010. PX 1, pp. 21-22. RX 5, pp. 102-103, 113.] She described the results as "horrible." Her left hand ended up being much worse than it was before the surgery. Her hand was totally numb and the pain was worse. [At the first post-operative visit, Dr. Love noted that Petitioner complained of significant numbness and an inability to grip. PX 1, p. 23.] The pain went up her entire arm and she was not able to use her hand because it was so swollen. At Dr. Love's direction, she underwent physical therapy at Champion Fitness following the surgery. [The therapy records reflect consistent left hand and left elbow complaints that worsened with various household activities. PX 2. RX 5, pp. 75-77, 113.] Petitioner testified that the therapy "helped somewhat" but she was still experiencing excruciating pain. The therapists used ultrasound but this sent pain shooting up her arm. She said "something is not right" and the therapists agreed. T. 78. She returned to her primary care physician and he referred her to Dr. Lee at Bonutti Clinic. Dr. Lee prescribed a Medrol Dosepak to try to reduce the swelling. He felt some of her problems could be neck-related so he sent her for a cervical spine MRI and X-rays that day. T. 78-79.

Dr. Lee's note of November 15, 2010 reflects that Petitioner underwent a left open carpal tunnel release by Dr. Love on August 19, 2010 and described her symptoms as dramatically worsening after this surgery. Dr. Lee noted that Petitioner complained of constant numbness in the index finger, partial numbness in the middle finger, swelling of the hand, difficulty gripping and grasping and worse symptoms at night. Petitioner reported being unable to perform her job as a seed lab technician because she could not feel her fingertips. Dr. Lee reviewed the EMG. On examination, he noted a standard, well-healed incision at the base of the palm and no thenar atrophy. He found Petitioner's symptoms to be "compatible with cervical pathology." He also felt Petitioner could have a double crush injury syndrome. He prescribed cervical spine X-rays and a cervical spine MRI. He prescribed a Medrol Dosepak. RX 5, pp. 91-92/113.

On February 16, 2011, Petitioner filed an Application for Adjustment of Claim alleging repetitive trauma injuries and an accident date of June 14, 2010. Arb Exh 2.

Petitioner testified she later sought another opinion from Dr. Li at Safeworks. Dr. Li's office was closer to her home. It was his belief that Dr. Love did not release the median nerve far enough. At his direction, Dr. Thatcher performed EMG/NCV testing of the left upper extremity on June 30, 2011. This testing revealed mild to moderate left carpal tunnel syndrome. PX 1, pp. 36-37. Following this testing, Dr. Li recommended a release and revision. He performed revision surgery on July 29, 2011. Petitioner testified this surgery helped in the sense that her hand numbness lessened but she was still experiencing tingling and pain shooting up her arm. T. 79. She was still unable to use her left hand. Dr. Li referred her to Dr. Atwater. He concluded her symptoms were neck-related so he prescribed neck treatment. She ended up undergoing a cervical fusion at C4-C5 and C6-C7. This surgery did not alleviate her left hand or arm problems. Repeat EMG/NCV testing performed on October 16, 2012 showed mild left carpal tunnel syndrome, moderate right carpal tunnel syndrome and mild left cubital tunnel syndrome. Dr. Thatcher described these conditions as having progressed since January

2012. PX 1, pp. 41-43. Dr. Atwater was concerned. He referred her to Dr. Oakey, who recommended a carpal tunnel release with a "fat flap revision." Dr. Oakey explained he was going to remove fat from her hand and wrap it around the median nerve so that the nerve would not collapse again. He performed this surgery along with an ulnar nerve transposition. T. 81.

Records in PX 6 reflect that, on November 5, 2012, following repeat EMG/NCV testing performed by Dr. Thatcher, Dr. Oakey noted that Petitioner's left carpal tunnel syndrome had "actually progressed" since her last surgery and that Petitioner also had left cubital syndrome and right carpal tunnel syndrome. He discussed the possibility of revision surgery and injected the left carpal tunnel. PX 6, pp. 46-47. On December 17, 2012, he noted that the injection provided no relief. He again discussed revision surgery, noting that the results were "unpredictable." PX 6, p. 45. He performed a left subcutaneous ulnar nerve transposition and left revision carpal tunnel release with hypothenar fat pad flap on February 12, 2013. At the first post-operative visit, on February 25, 2013, he provided Petitioner with a "boomerang" splint for her left elbow. He prescribed a cock-up splint for the left wrist. He directed Petitioner to return in one month. On April 3, 2013, he described Petitioner as doing well. He removed the braces and indicated Petitioner was "still" subject to a 10-pound lifting restriction. PX 6, p. 40.

Petitioner testified she felt "much better" after Dr. Oakey operated on her. The surgery relieved the shooting pain in her arm. The pain, numbness and tingling in her hand also improved. She still had issues but they were not as severe as prior to the surgery.

Petitioner testified that, as of Dr. Oakey's surgery, she started experiencing right carpal tunnel symptoms which she attributed to overusing her left hand. She underwent additional EMG/NCV testing which confirmed she had right carpal tunnel syndrome. [Dr. Trudeau performed EMG/NCV testing on May 28, 2015, following Dr. Fletcher's evaluation. He found the results to be indicative of severe median neuropathy at the right wrist, moderately severe median neuropathy at the left wrist, moderately severe ulnar neuropathy at the left elbow and mild left C5 radiculopathy. PX 6, pp. 21-30.]

On July 1, 2013, Dr. Oakey noted that Petitioner's left-sided complaints were continuing to improve but that she had a "small amount of loss of her left thenar muscle." He also noted that Petitioner reported experiencing burning pain in both hands with tasks requiring dexterity. He indicated that Petitioner would "ultimately require" a right carpal tunnel release but that she wanted to defer this due to her husband's upcoming surgery. He released Petitioner to full duty "at this point with the understanding that we will be doing a carpal tunnel surgery which will take her out of work activities in the fall." He directed Petitioner to return in two months. PX 6, p. 19.

On September 4, 2013, Petitioner returned to Dr. Oakey and reported increased pain in both hands secondary to placing TED hose on her husband's leg after his knee replacement. The doctor described the right-sided symptoms as "stable," noting "good APB strength. He

indicated that Petitioner planned to contact him when she wanted to proceed with the right carpal tunnel release. PX 6, pp. 15-17.

At Respondent's request, Dr. Kohlmann, an orthopedic surgeon, examined Petitioner on March 6, 2014. See further below.

Dr. Fletcher, an occupational medicine physician, evaluated Petitioner on April 16, 2015, at the request of Petitioner's attorney. See further below.

Petitioner returned to Dr. Oakey on July 15, 2015. The doctor noted ongoing bilateral symptoms. On re-examination, he noted 4/5 right thumb abduction and 4/5 left thumb opposition. He discussed right carpal tunnel surgery with Petitioner. PX 6, pp. 14-15.

Dr. Oakey performed a right carpal tunnel release on August 11, 2015. PX 6, pp. 7-8. On August 26, 2015, he described Petitioner as "thrilled" with the results of this surgery and "doing well with ROM exercises." He imposed a 10-pound lifting restriction. PX 6, pp. 11-13.

On September 28, 2015, Dr. Oakey noted that Petitioner was still experiencing "some sporadic issues in the small and ring fingers" following the right-sided release. He indicated it was "unclear" whether this was coming from a "more proximal etiology." He noted that Petitioner planned to pursue more care for her neck and would return to him as needed. PX 6, pp. 6-7.

Petitioner testified that, in July 2016, she came to understand that she had reached maximum medical improvement. At no point thereafter did Respondent offer her work. She requested vocational rehabilitation services but Respondent did not offer them to her. T. 85.

Dr. Fletcher testified by way of evidence deposition on November 18, 2016. PX 24. Dr. Fletcher identified Fletcher Dep Exh 1 as an accurate copy of his CV. He testified he is board certified in occupational and preventive medicine. Occupational medicine involves performing ergonomic assessments and making determinations as to factors causing or contributing to injuries and illnesses in the workplace. PX 24, p. 6. It also involves making determinations about individuals' capacity to work. PX 24, p. 7.

Dr. Fletcher testified he performs jobsite analyses to determine the frequency of a task, forcefulness, posture, exposure to vibration and awkwardness of positions. PX 24, p. 8.

Dr. Fletcher testified that Governor Rauner appointed him to the Commission's Medical Fee Advisory Board in January 2016. The board advises the Chairman about medical fees and access to care issues. PX 24, pp. 8-9.

Dr. Fletcher opined that Petitioner's claims involves a cumulative rather than acute injury. Before he first examined Petitioner, in April 2015, he reviewed voluminous medical records dating back to the early 2000s. He also reviewed Dr. Kohlmann's report and job

descriptions provided by both Petitioner and Respondent. He knows Dr. Kohlmann very well. Dr. Kohlmann is a surgeon, not an occupational medicine specialist. PX 24, pp. 10-11. Dr. Kohlmann is an "older mode" orthopedic surgeon who performed spine and extremity surgery. PX 24, p. 12.

Dr. Fletcher testified he disagrees with Dr. Kohlmann's report. He sees this claim as presenting a unique situation in that he "had a claimant who provided [him] a significant rebuttal to" Dr. Kohlmann's report.

Dr. Fletcher testified he first saw Petitioner on April 16, 2015. Petitioner is the spouse of one of his patients. He took care of Petitioner's husband for a long time. He saw Petitioner a second time on July 28, 2016. PX 24, pp. 13-14.

Dr. Fletcher identified Fletcher Dep Exh 4 as the job description Petitioner wrote. He has encountered only a few other individuals who have provided similarly detailed job descriptions. The description allowed him to have a better understanding of the tasks Petitioner performed. PX 24, p. 15. Petitioner performed her job for 20 years. In his opinion, her description provided a better sense of clarity than Respondent's "generic" description. Petitioner also provided some photographs. These photographs show a "poor ergonomic setup." The photographs of the task involving a magnifying glass also showed "sustained volar pressure on the wrist," which is a factor identified by the National Institute of Occupational Safety and Health [NIOSH] as a risk factor for developing carpal tunnel syndrome. PX 24, p. 17.

Dr. Fletcher testified that Petitioner did not originally allege right carpal tunnel syndrome. She underwent three left carpal tunnel procedures plus left cubital tunnel surgery and later, in 2015, underwent right carpal tunnel surgery by Dr. Oakey. Dr. Fletcher opined that the right carpal tunnel syndrome was a "complication of the treatment [Petitioner] underwent for her left hand." He has probably seen easily 5,000 cases of carpal tunnel syndrome in his career. With respect to her left hand, Petitioner had one of the worst surgical results he has ever seen. PX 24, p. 19. Petitioner's left hand was "basically butchered." He has photographs showing the scarring in that hand. Petitioner also has "horrible thenar atrophy present." Because she obtained such a poor surgical result, she started overusing her right arm. That is the basis of his causation opinion vis-à-vis the right carpal tunnel syndrome. PX 24, p. 19. It is not unusual for a person to start out with unilateral carpal tunnel syndrome and develop bilateral carpal tunnel syndrome secondary to overuse. PX 24, p. 20. The right carpal tunnel syndrome causally relates back to the June 14, 2010 accident because it is a complication of Petitioner's treatment. PX 24, p. 20. Fletcher Dep Exh 5 is a photograph he took of Petitioner's hands at the time of her initial examination. The photograph shows that Petitioner "has no thenar muscle eminence whatsoever." It also shows extensive scarring in the left lower wrist. Petitioner also has thenar atrophy in her right wrist but it is less severe. PX 24, pp. 20-21.

Dr. Fletcher opined that there is a causal relationship between the job duties Petitioner performed for 20 years and the development of her left carpal tunnel syndrome. The subsequent complications caused her to develop right carpal tunnel syndrome. Petitioner had

"no independent risk factor" for the development of carpal tunnel syndrome. Petitioner does not pursue hobbies that could have contributed. Nor is she diabetic. She does not have thyroid problems, does not smoke and is not obese. PX 24, p. 22. The only physical factor that lowered her threshold for developing left carpal tunnel syndrome was the fact that she had some proximal nerve compression in her neck. That is called "double crush syndrome." Petitioner had this prior to June 2010 but it was not recognized until she saw Dr. Lee. Eventually, Dr. Atwater performed a two-level cervical fusion in 2012. PX 24, pp. 21-22.

Dr. Fletcher did not find a causal relationship between Petitioner's repetitive work duties and her cervical spine condition. He views the cervical spine condition as degenerative. PX 24, p. 23.

Dr. Fletcher distinguished the jobsite analysis performed by Dr. Kohlmann from the kind of analysis he would perform as a board certified occupational medicine physician. In his view, it is critical to have the claimant present at the time of the analysis to determine factors unique to that person, such as height and wrist ratios. There is no evidence as to how much time Dr. Kohlmann spent at Respondent's facility. Nor is there evidence that he used tools Dr. Fletcher would typically use, such as strain gauges. PX 24, p. 24. Dr. Fletcher testified he is not sure whether Dr. Kohlmann, an orthopedic surgeon, is qualified to perform a jobsite analysis. During his career, he has seen orthopedic surgeons perform such analyses on only one or two occasions. PX 24, p. 24.

Dr. Fletcher testified he performs work for insurance carriers and defense firms. He also sees patients. Both sides call him to testify. He tries to be truthful. PX 24, p. 25. Respondent's firm has retained him in the past. PX 24, p. 25.

Dr. Fletcher did not find a clear causal relationship between Petitioner's repetitive work duties and her left cubital tunnel syndrome. The tasks Petitioner performed are not the typical tasks associated with cubital tunnel. PX 24, p. 27. If a person's wrist usage is limited, that could potentially put additional pressure on the rest of the arm. PX 24, p. 28. That Petitioner's cubital tunnel could have been a byproduct of the bad results she obtained from her first two carpal tunnel releases is a "reasonable theory." PX 24, p. 28. It is "probably" more than 50% likely that the poor surgical result caused the cubital tunnel. PX 24, p. 29.

Dr. Fletcher testified that, in late 1989, NIOSH came out with a list of factors playing into the development of carpal tunnel: forcefulness, pressure on the volar surface of the wrist, awkward positioning and vibration. "You don't necessarily have to have forcefulness if you have the other factors present." PX 24, p. 30. Petitioner's tasks were not only repetitive. They also involved "very abnormal awkward hand postures with radial and ulnar deviations" and "pressure on the volar surface of the wrist." PX 24, p. 30. Petitioner's work involved very fine detail, using a magnifying glass to look at seeds. This involved pressure on the volar surface of the wrist. He is relying on Petitioner's account of her job since he did not have an opportunity to visit Respondent's facility. PX 24, p. 31. Petitioner rebutted Dr. Kohlmann. Dr. Fletcher

testified he does not believe Dr. Kohlmann addressed all of the important risk factors. PX 24, pp. 31-32.

Dr. Fletcher opined that all of Petitioner's upper extremity surgeries are causally related to her injury of June 14, 2010. He further opined that the surgeries, therapy and EMG studies were reasonable and necessary. PX 24, pp. 32-33. Petitioner has not worked since the injury. Dr. Fletcher opined that Petitioner was disabled from work due to the severity of her condition up until the time he examined her. At that time, she still had impairment with respect to activities of daily life. Petitioner's Quick Dash score improved between April 2015 and July 2016, due to her right carpal tunnel release, but she still had atrophy and pain as of July 2016. PX 24, p. 34. Petitioner's hand dexterity is "very, very poor." She could not resume the kind of fine, intricate work she performed at Respondent. PX 24, p. 34. In his opinion, Petitioner is permanently and totally disabled. PX 24, p. 36.

Dr. Fletcher testified he has seen employees of Respondent but has never been in Respondent's facility. Respondent has sent employees to him. PX 24, p. 37.

Under cross-examination, Dr. Fletcher testified he is not an orthopedic surgeon, neurologist or neurosurgeon. He frequently refers patients to orthopedic surgeons. PX 24, pp. 38-39. He uses orthopedic surgeons who are tenants and he uses outside doctors as well. PX 24, p. 39.

Dr. Fletcher acknowledged that a note dated October 31, 2000 identifies Petitioner's employer as Norvat Seeds, not Respondent. PX 24, p. 40.

Dr. Fletcher testified he was not asked to address causation vis-à-vis the lumbar spine. Petitioner has degenerative disc disease at the cervical and lumbar levels. PX 24, p. 41. Aging and other factors, including microrepetitive trauma, excessive standing, vibratory exposure, smoking and trauma can contribute to degenerative disc disease. PX 24, p. 42.

Dr. Fletcher acknowledged that Petitioner is invested in her claim and is trying to present her side of the story. He is operating on the assumption she is being truthful. Dr. Kohlmann described her as reliable. PX 24, p. 43. If Petitioner misrepresented her job duties, that could affect his opinions. PX 24, p. 43.

Dr. Fletcher testified that early records from Dr. Love show Petitioner had a ganglion cyst in her wrist. Such cysts can develop spontaneously. They are potentially related to repetitive trauma but there is no good hard epidemiological evidence of that. PX 24, pp. 43-44. There is no relationship between Petitioner's ganglion cyst and her carpal tunnel syndrome. PX 24, p. 44. A ganglion cyst in the volar aspect could potentially cause compression but Petitioner's cyst was more in the dorsal area. PX 24, p. 44. Ganglion cysts can cause pain and swelling. The symptoms wax and wane. PX 24, p. 45.

Dr. Fletcher reiterated that Petitioner has no systemic risk factors for carpal tunnel, such as diabetes, smoking, thyroid issues or rheumatoid arthritis. She is female but gender is not as strong a risk factor as smoking, diabetes or thyroid problems. PX 24, pp. 45-46. Petitioner, like all people, uses her hands outside of work but her job involved unusual tasks, such as looking at and manipulating thousands of seeds. In terms of outside activities, Petitioner cared for her husband and a brother-in-law who had a stroke. He is unaware of Petitioner pursuing any hobbies such as knitting. Petitioner's husband had three surgeries while he was under Dr. Fletcher's care so Petitioner had to take him to the doctor. Petitioner's husband was never in a wheelchair. He was ambulatory but he could not drive. PX 24, pp. 47-48. Petitioner is actually older than most people who develop carpal tunnel. PX 24, p. 48. Petitioner had neck and back issues dating back to 2000. Petitioner's longstanding proximal nerve compression made her more susceptible to developing problems secondary to her work activities. Petitioner's non-work activities would not necessarily have had the same kind of impact, unless she was performing forceful or repetitive non-work activities. PX 24, p. 49. If Petitioner developed carpal tunnel as a homemaker, he would have asked her about her specific home activities. PX 24, p. 50. He asked Petitioner about these activities. PX 24, p. 50. He does not believe that those activities had any bearing on the development of her carpal tunnel. PX 24, p. 51.

Dr. Fletcher testified that the AMA Guides, Sixth Edition, are part of Illinois law since 2011. He considers the Guides authoritative. He used to give seminars on impairment ratings. He did this for the Illinois State Medical Society. After a couple of years, most people had learned what they needed to know. There wasn't much demand after that point. PX 24, p. 52. He performs about 40 to 50 impairment ratings per years. PX 24, p. 52.

Dr. Fletcher testified that some of the orthopedic surgeons who treated Petitioner felt there was a connection between her cervical spine issues and her left arm issues. PX 24, pp. 54-55.

Dr. Kohlmann testified by way of evidence deposition on January 27, 2017. Dr. Kohlmann testified he is a board certified orthopedic surgeon. He has been in practice since 1992. RX 8, p. 5. He is a general orthopedist. RX 8, p. 5. He has treated patients who have carpal tunnel syndrome. He has performed many carpal tunnel surgeries. An open carpal tunnel release involves making an incision at the base of the palm and releasing the transverse carpal and volar retinacular ligaments. He prefers to perform open releases but could perform an arthroscopic release. RX 8, p. 7. Some people have large carpal tunnels and others have small ones. The size is an "anatomical variation." RX 8, p. 8. Most commonly, people need releases because they develop flexor tenosynovitis. Carpal tunnel syndrome can also result from crush injuries or wrist fractures. Females develop carpal tunnel syndrome more frequently than men. RX 8, pp. 9-10. Some work activities would predictably result in carpal tunnel syndrome. Such activities would include using a screwdriver all day or repeatedly pinching hard with your thumb and index finger or thumb and middle finger. RX 8, p. 10. Use of vibratory tools could also cause the syndrome. Typing all day is repetitious but is not considered a cause. RX 8, p. 11.

Dr. Kohlmann testified he examined Petitioner on March 6, 2014, at Respondent's request. He needed to refer to his report (Kohlmann Dep Exh 2) while testifying. RX 8, pp. 11-12. Petitioner told him she worked for Respondent for 20 years and began having problems with numbness in her left thumb, index finger and middle finger sometime in 2010. Petitioner also told him that, after she underwent a left carpal tunnel release by Dr. Love, she woke up with terrible hand pain and numbness. Her symptoms did not resolve with physical therapy. RX 8, p. 11. She was off work so long she lost her job. Dr. Li ordered additional testing and then performed a repeat release but only some of her symptoms improved. Petitioner related she then underwent a cervical spine work-up and injections that "did not agree with her." RX 8, p. 14. After Dr. Atwater performed a two-level cervical spine fusion, her neck and radiating shoulder/trapezius pain improved but she continued to have pain in her arm, wrist and hand. She then saw Dr. Oakey, who performed an anterior subcutaneous ulnar nerve transposition and a revision left carpal tunnel release. RX 8, p. 14. Dr. Kohlmann testified that Petitioner remained symptomatic as of his examination. Petitioner told him she was still experiencing occasional left hand numbness, decreased bilateral hand grip strength, dizziness when looking up, loss of muscle mass in her forearm and weakness in both hands, to the point where she is unable to peel potatoes without experiencing bad pain and numbness in her right hand. She had been told she needed a right carpal tunnel release but was unsure whether she wanted to undergo that surgery. She also complained of longstanding low back pain and migraine headaches. RX 8, p. 15. She attributed her upper extremity problems to overuse at work. RX 8, p. 16.

Dr. Kohlmann testified that Petitioner described most but probably not all of the duties she performed at Respondent over the 20 years she worked there. RX 8, p. 17.

Dr. Kohlmann testified that Petitioner is right-handed. He testified that carpal tunnel syndrome usually develops in a person's dominant hand but can develop in the non-dominant hand. RX 8, p. 18. To him, it seems as if the dominant hand should be affected first. RX 8, pp. 18-19. Dr. Kohlmann testified that a ganglion cyst is fluid-filled. It can be found in the tendon sheath or the joint. He is not sure exactly why such cysts develop. RX 8, p. 19.

Dr. Kohlmann testified that cervical spine problems can cause symptoms that are similar to those caused by carpal tunnel syndrome. A person who undergoes carpal tunnel surgery could require revision surgery. RX 8, p. 21.

Dr. Kohlmann testified he went to Respondent's facility and saw the area where Petitioner worked. He saw various pieces of equipment and work stations. He was "walked through" the tasks Petitioner performed. He was allowed to perform the same tasks. RX 8, p. 22. He took instructions first. He was only in the lab. He did not go into the warehouse. RX 8, p. 23. In his opinion, the tasks Petitioner performed were "all very low force." He had to use his hands but the tasks did not require strenuous gripping, the use of vibratory tools or any unusual wrist positions. RX 8, p. 24.

Dr. Kohlmann then looked at the photographs that were made an exhibit at the time of Dr. Fletcher's deposition. He performed the function shown in the photograph at the 3:00 position. He did not have any sense that this task put stress on his hands, wrists or arms or required awkward positioning. RX 8, pp. 25-26. At no point during his site visit did he perform any tasks that were conducive to causing or aggravating carpal tunnel syndrome. He would reach the same conclusion even if the tasks were being performed during the busy season. RX 8, p. 27. Respondent did not hire him to perform a complete workplace evaluation. He does not perform such evaluations. RX 8, p. 28.

Dr. Kohlmann opined, to a reasonable degree of orthopedic certainty, that Petitioner's job duties, as he understood them, did not cause or aggravate her carpal tunnel syndrome. RX 8, p. 28.

Under cross-examination, Dr. Kohlmann acknowledged he saw Petitioner only once. Petitioner was never his patient. RX 8, pp. 28-29. He has no reason to dispute that Petitioner has carpal tunnel syndrome. RX 8, p. 29. He is familiar with the term "double crush." The theory goes that a person who has a cervical spine condition may be more likely to also development symptomatic peripheral nerve entrapment. RX 8, p. 30. He knows Dr. Love. She is no longer practicing medicine. RX 8, pp. 30-31. He never performed many independent medical examinations. He performs maybe one per month. RX 8, p. 31. He primarily performs examinations for insurance companies but some claimants' attorneys send examinees to him also. RX 8, p. 31. He has performed other examinations for Respondent's counsel's firm. RX 8, p. 32. He does not have any social relationship with Respondent's counsel or Mark Cosimini, another member of his firm. RX 8, p. 32. He is not friends with any of the owners or stockholders of Respondent. Before his site visit, he never went to Respondent's facility. RX 8, p. 33. He cannot recall when he made the site visit but he thinks it was after he examined Petitioner. RX 8, p. 33. He believes that, when he saw Petitioner, he did not know he would be visiting Respondent's facility. He reviewed records when he saw Petitioner but he does not have his file with him. RX 8, p. 34. He reviewed various X-ray images, an EMG/NCV study performed by Dr. Thatcher, Dr. Love's operative report and cervical spine MRI scans. He does not recall exactly how much time he spent with Petitioner. RX 8, p. 35. He spent time obtaining a history from Petitioner. He tries to write down exactly what the examinee tells him. RX 8, p. 36. He does not know where his notes are. It is possible he scanned the notes into the electronic health record. RX 8, p. 37. He does not know how much he charged for his report. His fee typically ranges from $800 to $2,300. He believes the hospital charges $1,000 per hour for his deposition time. RX 8, p. 38. His orthopedic practice is "very general" so it is "hard to say" how many carpal tunnel surgeries he performed in 2016. "It could be 5%" of the surgeries he performed. RX 8, p. 39. Respondent's counsel was present when he visited Respondent's facility. He cannot recall whether he prepared his examination report before he made this visit. RX 8, p. 39. He cannot recall whether he knew he would be making this visit when he examined Petitioner. RX 8, pp. 40-41. He does not know how much time he spent in total on Petitioner's claim. RX 8, p. 41. When he went to Respondent's facility, he met Respondent's counsel there. RX 8, p. 43. He spent half an hour to an hour at the facility. Petitioner was not present. A female employee was there and she was familiar with Petitioner's job. RX 8, p. 44.

He is not trained in occupational medicine. RX 8, p. 45. He has visited various workplaces, to help make adjustments, depending on what the employee's problem was, but he does not do this for a living unless asked. RX 8, p. 46. In the past, he saw patients at Dr. Fletcher's facility. RX 8, p. 46. He left the issue of work restrictions up to Dr. Fletcher. RX 8, p. 47. Dr. Fletcher is a well-qualified occupational medicine physician. He "knows what he's doing." RX 8, p. 47. He did not take any photographs at Respondent's facility. RX 8, pp. 47-48. The available photographs are still shots. The woman who guided them at Respondent's facility did not take them through every task that is listed in the job description attached to his report. RX 8, p. 48. She showed them some seed-related tasks and activities involving five-gallon jugs that had screw tops. There were "maybe certain parts that [he] didn't do." RX 8, p. 49. He never performed any task for an hour. He did not stay there eight hours or work there fifty weeks out of the year. RX 8, p. 49. He found no causal relationship between Petitioner's job and her carpal tunnel syndrome. He has been wrong at times during his career. RX 8, p. 50. Different physicians can render different opinions in matter such as this. RX 8, p. 50.

On redirect, Dr. Kohlmann testified it is possible he went to Respondent's facility before he examined Petitioner. He has no independent recollection of the timeline. RX 8, p. 51.

Petitioner testified she last worked for Respondent on August 18, 2010. She requested but never received workers' compensation benefits. She did receive short-term disability. Her employment by Respondent ended in February 2011. She had not planned to retire at that point. T. 93. She received a letter informing her that she had been terminated. If a Respondent employee is unable to resume working after receiving 26 weeks of short-term disability, he is officially terminated. T. 87. Since her termination, Respondent has not offered her work. T. 87.

Petitioner testified she has difficulty with intricate activities such as buttoning a button, zipping a zipper and tying shoes. When she takes a blouse off to wash it, she leaves it buttoned so she will not have to button it again. She now buys more leggings and pants that do not have have to be zipped up. She also buys slip-on shoes. She has learned to do things differently. She cannot cut meat or a steak because she lacks strength to put sufficient pressure on her hands to accomplish this. She continues to drive but travels less because gripping the steering wheel causes pain in her hands and wrists. T. 89. If she performs simple tasks such as this she can be up all night due to pain in her hands. She takes Gabapentin for her pain. T. 90. She can talk to someone via cell phone but usually uses the speaker function. She cannot hold a cell phone to her ear for more than two to three minutes because her hand goes numb. T. 90. She still does some gardening but not to the extent she did in the past. Her husband does a lot of the gardening now. T. 90-91. She can use pruners to snip plants with thin stems, such as roses, but lacks sufficient strength to grip the pruners hard enough to cut a plant that has diameter to it. She can pick vegetables but cannot carry a bucket. She cannot carry anything that is dangling from her hands. When she goes grocery shopping, she usually takes her husband or nephew along because she cannot carry bags that hang down from her hands. She can carry a gallon of milk only if she carries it up in her arms. T. 91. If she uses a computer for 10 or 15 minutes, her hands go numb from the typing. T. 92.

Petitioner testified she is currently receiving Social Security disability benefits. Her short-term disability carrier filed a claim on her behalf in October 2011 and Social Security awarded her benefits retroactively, finding that her disability began on August 17, 2010. T. 92.

Petitioner testified she was not present at Respondent when Dr. Kohlmann performed a job analysis. The doctor never observed her performing tasks at Respondent. To her knowledge, she never gave Dr. Kohlmann a complete description of her job duties.

Petitioner testified she continues to experience pain in her palms and wrists, along with numbness and tingling. Her symptoms vary in intensity depending on her activity level. When she performs yard work or cleans her house, she has to stop after 15 or 20 minutes to take a break and rest her hands. If she tries to perform any activity requiring gripping, such as mopping or sweeping, she has to stop because it causes a lot of pain in her hands. T. 94.

Petitioner testified she first met with Bob Hammond, a vocational counselor, in March 2017. Hammond discussed the job search process with her. She understood that she was supposed to contact prospective employers by making calls, visiting businesses and going online. She also understood she was supposed to present a positive outlook. She was supposed to tell employers what she could do with her hands rather than stress what she could not do. She was instructed to give Respondent as a reference and identify Kevin Kaiser as a contact person. T. 96.

Petitioner testified she believes she started looking for work in May 2017. She met with Bob Hammond on five or six occasions, over time, and also talked with him by phone. At one point, Hammond sent his assistant Kelly over to meet with her. She kept detailed records of the job contacts she made. She identified PX 20 as records she created to memorialize her job search between April 3, 2017 and June 24, 2019. T. 97. The records are complete and accurate. T. 97-98. While she was looking for work, she "applied for anything and everything," from clerical jobs to retail jobs to warehouse jobs. She participated in interviews but did not receive any job offers. She was either not qualified to perform the job or the job involved activities beyond her restrictions. T. 98-99.

Under cross-examination, Petitioner testified it would be difficult for someone to understand how complicated her job was if he did not perform it. During bin sampling, she might have to carry groups of small white bags weighing 30 pounds three or four times per day. T. 103. She frequently worked overtime. It was not unusual for her shifts to last 10 or 12 hours. T. 103. During bin sampling, she had to meet a quota each day. The seed handling and rolling involved fine dexterity but not forceful gripping. The seeds are small. T. 104. She had to forcefully grip to twist lids off jugs. T. 104-105. When she put the lids back on, she did not tighten them excessively because she would have to remove them again. T. 106. During a busy period of a month or a month and a half, she had one to two helpers. Otherwise, she worked alone in the lab. T. 106-107. During the period that she had helpers, the helpers performed the same tasks she performed. T. 107. She continued performing the pallet-related activities all

the way up until the time she stopped working for Respondent. T. 107. She has been married for 30 years. She owns a home. She cleans the home and performs all of the other household tasks, including laundry, dishes and vacuuming. She has a vegetable garden in the summer. She sometimes does canning. Her husband, an IDOT employee, was involved in a serious motor vehicle accident in approximately 2013. He had to undergo back surgery and have both knees replaced. T. 111-112. She helped care for him while he was recuperating. During that time, she hired people to perform yardwork because she could not do it all. T. 112. Before she underwent the first carpal tunnel release, she saw Dr. Hemmer at Tuscola Wellness. T. 113. Dr. Hemmer treated her neck and back. T. 114. RX 5. She kept track of all of the job contacts she made. She typed up those contacts each week. T. 115. She talked with Kevin on June 14, after she received the cock-up splint. She does not recall Bobbi being present during this conversation. She told Kevin she was having wrist problems due to her job duties. She worked for Respondent for 20 years and was familiar with Respondent's policies concerning accident reporting. Respondent required an injured employee to report the injury to a supervisor. Paperwork is usually completed but she did not complete any when she reported her injury to Kevin. T. 116. She initially chose not to turn in a claim to workers' compensation. She made this decision based on a prior experience years earlier. She later decided to pursue a workers' compensation claim. T. 117. When she met with Kevin a second time, in July, she again told him her condition was work-related. She did not contact anyone at Respondent at that point to complete paperwork for a workers' compensation claim. She has reviewed Hammond's reports. They are accurate. T. 119. Lou Rhodes, the person with whom she interacted in the past, was Respondent's plant manager. T. 122. Rhodes was not her supervisor as of the day she received the splint from Kilpatrick. T. 123.

On redirect, Petitioner testified the seeds she tested arrived at the lab in one-gallon jugs as well as bags. At the present time, her husband does most of the cooking because she has trouble lifting pots and pans and pouring things out of containers. Her husband also opens most of the jars and helps her seal lids during the canning process. T. 124. She does the dusting and lighter work while her husband helps with vacuuming and mopping. Before June 14, 2010, Respondent had an incentive-based safety program. If an employee did not have any recordable accidents, Respondent would take that employee out for a meal or give him a safety bonus. T. 125. When she made the decision to apply for short-term disability rather than workers' compensation, she feared that her job would be negatively affected if she pursued a workers' compensation claim. T. 129.

Under re-cross, Petitioner testified that, as of June 2010, she was sure her complaints were related to her job duties. Kilpatrick confirmed that belief. She told Kaiser she had a work-related injury but she chose to apply for short-term disability. T. 130-131.

Bob Hammond, a 67-year-old vocational consultant, testified on behalf of Petitioner. He obtained a master's degree in counseling from the University of Illinois. There are two major certifications available in the United States right now: CRC and ABVE. He was a member of the CRC for five years but let that lapse when he became a member of the American Board of

Vocational Experts, or ABVE. You have to undergo testing, obtain references and have a certain number of experiences to be certified as ABVE. T. 133-134.

Hammond testified his business is called Hammond Vocational Consultants. Most of the work he does involves Illinois workers' compensation cases. He has testified on prior occasions. He has been doing this kind of work for 31 years. T. 135. He has given over 300 evidence depositions. T. 136. He is familiar with the Act. T. 136. About 60% of the work he does is for respondents. He has done work for Respondent's law firm in the past. He is very familiar with Respondent's counsel, Terry Schroeder. Schroeder has hired him in the past. T. 137. In connection with his evaluation of Petitioner, he reviewed treatment records along with the depositions of Drs. Fletcher and Kohlmann. He issued four reports. T. 138-139. He met with Petitioner before preparing his initial report of March 27, 2017. After he submitted this report to Petitioner's counsel, Petitioner's counsel asked whether it would benefit Petitioner to look for work. He said yes. Dr. Fletcher opined that Petitioner is unable to return to work in the general labor market due to significant issues with dexterity. T. 142. Dr. Kohlmann, in contrast, did not discuss Petitioner's restrictions or capabilities in his reports or deposition. Dr. Kohlmann did not express the belief that Petitioner could resume her former occupation. T. 143-144.

Hammond testified he expressed some concerns about Dr. Kohlmann's opinions in his initial report. Dr. Kohlmann reached conclusions about Petitioner's job duties without addressing the issue of whether he and Petitioner are the same height and weight. T. 146. If he had only been presented with Dr. Kohlmann's opinions, he would have asked his referral source whether the doctor had reached conclusions about Petitioner's restrictions or whether the doctor was saying Petitioner was not subject to any restrictions. T. 147. Dr. Kohlmann is a general orthopedist while Dr. Fletcher is an occupational medicine specialist. He has interacted with Dr. Fletcher on numerous occasions. Dr. Fletcher has been at many jobsites and has an understanding of occupational requirements. T. 148.

Hammond opined that Petitioner is "severely limited in the ability to use her hands to do fine manipulations." Petitioner can make some gross motor movements but those are also limited because of the articulation of the fingers and wrists. T. 149. Petitioner is considered to be an individual of advanced or retirement age. From a vocational standpoint, she would have few, if any, transferable skills. T. 150. In his first report, he indicated that, if you follow Dr. Fletcher's restrictions and limitations, Petitioner is not employable in the labor market. T. 150.

Hammond testified he communicated with Petitioner a second time and instructed her how to go about performing a job search. He advised Petitioner what to say to prospective employers, in accordance with the Americans with Disabilities Act. He had Petitioner set up an E-mail account that was specific to her job search so he could access it and review her progress. T. 151. At their first meeting, Petitioner told him she was in so much pain she felt she would not be able to work. After further discussion, Petitioner came around to the idea of conducting a job search. T. 152.

Hammond testified he met with Petitioner around seven times. His job developers met with her three times. He also had eleven phone contacts with Petitioner. Between March 13, 2017 and June 2019, Petitioner made just shy of 1800 job contacts. In his long experience, this is only the second time that a person has made over 1500 contacts. T. 153. It is his opinion that Petitioner made a diligent job search. He reached this opinion after accessing Petitioner's E-mail account, talking with employers to make sure they received Petitioner's resume and reviewing the records Petitioner created. Respondent never formulated a vocational rehabilitation plan. T. 155. Nor did Respondent offer her restricted work. T. 155.

Hammond testified he charges $120 per hour. To his knowledge, he is the least expensive vocational counselor in his area. T. 156.

Hammond testified that generally he looks at a year's worth of job contacts, or somewhere between 700 and 900 contacts, before determining that there is no reasonably stable labor market for a particular individual. Petitioner made substantially more than 700 or 900 contacts. T. 157.

Hammond testified he viewed Petitioner as an "entry level person." He felt that telephonic jobs would be best for her because they would require less wrist and hand usage. He anticipated that Petitioner would be able to earn between $8.50 and $9.50 per hour.

Hammond opined that there is no reasonably stable labor market for Petitioner's services. He bases this opinion on the "abnormally" high number of contacts Petitioner made and the fact she applied for jobs even when there was only a remote possibility of being hired. "Nobody would hire her, nobody considered her and nobody brought her back for a second interview." T. 159. He believes Petitioner is totally disabled based on her diligent job search and because she cannot perform any services except those for which no reasonably stable labor market exists. T. 160.

Hammond testified he generated several bills along the way. T. 160-161. The last was in the amount of $4,031.27. T. 161.

Under cross-examination, Hammond testified that insurance carriers take varying views as to what constitutes a diligent job search. He looks to see if the person is spending about 32 hours per week looking for work, applying for a minimum of 15 jobs per week on the Internet and making 3 to 7 in-person contacts and "cold calls" per week. The term "diligent" is subjective. T. 163. Given Petitioner's upper extremity limitations, he would not send her to a construction company to hang siding or a warehouse to load cargo. T. 163-164. He counsels people how to go about looking for work within their restrictions but "sometimes we fall back into the familiar." In Petitioner's case, what was familiar was warehouse work and seed testing. That's what they went after because that is what she knew. Part of that is simply advancing the goal of getting an application in to an employer. T. 164-165. Some of the jobs Petitioner applied for were not physically suitable for her. T. 165. He does not know how many of

Petitioner's job contacts fall into this category. He has reviewed Petitioner's contacts. He has no idea how many follow-up contacts Petitioner made. T. 167.

Hammond testified he has known Dr. Fletcher for over 25 years. Dr. Fletcher is a very frequent participant in workers' compensation litigation. T. 169. He has met Dr. Kohlman once and has read a number of his reports. He is much less familiar with Dr. Kohlmann than Dr. Fletcher. T. 170. Petitioner is relatively tall but he has no idea how tall Dr. Kohlmann is. T. 171. It could be that Petitioner and Dr. Kohlmann are close to the same height. T. 171. He was not present when Dr. Kohlmann went to Respondent's plant and performed activities that he detailed in his report. He (Hammond) has never been in Respondent's plant. T. 171. He is not a physician. He has not performed the job that Petitioner performed. T. 172-173. An orthopedic surgeon who performs carpal tunnel surgery would have knowledge of the force that might be required to cause or aggravate that condition. T. 173. A board certified orthopedic surgeon could gauge whether an activity he performs could cause or aggravate carpal tunnel syndrome. T. 175.

Hammond testified that, in Petitioner's case, he performed about 130 follow-ups with prospective employers. T. 176. In his report of March 21, 2019, he noted that Petitioner had stopped looking for work due to increased pain levels. Based on the information he obtained from Petitioner's E-mail account, Petitioner stopped looking for work for about a year but restarted after he met with her. He would not consider taking a year off to be a diligent job search. T. 177.

On redirect, Hammond testified he looks at the combination of effort and time spent looking for work. He believes Petitioner has no physical capabilities with her hands. Under these circumstances, "you drop off the edge of all occupations unless you have education and a degree that you can follow that up with." T. 178-179. At the time of his initial report, in March 2017, he thought Petitioner was permanently and totally disabled. To make sure of this, he had Petitioner perform a job search. He would not go so far as to say it did not matter that Petitioner, at one point, stopped looking for work. Instead, what he would say is that, during the times Petitioner did look, she performed a diligent job search. Petitioner stopped looking due to pain and difficulty concentrating. T. 180. Between April 2017 and June 2018, Petitioner consistently looked for work each week. After she restarted, she again consistently looked for work. T. 180-181. Throughout his career, he has been aware of only one other person who applied for as many jobs as Petitioner did. T. 181.

Thomas Condron testified on behalf of Petitioner. Condron testified he worked as a tech at Respondent between 2006 and 2016. He worked in the tower, processing seeds and running seeds through machinery. He worked with Petitioner and observed Petitioner doing her job. T. 183-184. He brought samples in to the area where Petitioner worked. T. 185. He is aware that Petitioner began having problems with her hands around 2010. He was present at one conversation during which Petitioner discussed these problems with Kevin Kaiser, Respondent's plant manager. T. 187. He and Mike Thomas were in Kevin's office when Petitioner came in "with her hand in some gadget." At that point, Petitioner began conversing

with Kevin. Condron testified this conversation took place sometime around July 22, 2010. He does not know the exact date. T. 186. Petitioner said she had to have a carpal tunnel operation and she would be off work for a while. Petitioner did "not exactly" say the condition was work-related but he (Condron) "kind of figured she got it somewhere working in the lab." T. 188. Kaiser did not have much to say in response. Petitioner told Kaiser she was going to put it through her insurance rather than the company. Condron testified that, when he heard this, he called Petitioner a bad name. T. 189.

Condron testified that, at that time, Respondent's employees were "very safety conscious." In his department, they talked about safety all the time because they worked around moving machinery. T. 190-191. Respondent would provide a lunch once a quarter if no accidents occurred. If an employee filed a workers' compensation claim, "we would lose our incentive." T. 191. When his department reached five years with no accidents, they received T-shirts. After seven years, they again received T-shirts. The T-shirts commemorated years of safety. T. 192-193.

Condron testified that, when Petitioner said she was going to use her health insurance rather than workers' compensation, he called her an "asshole" right there and walked out of the room. In his opinion, "it should have been a workman's comp claim" but she was willing to forego that. T. 193.

Under cross-examination, Condron acknowledged he is not a doctor. He called Petitioner a bad name because, since she had carpal tunnel, he assumed it must be work-related. T. 194. He was present on only one occasion when Petitioner discussed her condition with Kevin Kaiser. T. 194.

Kevin Kaiser testified on behalf of Respondent. Kaiser testified he is site manager at Respondent in Tuscola. He held the same job in June 2010. He has worked for Respondent for just over 28 years. T. 197. If an employee reports a work injury at Respondent, he brings in his HSE manager, Bobbi Pierce, and begins the investigation process. He also takes it to the corporate level and brings in other regional HSE employees. An accident report is typically completed. T. 197-198.

Kaiser testified he does not recall the conversation that Petitioner testified to. He recalls seeing Petitioner wearing a brace on June 14, 2010. He and Bobbi Pierce talked with Petitioner about that. They are "drilled" to ask questions if an employee shows up at work wearing a brace or other device. T. 199. There are two reasons for that: Respondent does not want to cause the condition to worsen and needs to investigate whether there was an underlying injury. T. 200. He and Bobbi confronted Petitioner about the brace. Petitioner explained that she had been to the doctor. Petitioner showed them a cyst or knot on her hand. They asked Petitioner if she was subject to any restrictions and she said no. They told Petitioner to let them know if that changed. They also discussed the issue of whether the condition was work-related. Petitioner said it was not. "It was what [Petitioner] thought was a cyst." T. 203.

Kaiser testified that, during a subsequent conversation, Petitioner told him she was "going to have an additional surgery" and "additional time off." T. 204. He helped her initiate a claim for short-term disability. He completed the application form and sent it on to corporate. After that, he was "hands off" and "kind of in the dark" because the information obtained from doctors is protected by HIPAA. T. 205.

Kaiser identified RX 2 as a notice from Petitioner's law firm and an attached Application dated February 4, 2011. Kaiser testified that, before he received this document, he had no knowledge of Petitioner pursuing a workers' compensation claim. After he received RX 2, he passed it on to corporate. T. 206.

Under cross-examination, Kaiser acknowledged he does not hear very well. T. 207. He does not recall the exact date of the conversation he had with Petitioner. Respondent asked him about a conversation occurring June 14, 2010. T. 207. He does not know the meaning of the term "repetitive." He has "no clue" when he got up on June 14, 2010 or what he did that day. T. 208. He does not recall anything that occurred on June 14, 2010. T. 209. He likes to think his hearing was better on June 14, 2010. He does not wear hearing aids. He has had his hearing checked and has been told he has "slight hearing loss." T. 209. He did not file an occupational disease claim against Respondent. In June 2010, any accident investigation would have been conducted at the corporate level. T. 210. Bobbi Pierce was in his office when Petitioner came in. Pierce's office is 10 to 15 steps away from his. As of June 4, 2010 [sic], Pierce was Health Safety Environmental [HSE] manager. T. 211. At that time, about 30 individuals worked at Respondent. T. 211. Pierce had no other assigned duties outside managing safety. T. 212. When Petitioner entered his office, he went and got Pierce to show her the device Petitioner was wearing. T. 212. As soon as he saw Petitioner, he said, "let me go get Bobbi." As to whether he conversed with Petitioner outside of Pierce's presence, he "might have [said] hi." He "can't answer that question." T. 213. He immediately went to get Pierce. T. 214. He does not recall having any conversation of substance with Petitioner outside Pierce's presence. T. 215. He typically met with Pierce six times a day. Pierce does not report directly to him. They do not have any social relationship outside of work. T. 216. He has never had a specific protocol relating to repetitive trauma injuries. He thinks of an accident as a specific event such as a fall. T. 218. He would like to think he had a pretty good idea of what a repetitive trauma injury was as of June 2010. T. 218-219.

In an offer of proof, made after Respondent's counsel voiced relevancy and "beyond the scope" objections, Kaiser testified he has undergone training relating to ergonomics in the sense of evaluating work stations to make sure everything is at the proper level. T. 219-220. He did not undergo specialized training concerning notice of a specific trauma versus notice of a repetitive trauma injury. He did not talk to Petitioner before she went to the doctor. T. 223. If a doctor told Petitioner on June 14, 2010 that her carpal tunnel was work-related, he cannot explain why Petitioner did not tell him this. T. 223. The meeting he and Pierce had with Petitioner was brief. It lasted maybe 15 minutes. T. 224. Petitioner continued working up to the point of her left hand surgery. Before June 14, 2010, he had multiple daily interactions with

Petitioner. He was constantly in and out of the lab. T. 224. He does not recall Petitioner telling him that the surgery she was going to have was simple and she would be back to work in a few weeks. T. 225. He did not tell Petitioner she had two options in the sense she could use her health insurance or go through workers' compensation. T. 225. He only vaguely recalls the events of July 22, 2010. T. 226. He did not keep notes of either meeting with Petitioner. When they saw the brace, they asked Petitioner if she had hurt herself. Petitioner told them she did not know how it had happened. T. 227.

Arbitrator's Credibility Assessment

Petitioner's very lengthy tenure with Respondent weighs in her favor, credibility-wise.

The Arbitrator finds credible Petitioner's detailed description of her job duties. The Arbitrator also finds credible Petitioner's testimony as to the extra hours she put in during the busy season and the pace at which she was required to work. It is clear to the Arbitrator that Petitioner's job was not confined to the tasks outlined in Respondent's written description. Even so, that description reflects that the job involved "gripping" and making "precise finger movements" between one and four hours per day. RX 4. The description contains no mention of the rigorous pallet-related activities Petitioner periodically performed outside of the lab.

Respondent's plant manager, Kevin Kaiser, did not take issue with any aspect of Petitioner's testimony concerning her duties or the extra work she performed during the busy season.

Petitioner's notice-related testimony was also detailed and believable. Kevin Kaiser attempted to refute some of that testimony but the Arbitrator found him unconvincing. He initially stated that Respondent's safety director, Bobbi Pierce, was in his office when Petitioner came in, wearing a brace on her hand. He subsequently testified he was alone when Petitioner arrived and that he briefly spoke with her before going to get Pierce. The transcript reflects that Bobbi Pierce was present at the hearing. T. 200, 227. The Arbitrator finds it odd that Respondent did not call her as a witness, given the inconsistencies in Kaiser's testimony.

In his report of March 6, 2014, Respondent's examiner, Dr. Kohlmann, described Petitioner as a "very nice, warm person who was very believable." RX 7, p. 6. Kohlmann Dep Exh 2. In that same report, Dr. Kohlmann indicated he "performed a site visit requested by [Respondent]" and performed several seed-related and quality control tasks. He indicated that Petitioner described other non-seed related tasks, such as painting and handling pallets, to him and that he was already familiar with such tasks since he had performed them elsewhere.

At his 2017 deposition, Dr. Kohlmann was remarkably vague about his involvement in this claim. He could not recall whether he visited Respondent's facility before or after he examined Petitioner. He also had no recollection of the amount of time he spent with Petitioner or on the claim as a whole. He acknowledged he limited his visit to Respondent's lab. He did not perform any of the rigorous tasks Petitioner performed in the warehouse. He was

evasive about his billing. While he is an orthopedic surgeon, he conceded he has a general practice and that only about 5% of the surgeries he performs involve the carpal tunnel. He also acknowledged he does not perform jobsite analyses in the way that Dr. Fletcher does.

Overall, the Arbitrator did not find Dr. Kohlmann persuasive. He did not question Petitioner's diagnoses or treatment yet concluded that she requires no restrictions of any kind. In his report, he described Petitioner as having "very good function" in both hands yet went on to state "she can't make a fist and fully extend all the fingers." RX 7, p. 7.

Arbitrator's Conclusions of Law

Did Petitioner establish repetitive trauma injuries manifesting on June 14, 2010?

The Arbitrator finds that Petitioner developed left carpal tunnel syndrome secondary to repetitive trauma, with this condition manifesting on June 14, 2010. In so finding, the Arbitrator relies in part on Petitioner's credible testimony concerning the manual tasks she performed for Respondent and the time pressure she was under. The Arbitrator recognizes that Petitioner did not perform the same task all day, every day. "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. Edward Hines Precision Components v. Industrial Commission, 356 Ill.App.3d 186, 193-194 (2nd Dist. 2005). In City of Springfield v. IWCC, 388 Ill.App.3d 297, 314 (4th Dist. 2009), the Appellate Court upheld a finding that bilateral carpal tunnel was causally related to the claimant's job where the claimant "routinely twisted wire, used pliers, handled small objects and performed frequent and repetitive hand usage throughout his work shifts." Petitioner testified along similar lines,

Did Petitioner provide Respondent with timely notice?

The statutory language relevant to the issue of notice reads: "Notice of the accident shall be given to the employer as soon as practicable but not later than 45 days after the accident." Notice may be given orally or in writing. No defect or inaccuracy of notice shall bar recovery "unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy."

The notice requirement applies to employees like Petitioner who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident from which notice must be given is the date when the repetitive trauma injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 531 (1987). The statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. The purpose of the notice requirement is to enable the employer to investigate the alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In the instant case, Petitioner alleged a manifestation date of June 14, 2010. This is the date she saw William Kilpatrick, a physician's assistant affiliated with the Christie Clinic. Kilpatrick examined her left wrist, discussed her work duties with her and placed her left wrist in a splint. Petitioner testified that, after she saw Kilpatrick, she understood she had left carpal tunnel syndrome and that this condition stemmed from the duties she performed for Respondent. T. 68. Petitioner further testified that she went to work the same day she saw Kilpatrick, showed her splint to Kevin Kaiser, Respondent's plant manager, advised Kaiser that she had been diagnosed with carpal tunnel syndrome and that this condition was work-related and indicated she was not yet subject to restrictions. Petitioner testified to having a second conversation with Kaiser on July 22, 2010, one day after receiving a referral to a surgeon. Petitioner testified she again told Kaiser her condition was work-related and that she would likely require surgery. Based on interaction she had had with a different plant manager in the past, and because she believed the surgery would not require much recovery time, she told Kaiser she intended to submit her bills to her group carrier and seek short-term disability under workers' compensation.

As indicated above, the Arbitrator finds credible Petitioner's testimony as to her interaction with Kaiser on June 14 and July 22, 2010. Both dates fall within the statutory 45-day notice period. Petitioner's testimony included two compelling details. She indicated that, after she told Kaiser she intended to pursue benefits under group rather than under workers' compensation, he asked her if she was sure, to which she replied "yes." In reviewing the transcript, one can almost hear Kaiser's sigh of relief at that moment. Additionally, it was Kaiser, and not Petitioner, who completed the paperwork. This factor differentiates the claim from White v. IWCC, 4-06-0566WC (4th Dist. 2007). White also involved repetitive trauma injuries, albeit injuries involving the shoulders and back. The claimant in that case stopped working on July 17, 2000, around the time he underwent right shoulder surgery. The following May, he completed a sickness/accident form on which a box was checked stating that his back and upper extremity conditions were not work-related. One year into his sickness and accident benefits, he received a letter from his employer indicating his benefits were running out and his job would be discontinued if he did not resume working. He retired when the benefits ran out. It was not until October 29, 2002, about two weeks after a doctor issued a written opinion linking his conditions to his laborer duties, that he filed an Application for Adjustment of Claim. In this pleading, he alleged an accident or manifestation date of July 17, 2000. The arbitrator found the claim compensable and awarded benefits. The Commission reversed on the grounds that the claimant failed to provide the employer with timely notice. The Appellate Court affirmed this result, noting that the claimant could have alleged a manifestation date of October 15, 2002, under the "flexible standard" espoused by the Supreme Court in Durand v. Industrial Commission, 224 Ill.2d 53 (2006), but failed to do so. The Court also noted that, given the manner in which the claimant completed the sickness/accident forms, the employer had no basis for knowing that an accident existed to investigate. In the instant case, in contrast, Petitioner openly characterized her condition as work-related when providing notice (on the same day she learned of the condition) but indicated her willingness to defer benefits under the Act as she knew Respondent would want her to do. Petitioner ceded control to Respondent in

that she left it to Kaiser to complete the paperwork. Respondent introduced no evidence indicating she ever asserted in writing that her condition was not work-related.

The Arbitrator finds that Petitioner provided Respondent with timely notice of her condition.

Did Petitioner establish causal connection?

As a preliminary matter, the Arbitrator notes that Petitioner is not claiming causation as to her cervical spine condition. Dr. Fletcher described this condition as degenerative in nature.

The Arbitrator finds that Petitioner established causation as to her current post-operative left carpal tunnel syndrome condition of ill-being. In so finding, the Arbitrator relies in part on the histories Petitioner provided to her treating physicians. The Arbitrator also relies on the causation opinions expressed by Dr. Fletcher. As noted above, the Arbitrator found those opinions more persuasive than those expressed by Dr. Kohlmann. Dr. Fletcher had a significantly better understanding of Petitioner's duties. Dr. Kohlmann did visit Respondent's facility, on one occasion, but his recollection of this visit was poor and he readily acknowledged he does not perform jobsite analyses in the way Dr. Fletcher does. The Arbitrator also notes the absence of other intrinsic risk factors. Petitioner is not diabetic or overweight, does not smoke, does not have rheumatoid arthritis and has no thyroid-related problems. Dr. Kohlmann never suggested that some non-work factor was the cause of her condition. The therapy records following the initial left carpal tunnel release reflect that Petitioner experienced increased symptoms when performing various household activities. That such activities might have slowed Petitioner's recovery does not bar her claim. Repetitive work activities need not be the sole causative factor, not even the primary causative factor, so long as they were a causative factor in the resulting condition. A claimant is not required to eliminate all other possible contributing factors. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

That Petitioner's underlying cervical spine condition might have predisposed her to developing carpal tunnel syndrome does not bar her from recovering benefits for that syndrome. In Illinois, it has long been held that an employer takes an employee as it finds her. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

The Arbitrator also finds that Petitioner established causation as to her current post-operative right carpal tunnel syndrome via an overuse theory. In so finding, the Arbitrator relies in part on Petitioner's credible testimony that she began experiencing carpal tunnel symptoms in her right hand around the time she came under Dr. Oakey's care, due to overusing that hand. There is really no dispute in this case that Petitioner obtained a very poor result from her initial left carpal tunnel release. Nor is there is any dispute that she required revision surgery. Her left carpal tunnel syndrome treatment was unusually protracted and she continued to experience symptoms even after Dr. Oakey performed a third procedure. It makes sense to the Arbitrator that she would rely on and overuse her dominant right hand due to her left-sided symptoms.

The Arbitrator further finds that Petitioner did not establish causation as to her claimed left cubital tunnel syndrome. Neither Dr. Thatcher nor Dr. Oakey addressed causation via this condition. On direct examination, Dr. Fletcher initially testified he did not clearly see any causal relationship between Petitioner's job and the left cubital tunnel syndrome. He indicated that the tasks Petitioner performed at Respondent were not those commonly associated with the development of this syndrome. After Petitioner's counsel pressed further, asking him whether the cubital tunnel could be linked with Petitioner's poor outcome from her initial carpal tunnel surgeries, he did not fully commit himself. He simply stated this was a "reasonable theory." The Arbitrator finds that Petitioner did not meet her burden of proof on the issue of causation vis-à-vis the claimed left cubital tunnel syndrome.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the medical expenses detailed in PX 21. These expenses relate to treatment Petitioner received for her left carpal tunnel syndrome, her left cubital tunnel syndrome and her right carpal tunnel syndrome. The Arbitrator has previously found that Petitioner established causation as to her bilateral carpal tunnel syndrome but not as to her left cubital tunnel syndrome. The Arbitrator views the carpal tunnel treatment as reasonable and necessary. Respondent's examiner, Dr. Kohlmann, did not question Petitioner's diagnosis or any aspect of her care. When he examined her, she had not yet had the right-sided release but was contemplating it. He did not suggest it was unnecessary.

The Arbitrator awards the expenses in PX 21 that relate to left and right carpal tunnel syndrome treatment, subject to the fee schedule.

Is Petitioner entitled to temporary total disability? Is Petitioner entitled to maintenance? Is Respondent liable for the cost of the vocational services provided by Bob Hammond?

Petitioner claims she was temporarily totally disabled from August 19, 2010 through July 28, 2016, when she reached maximum medical improvement. PX 24 at 33. The stipulated average weekly wage of $659.70 gives rise to a temporary total disability rate of $439.80.

The Arbitrator finds that Petitioner was temporarily totally disabled during two intervals: from August 19, 2010 through July 1, 2013 (the date Dr. Oakey released her to full duty) and from August 11, 2015 (the date of the right carpal tunnel release) through July 28, 2016. Dr. Oakey's note of July 1, 2013 reflects he was fully aware that Petitioner had ongoing bilateral hand symptoms yet he imposed no restrictions. PX 6, p. 19. Dr. Fletcher found Petitioner to be continuously disabled but it appears he was unaware of Dr. Oakey's release.

Petitioner claims she is entitled to maintenance from March 13, 2017, the date of her first meeting with Bob Hammond, through the hearing of July 16, 2019. The Arbitrator finds that Petitioner was entitled to maintenance during two periods: April 3, 2017 (the date of her first job search contacts, PX 20) through June 30, 2018 and April 15, 2019 through June 30,

2019. The Arbitrator relies on Bob Hammond's reports and testimony, along with Petitioner's very extensive job search records (PX 20), in making this finding. Hammond testified that Petitioner initially resisted the idea of looking for work, due to her pain level, and did not start looking until after he communicated with her a second time. T. 152.

In the Arbitrator's view, Respondent failed on all fronts insofar as the issue of vocational rehabilitation is concerned. Respondent did not even prepare a written vocational assessment, as required by Section 9110.10 of the Rules Governing Practice Before the Commission. In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207 (1st Dist. 2009), the Appellate Court emphasized that such assessments are required "even in circumstances where no plan or program of vocational rehabilitation is necessary." Regardless of its defenses, Respondent had an obligation to assess Petitioner's employability and vocational needs. Nevertheless, the Arbitrator declines to award maintenance between July 2018 and March 2019 based on the concession that Hammond made under cross-examination when asked about Petitioner's inactivity during this period. The Arbitrator recognizes that Respondent paid no weekly benefits under the Act at any point and that an unproductive job search can be discouraging but Hammond agreed that taking time off is not compatible with a diligent search for work.

The Arbitrator finds Respondent liable for Hammond's charges of $7,649.73 (PX 18). See W. B. Olson, Inc. v. IWCC, 2012 IL App (1st) 113129WC, 820 ILCS 305/8(a).

What is the nature and extent of the injury?

Petitioner seeks an award of permanent total disability under Section 8(f) of the Act. There are three ways for a claimant to establish entitlement to benefits under this section: "by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience and condition, no jobs are available to a person in their circumstances." ABB C-E v. Industrial Commission, 316 Ill.App.3d 745, 750 (5th Dist. 2000). The Arbitrator finds that Petitioner established both that she is medically permanently totally disabled and that she falls into the "odd lot" category by virtue of her lengthy but ultimately unsuccessful job search. As for the medical aspect, Dr. Fletcher testified that Petitioner is totally disabled because of her hand condition. He characterized her dexterity as "very, very poor." PX 24, p. 34. Dr. Kohlmann, Respondent's examiner, did not comment directly on the issue of total disability but, in his report, conceded that Petitioner is unable to make a fist or close her fingers completely. RX 7, p. 7. As for the remaining component, Petitioner, via her own testimony and that of Bob Hammond, established she conducted a diligent but unsuccessful job search. During an initial period, Petitioner applied for approximately 1500 jobs. During a second period, prior to the hearing, she applied to 300 additional jobs. PX 20. She persisted in looking despite not receiving benefits or offers to interview. Hammond testified that, in his 31 years of experience, only one other individual had applied to as many jobs as Petitioner did. He also testified that, during the two periods in question, Petitioner diligently looked for work and there was no reasonably stable labor market for her.

Once Petitioner met her burden on the job search aspect, the burden shifted to Respondent to establish that there is a reasonably stable labor market for Petitioner's services and that Petitioner is employable in that market. Respondent offered no vocational evidence of any kind.

The Arbitrator awards permanent total disability benefits under Section 8(f) of the Act at the applicable minimum rate of $466.13 per week, beginning July 16, 2019 and for the duration of Petitioner's life.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID FINK,

Petitioner,

vs.

NOS: 12 WC 003215
12 WC 11480

AC McCARTNEY FARM EQUIPMENT,

Respondent.

ORDER

This matter comes before the Illinois Workers' Compensation Commission for an order to allow Petitioner's attorney to disburse attorney's fees that were held in escrow since the approved Settlement Contract Lump Sum Petition and Order was entered by Commissioner Kathryn A. Doerries on March 11, 2021. At the time Commissioner Doerries approved the Lump Sum Settlement Contract Petition and Order on March 11, 2021, a contemporaneous Order was entered that mandated Petitioner's counsel hold the claimed attorney's fees ($140,000.00) in escrow pending an Order of the Commission for disbursement. Commissioner Doerries allowed Petitioner's counsel leave to provide an itemization of legal work performed. Upon receipt of the documents provided by Petitioner's counsel in support of the Petition for fees in excess of the statutory cap on attorney's fees for settlements pursuant to §16a(B), the matter was heard by Commissioner Kathryn A. Doerries on March 25, 2021, with both parties represented by counsel and with Petitioner present by Webex.

§16a(B) states in pertinent part:

> With respect to any and all proceedings in connection with any initial or original claim under this Act, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or his dependents, whether secured by agreement, order, award or a judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be

> allowed to the attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this Section. However, except as hereinafter provided in this Section, in death cases, total disability cases and partial disability cases, the amount of an attorney's fees shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in this Act unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees. *820 ILCS 305/16a*

In favor of the Petition, Petitioner's attorney submitted multiple documents including an Affidavit signed by Petitioner on March 1, 2021 (Comm'nXA) swearing that he was fully aware that his attorney's law firm, Ridge & Downes, is limited by statute to Attorney's fees of 20% or 364 weeks of compensation, unless a further fee shall be allowed by the Illinois Workers' Compensation Commission. In his Affidavit, Petitioner represented that he was aware of the law firm's Petition for a fee of 35%, or $140,000.00, and that based upon the time, quality of work and advice that they had given him over a period of 11 years, it was his desire that Ridge & Downes be allowed the fee. The work over the 11 years included securing an expert opinion from Vocamotive, Inc., that he was permanently and totally disabled. Petitioner's attorney then brought his case to trial before an Arbitrator on March 1, 2017, which resulted in an award for Petitioner of permanent total disability benefits. On appeal by Respondent, the Commission modified the Decision to an award of 50% loss of use of the man as a whole, or $78,000.00.

Thereafter, Petitioner's counsel sought review of the Commission Decision in the Circuit Court of Winnebago County and on July 16, 2019, was successful in having the Commission Decision reversed. The Petitioner signed an Addendum to Fee Agreement on June 29, 2020, (Comm'nXC) allowing a fee of 25% of the gross amount recovered if an appeal was taken to the Circuit Court and if an appeal was taken to the Appellate Court, then the attorneys' fees shall be 35% of the gross amount received.

Respondent sought review in the Appellate Court, which on October 13, 2020, affirmed the judgment of the Circuit Court setting aside the Decision of the Commission and reinstating the Decision of the Arbitrator finding permanent total disability in favor of Petitioner. After a number of offers had been conveyed and rejected, the Petitioner agreed to settlement of these cases for $400,000.00 plus a Medicare Set-Aside of $76,126.00. (Comm'nXA)

In further support of the Petition, Petitioner's attorney submitted, and Commissioner Doerries reviewed, the Attorney Representation Agreement, (Comm'nXB), the executed addendum to the fee agreement, (Comm'nXC), the case file notes beginning January 20, 2012, to the present, case law, the Circuit Court and Appellate Court briefs filed by the parties, the proceedings throughout the Appellate Court and the results obtained, those being an award of permanent and total disability and a lump sum settlement offer of $400,000.00 plus a Medicare Set-Aside agreement of $76,126.00. (T, 5-6, Comm'nXA)

After recitation of the documents reviewed, the Commissioner addressed the Petitioner and advised she had reviewed his signed Affidavit, and reviewed the substantive points enumerated therein, in pertinent part, that Ridge & Downes is petitioning the Commission for a fee of 35% rather than the statutory 20%, pursuant to the addendum to the Attorney Representation Agreement signed June 29, 2020. When asked if he remained in agreement that for the services rendered, his attorney should be allowed a fee of 35% or $140,000.00, Petitioner responded, "Yes, I do." (T, 6)

Based on the foregoing, the Commission is in agreement with the fee arrangement and disbursement of the attorney's fees held in escrow is allowed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's law firm, Ridge & Downes, is hereby allowed to disburse attorney's fees of $140,000.00 that have been held in escrow since the Settlement Contract Lump Sum Petition and Order pertaining to cases 12 WC 3215 and 12 WC 11480 was approved on March 11, 2021.

DATED: APR 7 - 2021

Kathryn A. Doerries

KAD/bsd
04/06/21
42

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve E. Cluck,

Petitioner,

21IWCC0164

vs. NO: 18 WC 022337

Walgreens Family of Companies,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

21IWCC0164

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CLUCK, STEVE E
Employee/Petitioner

Case# **18WC022337**

21IWCC0164

WALGREENS FAMILY COMPANIES
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4689 HASSAKIS & HASSAKIS PC
JOSHUA A HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

21IWCC0164

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Steve E. Cluck
Employee/Petitioner

v.

Walgreens Family of Companies
Employer/Respondent

Case # 18 WC 022337

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **February 14, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care? – **Total Knee Replacement by Dr. McIntosh**
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, September 21, 2016, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$27,634.34**; the average weekly wage was **$727.22 (38 weeks)**.

On the date of accident, Petitioner was **57** years of age, with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$10,527.31** in TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$10,527.31**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall have credit of $11,220.40 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall authorize and pay for the treatment recommended by Dr. McIntosh.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/22/20
Date

APR 2 - 2020

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

21IWCC0164

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

STEVE E. CLUCK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 22337
	)	
WALGREENS FAMILY OF COMPANIES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 14, 2020. The parties agree that on September 21, 2016, Petitioner was a receiver/checker when he sustained injuries to his left knee which arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection and prospective medical care. All other issues are stipulated by the parties.

MEDICAL HISTORY

Petitioner provided a history of operating a stand-up fork truck when he attempted to exit the equipment and twisted his left knee and felt a "pop." He had an immediate onset of pain. On 9/28/16, Petitioner was examined by Dr. Houle at the Orthopedic Center of Southern Illinois for increased pain with range of motion and weightbearing and swelling. Dr. Houle noted pain at the joint line medially and overlying the left MCL, with a significantly uncomfortable McMurray's test. The initial assessment was a medial meniscus tear. Dr. Houle ordered an MRI, physical therapy, and took Petitioner off work.

The MRI demonstrated a complex tear of the posterior horn of the medical meniscus with a small meniscal flap, as well as a small horizontal tear of the body of the medial meniscus. It also showed a mild sprain to Petitioner's MCL, diffuse chondromalacia of the medial compartment, and moderate chondromalacia of the patella. Petitioner participated in physical therapy from 10/21/16 through 11/10/16 that did not improve his symptoms. On 1/17/17, Dr. Houle performed a resection of Petitioner's medial meniscus tear, chondroplasty of the medial femoral condyle, and chondroplasty of the patellofemoral compartment. Dr. Houle noted an "obvious tear of the posterior horn of the medial meniscus and some areas of grade 2 to 3 chondromalacia of the medial femoral condyle."

On 1/25/17, Petitioner reported 2 out of 10 pain and reported the sharp pain in the medial aspect of his knee was gone. He participated in physical therapy from 2/2/17 through 2/13/17. On 2/24/17, Petitioner reported

0 out of 10 pain, with difficulty going from squatting to standing, and advised Dr. Houle he would like to go back to work. Dr. Houle released Petitioner to return to work the following Monday and prescribed Mobic. Petitioner returned to Dr. Houle on 3/27/17 complaining of 3 out of 10 pain, difficulty descending stairs, and feeling a locking sensation stepping off the fork truck at work. Dr. Houle assessed persistent pain secondary to some degree of osteoarthritis from the time of surgery. On 5/1/17, Dr. Houle administered a cortisone injection which provided some relief.

Petitioner continued to follow up with Dr. Houle complaining of increased pain by the end of his work day. Dr. Houle recommended medications, injections, physical therapy, bracing and potentially knee replacement surgery. On 11/13/17, Petitioner reported severe flareups for which Dr. Houle stated Petitioner may require future cortisone injections.

Petitioner sought a second opinion with Dr. Jeffrey McIntosh on 2/20/18. Petitioner was experiencing sharp pain in the medial joint line and he was walking with an antalgic gait. Dr. McIntosh noted swelling and pain at the extremes of flexion and tenderness in the medial joint line. Dr. McIntosh reviewed an x-ray of Petitioner's left knee taken in 2014 when Petitioner sustained injuries to his *right* knee, with an x-ray taken by Dr. Houle after his 9/21/16 accident. Dr. McIntosh performed left knee x-rays on 2/20/18 which revealed an almost complete loss of joint space. Dr. McIntosh opined Petitioner was suffering from degenerative joint disease which significantly progressed over the last two years as "determined by radiographic evaluation." Dr. McIntosh recommended a total knee replacement.

On 5/21/18, Petitioner presented to Dr. Jason Young for a Section 12 examination at Respondent's request. Petitioner reported he had start up pain and aching in his left knee and that he was still working full duty. Petitioner reported the steroid injections provided temporary relief. Dr. Young noted Petitioner's previous right knee surgery in 2014. Dr. Young noted Petitioner walked with a slight limp favoring the left side, with noted medial and patellofemoral compartment pain of the left knee. Dr. Young stated x-rays were performed the day of the visit of Petitioner's bilateral knees that revealed medial joint space collapse with bone-on-bone arthritic changes. Dr. Young observed moderate patellofemoral arthrosis and superior osteophyte formation of the patella of the left knee and medial joint space collapse of the right knee which was also near bone-on-bone in severity. Dr. Young assessed severe left knee osteoarthritis which he felt clearly preexisted the work incident. Dr. Young opined chondromalacia was not something that occurred acutely, but was something which occurred over many years. He felt the work injury did not accelerate the underlying disease. Dr. Young noted Petitioner's progression was one of a natural variety and there had been no significant acceleration as a result of the meniscus tear. Dr. Young noted arthritic changes in the contralateral knee which were indicative of a genetic component rather than an acute traumatic component. Petitioner's arthritic progression was typical for the type and severity of the arthritis he had. There was no acute cartilage damage or chondral flap which would have been a result of a plant and twist mechanism, but rather a degenerative process when the cartilage was globally thin indicative of normal wear and tear over the course of Petitioner's life. Dr. Young opined the need for a left knee replacement was in no way related to the 9/21/16 work incident.

On 7/24/18, Petitioner complained that his *right* knee was bothering him and Dr. McIntosh aspirated the right knee and injected same with 40 mg. of Kenalog.

Dr. McIntosh authored a narrative on the question of causation. Dr. McIntosh reviewed and compared the radiographs from 2014, 2016, and 2018 related to Petitioner's left knee. He noted that the joint space in 2014 and

2016 were very similar in appearance. However, upon comparison of the 2018 films, Dr. McIntosh noted that, "[i]n comparison views of the right knee and the left knee from February 2018, there is a significant decrease in the joint space in the left knee compared to the right, which is notable." Had the injury and subsequent surgery not contributed to the worsening of his arthritis, Dr. McIntosh would expect the changes in the joint space to be equal, especially if it was a "genetic" predisposition as suggested by Dr. Young. He attributed the progressive change in the left knee to Petitioner's left knee surgery.

TESTIMONY

Petitioner testified he has worked for Respondent for twenty years. On the date of accident, Petitioner dismounted a fork truck and his left knee twisted and popped. He felt immediate pain and reported the accident. Petitioner testified that when he saw Dr. Houle on 2/24/17 he had 0 out of 10 pain with some difficulty squatting. That he returned to work shortly following that visit and his knee pain returned. He has worked full duty since 2/25/17. He treated with Dr. Houle several times after returning to work and received cortisone injections that provided temporary relief. Petitioner testified he has never had symptoms in his left knee prior to the accident. He testified he treated with Dr. Houle prior to this accident for a meniscal surgery on the right knee in 2014. Petitioner testified he did not have any pain in his right knee at the time of arbitration. He further testified that Dr. Jason Young did not take x-rays of his knees at the Section 12 examination as indicated in the report.

Dr. Jeffrey McIntosh testified by way of deposition. Dr. McIntosh maintained that subjectively, chronologically and objectively from comparison radiographic evaluation, Petitioner's deterioration of his left knee following his 9/21/16 incident and 1/17/17 surgery accelerated the deterioration of Petitioner's left knee joint space leading to the need for a total knee replacement. Dr. McIntosh opined that it was his opinion to a reasonable degree of medical certainty that Petitioner's need for total knee replacement is causally related to his work injury and the *sequela* from the subsequent meniscal surgery and chondroplasty. He understood that Petitioner had no problems with his left knee prior to his work accident. In reviewing the comparison studies from 2014 to 2016, Dr. McIntosh noted there was slight worsening of both knees, but they maintained equal space between the medial femoral condyle and the medial tibial plateau.

In comparing the 2016 to 2018 films, Dr. McIntosh noted that the accident accelerated the arthritis in Petitioner's left knee. He stated that there was a "significant difference" in the left knee compared to the right from 2016 and 2018. Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner merely had a genetic predisposition to arthritis as Petitioner's knee progression did not occur at an equal rate, but he developed arthritis at a faster rate in the left. He noted that when you change the anatomy of the knee, you change the weight-bearing of the knee by removing part of the cartilage or if there is damage to the cartilage that lines the bone that has the capacity to accelerate the development of arthritis in the knee. Even though the meniscal resection was undertaken with chondroplasty to improve the immediate symptoms, it put Petitioner at risk to develop arthritic changes which happened at a rapid rate.

Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner was at MMI in February, 2017 in light of Petitioner's continued symptoms after returning to work. He noted that the aspiration of Petitioner's right knee in July, 2018 was secondary to Petitioner ambulating with an antalgic gait. Petitioner ambulating with an antalgic gait was documented in Dr. McIntosh's initial evaluation. Dr. McIntosh explained the torn meniscus was resected and when there is injury to the cartilage there is no real cure for that outside of replacing cartilage. The structural changes in Petitioner's left knee with his injury and repair, in combination with the accelerated rate of progression

in the left knee versus Petitioner's right knee, allowed Dr. McIntosh to opine that the incident and subsequent surgery led to the need for knee replacement surgery.

Dr. Jason Young testified by way of evidence deposition. He testified consistent with his written report. Again, he opined that Petitioner had severe left knee osteoarthritis and the work incident did not accelerate the underlying disease. Dr. Young testified arthritis can be severe in some patients yet they have no pain, and with others arthritic knee pain begins spontaneously meaning arthritis is not always associated with a particular event. He testified a knee surgery does not automatically equate to advancing of arthritic disease and many do just fine following surgery. He testified given the amount of arthritis Petitioner had, the arthritic progression was in the normal course. Dr. Young testified Petitioner reached MMI on 2/27/17 when he was returned to full duty work. He testified further treatment was related to the natural history of his underlying degenerative disease. He testified based on Petitioner's presentation and most recent radiographs, Petitioner was a candidate for a left total knee replacement. He testified he had no knowledge of any prior complaints of the left knee before 9/21/16, but stated it would not be surprising for someone to be functioning completely normal with a really degenerative advanced arthritic knee.

CONCLUSIONS OF LAW

ISSUE (F): Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator concludes that Petitioner's current condition of ill-being with regard to his left knee is causally related to his work accident of September 21, 2016. Petitioner testified credibly and the records support that prior to his accident, Petitioner did not have symptoms or receive treatment for his left knee. Petitioner sustained an acute accident on September 21, 2016 for which he felt immediate pain and symptoms resulting in a meniscal resection and chondroplasty in his left knee.

The opinions of treating physicians Dr. Houle and Dr. McIntosh are more credible than those of Dr. Jason Young. Dr. Houle and McIntosh compared and reviewed the x-rays of Petitioner's left knee from 2014, 2016, and 2018. Dr. McIntosh explained the comparison x-rays objectively show an accelerated collapse of joint space in Petitioner's left knee following his meniscal resection and chondroplasty. He noted a loss of all cushioning in Petitioner's medial joint line, which Dr. Young agreed.

Dr. Young maintained Petitioner's current state of ill-being was merely genetic; however, Dr. Young did not review Petitioner's MRI films, the arthroscopic photos from Dr. Houle's surgery, the comparison x-rays done in 2014 and 2016, or any imaging that predated the date of accident, including records from Petitioner's prior right knee surgery in 2014. Dr. young did not review Dr. McIntosh's narrative report of January, 2019 or Dr. Houle's treatment note dated March 27, 2017 when Petitioner's symptoms returned following surgery. Dr. Young agreed that in light of the fact he had not reviewed the 2014 and 2016 x-rays, he had no opinion about the interval changes demonstrated on those studies.

Further, it was Dr. Young's understanding that Petitioner's left knee was asymptomatic prior to the accident. Dr. Young could not identify, but for the September 21, 2016 incident, when Petitioner's left knee would have become symptomatic and opined it was coincidental that his underlying arthritis had become symptomatic at the time Petitioner sustained his accident. Despite Petitioner being immediately symptomatic following this accident, his meniscal injury, subsequent meniscectomy and chondroplasty, increase in symptoms immediately

upon returning to work, and the temporal relationship of his manifestation of symptoms to his injury, Dr. Young simply believed it was coincidental that his underlying arthritis was symptomatic. Dr. Young could not opine to any degree of medical certainty exactly when, but for the September 21, 2016 event, Petitioner's arthritis would have started causing him pain. In light of the above shortcomings in the foundation of Dr. Young's opinions, the Arbitrator gives little weight to his opinions on causation.

Aside from the direct opinions on the issue of causation by Dr. McIntosh and Dr. Houle, causation may also be shown by a chain of events which demonstrates a previous condition of good health, an accident and a subsequent injury resulting in disability. That scenario may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 69, 63-63 (1982). In the case at hand, Petitioner had no history of pain, treatment, disability or limitation with his left knee up until his twisting incident and subsequent meniscal resection and chondroplasty. Petitioner worked with Respondent for over 20 years. There was no medical opinion, record or testimony that Petitioner ever had difficulty ascending/descending stairs; getting up from a squatted position; standing for durations; stepping down from his forklift; or suffered from daily pain, locking and swelling. The medical records wholly support Petitioner continues to be plagued with difficulty with his left knee, which is well documented upon his return to work following his January 17, 2017 surgery. The records taken as a whole support a clear, well-documented onset of symptoms and a lack of longstanding improvement which began with the September 21, 2016 incident.

ISSUE (K): Is Petitioner entitled to any prospective medical care?

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury, and the credible opinions and/or testimony of Dr. Houle and Dr. McIntosh, the Arbitrator orders Respondent is liable for Petitioner's medical care, including a left total knee replacement as recommended by Dr. McIntosh and Dr. Young. Accordingly, Respondent shall authorize and pay for prospective medical care as recommended by Dr. McIntosh as provided in Sections 8(a) and 8.2 of the Act.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/22/20

DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Giovanni Cruz,

Petitioner,

21IWCC0166

vs.

NO: 19 WC 013786

Schilke Music,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0166

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CRUZ, GIOVANNI
Employee/Petitioner

Case# **19WC013786**

SCHILKE MUSIC
Employer/Respondent

21IWCC0166

On 11/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
ANDREW MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

21IWCC0166

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Giovanni Cruz
Employee/Petitioner
v.
Schilke Music
Employer/Respondent

Case # 19 WC 13786

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2019 and October 9, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **1/25/2019,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned ***$28,633.28***; the average weekly wage was ***$550.64***.

On the date of accident, Petitioner was ***30*** years of age, ***single,*** with ***0*** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of ***$2,065.72*** for TTD, $***N/A*** for TPD, $***N/A*** for maintenance, and ***$1,822.97*** for other benefits, for a total credit of $***3,888.69***.

Respondent is entitled to a credit of $***N/A*** under Section 8(j) of the Act.

ORDER

Because Petitioner did not sustain an accidental injury which arose out of and in the course of his employment with Respondent, and because his current condition of ill-being is not causally-connected to the alleged incident, benefits are denied.

Respondent shall be given a credit of $2,065.72 for TTD, and $1,822.97 for medical benefits that have been paid, for a total credit of $3,888.69.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-21-19
Date

ICArbDec19(b)

NOV 22 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GIOVANNI CRUZ, Petitioner,	)	
v.	)	19 WC 13786
SCHILKE MUSIC, Respondent.	)	

MEMORANDUM IN SUPPORT OF ARBITRATOR'S DECISION

Statement of Facts

On January 25, 2019, Petitioner, Giovanni Cruz, was an employee of Schilke Music. He makes parts for trumpets (Tr. p. 39). On the alleged incident date, he and an employee named Eric had to move a rack. Mr. Cruz said he had a bad hold on the rack. When he tried to reposition it, he felt a pain in his right wrist and a sort of "pop" feeling. He initially testified this occurred approximately 10:00 a.m. to 12:00 pm (Tr. p. 40). He described the rack as having a cloth wheel and a paper wheel. He said the rack was about 5 feet long. He would not be able to lift it by himself (Tr. p. 41).

When further describing the incident moving the rack, he testified "I felt it, I felt losing my balance. And when I reached – I turned my hand to grab it, that's when I -- all the weight was on my right hand and I felt it, like, a really bad pain and then, like, some kind of, like, pop vibration in my right hand" (Tr. p. 42-43). He did not yell out. The pain was on the outside of his right wrist (Tr. p. 43). When this happened, they let go of the rack and then tried to reposition to get it to move. They eventually got the rack into position. Mr. Cruz said he told Eric about what happened with his wrist but he does not think Eric heard him. He did not tell anyone else with the employer that day what had happened with his wrist. He said he did not report it because he assumed he pulled a muscle. He said this happened on a Friday and he felt maybe over the weekend he would heal and then he could just go back to work on Monday (Tr. p. 44).

Eric Zaragoza testified on behalf of the petitioner. He said that he and Mr. Cruz were moving a cloth dispensary back to its original location. He said the dispensary was 7 feet by 4 feet (Tr. pp. 12-13). Mr. Zaragoza said he was at the back of the dispensary and Mr. Cruz was in the front (Tr. p. 14). Mr. Zaragoza believes they had to move the dispensary maybe 20 feet. He said while they were carrying the dispensary it tilted forward and Mr. Cruz went to catch it. Mr. Zaragoza testified that as this was being done he saw Mr. Cruz tweak his hand or wrist. They set the rack down and eventually moved it back to its original location (Tr. pp. 14-15). Mr. Zaragoza testified that they had moved the rack 17 or 18 feet before setting it down. He said they took probably a 2 or 3 minute break before moving it the last few feet. He testified that they took the break until Mr. Cruz' wrist felt better. They then moved the dispensary the remaining 2 or 3 feet (Tr. pp. 28-29).

Video clip 1 shows the petitioner and Mr. Zaragoza first moving the rack at 6:04 am (Rx. 2). Mr. Cruz was facing and walking forward and Mr. Zaragoza was walking backwards. They slid the rack most of the way and then picked it up in order to not scratch the new floor (Tr. pp. 66-67). While watching clip 1, Mr. Cruz testified that he hurt his wrist at 6:04 am between the 13 and 19 second mark (Tr. p. 69-70). After moving the rack, Mr. Cruz tied his shoe. Mr. Cruz agreed that during the movement of the rack at 6:04 am that he and Mr. Zaragoza did not take a 2 or 3 minute break before completing the task (Tr. pp. 71-72).

Video clip 7 shows them moving the rack back at 11:21 am (Rx. 2). Again, Mr. Cruz was walking forward and Mr. Zaragoza was walking backwards. Mr. Cruz testified that while moving the rack they did not stop to take a 2 or 3 minute break, as described by Mr. Zaragoza. After moving the rack, Mr. Cruz pointed with his right to someone in the finishing room (Tr. pp. 73-75).

Mr. Cruz finished the workday, ending at 2:30 p.m. He was able to perform his duties throughout the remainder of the day as he said he took most of the load on his left hand. He said he struggled the whole day (Tr. p. 44-45).

Mr. Cruz testified he did not go to work on Monday and he called off. He believed he spoke to Chris on the phone, the manager at Schilke (Tr. p. 45). Brian Persaud, the petitioner's direct supervisor, said that Mr. Cruz arrived at work on Monday and said that he hurt his wrist and needed to see a doctor. Mr. Cruz did not say that he injured his wrist at work (Tr. pp. 104-105).

The petitioner first saw Dr. Bednar at Loyola on January 29, 2019. He told him he suffered an injury on the job. He initially told him the injury had occurred three days earlier. Petitioner clarified, saying he told him it happened a few days before. He testified that he told Dr. Bednar that it happened on Friday. According to Mr. Cruz, Dr. Bednar at the time said the date was not important (Tr. p. 45-46).

Dr. Bednar provided him with a wrist splint for his right wrist and gave him a 5-pound lifting restriction. Those restrictions were originally accommodated (Tr. p. 47). Brian Persaud testified that on February 12, Mr. Cruz told him that according to his doctor he needed complete rest. He asked Mr. Persaud if he was going to get paid for his time off-of-work because it was a work-related injury. This was the first time Mr. Persaud was aware that Mr. Cruz was claiming the injury was related to work (Tr. p. 106).

Andrew Naumann is the owner of Schilke Music. He first became aware that Mr. Cruz was claiming a work-related injury when he was notified by Brian Persaud on February 12 (Tr. p. 111-112). As Mr. Naumann was out-of-town at the time, he called the petitioner. The petitioner told him the event took place first thing in the morning on January 25 while moving a rack (Tr. pp. 112-113). Upon returning to town, he spoke with Mr. Cruz again about the

incident. At that time, the petitioner said he did not injure his wrist first thing when the rack was first moved. He injured it when he moved that rack back later in the morning (Tr. p. 114). Mr. Naumann described a surveillance system he has in the facility to observe activities in high traffic areas. He prepared Rx. 2, which is a disc that contains 25 clips of video. The clips show every time Mr. Cruz appeared on any of the cameras on January 25, 2019 (Tr. pp. 114-115).

Petitioner continued to treat with Dr. Bednar on March 5, 2019. Ever since March 6, 2016, he has not worked (Tr. p. 50). He had an MRI of the right wrist taken March 22, 2019. He had follow-up visits with Dr. Bednar on March 26, April 9 and April 30, 2019. Dr. Bednar prescribed surgery for the right wrist (Tr. p. 49).

Petitioner attended a Section 12 examination with Dr. Bryan Neal on September 5, 2019 (Tr. p. 51, Rx. 1).

Petitioner testified he was still having problems with his wrist. He cannot rotate it fully to the left. He said he wears the splint all the time. He still wants to undergo surgery (Tr. p. 55).

ARGUMENT

Findings of Arbitrator

As to Issue C, did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Petitioner did not sustain an accident that arose out of and in the course of his employment.

Petitioner testified that after the accident, he was able to work through the end of his workday because "I took most of the load on my left hand. But I struggled the whole day." (Tr. p. 45) This representation is not supported by his activity shown on surveillance video. In Respondent's Ex. 2, clip 8 (11:50 am), Petitioner is viewed vigorously moving the handle of the pallet jack up and down with two hands. He then continues this movement of the handle with only his right hand. He is then shown pulling the pallet jack with his right hand in this clip, continuing to do so in clips 9, 10, and 11 (11:51 am to 11:53 am) (Rx. 2). In clip 23 (1:56 pm), Petitioner is shown moving buckets and rolling up and carrying a rubber mat. He initially carries the rubber mat with two hands and then walks while carrying the rubber mat at his side with his right hand only (Rx. 2). Petitioner testified that the rubber mat may have weighed 5 pounds (Tr. p. 92). Andrew Naumann testified the mat was 6 foot long by 3 foot wide and it weighed at least 30-35 pounds (Tr. p. 119).

The Arbitrator notes additional activity exhibited by Petitioner after the alleged incident. In clip 12 (12:00 pm), the Petitioner is shown carrying his gloves with his right hand and moving his hands while speaking. In clip 13 (12:01 pm), he is shown gesturing with his hands. In clip 14 (12:49 pm), he is carrying a large roll of hand towels with his right hand. He is shown bending his right hand underneath the roll of towels. In clips 16 and 17 (1:13 pm), he is shown picking up a box with his right hand and breaking down the box using his right hand. In clip 22 (1:46 pm), he is shown cleaning the work area with a rag for 8 minutes and 29 seconds, often using the right

hand. In clip 24, (2:21 pm), he is shown pulling (with assistance) a 55-gallon tank. Clip 25 (2:30 pm) shows him punching out at the end of the day with the right hand (Rx. 2).

Not only do these clips fail to show him mostly taking the load with his left hand, and struggling the whole day, they fail to show any evidence of pain or problems with the right hand whatsoever.

The finding of no accident is based upon other discrepancies as well. At trial, and in discussions with Andrew Naumann, Petitioner wavered in saying whether the accident occurred when the rack was moved first thing in the morning, or when it was moved back between 10:00 a.m. and 12:00 noon. At trial, Petitioner initially testified on direct examination that the incident occurred between 10:00 am and 12 pm (Tr. p. 40). However, on cross-examination, after being shown the video clip of the rack first being moved, he testified he was injured at 6:04 am, somewhere between the 13 and 19 second marks (Tr. p. 65-70). After direct examination, Petitioner met with his attorney. On re-direct examination, he testified he injured his wrist when he was moving it back at 11:21 a.m. (Tr. p. 89).

Mr. Naumann testified that he initially spoke with Petitioner on February 12. During that conversation, Mr. Cruz told him he was hurt when he was moving the rack first thing in the morning (Tr. p. 113). After returning from out-of-town, he met with Mr. Cruz again. At that time, Mr. Cruz told him he had injured his wrist while moving the rack back, and not first thing in the morning (Tr. p. 114).

Another question is raised as to the reporting of the incident. While saying he did not remember being told that he was to immediately report any work injury regardless of how minor, he admitted there was language in the employee handbook about immediately reporting work injuries (Tr. p. 57). Brian Persaud, his direct supervisor, testified that Mr. Cruz had been instructed to immediately report any type of work injury to him (Tr. p. 104). Mr. Cruz

acknowledged at trial that he did not tell his employer that he was hurt at work on the incident date (Tr. p. 57-58). Mr. Persaud testified that he was not told by Mr. Cruz that his wrist injury was work-related until February 12, 2019 (Tr. p. 106).

Brian Persaud testified that on the January 25, 2019 alleged incident date, he observed no behavior on the part of Mr. Cruz to indicate he had injured his wrist. Mr. Cruz said nothing to him about injuring his wrist on that date.

The Arbitrator does not rely upon the testimony of Eric Zaragoza. Mr. Zaragoza said that after seeing Mr. Cruz "tweak" his hand or wrist, that they waited 2 or 3 minutes before completing the move of the cloth dispensary rack (Tr. pp.28-29). This break did not happen, as shown in the video and confirmed by Mr. Cruz (Rx. 2; Tr. pp. 71-75). While testifying he saw the "tweak" in the petitioner's face when it happened (Tr. p. 18). However, he also said that he was looking backwards as they were moving the dispensary and thus could not see where the petitioner's hands were placed on the rack (Tr. p. 28). The Arbitrator further notes that located between Mr. Zaragoza and the petitioner on the rack was a roll of cloth and a roll of paper. These rolls would have made it even more difficult to see the expression of Mr. Cruz described by Mr. Zaragoza.

For the foregoing reasons, the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent.

As to Issue F, Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

Petitioner's current condition of ill-being is not causally related to the alleged incident.

As discussed previously, the Arbitrator does not find Petitioner's testimony to be credible in many areas. The Arbitrator specifically notes the Petitioner's testimony at trial that he made it through the remainder of the workday by taking most of the load with his left hand and that he

had struggled the whole day (Tr. p. 45). This is clearly not the case, based upon the video clips submitted into evidence as Respondent's Exhibit 2.

In addition, the Arbitrator notes the report of Dr. Bryan Neal. Dr. Neal conducted an Independent Medical Examination on September 5, 2019. In addition, he had the opportunity to review the surveillance video (Rx. 2). Based on his review of the video in conjunction with his discussion with Petitioner and his examination, it was his opinion that the Petitioner's right wrist condition was not causally-connected to the alleged work incident. In discussing the video clips, Dr. Neal wrote:

> "No video clip shows the examinee or any individual pictured in any of the video to have either injured his wrist or to look like there is any injury complaint, problem or issue. Clip #1 and clip #7, the only clips where, based upon his history, the injury could have occurred, do not support any injury to the wrist as he described" (Rx. 1 p. 14).

The Arbitrator notes that the treating physician, Dr. Bednar, did not have the benefit of reviewing the surveillance video. As such, Dr. Neal is in a better position to assess the causation issue and the Arbitrator relies upon the opinion of Dr. Neal in this issue. The Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to the alleged work incident.

As to Issue J, were the medical services that were provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services; the Arbitrator finds the following:

As Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and as Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Respondent is not liable for any medical treatment charges incurred by Petitioner.

As to Issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to prospective medical care.

As to Issue L, what temporary benefits are in dispute, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to temporary total disability benefits.

As to Issue N, is Respondent due any credit, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, the Arbitrator awards a credit to Respondent for $2,065.72 for TTD paid and $1,822.97 for medical bills paid for a total credit of $3,888.69.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Demetrius Bell,

Petitioner,

21IWCC0167

vs. NO: 16 WC 019664

RJ Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, other (intoxication) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 17, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0167

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELL, DEMETRIUS
Employee/Petitioner

Case# **16WC019664**

21IWCC0167

RJ TRANSPORTATION
Employer/Respondent

On 1/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

21IWCC0167

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Demitrius Bell
Employee/Petitioner

Case # **16** WC **19664**

v.

R. J. Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 5, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **June 20, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**29,505.32**; the average weekly wage was $**567.41**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**378.27**/week for **10** weeks, commencing **June 21, 2016** through **August 30, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $753.00 to Premier Occupational Health, $6,901.26 to Elmwood Park Same Day Surgery Center, $5,520.66 to Instant Care Equipment Leasing, $1,925.00 to Windy City Anesthesia, $11,135.00 to Athletico Physical Therapy, and $749.06 to Prescription Partners, for a total of $26,983.98, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**340.45**/week for **30** weeks, because the injuries sustained caused the **6**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

January 14, 2019
Date

JAN 17 2019

FACTS:

On June 20, 2016, Petitioner was employed by the Respondent in "Quality Control" and "Replenishment", and he had been so employed for approximately one year. Petitioner testified that, on a daily basis, he was required to pick orders and take them to the correct areas in the warehouse for distribution. Petitioner testified that on June 20, 2016, he arrived at 6:30 a.m. for his regular 7:00 a.m. shift, in good health without any pain complaints. Petitioner testified that he had to pick orders that morning, which required him to maneuver pallets, some of which were empty, some weighing over 500 pounds. Petitioner testified that he needed to move a specific pallet, but was unable to do so without moving another pallet that was placed vertically on top of the pallet that he needed to move. Petitioner testified that the vertical pallet was stuck, and when pulling hard to free the pallet, he injured his low back. Petitioner testified that he immediately felt pain in his low back, with subsequent numbness and tingling in his legs. Petitioner testified that he had never felt such pain.

Petitioner testified that he reported his injury to his supervisor, and was sent to Premier Occupational Health for Medical treatment. In his "Injury Statement" that Petitioner was required to complete when arriving at Premier Occupation Health, Petitioner stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Prior to his physical examination, Petitioner willingly underwent drug and alcohol tests. Petitioner's drug screen was negative. On his alcohol test, Petitioner registered a blood alcohol content ("BAC") of .045 and .041. Petitioner testified that he was made aware of the positive test, that he was surprised of the result because he did not feel intoxicated, and that he would not have worked had he known he had alcohol in his system. Petitioner further testified that he spent the preceding day celebrating Father's Day with his family, and that he had consumed alcohol that evening.

Petitioner was examined by Dr. Gorovits, to whom Petitioner gave an identical accident description. During a physical examination, Petitioner described constant, sharp, and severe pain in his low back. Petitioner underwent an x-ray that revealed 2mm retrolisthesis at L5-S1. Petitioner was prescribed analgesic balm, naproxen, and given a lumbar brace. Dr. Gorovits returned Petitioner to work for a "[r]egular duty trial." Petitioner testified that he returned to work and sat in the breakroom until his employer informed him that he was terminated as a result of the failed alcohol test.

On June 21, 2016, Petitioner sought treatment at Elmwood Park Same Day Surgery Center, in Elmwood Park, Illinois. Petitioner was examined by Dr. Amit Mehta, and stated that he suffered a work injury the previous day. Specifically, Dr. Mehta noted that Petitioner "was pulling a pallet out of the racks which weighed approximately 30# when he felt sharp, 10/10 back pain." It was noted that Petitioner was also suffering from radicular symptoms going down the right leg that were triggered by "pulling the pallet as he was bending over pulling them out of the racks." Dr. Mehta prescribed physical therapy three times per week for four weeks, terocin cream, and disabled Petitioner from work. Dr. Mehta also opined that Petitioner's conditions and symptoms were casually connected to the mechanism of Petitioner's injury at work.

On June 23, 2016, Petitioner presented to Athletico Physical Therapy. In the initial treatment note, it is indicated that Petitioner was experiencing sharp back pain when lifting a pallet at work that radiated into his right toes and into the back of his leg.

On July 5, 2016, Petitioner returned to Elmwood Park following his sessions of physical therapy. Petitioner was experiencing low back and radicular symptoms in the right leg. During the

physical exam, Petitioner had a positive right-sided slump seat test. Petitioner was diagnosed with low back pain, myofascial pain, and lumbar radiculopathy. Petitioner's current pain medications were discontinued, and he was prescribed a trial of Mobic 7.5 mg. In addition, Petitioner was to continue physical therapy and an MRI of the lumbar spine was recommended. Petitioner was disabled from work until his next follow up in two to three weeks.

On July 14, 2016, Petitioner underwent an MRI of the lumbar spine which was reported to demonstrate a right-sided disk herniation measuring approximately 3-4mm at L5-S1 and a 2-mm posterior annular disk bulge which indented the ventral surface of the thecal sac at L4-L5.

On July 26, 2016, Petitioner was examined by Dr. Mehta at Elmwood Park following the MRI and physical therapy. Dr. Mehta reviewed the MRI findings and performed a physical examination of Petitioner, which revealed continued low back pain and radicular symptoms caused by the pathology shown on the MRI. Due to Petitioner's continued symptoms, Dr. Mehta recommended an L5-S1 epidural injection. Petitioner was disabled from work, to continue taking the Mobic as needed, and to follow up to undergo the injection.

On August 2, 2016, Dr. Mehta performed an L5-S1 interlaminar epidural injection under fluoroscopic guidance. Petitioner was prescribed a cold/compression therapy device and accompanying wrap. Petitioner testified that the injection and cold therapy device significantly improved his symptoms.

On August 19, 2016, Petitioner returned to Elmwood Park. Upon examination, it is noted that "since the injection [Petitioner's] symptoms have improved dramatically." It is also noted that Petitioner wanted to transition out of physical therapy as he felt that his home exercise program at that point was adequate, and that he was interested in returning to work. Petitioner's medications were discontinued, he was continued off work, and he was prescribed work conditioning. Petitioner was to follow up in four weeks.

On August 30, 2016, Petitioner returned to Elmwood Park, and was noted to still be doing well following the injection. It was noted that Petitioner wanted to be returned to light-duty work, and he reported that his pain was currently at a 0/10 but occasionally at 4-6/10 with certain activities, such as bending forward and lifting over ten pounds. Petitioner was returned to work with a ten pound restriction, and instructions to begin work conditioning, and to follow up in one month.

On September 8, 2016, Petitioner was examined by Dr. Kern Singh at Midwest Orthopedics at Rush at the request of the Respondent.

On September 21, 2016, Petitioner attended a work conditioning session. Petitioner met one of four job demands. Nonetheless, Petitioner indicated that he was working full-time at a new job, and despite continuing to feel right leg pain from time to time, his current job did not require lifting.

On October 11, 2016, Petitioner followed up at Elmwood Park. Dr. Mehta noted that Petitioner underwent physical therapy and an injection that provided an overall improvement of 60-70% relief. Dr. Mehta noted that Petitioner suffered from occasional soreness, but that his pain was a 0/10 at that time. Dr. Mehta found Petitioner to be at maximum medical improvement and released him from care at full duty.

Petitioner testified that he thought physical therapy and the injection, along with the medication and cold compression machine, helped to relieve his pain and enable him to return back to work. Petitioner further testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. Petitioner testified that he did have a prior back injury in 2012, but that he had no back pain in the period of time before his employment with Respondent and during his employment with Respondent prior to the injury that he sustained on June 20, 2016.

The January 10, 2018 deposition testimony of Dr. Amit Mehta was admitted into the record as Petitioner's Exhibit 6. Dr. Mehta is a board certified Anesthesiologist and Pain Management Specialist who primarily treats patients with spine-related issues. Dr. Mehta testified that, to a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner's complaints were aggravated or caused by the mechanism of injury described. Dr. Mehta testified that he recommended physical therapy because it can help with any type of back injury, and is many times the first step in treating a patient prior to more invasive treatment. Dr. Mehta testified that he prescribed Naproxen and Terocin cream because Naproxin is an anti-inflammatory that can help with pain, and topical creams such as Terocin help to reduce localized back pain without any major side effects.

Dr. Mehta testified that Petitioner's positive right-sided "Slump Test" is indicative of disc and/or nerve irritation. Dr. Mehta testified that the Petitioner's MRI report indicated a right-sided disc protrusion at L5-S1 measuring 3-4 mm and a 2 mm bulge at L4-L5, and he opined that the pathology on the MRI was the cause of Petitioner's physical and subjective complaints. As a result of the disc protrusion causing low back pain and radiculopathy, and the medications and physical therapy providing minimal relief, Dr. Mehta testified that the next step in treatment was an epidural injection for diagnostic and therapeutic purposes. Dr. Mehta testified that the Petitioner's improvement in pain and radicular symptoms indicated that the injection was successful.

On cross examination, Dr. Mehta testified that the Petitioner's positive alcohol test indicating a BAC of .041 would not affect his causation opinion as the Petitioner's clinical history, physical examination, and imaging studies correlated to his subjective complaints, and that alcohol in his system did not change the fact that he had a disc protrusion and radiculopathy. Dr. Mehta further testified that, based upon Petitioner's subjective complaints, objective symptoms, and diagnostic reports, it was his opinion that Petitioner suffered an acute injury that was casually related to the mechanism of injury described by Petitioner.

The February 28, 2018 deposition testimony of Dr. Kern Singh was admitted into the record as Respondent's Exhibit 2. Dr. Singh testified that he examined Petitioner on September 8, 2016 and that Petitioner informed him that he hurt his back while pulling a pallet. Dr. Singh further testified that Petitioner had minimal back pain, no leg pain, and that the last epidural injection provided Petitioner significant relief. Dr. Singh opined that Petitioner was negative for back pain and demonstrated no symptom magnification with negative Waddell's findings. Dr. Singh testified that his impression of the Petitioner's MRI revealed an L5-S1 disc protrusion. Regarding causation, Dr. Singh testified that he felt Petitioner's injury was sustained during "his work-related event. . .".

When asked what treatment he would recommend for someone with an L5-S1 disc protrusion, regardless of whether it was acute or degenerative, Dr. Singh testified that he thought physical therapy, anti-inflammatories, prescription meloxicam, and an MRI would be appropriate and reasonable. Dr. Singh further testified that he recommends epidural steroid injections if a patient has

radiculopathy and nerve root distribution that correlates with an MRI. Furthermore, he testified that one epidural steroid would be a reasonable course of treatment for Petitioner. Finally, Dr. Singh testified that, based upon a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner suffered an injury at work on June 20, 2016.

The March 22, 2018 deposition testimony of Dr. Jerrold Leikin was admitted into the record as Respondent's Exhibit 1. Dr. Leikin is a medical toxicologist and physician who teaches in the field of medical toxicology. He testified that in his specialty of medical toxicology, he has performed retrograde extrapolation in regards to alcohol content a person may have had in their system over a thousand times in the past 30 years. Dr. Leikin testified that he reviewed the breathalyzer test results from the day of the Petitioner's alleged accident, and that he performed a "retrograde extrapolation" of Petitioner's blood alcohol test. Dr. Leikin opined that, due to the Petitioner's blood level that was identified after the accident, the Petitioner was at increased risk from being involved in an accident at work and thus impaired due to alcohol intoxication. Dr. Leikin testified the he determined that Petitioner's blood alcohol level would have likely been between 0.056% and 0.076% at the time of the injury. When questioned further, Dr. Leikin opined that it was very possible for Petitioner's blood alcohol level to be 0.061% at the time of the injury, but could have been lower. At this level, Dr. Leikin testified that a person would be unable to concentrate or multi-task, and have problems judging time, space, and distance. Dr. Leikin opined that the neurological effects of a 0.046% or a 0.056% blood alcohol level could have contributed to Petitioner's injury.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by the preponderance of the evidence that he suffered an injury on June 20, 2016 that arose out of and in the course of his employment for Respondent.

In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Industrial Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). Petitioner must show, through a preponderance of the evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 214 (2003). If an employee's intoxication is the proximate cause of his accidental injury, or the employee was so intoxicated that the intoxication constituted a departure from employment, then no compensation is owed to the employee by the employer. 820 ILCS 305/11 (2011). If, at the time of the injury, the employee's blood alcohol level was 0.08% or above, there is a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the injury. *Id.*

In the instant case, Petitioner's tested blood alcohol levels were 0.041% and 0.045% at the time he was tested. Dr. Jerrold Leikin opined that Petitioner's blood alcohol level was likely around

0.061 at the time of the accident. Because the tested and estimated levels of Petitioner's intoxication are below 0.08%, there is no rebuttable presumption that Petitioner's intoxication was the proximate cause of his injury.

Therefore, the Arbitrator finds that Petitioner was not required to overcome the rebuttable presumption that his intoxication was the proximate cause of his injury, and that such burden is on Respondent. Respondent offered no evidence that Petitioner's intoxication was the proximate cause of his injury. Petitioner testified that he felt no pain in his lumbar spine prior to the injury, gave a consistent history throughout his medical treatment, and was subsequently released from care after undergoing treatment that was reasonable according to both Dr. Mehta and Dr. Singh. Accordingly, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by a preponderance of the evidence that his lumbar spine injury was causally related to the accident at work.

To prove this element, Petitioner must show that his injury was caused by "some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 672 (2003).
The Arbitrator finds it significant that Petitioner was working full duty and testified that he had no prior complaints or treatment to his lumbar spine prior to the accident. Here, Petitioner testified that his job was to essentially pick orders and move product around the warehouse to ensure that the correct product was in the correct location for transport. He testified that he needed to remove a pallet off of a rack that had another pallet stood up vertically on the pallet he needed. When attempting to pull out the vertical pallet, he felt a sharp pain in his back that ultimately developed into numbness and tingling in his legs.

Petitioner was immediately sent to Premier Occupational Health, where he stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Petitioner provided a nearly identical history throughout the rest of his treatment, including the independent medical examination with Dr. Singh. Furthermore, both Dr. Singh and Dr. Mehta opined that Petitioner suffered an injury at work.

Petitioner testified that he did suffer a back injury in 2012, but that he could not remember the last time he had treated for, or suffered pain from, that incident. Petitioner testified that he had worked for Respondent for approximately one year prior to the instant injury, and had no back pain prior to June 20, 2016. The Petitioner testified that he still suffers back pain as a result of the work injury, despite also having "good" days. Petitioner further testified that his back sometimes affects his sleep.

Relying on the above, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the injury that occurred on June 20, 2016.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Petitioner has met his burden of proof by a preponderance of the evidence that the medical services provided were reasonable and necessary.

Petitioner immediately sought treatment for his injury at Premier Occupation Health. Petitioner subsequently sought treatment at Elmwood Park Same Day Surgery Center. He was prescribed physical therapy, which he underwent at Athletico Physical Therapy. Petitioner testified that he felt the physical therapy did help to relieve his symptoms. Furthermore, Dr. Mehta and Dr. Singh testified that physical therapy and non-opioid medications were a reasonable course of treatment. Petitioner also underwent an epidural steroid injection at L5-S1 while under anesthesia, and was provided with a cold/compression device post-injection. Petitioner testified that the injection and cold/compression device helped to relieve his symptoms.

The Arbitrator takes note of the testimony of both Dr. Singh and Dr. Mehta, who both opined that an epidural steroid injection was reasonable in the instant case. In addition, the medical records indicate that Petitioner had significant symptom relief following the injection and returned to work not long afterward.

Regarding payment for reasonable medical treatment, the Arbitrator finds that the medical bills introduced by Petitioner show unpaid charges for medical treatment in the following amounts:

Premier Occupational Health:	$753.00
Elmwood Park Same Day Surgery Center:	$6,901.26
Instant Care Equipment Leasing:	$5,520.66
Windy City Anesthesia:	$1,925.00
Athletico Physical Therapy:	$11,135.00
Prescription Partners:	$749.06

Respondent has not paid all appropriate charges. Therefore, Respondent is ordered to pay the aforementioned medical bills, totaling $26,983.98 pursuant to Section 8(a). The parties stipulated that the Respondent is entitled to credit for any medical bills paid by the Petitioner's group insurance.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he was owed temporary total disability benefits from June 21, 2016 to August 30, 2016, while he was disabled from work.

The Arbitrator recognizes that off work status notes were provided throughout Petitioner's treatment, until he asked to be released back to work.

Therefore, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of $378.27/week for a period of 10 weeks, commencing on June 21, 2016 through August 30, 2016, as provided by Section 8(b) of the Act.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no report of impairment compliant with the provisions of of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a material handler. The Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Arbitrator therefore gives some weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 46 years old at the time of the accident. The Arbitrator considers the Petitioner to be younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less able to recover fully from such an injury. The Arbitrator therefore gives little weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. Because there is no evidence of any impairment to future earnings, the Arbitrator gives no weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Petitioner testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. These complaints are corroborated in the medical records as well as the testimonies of both Dr. Mehta and Dr. Singh. The Petitioner's complaints as supported by the

medical records, evidences some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 6% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSARIO JIMENEZ,

Petitioner,

vs.

21IWCC0168

NO: 18 WC 13761

CHICAGO MARRIOTT OAK BROOK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability benefits, medical expenses, and prospective medical treatment and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the Arbitrator's decision with the following clarification:

On April 12, 2018, Petitioner was working as a banquet server for Respondent. She testified she was working in the VIP room and that she was directed by her supervisor to go to Starbucks to find lids for the coffee cups as there were none in the VIP room or storage. (T. 10) Petitioner went to Starbucks and obtained lids and some cups. Petitioner subsequently realized they were not the correct lids so she grabbed the lids, advised her supervisor that they were not the correct lids, and went to Starbucks for a second time. (T. 11)

On this second trip to Starbucks Petitioner was carrying the cups and lids she was going to return and as she was walking, she tripped. (T. 8) Her leg went to the side, her left knee popped and Petitioner was unable to continue walking. (T. 8-9) After advising her general manager and Human Resources, she was put in a taxi cab to go to the occupational health clinic for an examination. (T. 12-13)

21IWCC0168

On April 12, 2018 the same day the accident occurred, Petitioner was examined at Advocate Occupational Health where she was taken off work, diagnosed with a left knee sprain and instructed to follow up with an orthopedic surgeon should problems persist. (Px1) She reported that the incident occurred while she was walking rapidly and felt a pop in her knee. (Px1) Petitioner followed up with orthopedic surgeon, Kevin Tu, M.D., on May 10 2018, at which time he ordered an MRI and placed Petitioner on restricted duty. (Px2) Petitioner described her accident as quickly walking and tripping over the junction between the hard floor and carpet. (Px2) Petitioner underwent an MRI on May 15, 2018 which showed a torn meniscus. (Px3) On May 24, 2018, Petitioner returned to Dr. Tu, at which point he recommended conservative treatment consisting of physical therapy. He continued restrictions. (Px2) Petitioner returned on June 28, 2018, at which point physical therapy was discontinued and surgery was recommended. Restrictions were again continued. Petitioner returned to Dr. Tu on August 9, 2018 and September 20, 2018, and authorization for the recommended surgery was still pending. Petitioner's restrictions remained in place. (Px2)

On cross-examination, Petitioner testified that she was walking very fast at the time she hurt her knee. She wasn't walking or jogging. (T. 18) She was walking fast because of customer's complaints. (T. 23) She didn't fall, but she tripped and then her foot got stuck and she couldn't move. (T. 27) Petitioner did not testify as to any defects in the floor.

The Respondent does not dispute that the evidence establishes that at the time the Petitioner sustained her knee injury she was at work – i.e. in the course of her employment. As the parties do not dispute that Petitioner's knee injury occurred in the course of her employment, the Commission will only address the second element that must be proved to find the case compensable --whether the Petitioner's knee injury arose out of her employment.

The *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (9/24/20) case provides the proper analysis to be applied in this instance. In *McAllister* at ¶60, the court held that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 (1989), stands for the proposition that an injury arises out of a claimant's employment for purposes of the Act if, at the time of injury, the claimant was performing an act that he might reasonably be expected to perform incident to his employment or causally connected to what the claimant must do to fulfill his assigned job duties, even if the act involves an everyday activity.

In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill.2d at 58; *see also The Venture - Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18; *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 204 (2003). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro,* 207 Ill.2d

at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58) *see also Baggett v. Industrial Comm 'n*, 201 Ill.2d 187, 194 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.").

A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987). To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶31; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152115WC, ¶38; *Baldwin v. Illinois Worker 's Compensation Comm'n*, 409 Ill.App.3d 472,478 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105 (2006).

Petitioner's knee injury arose out of her employment because at the time she injured her knee while in the process of retrieving coffee cup lids for customers, she was at work performing an act her employer might reasonably expect her to perform incident to her assigned job duties as a banquet server, and in fact, was directed to perform. Therefore, the knee injury was employment related, as it was caused by retrieving coffee cup lids for the customers in the VIP concierge room — an act that was incident to and causally connected to Petitioner's job duties as a banquet server. *Caterpillar Tractor*, 129 Ill.2d at 58; *Memorial Medical Center v. Industrial Comm 'n*, 72 Ill.2d 275, 280 (1978) (" 'to come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury' " (quoting *County of Cook v. Industrial Comm 'n*, 69 Ill.2d 10, 17 (1977))).

Sisbro and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill.2d at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once she has presented proof that she was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill.2d at 58.

In addition to proving accident, Petitioner met her burden that her current condition of ill-being is causally related to her work injury. Petitioner reported directly to occupational health, wherein she was diagnosed with a "sprain of unspecified collateral ligament of left knee." (Px1) She followed up with orthopedic surgeon Dr. Tu, who ordered an MRI and ultimately diagnosed that she had a torn medial meniscus. (Px2, 5/24/18 visit) On August 9, 2018, Dr. Tu opined that Petitioner's mechanism of injury was consistent with the development of a medial meniscus tear. (Px2) Respondent did not offer any medical opinion to refute this causation opinion.

Based on the finding of accident and causation, the Arbitrator appropriately awarded medical expenses as all were in furtherance of the treatment of Petitioner's knee injury. He also appropriately awarded prospective treatment in the form of left knee arthroscopic surgery and

21IWCC0168

attendant care, as well as temporary total disability benefits from the day following the injury through the date of trial.

In addition to the foregoing, the Commission corrects a scrivener's error contained in the Arbitration Decision in the second to last sentence of the second paragraph on page 11. The Commission replaces the word "hear" with the word "heard".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,122.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 022321
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

JIMENEZ, ROSARIO
Employee/Petitioner

Case# **18WC013761**

21IWCC0168

CHICAGO MARRIOTT OAK BROOK
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2512 THE ROMAKER LAW FIRM
JASON BRISKI
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN A RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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STATE OF ILLINOIS)
)SS.
COUNTY OF Dupage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rosario Jiminez
Employee/Petitioner

v.

Chicago Marriott Oak Brook
Employer/Respondent

Case # **18** WC **13761**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **April 12, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

On **April 12, 2018**, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On **April 12, 2018**, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent on **April 12, 2018**.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $31,092.88 and the average weekly wage was **$597.94**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

ORDER

Accident

Petitioner was injured in a work related accident on April 12, 2018, while working as assigned for Respondent when she injured her left knee. Based upon Petitioner's consistent and credible testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu, the Arbitrator holds that Petitioner had an accident that arose out of and in the course of the employment by Respondent on April 12, 2018.

Is Petitioner's Current Condition of ill-being causally related to the injury?

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability (TTD) benefits of $398.62 per week for a Petitioner 27 and 5/7th weeks, commencing April 13, 2018 to the date of trial as provided in Section 8(b) of the Act. Total TTD owed is $11,047.35.

Medical Benefits

Petitioner's medical bills were admitted as Petitioner's Exhibits 1,2,3 and 4. The Arbitrator awards the medical bills in Exhibits 1,2,3 and 4. The Respondent shall pay the reasonable and necessary medical services of **$9,974.03** to Petitioner and The Romaker Law Firm as provided in Section 8(a) and 8.2 of the Act.

Prospective Medical Care

Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. Respondent has not provided any rebuttal medical evidence or testimony. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Charles W Watts

Signature of Arbitrator

March 26, 2020
Date

APR 2 - 2020

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PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.
If you prefer, you may submit the front of this application form with the *Proof of Service* on a separate page.

I, **Jason Briski**, an attorney, affirm that I emailed and ☐ delivered ☐ mailed with proper postage in the city of **Chicago** a copy of this form at **5:00pm** on **November 15, 2018** to the Respondent listed on this application and to each additional party, if any, at the address listed below.

TO: Mr. Brian Rudd
Nyhan Bambrick Kinzie and Lowry
20 N. Clark Street, Suite 1000
Chicago, IL 60602
Via E-Mail to bar@nbkllaw.com

Arbitrator Charles Watts
Illinois Workers' Compensation Commission
100 W. Randolph
Chicago, IL 60601
Via E-Mail to charles.watts@illinois.gov

Signature of person completing *Proof of Service*

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosario Jimenez	)	
	)	
Petitioner,	)	
	)	
vs.	)	Nos. 18 WC 13761
	)	
Chicago Marriott Oak Brook	)	
	)	
Respondent.	)	

FINDINGS OF FACT

The parties stipulated that on April 12, 2018, the Respondent, Chicago Marriott Oak Brook, was operating under and subject to the provisions of the Act, and that an employee-employer relationship existed between Respondent and Petitioner. (*See* Request for Hearing Form, Arb. Ex. 1,). The parties also stipulated that Respondent was given notice of the accident within the time limits stated in the Act. (*See* Request for Hearing Form, Arb. Ex. 1,). Additionally, the parties stipulated that Petitioner's average weekly wage to be considered is $597.94. (*See* Request for Hearing Form, Arbitrator's Ex. 1). Further, the parties stipulated that at the time of the injury Petitioner was 61 years old, married, with zero dependent child. (*See* Request for Hearing Form, Arb. Ex. 1). The Request for Hearing Form was entered as Arbitrator's Exhibit #1. (Tr. p 5). Petitioner's list of outstanding medical bills was attached to Arbitrator's Exhibit #1. (Tr. p. 6). The Application for Adjustment of Claim for the case was entered as Arbitrator's Exhibit #2. (Tr. p. 6). An interpreter was used for the hearing named Paula Riordan. (Tr. p. 7).

On October 23, 2018, Petitioner submitted Exhibits #1 through #4 and all Petitioner's Exhibits were admitted into evidence. (Tr. pp. 79-82). Respondent withdrew Exhibits #1, #2 and #3; and submitted Exhibits #4 through #8; however, Respondent's Exhibit #8 was rejected and not admitted into evidence. (Tr. pp. 82-86). Petitioner objected to Exhibit # 6(a) and 6(b) based on lack of foundation; however, the Arbitrator over ruled the objection and allowed the exhibit to be admitted. (Tr. pp. 83-85).

On October 23, 2018, Petitioner testified that she worked at Marriott International in Oak Brook as a banquet server for approximately 14 years. (Tr. pp. 7-8). Petitioner testified that she

injured her left knee on April 12, 2018. (Tr. p. 8). Petitioner testified that the injury occurred when she was walking very fast to Starbucks in the hotel while she was carrying some cups and lids (Tr. p. 8).

Petitioner testified that she as she was walking, carrying the cups and lids, she tripped on a carpet and her leg went to the side and she heard a popping sound. (Tr. pp. 8-9). Petitioner testified that she felt a sharp pain and was not able to walk anymore. (Tr. p. 9). Petitioner testified that she tried to take two steps but she could not move. (Tr. p. 9). Petitioner testified that the carpet she tripped on was a mat to clean feet at the entrance of the hotel. (Tr. p. 9).

Petitioner testified that she was going to Starbucks to return the cups and lids because they did not match the cups in the VIP room. (Tr. p. 10). Petitioner testified that the Starbucks was within the Marriott Oak Brook Hotel. (Tr. p. 10). Petitioner testified that she was working in the concierge room for people that have a key that are VIP to go into. (Tr. p. 10).

Petitioner testified that she went to the storage room looking for lids but could not find any and she had to go to other departments to get lids for the cups (Tr. p. 10). Petitioner testified that her supervisor Megan told her to go to Starbucks. (Tr. p. 10). Petitioner testified that she went to Starbucks and got some lids and cups but did not realize that the lids did not fit until customers started complaining about it. (Tr. p. 10). Petitioner testified that she spoke to her supervisor Megan again. (Tr. p. 11) Petitioner testified that Megan directed her to go back to Starbucks. (Tr. pp. 11-12). Petitioner testified that it was her second trip going back to Starbucks when she tripped and injured herself. (Tr. p. 12).

Petitioner testified that after she tripped she could not walk so she was looking around to see who could come and help her. (Tr. p. 12). Petitioner testified that she did not fall down and the clients at Table 15 saw her trip and asked if she was ok. (Tr. p. 12). Petitioner testified that she reported the accident and they took her to tell the general manager, Christina Duncan. (Tr. p. 12). Petitioner testified that HR was called and she spoke to Diana and was told they would write an accident report and she could go to the hospital. (Tr. p. 13). Petitioner testified that she was sent in a taxi for medical treatment. (Tr. pp. 13-14).

Petitioner testified that she was seen at Advocate Occupational Health on the same day that she hurt her knee. (Tr. p. 14). Petitioner testified that the occupational clinic kept her off work and told her to follow up with an orthopedic surgeon. (Tr. p. 14). Petitioner testified that she sought care from Dr. Tu, an orthopedic surgeon, on May 10, 2018. (Tr. p. 14). Petitioner

testified that Dr. Tu ordered an MRI of her left knee, which was performed on May 15, 2018. (Tr. pp. 15). Petitioner testified that Dr. Tu gave her work restrictions and she sent the restrictions to Respondent, however, Respondent did not offer her light-duty work. (Tr. p. 15). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and she began physical therapy. (Tr. p. 15). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. p. 16).

Petitioner testified that when she saw Dr. Tu at the end of June 2018, he recommended surgery for her left knee. (Tr. p. 16). Petitioner testified that she has continued to treat with Dr. Tu, but she has not been able to have surgery for her left knee because it has not been authorized by Workers' Compensation insurance. (Tr. p. 16). Petitioner testified that she has not received any Workers' Compensation disability pay. (Tr. pp. 16-17). Petitioner testified that she wants the surgery so she can go back to work (Tr. p. 17).

On cross-examination, Petitioner testified that she was claiming an accident dated April 12, 2018, and she began her shift at six o'clock in the morning. (Tr. pp. 17-18). Petitioner testified that she was working in the restaurant area near the Starbucks and she received customer complaints that coffee lids need to be restocked. (Tr. p. 18). Petitioner testified that she was walking fast, but she was not running or jogging. (Tr. p. 19). Petitioner testified that she went to Advocate Occupational Health and spoke to Dr. Piotrowski. (Tr. p. 19). Petitioner testified that she told Dr. Piotrowski that she was walking rapidly on carpet at work and felt a pop in her left knee. (Tr. p. 19). Petitioner was asked by Respondent's counsel if she tripped on a carpet or a mat and Petitioner testified that it was a mat but she was not sure what it was called. (Tr. pp. 19-20). The interpreter explained on the record that the Spanish word Petitioner was using, "Alfombra", can be a mat or a carpet used for either. (Tr. p. 20).

On cross-examination, Petitioner testified that x-rays of her left knee were taken and she did not break any bones or have any fractures. (Tr. p. 20). Petitioner testified that she was initially diagnosed with a left knee sprain. (Tr. p. 20). Petitioner testified that she sought treatment with Dr. Tu for the first time on May 10, 2018. (Tr.21-22). Petitioner testified that she gave Dr. Tu a description of her accident and told him that she was walking quickly between the floor and the carpet when she tripped over a junction between the carpet and the hard floor. (Tr. p. 21). Petitioner testified that she told her treating doctors that she tripped when she crossed from the floor to the carpet. (Tr. p. 22).

On cross-examination petitioner testified that she had a conversation with Respondent that was recorded. (Tr. p. 23). Petitioner testified that she told Respondent that customers were complaining about coffee lids and she was walking fast because of the customer complaints. (Tr. p. 23). Petitioner testified that her foot got stuck and she could not move anymore. (Tr. p. 23). Petitioner testified that she did not remember what she told respondent and she answered what Respondent asked her while she was in a lot of pain. (Tr. p. 26). Petitioner testified that she did not say that her foot simply got stuck and when she tripped it did get stuck. (Tr. p. 27).

On cross-examination Petitioner testified that her accident took place about 10 to 15 feet from the outside of the Starbucks. (Tr. p. 27). Petitioner testified that the hostess stand and computer were near where her accident occurred and she held on to it. (Tr. pp. 27-28). Petitioner testified that the hostess stand and computer were at the entrance door and by the door going to Starbucks. (Tr. p. 28). Petitioner testified that she did not know the distance from where the accident occurred to the hotel entrance door and restaurant Table 15 was ten to fifteen feet away. (Tr. p. 29).

On cross-examination Petitioner testified that she spoke with the general manager Christina, immediately after she was hurt, who called HR and then Cathy and Megan arrived. (Tr. p. 29). Petitioner testified that she told the HR person, Diane Wnek that she tripped on a mat near the exit door. (Tr. p. 29). Petitioner testified that when she hurt her knee she stumbled but did not fall to the ground. (Tr. p. 29).

On cross-examination Petitioner said she did not remember that well if the photograph marked Respondent's Exhibit 5E showed the floor by Table 15, but it appeared so. (Tr. p. 31). Petitioner said she walked on the floor many times and it was the floor that went to the hostess stand. (Tr. p. 32). Petitioner testified that she did not know if the carpet started after the wooden dividing wall and she did not know if the floor tiles were broken. (Tr. p. 33).

On redirect examination, Petitioner testified that there was carpeting on top of the tile floor and that was away from the area of the floor shown in Respondent's Exhibit 5E. (Tr. p. 34). Petitioner further testified that that the carpeting is what she tripped on. (Tr. p. 34). Petitioner testified again that she tripped on the carpeting after re-cross and re-direct examination. (Tr. p. 36).

The Market Director for Human Resources, Diane Wnek testified for the Respondent. (Tr. p. 38). Ms. Wnek testified that she oversees recruiting, talent management, performance

development, associate issues, disciplinary actions, terminations, hiring, Workers Comp, and other human resources situations. (Tr. p. 38).

Ms. Wnek testified that she has interacted with the Petitioner. (Tr. p. 38). Ms. Wnek testified that on April 12, 2018, she was working at the Chicago Marriott Oak Brook location and received a call at about 8:00 am from the general manager regarding an associate injury. (Tr. p. 39). Ms. Wnek testified that she spoke to Petitioner in the hallway behind the restaurant concierge lounge and Petitioner was sitting on a chair with ice on her knee. (Tr. p. 39). Ms. Wnek testified that Petitioner, general manager, Kristin Duncan and herself were present for the conversation. (Tr. p. 40).

Ms. Wnek testified that Petitioner told her it was very busy that morning, she was rushing around to get lids for to-go coffee cups for guests, and that while she was walking through the restaurant her knee gave out and began hurting her, and that she had made it as far as the mat where she could not continue any farther and that was where she stayed until she got assistance to move from that spot. (Tr. p. 40).

Ms. Wnek testified that her conversation with Petitioner was in English without an interpreter and she was able to communicate with the Petitioner in English. (Tr. p. 41). Ms. Wnek testified that it was her impression that Petitioner was capable of understanding and communicating in English. (Tr. p. 41). Ms. Wnek testified that Petitioner told her she was walking through the front portion of the restaurant which would have been on tile floor that goes past the hostess stand towards Starbucks when she hurt her knee. (Tr. p. 42). Ms. Wnek testified this is near an exit door that leads to the outside just outside the Starbucks entrance. (Tr. p. 42). Ms. Wnek testified that the exit door would be probably ten to fifteen feet away from where Petitioner said she hurt her knee. Ms. Wnek testified there is not carpeting or a mat in that area. (Tr. p. 42).

Ms. Wnek testified that there are walk off mats used at the hotel at the exits particularly during the winter months. (Tr. p. 43). Ms. Wnek testified the walk off mats are flat and they take moisture off guest's shoes as they come in and out the door. (Tr. p. 43). Ms. Wnek testified there is not any transition or junction between the tile and carpet in the area where she understood that Petitioner was walking. (Tr. p. 43). Ms. Wnek testified that the area where Petitioner hurt her knee was open to the public. (Tr. p. 43).

Ms. Wnek testified that the hotel has security cameras and as an HR representative she has access to the surveillance video. (Tr. pp. 43-44). Ms. Wnek testified that she reviewed the surveillance footage dated April 12, 2018, and saw Petitioner walking to the Starbucks, then she stops and catches herself and then continues walking to the Starbucks entrance where the mat was. (Tr. p. 44). Ms. Wnek testified that based on what she saw in the video the floor where Petitioner stumbled was tile. (Tr. p. 44). Ms. Wnek testified that there were not any mats in the area. (Tr. p. 45). Ms. Wnek testified that the camera was pointed down in the Starbucks and you can see the servers through the window. (Tr. p. 47). Ms. Wnek testified that Petitioner was seen stumbling through the window. (Tr. p. 49). Ms. Wnek testified that Petitioner caught herself in the video and then goes to the mat and stayed there. (Tr. p. 49). Ms. Wnek testified that she thought she saw Petitioner leaning on the door and her co-worker took her to the back. (Tr. p. 49). Ms. Wnek testified that the co-worker that helped Petitioner was named Marco. (Tr. p. 50).

Ms. Wnek then testified that the photograph marked Exhibits 5A showed the tile floor next to Table 15 along with Table 15, as it looked on April 12, 2018. (Tr. p. 54). Ms. Wnek testified that she took the photograph marked Exhibits 5A-5F after Petitioner was hurt. (Tr. p. 55). Ms. Wnek testified that photograph 5B was an accurate representation of the floor on the date of the accident. (Tr. pp. 55-56). Ms. Wnek testified that photograph 5C was the tile floor by the hostess stand on the date of the accident and photograph 5D was a photograph of the floor next to the hostess stand and towards the Starbucks. (Tr. p. 56). Ms. Wnek testified that photographs 5E and 5F show the floor by Table 15 on the date of the accident. (Tr. p. 57).

Ms. Wnek testified that a supervisor's accident report related to Petitioner's knee injury was drafted by Megan Orr, Petitioner's supervisor. (Tr. p. 58). Ms. Wnek said the only inaccuracy in the report is that it says Rosario (Petitioner) was seen by Megan talking to Marco immediately prior to her fall and fall is erroneous because Petitioner never said she fell but stumbled. (Tr. pp. 58-59).

On cross-examination, Ms. Wnek testified that she was responsible for performance management or performance appraisals employees. (Tr. p. 60). Ms. Wnek testified that safety is not part of the performance management system, but Marriott tracks safety incidents. (Tr. p. 61). Ms. Wnek testified that all the Marriott properties are measured against each other for safety incidents, lost time and restricted duty statistics. (Tr. p. 61). Ms. Wnek testified that five OSHA

recordable injuries have occurred at the Marriot Oak Brook in 2018. (Tr. p. 62). Ms. Wnek denied that high levels in the organization would ask about injuries if the properties she was responsible for started to have more OSHA reportables than the other properties. (Tr. p. 63).

On cross-examination, Ms. Wnek testified that she would normally use a translator for meetings with Petitioner and her co-workers if it was needed. (Tr. p. 64). Ms. Wnek testified that she did not speak Spanish, however, she felt that Petitioner was able to respond accurately to her questions about the accident. (Tr. p. 64). Ms. Wnek testified that Petitioner said she was very busy rushing to get lids. (Tr. pp. 64-65).

On cross-examination, Ms. Wnek testified there is not a camera by the entrance door to the hotel and the camera in Starbucks is the only camera in that area. (Tr. p. 65). Ms. Wnek testified that the exit door for the hotel is on the edge of the video frame. (Tr. p. 66). Ms. Wnek testified that a runner mat was located at the doorway. (Tr. p. 67)

On cross examination, Ms. Wnek testified that she did not recall if she took the pictures on the day of the accident or the next day, or a couple days later. (Tr. p. 69). Ms. Wnek testified that she did not take a picture of the pathway to the Starbucks because the Petitioner did not say the accident occurred in the Starbucks. (Tr. p. 69). However, Ms. Wnek testified that Petitioner did say she was walking towards the Starbucks. (Tr. p. 69). Nevertheless, Ms. Wnek testified that she did not take any pictures in the direction of the Starbucks. (Tr. p. 70). Ms. Wnek testified that the mats at the entrance doors are used during the wet months of the year; but she did not have knowledge of who maintains the mats or if they are changed periodically. (Tr. p. 70). Ms. Wnek testified that it is possible for the mats to move. (Tr. p. 70).

On cross-examination, Ms. Wnek testified that she did not talk to the customers at Table 15 that saw Petitioner injure herself. (Tr. p. 70). Ms. Wnek testified that she did not know why Megan Orr, Petitioner's Supervisor that completed the accident report was not present for the arbitration hearing, yet Ms. Orr still works for Marriott. (Tr. p. 71).

Ms. Wnek testified that she did not know why the question on page 2 of the accident report asking, "Was the person carrying anything when injured?" was not marked. (Tr. p. 72). However, Ms. Wnek testified that Petitioner told her that she was carrying lids. (Tr. p. 72). Ms. Wnek testified that she did not know why the accident report says that Petitioner was talking to Marco prior to her fall as an "unsafe work practice", although she previous testified that was incorrect. (Tr. p. 72). Further, Ms. Wnek testified that Petitioner was not talking to Marco in the

video shown. (Tr. p. 72). Ms. Wnek testified that the supervisor's accident report was marked yes for the question, "Did a time constraint, hurrying to complete a task, contribute to the injury?" (Tr. p . 73).

On cross-examination, Ms. Wnek testified that the accident report was marked yes for the question, "Did an unsafe work practice contribute to this injury?" (Tr. p. 73). Ms. Wnek testified that it was important to capture the information for the supervisor's accident report as part of the investigation to see if there was anything out of the ordinary or something that could be prevented. (Tr. p. 73). Ms. Wnek testified that if employees engaged in hurrying to complete something, it could increase the risk of an injury occurring. (Tr. p. 74).

On re-direct, Ms. Wnek testified that she took the photographs for Respondent's Exhibits 5A-5F after she spoke to the Petitioner to show there were no defects or an unsafe condition in the area. (Tr. p. 75). Ms. Wnek testified that the mats were in the proper location. (Tr. p. 75). Ms. Wnek testified that it was recommend that Petitioner practice safe walking, but she did not know what training took place besides that listed for 2017. (Tr. p. 76).

Ms. Wnek testified that it did not appear in the video that Petitioner was working or moving in a hurried manner. (Tr. p. 78). However, on cross-examination Ms. Wnek was asked how she could tell that it didn't appear that Petitioner was hurry although she was looking through a window on the video for a brief amount of time and Ms. Wnek testified that it was her interpretation that Petitioner was walking normally. (Tr. p. 78). Ms. Wnek testified that if there were not proper lids in the VIP rooms, it was an issue that needed to be corrected quickly. (Tr. p. 78-79).

Medical Treatment

Petitioner testified that she was sent by Respondent in a taxi to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI

performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2 at 5/24/18) Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

ISSUES

Based upon the Stipulation Sheet signed by the Parties, as amended, the matters in dispute are as follows:

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
(F) Is Petitioner's current condition of ill-being causally related to the injury?
(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
(K) Is Petitioner entitled to any Prospective Medical Care?
(L) What temporary benefits are in dispute? TTD

(*See* Arbitrator's Exhibit 1, Request for Hearing form).

Regarding Issue (C)

Regarding the issue "Did an Accident Occur that Arose Out of and in the Course of the Employment by Respondent," Petitioner testified that she injured her left knee during the scope of her employment on April 12, 2018, the Arbitrator finds the following:

A. Petitioner's Testimony Was Consistent and Credible Proving That Her Employment Exposed Her To A Risk Greater Than The General Public

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The requirement under the Workers' Compensation Act that a compensable injury arise out of the employment concerns the origin or cause of the claimant's injury. Adcock vs. IWCC, 2015 Ill. App.2nd 130884WC citing Parro v. Industrial Comm'n, 167 Ill.2d 385, 393, 212 Ill.Dec. 537, 657 N.E.2d 882 (1995). Whether an injury arose out of and in the course of a claimant's employment is a question of fact to be resolved by the Workers' Compensation Commission. Adcock vs. IWCC, 2015 Ill. App.2nd

130884WC citing Illinois Institute of Technology Research Institute v. Industrial Comm'n, *314 Ill.App.3d 149, 164, 247 Ill.Dec. 22, 731 N.E.2d 795 (2000).*

For an injury to arise "out of" the employment, the injury must have occurred from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of the employment if, at the time of the incident or accident, the employee was performing acts he or she was instructed to perform by his or her employer, acts he or she had a common law or statutory duty to perform, or acts the employee might reasonably be expected to perform incident to his or her assigned duties. O'Fallon School Dist. No. 90 v. Industrial Commission, *313 Ill.App.3d 413729 N.E.2d 523246 Ill.Dec. 150 (2000).* In O'Fallon, Petitioner was a school hall guard and injured her back when she quickly twisted and turned to stop a student that ran past her. Id. Compensation was denied under the theory of common risk, but the Commission reversed its decision following a Circuit Court mandate. Id. The appellate court affirmed stating that the Petitioner was subject to enhanced risk inherent in her duties. Id.

In Nascote Indutries, compensation was awarded due to frequency of usage although there was no "defect." In that case, Petitioner was required to pick up bumpers, walk to her work station and step up onto a rack. Petitioner stepped down from the rack and her foot turned causing a fractured metatarsal. The court affirmed compensation because Petitioner's foot injury "arose out of the course of employment" based on increased risk to foot, despite employer's claim that there was nothing unusual about the premises which contributed to the injury, where claimant stepped on to floor off part of a machine or platform that she was required to load as part of her job duties, claimant's work was fast-paced and involved quick turnaround rate, and claimant had to keep pace with parts press. Nascote Industries v. Industrial Commission *353 Ill.App.3d 1056, 820 N.E.2d 531, 289 Ill.Dec. 755 (2004).*

The court addressed an unexplained fall down stairs that occurred while Petitioner was moving hastily for her job in William G. Ceas and Company v. Industrial Commission, *261 Ill. App. 3d 630, 199 Ill. Dec. 198, 633 N.E. 2nd 994 (1994).* The Commission found the claim compensable due to Petitioner's hurried departure to deposit packages at her supervisor's request. Id. However, the appellate court then reversed, but after a rehearing was allowed, the court reversed the earlier decision and opined that the employer's last minute assignment caused

her to descend the stairs in a hastily manner and therefore the risk of injury was increased as a result of her work duties. Id.

Additionally, Petitioner has the burden of proving, by a preponderance of the evidence, all the elements of her claim. O'Dette v. Industrial Commission, *79Ill. 2d 249, 253.* Preponderance is evidence which is of greater weight or more convincing that the evidence offered in opposition to it, evidence which as a whole shows the fact to be proved as more probable than not. Houck v. Nationwide Rail Service, *No. 11 I.W.C.C. 0249*, citing Kordrey Jones v. J. Rubin Co, *98 IL W.C. 7779.* Factors to consider in determining whether a Petitioner has sufficiently carried the burden is credibility. Id.

In the case before the Arbitrator, Petitioner was credible and consistent. Petitioner testified that on April 12, 2018, she was hurrying to Starbucks while carrying cups and lids, when she tripped on carpeting and twisted her left knee causing injury. (Tr. pp. 8-12). Petitioner testified that the carpet was a mat located at the entrances of the hotel. (Tr. p. 9). Petitioner testified that she was hurrying because the lids did not fit the cups for customers in the VIP room. (Tr. pp. 8-12). Petitioner testified that she had received customer complaints about the coffee lids. (Tr. p. 18). Petitioner testified that she when she tripped her leg went to the side , she hear a popping sound and she felt immediate pain and could not walk. (Tr. pp. 8-9). Further, Petitioner testified that the carpeting she was referring to was a mat used by the hotel entrances. (Tr. p. 9).

The Medical records show that Petitioner consistently gave the same mechanism for her accident and injury which was that she tripped on carpet. Petitioner gave the same history of accident to Respondent's Occupational Clinic and Dr. Tu. (PX1 and PX2) The Occupational Clinic records report the description of the accident as "walking rapidly on carpet at work when I felt a pop in my knee," and the work status form states, "severe left knee pain after tripping at work no fall reported." (PX1). The history in Dr. Tu's notes stated, "she was walking quickly in between the floor and she tripped over the junction on the hard floor and the carpet." (PX2). Respondent questioned Petitioner about the differences between the descriptions. Although the records have slight differences, the medical records were not prepared in anticipation of litigation and the differences are negligible. Both histories state that Petitioner was walking rapidly or quickly when she tripped.

In addition to Petitioner's testimony and treatment records, Respondent's Exhibit 4, the supervisor's accident report documented that Petitioner was walking in a hurried manner causing an unsafe work practice as testified to by Respondent's witness, Ms. Wnek. (Tr. pp. 72-73, RX4). Further, the report listed suggested training for Petitioner to prevent future accidents and safety concerns. (Tr. pp. 73-74, RX4). Respondent's witness acknowledged that employees that work in a hurried manner are more likely to suffer injuries. (Tr. pp. 73-74).

Respondent's witness, Ms. Wnek, was simply not credible when testifying about Petitioner's accident. First, Ms. Wnek did not witness the accident and only spoke to Petitioner following the injury occurred. (Tr. pp. 13,39). Additionally, Ms. Wnek testified that she does not speak Spanish and did not use a translator when she spoke to Petitioner about the accident (Tr. pp. 63-64). However, Ms. Wnek testified that she would use translators for important employee meeting with Petitioner and her co-workers. (Tr. pp. 63-64). Apparently Ms. Wnek did not feel that an accident investigation was important enough to have a translator for her discussion with Petitioner.

Further, Ms. Wnek testified that she did not take pictures of the walkway leading to the Starbucks submitted as Respondent's Exhibit 5, because it was not her understanding of where the Petitioner tripped. (Tr. pp. 69-70). This is not credible since the records from Respondent's Occupational Clinic list the description as walking rapidly on carpeting and Ms Wnek was listed as a company contact. Therefore, Ms. Wnek would have reviewed the Occupational Clinic records as part of the accident investigation. As the site HR Director, Ms. Wnek would have been aware after Petitioner's treatment at the Occupational Clinic on April 12, 2018, that Petitioner tripped on carpeting. However, Ms. Wnek choose to take photographs that were limited in scope, without providing a picture of the run off mat that she testified was at the entrance of the hotel. Further, Ms. Wnek could not accurately testify as to when she took the photographs, only that they might have been taken the day of, or the day after, or within a few days. (Tr. p. 69).

Additionally, Ms. Wnek's testimony regarding the surveillance video was not credible. The view was a downward angle inside Starbucks and Petitioner was only visible through a small window. On cross-examination, Ms. Wnek testified that based on her interpretation of the video, the Petitioner did not appear to be hurrying although Petitioner was only visible for a few seconds. (Tr. p. 78). The surveillance video provided a limited and brief view of the Petitioner.

In fact, the surveillance video does not even show the actual floor at the moment the Petitioner is seen tripping. (PX7). Therefore, it is impossible from the surveillance video to see whether there was a mat at the point where Petitioner tripped. (PX7).

Much of Respondent's argument against finding accident is that Petitioner gave conflicting statements about the nature of her tripping incident. Respondent is correct that all of the various accounts do not perfectly align in terms of words chosen, descriptions used, or exact location where Petitioner tripped. The Arbitrator finds, however, that this is an exercise in splitting hairs and will not let the perfect defeat what amounts to good evidence in Petitioner's favor. Petitioner claimed she was in a hurry and tripped in such a manner that she hurt her knee while going to fetch lids as part of her job. She reported the incident, was treated near in time to the injury and was in fact hurt. The vast majority of all evidence in the record aligns with Petitioner's account of what happened.

Petitioner's testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu where consistent and credible. Similar to the O'Fallon, Nascote Indutries and William G. Ceas cases discussed above, Petitioner was engaged in activity on behalf of the employer that increased her risk of injury beyond the risk to the general public. In this case, Petitioner was working in a hurried manner carrying cups and lids as was testified to by Petitioner and Respondent's witness. Moreover, Petitioner was engaged in activities directed by her supervisor. Further, Petitioner accident was documented in the Respondent's supervisor report as the result of working in a hurried manner.

Based upon all of the above, the Arbitrator finds that the Petitioner suffered a left knee injury that arose out of and in the course of her employment, as a result of the work related accident of April 12, 2018.

B. Respondent's Exhibits 6(a) and 6(b) Were Properly Admitted as Evidence By the Arbitrator As an Admission by a Party Opponent

Under the Illinois rules of evidence, proper foundation must be laid to show authentication and identification for audio recordings to be admitted as evidence. Geary & Graham's Handbook of Illinois Evidence 9th Edition. Sound recordings of voices are authenticated if a proper foundation is laid, including the identification of the speakers. Id. Further, a transcript of the sound recording may be admitted in evidence if a sufficient

foundation is presented establishing the accuracy of the transcript and the identity of the speakers. Id. Communications by telephone do not authenticate themselves; the person speaking must be identified. Id.

Relevant and material audio recordings are admissible "if a proper foundation has been laid to assure the authenticity and reliability of the recording." People v. Viramontes, *410 Ill.Dec. 221, 69 N.E.3d 446 (2017)* citing, People v. Aliwoli, *238 Ill.App.3d 602, 623, 179 Ill.Dec. 515, 606 N.E.2d 347 (1992).* A sufficient foundation is laid when "a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." Id. citing In re C.H., *398 Ill.App.3d 603, 607, 339 Ill.Dec. 139, 925 N.E.2d 1260 (2010).*

In a recent case before the commission concerning proper foundation, Dinaz Ravji v. United Airlines, Inc., *No. 05 W.C. 54051, No. 12 I.W.C.C. 0094, (2012)* the Illinois Workers Compensation Commission ruled that the Arbitrator was in error to admit still photographs from surveillance video introduced as exhibits by Respondent. In Ravji v. United Airlines, Respondent argued that the foundation was laid when Petitioner identified herself in the video; however, the commission disagreed citing People v. Flores 406 Ill.App.3d 566, 941 N.E.2d 375 (2010).

The court in Flores found that the trial court improperly admitted a video. The court opined that witness testimony was sufficient foundation for admission of the videotape for use as *demonstrative* evidence, and the court cited M. Graham, Geary & Graham's Handbook of Illinois Evidence as follows: "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time [.]" [citation omitted] Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. However, the Flores court noted that foundation for admitting the tape to be used as *substantive* evidence, however, required "something more rigorous than the witnesses' testimony that the video in evidence truly and accurately depicted that which it purported to depict." 406 Ill.App.3d at 576, 941 N.E.2d at 384. The court indicated that, "visual recordings, when treated substantively, are real evidence requiring a proper foundation, including evidence that the proposed exhibit is substantially unaltered." Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. The witness testified

that the copy he produced was altered because he omitted portions from the original tape. The court held that the trial court abused its discretion when it considered the tape as substantive evidence, and stated that "an adequate foundation must show that the original has been preserved without change, addition, or deletion and that, if a copy is introduced into evidence, there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." Flores, 406 Ill.App.3d at 577, 941 N.E.2d at 385.

In the present matter before the arbitrator, Respondent's Exhibits 6(a) and 6(b) are a recorded audio statement with a translator and a transcript. At the hearing on October 23, 2018, Respondent did not lay a proper foundation to admit the recorded statement, translation and transcript. Respondent did not provide a witness to testify to the authenticity and accuracy of the recorded statement. The speakers on the recorded statement were not identified. Respondent did not provide a witness to testify about the accuracy of the Spanish to English translation of the recorded statement or the transcript. Further, because Respondent did not have a witness, Petitioner was not afforded the opportunity to cross-examine the individuals responsible for creating the recorded statement. Additionally, Petitioner could not cross-examine the translator with respect to his or her qualifications.

Respondent argued at Arbitration that Petitioner testified that she gave a statement and therefore it was an admission by a party opponent. (Tr. p. 24) Further, Respondent's counsel argued at Arbitration that Petitioner admitted it was her on the recorded statement. (Tr. p. 84) The Arbitrator finds this admission by a party opponent sufficient to admit the recorded statement into evidence despite the lack of foundation testimony that was outlined in the discussion above.

Based upon all of the above, the Arbitrator finds that Respondent's Exhibits 6(a) and 6(b) were properly admitted at Arbitration and should not be stricken from the record.

Regarding Issue (F)

Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial

Comm'n,207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The "arising out of" component for obtaining compensation under the Workers' Compensation Act is primarily concerned with causal connection; to satisfy that requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.(Id.) Claimant need only prove some act or phase of his employment was a causative factor in the ensuing injury to recover benefits under the Act. He need not prove it was the sole causative factor, nor even that it was the principal causative factor of his injury. Republic Steel Corp. v. Industrial Comm'n, *et al.*, 26 Ill.2d at 45, 185 N.E.2d at 884 (1962).

Petitioner testified that on April 12, 2018, she was hurrying to the Starbucks in Respondent's hotel to get cups and lids for guests when she tripped on mat causing injury to her left knee. (Tr. p. 8). Petitioner testified that when she tripped, her left leg went to the side and she heard a pop followed by immediate pain. (Tr. pp. 8-9).

Petitioner testified that Respondent sent her by taxi to Advocate Occupational Health on the same day of the accident. (Tr. pp. 13-14). The records indicate that Petitioner was walking rapidly on carpet when she tripped injuring her left knee. (PX1). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18). Petitioner testified that she has not been able to have the surgery because the insurance did not authorize it. (Tr. pp. 16-17).

Respondent offered no rebuttal testimony or medical evidence regarding Petitioner's need for left knee surgery as recommended by Dr. Tu.

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury. This is supported by the medical records and opinions of Petitioner's testimony at trial, the treaters at Advocate Occupational Health and Dr. Tu.

Regarding Issue J:

Were the Medical Services Reasonable and Necessary, The arbitrator holds the following:

For all the reasons stated above, Petitioner suffered a work related injuries on April 12, 2018. As a result of those injuries, Petitioner has the following unpaid medical bills:

Provider	Dates of Service	Balance
Advocate Occupational Health	4/12/2018	$387.00
Dr. Kevin Tu	5/10/2018 to 9/20/2018	$1,820.00
Premier Imaging & Open MRI	5/15/2018	$1,626.03
Total Rehab	5/29/2018 to 6/29/2018	$6,141.00
	Total outstanding:	**$9,974.03**

Petitioner had admitted medical bills from Advocated Occupational Health (PX1) that had a balance of $387.00, Dr. Kevin Tu (PX2) with a balance of $1,820.00, Premier Imaging and Open MRI (PX3) with a balance of $1,626.03, and Total Rehab (PX4) with a balance of $6,141.00. Petitioner's treatment at Advocate Occupational Health was at the direction of and authorized by Respondent. (PX1) Respondent's clinic directed petitioner to follow up with an orthopedic doctor, which is Dr. Tu. (PX1) The MRI for her left knee was ordered, by Dr. Tu, Petitioner's treating physician. (PX2) The physical therapy at total rehab was recommended by Dr. Tu. (PX4).

In sections C and F above, the Arbitrator found that Petitioner did suffer a work related injury and her condition of ill being is causally connected to that injury. Respondent did not produce any medical opinions or testimony. Therefore, based upon the totality of the evidence, including medical opinions, and witness testimony, the Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injury

and the Arbitrator awards the $9,974.03 of the medical bills listed above, as provided in Sections 8(a) and 8.2 of the Act.

Regarding Issue K:

Is Petitioner entitled to any Prospective Medical Care?

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for. Plantation Manufacturing Co. v. Industrial Comm'n, 294 Ill.App.3d 705, 710, 229 Ill.Dec. 77, 691 N.E.2d 13 (1997).

The ability for the Commission to award and order prospective was also decided in Homebrite Ace Hardware v. Industrial Commission 351 Ill.App.3d 333, 814 N.E.2d 126 (2004), and the court relied on Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill.App.3d 650, 655–56, 239 Ill.Dec. 767, 714 N.E.2d 1064 (1999), the court held that the Commission's order directing the employer to provide written authorization for a prescribed surgery was proper.

In the current case before the Arbitrator, Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. (PX10). Respondent has not provided any rebuttal medical evidence or testimony.

The arbitrator found in sections C and F that an accident occurred on April 12, 2018, that arose out of and in the course of Petitioner's employment by Respondent and Petitioner's left knee injury and current ill-condition is causally related. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

Regarding Issue L:

What temporary benefits are in dispute? The Arbitrator finds the following:

A claimant is entitled to TTD when a "disabling condition is temporary and has not reached a permanent condition." Manis v. Industrial Comm'n, 230 Ill.App.3d 657, 660, 172 Ill.Dec. 95, 595 N.E.2d 158, 160-61 (1st Dist. 1992) The time during which a claimant is

temporarily totally disabled is a question of fact for the Commission; and to be entitled to TTD, claimant must prove not only that he did not work but that he was unable to work. City of Granite City v. Industrial Comm'n, 279 Ill.App.3d 1087, 1090, 217 Ill.Dec. 158, 666 N.E.2d 827, 828-29 (5th Dist. 1996). The dispositive test is whether the condition has stabilized, because the Commission reviews the evidence to ascertain whether claimant has reached maximum medical improvement, *i.e.,* the condition has stabilized. Beuse v. Industrial Comm'n, 299 Ill.App.3d 180, 183, 233 Ill.Dec. 453, 701 N.E.2d 96, 98 (1998).

Petitioner testified that she was sent by Respondent to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health, the treaters ordered her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3).

Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

Petitioner's medical records from Advocate Occupational Health and Dr. Tu all demonstrate that Petitioner was kept off work or on restricted duty beginning April 12, 2018. (PX1, PX2). Petitioner testified that she faxed her restrictions to Respondent, but she was not offered light-duty work and she has not received any Workers' Compensation disability pay. (Tr. pp. 15-17).

The Arbitrator holds, for the reasons stated in the "Accident", "Causation" and "Prospective Care" sections and based upon all testimony and medical evidence, Petitioner is awarded temporary total disability (TTD) benefits from April 13, 2018, up to the date of trial or 27 and 5/7 weeks times Petitioner's TTD rate of $398.62 per week (AWW of $597.94 as stipulated, Arb EX1) for a total of $11,047.35 in TTD benefits due.

CONCLUSION

In conclusion, the Petitioner's testimony was credible and convincing. Petitioner's medical records and testimony corroborate that she injured her left knee working for Respondent on April 12, 2018. The Arbitrator finds that Petitioner was injured in the course of her employment with Respondent on April 12, 2018.

The Arbitrator finds that Petitioner proved that her left knee injuries were caused by the work accident of April 12, 2018. The Arbitrator holds that Respondent shall authorize Petitioner's recommended left knee surgery, post-surgery physical therapy and other related post-surgical medical treatment as provided in Section 8(a) Act.

The Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injuries and the Arbitrator awards the $9,974.03 of medical bills listed in Section J above, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator finds that Petitioner is owed temporary total disability (TTD) benefits due and owing of $11,047.35 for the period of disability from April 13, 2018, up to the date of trial on October 23, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK TANTILLO,

Petitioner,

21IWCC0165

vs. NO: 12 WC 34352

PTO SERVICES, INC., and the
ILLINOIS STATE TREASURER as
EX-OFFICIO CUSTODIAN of the
INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, benefit rate, wages, temporary total disability benefits and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's award regarding causation and the duration of temporary total disability benefits. However, the Commission modifies the calculation of the average weekly wage as well as the amount of permanency and medical benefits awarded.

The Commission disagrees with the Arbitrator's finding that Petitioner's working overtime was mandatory. At no point did the Petitioner testify that overtime was mandatory, but only that he worked approximately 55 hours per week. (T. 18) Additionally, although the wage statements entered into evidence between December 16, 2011 and June 15, 2012 reflect some overtime in 21 out of 27 pay periods, the number of hours worked are not regular and vary significantly. (Px14)

In *Airborne Express*, the Appellate Court found, that overtime should not have been

included in the claimant's average weekly wage because, "Although the claimant consistently worked overtime he did not work a set number of overtime hours each week." *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n (Bronke)*, 372 Ill. App. 3d 549, 555, 865 N.E.2d 979, 985 (1st Dist. 2007).

The same rationale applies in the instant case. Although Petitioner may have worked *some* overtime based on the evidence presented, the hours were not consistent and no evidence was presented that overtime was mandatory. Therefore, the Commission finds that Petitioner's average weekly wage is $17.90 x 40 hours per week = $716.00.

Regarding the medical bills, Petitioner failed to prove that the Prescription Partners charges contained in Px21 were reasonable, necessary and causally related to the accident of June 2, 2012. Petitioner's claims include $5,079.35 in charges from Prescription Partners. However, there are several problems with the bill of Prescription Partners:

1) It lists a date of injury of June 1, 2013 – not the date of accident that is at issue in this case – June 2, 2012.
2) The first Date of Service listed is June 27, 2013.
3) It is for medication dispensed by Dr. Howard Freedberg at Suburban Orthopedics. There are no treating records from this provider in evidence.
4) This record only lists *total amounts* per date of service and *NOT an itemized list* of prescriptions that were dispensed. Therefore, there is no way to know how, if at all, these charges are related to Petitioner's work accident on June 2, 2012.

We next modify the Arbitrator's award of permanency. The following is our analysis of Petitioner's permanent partial disability under §8.1b(b) of the Act:

i) No AMA impairment rating was submitted so we give this no weight.

ii) The Arbitrator gave "significant weight" to Petitioner's testimony that that he "is not able to pursue higher paying jobs due to his medical condition." However, there is no evidence of this. Petitioner was released to full duty with no restrictions for both his cervical and right shoulder. The Commission therefore only gives this factor some weight.

iii) The Arbitrator gave "greater" weight to this factor and concluded that Petitioner was an older individual whose disability "will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations." Although Petitioner testified that he takes an occasional Meloxicam and rubs "horse liniment" on his shoulder and neck area "every couple days" in the winter (T. 41-43), most of his testimony focused on how his disability affected his outside hobbies. The Commission gives this factor some weight.

iv) The Arbitrator found that Petitioner's "earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting," the Arbitrator gave "greater" weight to this factor.

Petitioner was released with no restrictions. Petitioner testified that he currently works at a job where he does paperwork and doesn't drive very much. (T.44-45, 52) However, Petitioner failed to prove that his decision regarding where to work has been anything other than a personal choice. Petitioner testified:

> Q: How has your earning capacity been impacted by the shoulder and neck injury of 2012?
>
> A: Well, it hurt due to the fact that I can't pass a test to drive for Holland or UPS and they call me all the time because I have an excellent driving record.
> But I know I can't pass the physical capacity test and lift 140 pounds or lift 80.
>
> I am getting paid $24 an hour now.
>
> Q: What are they paying at UPS or Holland?
>
> A: I think it's $29.30 and XPO that's a non-union company, they're paying $30.45.

Petitioner testified that he "can't pass a test to drive", but no evidence was introduced regarding the requirements of said test. Assuming the "test to drive" refers to the DOT test, no evidence was presented regarding those test requirements. Since Petitioner was released without restrictions, this testimony does not support a finding of a reduction in earnings capacity. Petitioner's claim that he is presently earning $24 per hour but could possibly be earning $29+ elsewhere is self-serving speculation. The Commission therefore gives this factor little weight.

v) The Commission modifies the last paragraph of page 12 of 13 of the Arbitrator's decision regarding factor "(v)" as follows:

> The Commission adds the phrase "as per the opinions of Drs. Burra and Lorenz" to the first sentence after the word "accident".
>
> The Commission further modifies that paragraph and adds the following:
>
> Although Petitioner's cervical issues resolved as Dr. Lorenz noted at the time of Petitioner's office vision on April 8, 2013, Petitioner sustained a SLAP-type tear of the superior labrum with the tear extending into the proximal biceps tendon as corroborated by a high resolution MRI arthrogram performed on August 28, 2012. Notwithstanding the fact that the office visit note dated January 5, 2013 authored by PA David Tan indicates "the high field arthrogram study noted no full thickness rotator cuff tendon tears and we do not believe he would be a candidate for a shoulder arthroscopy at this time," said note also reflects that "the

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definitive treatment for him would be a total shoulder arthroplasty at some point in the future."

The remainder of the paragraph remains unchanged.

As the Commission finds that Petitioner sustained a SLAP lesion and not a rotator cuff tear, the Commission reverses that finding by the Arbitrator. The Commission further vacates the award of 20% loss of a person as a whole. Based on its finding that the Petitioner sustained an unoperated SLAP lesion, the Commission awards Petitioner 10% loss of a person as a whole.

Additionally, the Commission awards 2.5% loss of a person as a whole based on the unoperated cervical radiculopathy. Although Petitioner's first EMG on September 14, 2012 showed "marked abnormality with respect to the C5-6-7 roots," the second EMG on March 22, 2013, did "not reveal any active denervation in the Rt C5, C6 or C7 distribution. [P's] strength has significantly improved and his pain has improved in the Rt arm, although not totally so."

Based on the above, we find that Petitioner has sustained the loss of use of 12.5% of the person-as-a-whole under §8(d)2 of the Act. Since we have found that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $716.00, his weekly permanent partial disability rate is $429.60.

Furthermore, the Commission modifies the award for medical expenses from $33,695.24 to $28,615.89 as the Commission finds that the Petitioner failed to prove the Prescription Partners bill was related to the accident of June 2, 2012.

In addition to the foregoing, the Commission corrects the following scrivener's errors contained in the Arbitration Decision:

1) In the first sentence of the sixth full paragraph on page 4 of 13, the Commission corrects the date to "July 26, 2012", from July 23, 2012.

2) In first sentence of the first full paragraph on page 10 of 13, the Commission corrects the date to "July 26, 2012", from August 22, 2012.

3) In the last sentence of the paragraph under issues (H) and (I), contained on page 11 of 13, the Commission deletes the word "not" in regard to Petitioner's marital status.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $477.33 per week for a period of 52 3/7 weeks, from September 1, 2012, through September 2, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

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the sum of $429.60 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,615.89 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 020921
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TANTILLO, PATRICK
Employee/Petitioner

Case# **12WC034352**

21IWCC0165

PTO SERVICES INC AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKER BENEFIT FUND
Employer/Respondent

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
ANTIA M DeCARLO
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0000 PTO SERVICES INC
1000 JORIE BLVD
SUITE 228
OAK BROOK, IL 60521

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Patrick Tantillo
Employee/Petitioner

Case # **12** WC **34352**

v.

PTO Services, Inc. and the Illinois State Treasurer as Ex Offico Custodian of the Injured Worker Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other - Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer

FINDINGS

On **June 2, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**50,288.16**; the average weekly wage was $**967.08**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**644.72**/week for **52 3/7** weeks, commencing **September 1, 2012** through **September 2, 2013**, as provided in Section 8(b) of the Act

Respondent shall be given a credit for any temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $**33,695.24**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**580.25**/week for **100** weeks, because the injuries sustained caused the **20**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 – 2019

FACTS:

Petitioner filed an original Application for Adjustment of Claim on October 3, 2012 alleging an injury to his "right arm (shoulder) & neck" while working for his employer, P.T.O. Services, Inc. on June 2, 2012. The Application for Adjustment of Claim was mailed to the Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 on October 3, 2012. In response to that filing, Chilton, Yamber, Porter, LLP (hereinafter "Chilton") filed an Appearance on behalf of P.T.O. Services, Inc. with the Illinois Workers' Compensation Commission.

Petitioner filed a Stipulation to Substitute Attorneys on February 2, 2017 which was sent to Chilton, on behalf of P.T.O. Services, Inc. on March 1, 2017 (PX 2 & 3).

The Illinois Workers' Compensation Commission sent a Notice of Hearing to the employer Chilton, on behalf of P.T.O. Services, Inc. by mail on July 10, 2017. (PX4). The Notice contained the following language: "This is a legal notice informing you that the Petitioner has filed a case with the IWCC for workers' compensation benefits. Employers, forward this notice to your insurance carrier or attorney."

On June 15, 2017, Chilton filed a Motion to Withdraw as the Attorney of Record for P.T.O. Services, Inc. citing the reason: "Our firm filed an appearance in this case on behalf of and at the request of P.T.O. Services, Inc. to protect it against any potential workers' compensation exposures in this case. Per the attached exhibit #1, P.T. O. Services, Inc. voluntarily officially dissolved as a corporation with the Secretary of State on April 17, 2017 and no longer exists, and our firm has no client remaining." (PX5). Based on this Motion, Chilton obtained an Order allowing them to withdraw as the attorney of record in this matter.

On July 7, 2017 an Amended Application for Adjustment of Claim naming "State Treasurer & ex officio-custodian of the Injured Workers' Benefit Fund was filed with the Illinois Workers' Compensation Commission. (PX6). On July 11, 2017 Petitioner filed a Request for Information on Employer's Insurance Coverage which was returned 07/12/2017 an indicated that there was no insurance coverage on the date of accident. (PX 7).

On January 17, 2018, Petitioner filed a Request for Hearing before Arbitrator Erbacci on March 1, 2018, with notice to the Respondent, P.T.O. Services Inc at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX8). The case was set for trial on March 12, 2018 and Respondent P.T.O. Services, Inc. failed to appear on that date. That same day, the Arbitrator specially set this matter for Hearing on June 7, 2018. Due to a clerical error, the Arbitrator dismissed this matter that same day. The Commission issued a Notice of Case Dismissal on March 13, 2018, which was sent to P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX9).

On March 20, 2018, Petitioner sent a certified letter to Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 detailing that this matter is specially set for trial on June 7, 2018 along with a Motion to Reinstate the Case. (PX10 & PX11). These items were delivered to P.T.O. Services, Inc. on April 2, 2018. (PX10).

On the trial date, June 7, 2018 the Arbitrator reinstated the case. Petitioner and IWBF were present with their attorneys and Respondent PTO Service, Inc. failed to appear. This

matter was set for trial on 09/17/2018. Due to a clerical error notice was not sent to PTO Services and this matter was continued by Email to December 7, 2018.

On September 7, 2018 a letter was sent to PTO Services Inc at 1000 Jorie Blvd, #228, Oak Brook, IL 60521 advising of a trial date of December 7, 2018 by regular and certified mail. Both mailings were returned to sender. (PX 23). Further, on September 11, 2018, Petitioner filed a Notice of Motion Request for Hearing requesting the agreed trial date of December 7, 2018. Respondent P.T.O. Services, Inc. failed to appear on December 7, 2018 and the case proceeded ex-parte.

Petitioner presented a Certification from NCCI confirming that P.T.O. Services, Inc. did not have insurance on the date of accident, June 2, 2012. (PX 12).

Petitioner testified that he was an employed as a commercial truck driver with P.T.O. Services, Inc. on the date of accident, June 2, 2012. He submitted a copy of his job description obtained from P.T.O. Services, Inc. Driver Hiring Policy updated March 24, 2010. (PX13). This job description confirms that he was hired to "operate 26,000+ lb. trucks on interstate and/or intrastate routes: arrange, load, transport and unload freight." (PX13). Petitioner also submitted a compensation report from P.T.O. Services, Inc. for the period of October 23, 2011 to June 23, 2012. (PX14). Further, Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He also testified that he worked on average 48 hours every week. He worked overtime 21 of the 27 weeks prior to his accident and working overtime was mandatory.

Petitioner was driving his route as an employee of P.T.O. Services, Inc. on June 2, 2012 when he attempted to open the rear of his trailer. He was forced to use a crowbar in order to open the jammed metal doors. While prying the doors open he fell forward, striking his head and body on the open doors. He notified his supervisor, Tom, the same day, June 2, 2012.

Petitioner first sought medical treatment on June 5, 2012 with his Rheumatologist, Dr. Alnadjm. (PX15). Of note, Petitioner began treating with this doctor prior to this accident, on April 17, 2012. At that time, Petitioner complained of right shoulder pain, however the hand written notes seem to suggest the doctor believed there to be an issue with the biceps tendon. On June 5, 2012, the first visit following his work related injury, Dr. Alnadjm noted "R shoulder pain. Crowbar slipped at work on 6-2-12 and now has a hard area by neck." (PX15). That same day, he prescribed an MRI of the neck and shoulder. Further, it appears at the bottom of the hand written page the doctor administered a cortisone injection. Petitioner followed up with Dr. Alnadjm on July 23, 2012 and was referred to Southside Orthopedics. (PX15).

Petitioner went to Southside Orthopedics on July 23, 2012. He was diagnosed with severe degenerative joint disease of his right shoulder. Further, the doctor opined: "I think you can blame all his shoulder symptoms on these changes with some exacerbation from the crow bar incidences." The doctor noted that since Petitioner did not get much benefit out of the cortisone shot, he is probably at the end stage disease. Lastly, the doctor referred him to Hinsdale Orthopedics to explore the option of a total shoulder replacement. (PX16).

Dr. Alnadjm again prescribed an MRI to the shoulder on July 31, 2012. (PX15). An MRI was performed on the cervical spine, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative change in the cervical spine with multilevel disc disease.

2. At C2-3, left peridiscal posterior osteothytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C3 nerve root.

3. At C3-C4, 2 mm broadbased posterior disc protrusion with peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in bilateral neural foraminal enchroachment and abuts the exiting C4 nerve roots, more on the left side.

4. At C4-C5, 2 mm posterocentral disc protrusion with small peridiscal posterior osteophytes (hard discs). There is no central canal or neural foraminal stenosis.

5. At C5-C6, subtle diffuse posterior disc bulge and small peridiscal posterior osteophytes (hard discs). No central canal stenosis or neural foraminal stenosis.

6. At C6-C7, 4 mm broadbased posterior disc protrusion indents the thecal sac and abuts the cord. The disc protrusion with small peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C7 nerve root. (PX17)

An MRI was performed on the right shoulder, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative disease of the glenohumeral and acromioclavicular joints with large effusion. Areas of marrow edema adjacent to these joints. Clinicopathological correlation is suggested to rule out possibility of infective etiology.

2. Supraspinatus tendinosis with no evidence of tear.

3. Type II acromion process with acromioclavicular joint arthropathy this results in impingement.

4. Collection in the subcoracoid and subscapularis bursa.

5. Diffuse degeneration of the glenoid labrum.

6. Biceps tendon tenosynovitis. (PX17)

Dr. Alnadjm reviewed the MRI on August 7, 2012 and released him into the care of an orthopedic surgeon. (PX15). Petitioner first treated with Hinsdale Orthopedics, at the request of Dr. Alnadjim, on August 22, 2012. (PX18A). Hinsdale details his history of accident as follows:

He is a right-hand dominant truck driver. He drives a spotting Jeep which essentially takes trailers and lifts them on hydraulics, and he as to position them into a dock and then open the doors. Of late, he has been handling the same Jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open these doors, and in the process of doing so, he has had a few injuries the most recent being a slipping injury where the crowbar slipped forward and his arm essentially

> impacts as it slipped and crashed against the shipping container. He described a series of 3 injuries which happened on March 24, 2012, June 2, 2012 and June 9, 2012. All of these are associated with these stuck doors when he was prying open with this crowbar. Consequent to this he has developed significant pain in his right shoulder. While he has had other problems on the rest of his body he had never had any for a problem with his right shoulder. He used to swim. He used to play recreational softball and baseball and other athletic activities without any problems and he has also been performing his job without any problems until this present situation. He does complain of some neck pain which appears to be resolving. At this point, he does not have any paresthesias or weakness on the right side. In the course of his development of symptoms he has also noticed that he is developing significant scapulothoracic pain and loss of range of motion. (PX18A).

Dr. Burra performed a complete examination including reviewing the MRI images. He noted a bulge at C3-4 with neural foraminal encroachment on the left; some changes at C4-5 and C2-3; and the most significant issue at C6-C7 with a 4 mm posterior disc protrusion that his encroaching on the left neural foramen. He noted the MRI of the shoulder revealed a significant amount of atrophy changes and streaking in the infraspinatus and osteophyte formation and chondral pathology was quite evident. Based upon same, Petitioner was diagnosed with a rotator cuff tear and glenohumeral arthritis. In order to confirm the rotator cuff tear, a high field MRI arthrogram was prescribed. Further, Dr. Burra noted that a total reverse total shoulder could be required. (PX18A).

The high field MRA was performed by Hinsdale Orthopedics on August 28, 2012 and found: "(1) SLAP type of superior labrum with the tear extending into the proximal biceps tendon. (2) Severe glenohumeral osteoarthritis with virtually complete absence of articular cartilage and subchondral cysts in the humeral head. (3) Supraspinatus tendinosis but no full thickness tears. (4) Inferiorly projecting AC arthrosis with an acquired type III acromion. (5) Degeneration of the inferior remainder of the glenoid labrum." (PX18A). At his follow up appointment on September 14, 2012, Dr. Burra diagnosed a partial-thickness tear of the supraspinatus with approximately 75% atrophy of the supraspinatus, a longitudinal tear of the biceps, a SLAP tear of the labrum and severe glenohumeral space narrowing with virtual absence of articular cartilage. In addition, an EMG with neurology consult was prescribed in order to determine if there is any neurological compromise to his supraspinatus which could be causing the atrophy. (PX18A).

Petitioner followed up with Hinsdale orthopedics on September 25, 2012. At that time, Dr. Burra reviewed his neurological consultation and EMG. The EMG revealed "evidence of right sided C5-6 radicular process. Based on the fact that there is some denervation of the tricep muscle, there may be some degree of C7 involvement as well. Not only are there findings of ongoing denervation corresponding to the described myotomes, but there is also evidence of chronic neurogenic change in these myotomes." Based upon same, Dr. Burra diagnosed "Disc Disease: Cervical" and prescribed "immediate spine consult before going forward with treatment for the right shoulder." He was again prescribed to be off work. (PX18A).

On October 17, 2012, Hinsdale Orthopedics noted complaints of fatigue and weight change. Petitioner was instructed to follow up with his PCP and remain off work. (PX18A).

Dr. Lipov from Oak Brook Surgical Center examined Petitioner on November 2, 2012 and diagnosed cervical radiculopathy with pain in the neck and right arm. That same day, he performed a cervical epidural steroid injection at C5-C6. (PX20).

On November 5, 2012, Dr. Burra again discussed the continuing right shoulder diagnosis of a SLAP lesion, bicep tendnitis, impingement, ACJ pain, PRCT with atrophy from neurological process, glenohumeral OA. However, he could not address the conditions with surgery until the neurological issues had been fully addressed. Petitioner was prescribed off work and to continue his spine and neurologic treatment. (PX18A).

Petitioner saw Dr. Lorenz at Hinsdale Orthopedics on November 21, 2012 and was diagnosed with: "1.Rotator Cuff Tear. 2. SLAP lesion. 3. Radiculopathy C5, 6, and 7 on the right which is really quite severe with nerve atrophy." Further, he was prescribed a myelogram and post Myelogram CT and to remain off work. (PX18A).

The CT of the cervical spine was performed at Hinsdale Hospital on December 7, 2012. It revealed: "broad based left paracentral disc protrusion at C6-C7 with resulting moderate spinal stenosis and broad-based central disc osteophyte complex at C3-C4 resulting in mild spinal stenosis. (PX19). Further, his final diagnosis from Hinsdale hospital that day was "brachial neuritis or radiculitis NOS." (PX19).

Dr. Lorenz reviewed the Myelogram on December 10, 2012 and noted "spinal stenosis most predominantly at C6-7 but also at C5-6 with fairly significant degenerative changes. L4-5 is only mild." Lorenz prescribed a decompression at C5-6 and C7; a second opinion with Dr. Franczak and continued off work. (PX18A).

Dr. Burra examined the shoulder again on January 5, 2013. Despite, Petitioner's reported improvement with strength and pain, the doctor noted that a total shoulder arthroplasty would be necessary at some point in the future. In an attempt to immediately address the pain, Burra performed cortisteroid injections to the primary pain generators in the biceps tendon and subacromial space, prescribed physical therapy and continued off work. (PX18A).

At Petitioner's follow up on April 9, 2013 with Hinsdale Orthpedics he reported 25% improvement of shoulder pain. His right shoulder diagnosis on that date was bicep tendinitis, impingement, ACJ pain and glenohumberal OA. Based upon his response to the injection, surgery may be appropriate to address the bicep, impingement and ACJ narrowing. However, Dr. Lorenz needs to provide clearance before proceeding with surgery. Lastly, he was again restricted from any kind of work. (PX18A).

Dr. Lorenz examined Petitioner on April 18, 2013 and noted that his cervical radiculopathy resolved and prescribed a functional capacity assessment to determine work limitations, if any, with the cervical spine. He further indicated the cervical issues were not an impediment to shoulder surgery by Dr. Burra. (PX18A).

On May 6, 2013, Dr. Burra addressed the right shoulder again. The best way to address his pain generators is to proceed with an arthroplasty of the right shoulder however Patrick does not want to proceed due to the potential effect on his ability to return to work. Dr.

Burra agreed with Lorenz' prescription for a functional capacity assessment to determine functional abilities and to remain off work until the results were reviewed. (PX18A)

On July 9, 2013 Petitioner returned to Dr. Burra for continued deep shoulder pain. As a result, a series of synvisc injections were prescribed, the first ultrasound guided injection on the right glenohumeral was performed on this day. Further, Petitioner remained off work and the FCA was put on hold until all three injections were performed. (PX18A).

The second ultrasound guided injection of the right subacromial space was performed on July 16, 2013 and the off work note was extended. The third and final viscosupplementation injection with Synvisc into his right shoulder on July 22, 2013. The doctor released him to return to modified duty on July 23, 2018. (PX18A). However, Petitioner testified that a light duty job was not offered at that time.

On August 8, 2013 the Functional Capacity Evaluation prescribed by both Dr. Burra and Dr. Lorenz was performed at Newsome Work Performance Center. The evaluation found: "This job specific evaluation was performed using a 100% kinesiophysical approach and Mr. Petitioner demonstrated the ability to perform 0.00% of the physical demands as a Truckdriver." (PX18A). However, Mr. Petitioner also "demonstrated the physical capabilities and tolerances to perform within the HEAVY physical demand level based on an occasional lift/carry of 80 lbs. and a frequent lift of 45 lbs. from floor to waist." (PX18A). Lastly, the evaluation concluded that Petitioner was putting for "maximum effort" during the testing. (PX18A). After reviewing the FCE, he was returned to work full duty, for his cervical condition on, August 14, 2013. It was specifically noted that he was not released to return to work for his shoulder condition. He returned to Hinsdale Orthopedics on August 27, 2013 and was returned to work full duty, for his shoulder condition. Specifically, it was noted that he continues to have limitations on range of motion. The doctor specifically noted Petitioner's motivation to return to work full duty. Further, the injections were expected to "work well for at least 6-8 months" but he "may be a candidate for a future series" depending on symptoms or "to postpone or avoid any total joint replacement." (PX18A).

Petitioner testified that he is currently employed as a truck driver but he is working in a supervisory capacity. He performs limited driving and no lifting in his position. His earnings are similar to what he was earning at the time of his accident. However, he did note that his earnings were impaired due to his lifting limitations. He is unable to pursue higher paying jobs as a truck driver due to his inability to lift and load cargo into the trucks.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (A.), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds and concludes as follows:

Petitioner testified that he began working for Respondent-Employer, P.T.O. Services, as a commercial truck driver in December 2011. He further testified that the Respondent-Employer was in the freight business stationed in Minooka, Illinois, and it delivered freight to various places all over the country. As a commercial truck driver, Petitioner drove trailers to various locations, then picked up

trailers from other locations. He also acted as a spotter, which involved opening shipping containers and moving the contents from one area of a shipping yard to another. Based upon the unrebutted testimony and other credible evidence, as well as the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

In Support of the Arbitrator's Decision relating to (B.), Was there an employee-employer relationship, the Arbitrator finds and concludes as follows:

The Arbitrator finds an employee-employer relationship did exist between the Petitioner and P.T.O. Services. The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties. While, the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. Roberson v. Indus. Comm'n, 225 Ill. 2d 159, 175 (2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Id.

Petitioner's testimony and other evidence established that he was employed by P.T.O Services. He was hired by Tom Wistlow in December 2011, and was paid by payroll check (PX 14). He clocked in and out daily, and received a ticket containing his duties for the day when he clocked in. P.T.O Services provided all of the equipment required to complete the job. As a commercial truck driver, Petitioner's work encompassed P.T.O. Services' general business as a freight distribution company.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 an Employee-Employer relationship existed between the Petitioner and Respondent-Employer P.T.O Services Inc.

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (D.), What was the date of accident, the Arbitrator finds and concludes as follows:

On June 2, 2012, Petitioner arrived at work and punched into a payroll clock. He obtained a ticket that laid out his "spotter" duties for the day. Petitioner was in the process of attempting to pry open a shipping container with a crow bar when something broke on the door, and he smashed his head in the door of the shipping container. Petitioner sat down on the ground due to experiencing head pain. Another employee walked by while Petitioner was sitting on the ground and asked Petitioner if he was ok. Petitioner's head and knuckles were bleeding. He immediately reported the accident to Tom Wistlow.

Petitioner sought medical attention on June 5, 2012 with Dr. Alnadkim. (PX 15). Petitioner reported that he was experiencing right shoulder pain after a crow bar slipped at work, and Dr. Alnadjim noted that Petitioner had a hard area by his neck. Id. Petitioner went to Southside

Orthopedics on June 26, 2012, where he reported that he was injured while pushing a crowbar at work. (PX 16).
Petitioner was subsequently referred to Dr. Burra at Hinsdale Orthopedics, who he saw on August 22, 2012. (PX 18). Id. Dr. Burra noted that Petitioner is a right-hand dominant truck driver, and he drives a spotting jeep which takes trailers and lifts them onto hydraulics, and he has to position them into a dock and open the doors. Id. Dr. Burra reported that Petitioner has been handling with same jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open the doors, and in the process, he has had a few injuries. Id. Petitioner reported that he injured himself at work on June 2, 2012 when the crowbar slipped forward and his arm impacted it, and, as it slipped, it crashed against the shipping container. Id. Petitioner was diagnosed with a right rotator cuff tear and glenohumeral arthritis, and a MRI arthrogram was ordered. Id.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that on June 2, 2012, he sustained an accidental injury which arose out of in the course of his employment by Respondent-Employer P.T.O Services, Inc.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner established that Respondent-Employer was aware of Petitioner's accident. Petitioner testified that he informed his supervisor, Tom Wistlow, of the accident immediately after it occurred on June 2, 2012. When Petitioner was given authority to return to work light duty, he informed Mr. Wistlow, who told him there was no light duty work available.

Based upon the unrebutted testimony and credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that he provided Respondent-Employer with timely notice of the accident as defined by the act.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner, as well as the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates establish that the injury of June 2, 2012 caused injury to the Petitioner's right shoulder and neck (cervical spine). The Petitioner, thereafter, commenced a continuous course of medical treatment for those injuries. The Arbitrator concludes that the Petitioner has proven by a preponderance of the evidence that his present condition of ill-being relative to his right shoulder and neck (cervical spine) is causally connected to his injury of June 2, 2012. This conclusion is based upon the unrebutted testimony of the Petitioner and an examination of the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

Petitioner alleges that his earnings from Respondent-Employer were $967.08 per week, or $50,288.16 per year. (Arb Ex 1). Petitioner submitted "compensation reports" dated November 1,

2011 through June 27, 2012. (PX 14). The compensation reports submitted show that Petitioner was paid a total of $18,615.80 over a 27-week period in "regular" pay, and $6,815.48 in "overtime" pay. *Id.*

Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He worked overtime in 21 of the 27 weeks prior to his accident and he testified that working overtime was mandatory. Petitioner's earnings were $50,288.16 in the 52-weeks prior to his injury of June 2, 2012. The Arbitrator concludes that Petitioner has proven beyond a preponderance of the evidence that his average weekly wage was $967.08. The basis for this conclusion was the unrebutted testimony of the Petitioner and the wage statements admitted into evidence as PX 14.

With respect to Issue (H), What was the Petitioner's age at the time of the accident, and (I), What was the Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of the Petitioner as well as the emergency room records, established that the Petitioner's date of birth is January 26, 1954, making him 58 years of age on the date of accident. The unrebutted testimony of the Petitioner established that he was married and he had no children under the age of 18 on the date of injury. Based upon the unrebutted testimony and other credible evidence the Arbitrator finds that Petitioner was 58 years old on the date of accident and that that Petitioner was not married and had no children on the date of injury.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the Petitioner has established by more than a preponderance of the credible evidence that the medical bills related to the treatment of the Petitioner's work injury of June 2, 2012are reasonable, necessary and causally related to the accident, and that the Respondent shall pay for those medical expenses under Section 8(a) of the Act and pursuant to the Illinois Fee Schedule. This conclusion is based upon the testimony of the Petitioner and an examination of the medical records. Respondent has paid no medical bills to date. As such, Respondent shall pay reasonable and necessary medical services of $33,695.24, as provided in Sections 8(a) and 8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner testified, and the medical records indicate that the Petitioner was off work as a result of his injuries from September 1, 2012 through September 2, 2013. Based upon the Petitioner's unrebutted testimony and the medical records admitted into the record, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 1, 2012 through September 2, 2013, a period of 52 3/7b weeks.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered a rotator cuff tear, SLAP lesion, C5,6,7 radiculopathy on the right with nerve atrophy as a result of this accident. He was prescribed a shoulder replacement and a cervical decompression that he did not pursue due to his fear of the surgeries themselves. He received physical therapy and injections to work through the pain. Further he testified that he continues to perform home exercises every day in order to deal with these physical conditions. Petitioner testified to continued need to take over the counter medication and horse liniment depending on the weather. He testified to continued work as a truck driver, however earning less at a job requiring less physical lifting.

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a truck driver, which the Arbitrator notes includes some heavy work. The Arbitrator notes that the Petitioner has been working in a position that requires limited driving and no lifting. Because of the testimony that petitioner is not able to pursue higher paying jobs due to his medical condition, the Arbitrator gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 58 years old at the time of the accident. The Arbitrator considers the Petitioner to be an older individual and concludes that because of his age the Petitioner's permanent partial disability will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations. The Arbitrator therefore gives greater weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that his earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting, the arbitrator therefore gives greater weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes significant surgeries of a shoulder replacement and cervical decompression at three levels have been prescribed for the Petitioner as a result of this accident. The Petitioner credibly testified that he currently experiences a loss of strength in his arm as well as pain in his shoulder and neck. These complaints are corroborated in the medical records of the Petitioner's treating

physicians. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 20% disability to his whole person.

In Support of the Arbitrator's Decision relating to (O.), Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer the Arbitrator finds and concludes as follows:

This matter was heard on December 7, 2018. It proceeded *ex parte* against Respondent-Employer P.T.O. Services. The Injured Workers' Benefit Fund was represented by the Attorney General's office by Assistant Attorney General Danielle Curtiss. A review of the Illinois Workers' Compensation Commission records by Roguens Loriston failed to reveal any workers' compensation insurance coverage for the Respondent-Employer ASM Transport Services, Inc. on June 2, 2012. (PX 12).

On the hearing date, no one from P.T.O. Services was present, and the hearing proceeded *ex parte* against the Respondent-Employer. Petitioner introduced into evidence correspondence from Petitioner's attorney's office sent via certified mail to the Respondent-Employer's addresses including the addresses filed with the Secretary of State registered agent for P.T.O. Services (PX 8; PX 10; PX 11; PX 24).

Based on the above, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that the Injured Workers' Benefit Fund of Section 4(d) of the Illinois Workers' Compensation Act , applies and that the Injured Workers' Benefit Fund has been properly named as a Respondent in this matter. Further, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Respondent-Employer P.T.O. Services had adequate and timely notice of the hearing.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM VRCHOTA,

Petitioner,

vs. NO: 13 WC 34611

DD&G DEVELOPMENT & RESTORATIONS, and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

21IWCC0169

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the January 8, 2020 Decision of the Arbitrator. Therein the Arbitrator found no employment relationship existed between Petitioner and Respondent DD&G Development & Restorations, and Petitioner failed to prove he sustained an accidental injury on October 9, 2013.

While the matter pended on Review, Respondent DD&G Development & Restorations ("DD&G") filed a Motion to Dismiss Petitioner's Review. Respondent Injured Workers' Benefit Fund subsequently joined the motion. The parties briefed the issue, and the matter was taken under advisement for ruling by the full panel. Notice having been provided to the parties, the Commission, after reviewing the record in its entirety, hereby dismisses Petitioner's Review for the reasons stated below.

In its Motion to Dismiss, DD&G noted, on April 9, 2020, Petitioner executed a settlement and release of his civil claim against DD&G for the injury at issue and a dismissal order was thereafter entered stating "said cause having been settled by agreement of the parties." Motion Exhibit B. DD&G further noted the dismissal order is a public record of a civil court case and therefore subject to judicial notice. DD&G argued, under Sections 5(a) and 11 of the Act and *Rhodes v. Industrial* Commission, 92 Ill.2d 467 (1982), Petitioner is now precluded from continuing his workers' compensation claim. The Commission agrees.

Initially, the Commission finds the April 29, 2020 Dismissal Order is subject to judicial notice. Illinois courts recognize that documents containing readily verifiable facts from sources of indisputable accuracy may be judicially noticed if doing so will aid in the efficient disposition of a case. *City of Centralia v. Garland*, 2019 IL App (5th) 180439, ¶ 10; *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 36. Public documents that are included in the records of courts and administrative tribunals are subject to judicial notice. *People v. Davis*, 65 Ill. 2d 157, 164 (1976); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009); *NBD Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520 (1993); see also *People v. Ernest*, 141 Ill. 2d 412, 428 (1990) (observing that trial court was authorized to take judicial notice of transcripts in underlying action); *In re McDonald*, 144 Ill. App. 3d 1082, 1085 (1986) (recognizing that trial court has authority to take judicial notice of hearing transcripts). While we do not believe judicial notice can be extended to the Release and Settlement Agreement itself, the Commission emphasizes the Dismissal Order states the civil claim "has been settled by agreement of the parties." Black letter contract law states there must be consideration in order to have a settlement.

The Commission further concludes *Rhodes* is dispositive of the instant matter. In *Rhodes*, the Supreme Court of Illinois held as follows:

> The legislative intention underlying section 5 of the Workmen's Compensation Act would obviously be frustrated if an injured employee could recover damages in a common law action and workmen's compensation benefits as well. If an employee initiates a common law action for his injury and receives payment from his employer as a result of such suit he is disqualified from obtaining an award under the Workmen's Compensation Act. The statute's design was to serve as a substitute for an employee's common law right of action and not as a supplement to it. 92 Ill.2d at 471. (Emphasis added).

The Commission finds the language of the Dismissal Order is sufficient to establish "the receipt of payment from the employer." Therefore, Petitioner "is disqualified from obtaining an award" under the Act, and his Petition for Review is hereby dismissed.

The Commission further notes, assuming *arguendo*, Respondent's Motion to Dismiss was denied and we reached the merits of Petitioner's Review, the Commission would affirm and adopt the Decision of the Arbitrator. The Commission finds the injury did not arise out of Petitioner's employment. We emphasize Mr. Kowalski credibly testified he works by himself, and on those occasions he needs assistance with flooring, he chooses the person; at no time would Mr. Schwager assign an assistant to him. As such, there is no credible evidence of an employment-related reason for Petitioner's use of the miter saw, and we find Petitioner was acting outside the scope of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review filed February 3, 2020, is hereby dismissed.

21IWCC0169

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2020 is final.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
TJT/mck
051
o020321

APR 13 2021

Thomas J. Tyrrell

Stephen J. Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on February 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VRCHOTA, WILLIAM
Employee/Petitioner

Case# **13WC034611**

DD&G DEVELOPMENT AND RESTORATIONS LLC & THE ILLINOIS STATE TREASURER AS EX-OFFICO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0169

On 1/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

4239 LAW OFFICE OF JOHN ELIASIK
BRIAN C HERCULE
180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

0210 CANAN & SHAPIRO PC
JOHN MORRIS
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

6285 ASSISTANT ATTORNEY GENERAL
DANIEL KALLO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Vrchota
Employee/Petitioner

v.

DD&G Development and Restorations, LLC

&

The Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund

Employer/Respondent

Case # **13 WC 34611**

21IWCC0169

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **October 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **10-09-13**, Respondent ***was not*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$5,541.00**; the average weekly wage was **$307.83**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds Petitioner was not an employee of Respondent on October 9, 2013 and that Respondent was not subject to the Workers' Compensation Act. As such, all claims for benefits are denied.

The Arbitrator finds Petitioner did not sustain an injury arising out of his employment. As such, all claims for benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

01-07-20
Date

ICArbDec p. 2

JAN 8 - 2020

21IWCC0169

FINDINGS OF FACT

William Vrchota (hereinafter "Petitioner") alleges he sustained a work-related accident while employed by DD&G Development (hereinafter "Respondent") on October 9, 2013. Respondent disputes Petitioner was an employee and contends he was instead an independent contractor, and disputes Petitioner sustained a compensable work-related injury regardless of the employment relationship. Petitioner testified on behalf of himself. Dave Schwager, Respondent's owner, Kenneth Kowalski and Orian Phillips testified on behalf of Respondent.

MEDICAL RECORDS (PX 2 and PX 4)

The EMS notes contained within the certified records state Petitioner was found with lacerations to the arm. The records state his medications were Norco, Oxycodone and Meloxicam. Petitioner was also intravenously given Fentanyl and Midazolam.

Petitioner arrived at St. Alexius Medical Center by ambulance at 9:48 a.m. immediately following the accident. The past medical history was noted to be heartburn, drug abuse, sleep apnea and chronic back pain. Petitioner stated he was cutting wood with a saw when his forearm got caught and pulled into the saw. An x-ray of the arm was completed which showed an open comminuted fracture with the distal defect at the ulnar.

Dr. Thomas Fendon evaluated Petitioner. The record stated Petitioner narcotized but arousable and able to communicate. Dr. Fendon noted the significant laceration and recommended surgery, which Petitioner underwent that day. The surgery included a number of tendon and muscle repairs as well as a debridement and irrigation of the ulnar fracture. Petitioner was released from the hospital later that day.

Petitioner next presented to APAC Groupe Centers for pain management on October 17, 2013. Petitioner stated he had been cutting hardwood flooring and put his arm up to protect his chest from getting cut. He stated it was not a workers' compensation case. He did state the injury was aggravated by movement and had associated numbness and swelling. Petitioner was diagnosed with an arm injury and musculoskeletal deformity of the upper arm as well as an open wound of the upper arm with tendon involvement. He was instructed to begin 30-days OxyContin, though it was noted there would have to be an exit plan and the medications would be regulated by his wife. He was also instructed to continue his Norco for breakthrough pain and follow-up in one month to check on pain management.

Petitioner returned on November 26, 2013 for medication management. He stated his pain was aggravated by movement but alleviated by medications. Petitioner stated the pain was disabling. He was prescribed Norco and Morphine. The next visit was December 24, 2013 at APAC Groupe, and Petitioner's chief complaint was pain in his thoracic spine and arm pain. There was no explanation for the start of the thoracic pain. Petitioner stated he was not working and had no therapy ordered by the orthopedic surgeon in Elgin. Petitioner was instructed to begin therapy and follow-up in one month, as well as continue medications as directed. On January 28, 2014, Petitioner presented with lower back pain with numbness down the right leg. Petitioner stated he was now a vegetarian. He still was not working and described chronic ongoing disabling pain. Dr.

Pang noted the pain was self-limiting. The diagnoses were back pain, myalgia, current drug user and shoulder pain. The impression was chronic myofascial back pain, and it was noted he was three months out from the left upper extremity trauma. Petitioner stated he was reducing the dosage and he was to continue decreasing his Norco.

The last medical record is a drug screen which was collected on January 28, 2014. The drug test noted inconsistent results based on the presence of pregabalin, cocaine metabolic, ethyl glucuronide sulfate. It was noted pregabalin was detected but did not match any of the reported prescriptions and that cocaine is a schedule 2 controlled substance with limited pharmaceutical application.

Testimony of KENNETH KOWALSKI

Kenneth Kowalski was the first to testify in this case as he testified via evidence deposition on June 27, 2018 given he was, at the time, in the process of undergoing chemotherapy. Mr. Kowalski testified he was a laborer with safety and OSHA certification and used to be a part of the laborers union. Mr. Kowalski testified he performed handyman work such as carpentry, flooring and drywall. He testified he worked for himself, though not under any corporation. He secured most of his work by word-of-mouth or with customers calling him directly. Mr. Kowalski testified he had no financial interest in the claim, and was in fact losing money by appearing.

Mr. Kowalski testified he met Mr. Schwager about 20-years prior and had performed work for Respondent for five or six years as a handyman. To secure work with Respondent, Mr. Schwager would call Mr. Kowalski and advise he had a possible job for him. Mr. Kowalski would then review the job and provide Mr. Schwager with an estimate, or bid, for what the work would cost. Mr. Kowalski stated that if his bid was chosen, he worked as an independent contractor. He stated if he had to bring extra help in for the work, he would bring one of his kids, at his own discretion and cost. Mr. Kowalski stated he was paid by the job, not on an hourly basis. He testified taxes were not taken out of his checks and he himself was responsible for paying taxes. He testified he would bring his own tools, unless he did not have something in which case he would ask Mr. Schwager if he could borrow his tools. He testified he was not required to wear any clothing with Respondent's name on it. He was not required to keep his hours and could arrive at the jobsite at his discretion. While doing work for Respondent, he was allowed to have concurrent employment and set his own hours, and testified he sometimes told Mr. Schwager he would not be present if he had another job, and that there was no problem with Respondent when such issues arose. He testified he and Mr. Schwager both had the right to terminate the contract. He stated he was only responsible for the flooring, and that he had discretion over how to do the work. He testified Mr. Schwager was not present at all times watching over him and Mr. Schwager was only present once or twice on the whole job. He was not given any type of vehicle by Respondent.

Mr. Kowalski testified he was working October 9, 2013. Mr. Kowalski's services were retained by Respondent to install flooring for a remodeling job on a residential home. Mr. Kowalski stated the house was essentially a three level building. The garage was down a little from the main level of the house, then there was a second staircase going to the top second floor. At the top of the second flight of stairs, to the right, there was a bedroom where all the tools were kept. There was also a children's bedroom on the same side of the staircase, and a closet in a room on the left-hand side

of the staircase. Mr. Kowalski stated all of the power tools were kept in the bedroom on the second floor to keep them away from children living in the house.

He testified he was doing the flooring by himself, and arrived at about 7:20 a.m. or 7:30 a.m. No one was present when Mr. Kowalski arrived. He testified Petitioner showed up much later while Mr. Kowalski was in the garage. Petitioner and Mr. Kowalski briefly talked, and Petitioner told Mr. Kowaski he was there to clean up. Mr. Kowalski testified, after this discussion with Petitioner, he witnessed Petitioner walk over to a corner and "crushed up a pill, rolled up a dollar bill, snorted [the pill], and immediately became lethargic, started slurring his words, stumbling" (RX 7, pg 27) Mr. Kowalski was about 6 feet from Petitioner during these actions. After snorting the pill, Petitioner became lethargic and started slurring his words and stumbling. He started walking towards Mr. Kowalski and almost head butted Mr. Kowalski given how close he was, all characteristics Mr. Kowalski did not notice before he witnessed Mr. Vrchota snort the pill. Mr. Kowalski testified he instructed Petitioner to go home but Petitioner told Mr. Kowalski he was not his boss and therefore not to tell him what to do. Given Petitioner refused to leave, Mr. Kowalski returned to his own work and instructed Petitioner not to touch any tools. Mr. Kowalski testified he was measuring the inside of a closet, with his head inside, when he heard a "Bam" and a yell. He ran to the room from where he heard the noise and Petitioner was bleeding everywhere. He wrapped the injury and took Petitioner downstairs. He called 911 and stayed with Petitioner until the ambulance arrived.

Mr. Kowalski testified Petitioner was not working with Mr. Kowalski on of the flooring job. Mr. Kowalski testified the flooring was his own job and, to the best of his knowledge, Petitioner was not supposed to help or aid in doing the flooring work. He testified he did not ask Petitioner do any work for him, and prior to that date had not ever asked Petitioner to help them with any flooring work. He also testified there was no other carpentry work going in the house besides the flooring, or any other work in the house besides the flooring which would necessitate use of the saw.

The saw was present during the deposition of Mr. Kowalski. He testified it was a Bosch 12 inch circular compound miter saw, or sliding compound miter saw. He testified it was the same saw present at the job on October 9, 2013. Mr. Kowalski noted the blade had a guard over it, which was in place on October 9, 2013. He testified he had used the saw on October 9, 2013 before Mr. Vrchota did, and that there were no problems with the saw. He testified the blade worked fine and was not dull. He stated there were no alterations made to the machine and that the saw was new at the time of the accident, having been bought for a job right before the one in question. Mr. Kowalski stated he would likely use the saw even if the cover were off, but that he was certain the cover was not off on the date in question. Mr. Kowalski explained how to use the saw, noting one would put a piece of wood onto the plate and against a back guard. He noted the safety switch on the handle, and that the blade guard only raised when the blade went down. He stated the hand holding the wood would be kept a couple inches from the blade, and the blade would come straight down into the lumber. He noted the blade could not move left to right given the lock on it, which would have to be released in order to move it side to side. He also stated the plate itself cannot be moved.

Mr. Kowalski testified there were no problems with the locking of the machine. He also testified the back stop for the lumber not only keeps it straight but prevents it from launching backwards

when the blade enters the wood. He noted the wood would be pressed against the blade when cut, and that if there was an issue the wood would stall against the backstop. He testified based on the direction the blade moved it could not shoot the wood forward, only backward, which would then have it hitting the backstop. He opined it was physically impossible for the wood to have caught and pulled Petitioner forward because, at worst, if the blade was dull it would just bump and stop. He testified, based on where the lumber is held, it would be impossible for the cut like Petitioner's to have occurred as the wood can only be pulled backwards, not forwards, and there is a backstop to prevent the wood from actually moving.

On cross-examination, Mr. Kowalski confirmed he did not know what the actual pills were that Petitioner crushed and snorted. Mr. Kowalski testified he saw Petitioner come upstairs and walk past him, but did not stop him as he was there to do his own job. He testified the arrangements to do any particular job were generally verbally made with Mr. Schwager, and that they had a general agreement each year rather than one done before each specific job. He testified he was present during one of the first jobs Petitioner had with Respondents in which Petitioner provided an estimate for a painting job. He was also unaware how many jobs Petitioner had with Respondent. Mr. Kowalski was asked if the wood could slip one way or the other before the blade engaged with the wood, and Mr. Kowalski testified the wood could move before the blade engaged. He testified it was not possible for that to happen after the blade engaged. Mr. Kowalski again confirmed he had never use the saw with the blade cover off. On examination by the State, Mr. Kowalski confirmed the blade comes straight up and down and does not come at an arc.

Mr. Kowalski, on redirect, testified he instructed Petitioner to go home but had no reason to believe he would disobey the statement of not using the tools. He also testified there was no benefit to having the blade guard taken off. He testified it did not make the saw work quicker and there was no reason someone would take the blade off. He also testified the only difference between the blades on the date in questioned and at the deposition was that it was newer, but there were no other differences.

Testimony of PETITIONER

Petitioner testified on his own behalf at trial. Petitioner testified DD&G Development was his employer on October 9, 2013. Petitioner stated he had worked for Respondent for a few years. He testified he made $15.00 per hour and worked full time, sometimes six days a week. He testified he did plumbing, carpentry, and some general stuff like picking up supplies, driving the truck and cleaning up around a job site. He testified he never did painting for Respondent, but he had done flooring for them one or two times before the accident. He testified he was paid in cash and checks and was paid hourly, not by the job. He testified he kept track of hours on his phone and then compared them with Mr. Schwager, and would be paid for the hours worked. He stated Mr. Schwager was his boss. He testified he did not sign anything when he was first hired nor fill out an application. He also stated, when he first started, he drove a truck one day to pick up supplies and started doing general helping, but was eventually asked to sign the Independent Contractor agreement to continue working for Respondent. Petitioner testified Mr. Schwager appeared at a job site and said Petitioner had to sign the document to get paid. Petitioner testified he did not want to sign the form, but was told he would not receive his money for the week if he refused to do so.

Petitioner testified he had never worked under the name, owned a business or solicited business as Bill's Painting. He testified he was not familiar at all with the name Bill's Painting.

Petitioner testified that, in order to determine his job duties, Mr. Schwager would come in to the job site at the end of the day and tell him to be there the following day. He testified Mr. Schwager set his hours and he was basically instructed to appear at a specific time, generally around 7:30 or 8:00 a.m., and worked 8 1/2 or 9 hours per day. Petitioner testified he had no other jobs while working for Respondent. He testified he had done a little construction but mostly plumbing prior to working for Respondent and, when asked whether he could've taken other jobs, testified he did not have the time. Petitioner testified he was not allowed to come and go from job sites as he pleased, and would have to secure permission from someone else at the jobsite. Petitioner testified he and other workers would take lunch together but could do so whenever they wanted. He testified he did sometimes have to run errands for Respondent such as picking up supplies, at which point he would use a company credit card. He testified he would do this once or twice a day. Petitioner testified he did not bring his own tools, or in fact own any, as they would be provided by Mr. Schwager. Petitioner also testified Mr. Schwager had bought him some clothes given he was unhappy with the clothes Petitioner chose to wear to a job site.

Regarding the alleged date of accident, Petitioner testified he was working a hardwood floor job in Schaumburg. He testified he was supposed to cut the wood and bring it back and forth to Mr. Kowalski. He stated it was only the first or second day they had been on this job. Petitioner testified it was him and Ken working at the job site that morning. He testified Dave had been there briefly in the morning but left once the work started. Petitioner testified he was using the saw to cut a piece of hardwood and that the saw blade was older. He testified having said that they needed a new blade given the saw was not cutting properly. He also testified the safety guard on the blade was taped up because Mr. Schwager had said he and Mr. Kowalski were working too slow. Petitioner testified when he brought the saw down, the wood got bound up and pulled him forward, at which point he put his arm up to block his chest, and cut his arm on the blade. Petitioner testified the cut was on his left arm right above his wrist, and he did show the Arbitrator the cut during the trial. The Arbitrator noted the scar started at one part of the arm and sort of went around creating a Y shape at both ends. The Arbitrator does note pictures of the initial injury were entered into evidence as Petitioner's Exhibit 7. The Arbitrator noted he would not notice the scar from where he was sitting. He noted the scar was long and significant, but not prominent and that he would not have noticed a scar even if the sleeve had been rolled up as it was not a raised scar.

Petitioner testified after the injury he was rushed to the emergency room by ambulance where he underwent immediate surgery at St. Alexius. He reported he was released the same day of the surgery and was given pain medication immediately. He also testified he had been completely knocked out for the surgery. He testified he was supposed to have physical therapy but did not due to insurance issues. He testified he did follow up to treat with Dr. Peng for pain in his arm. He testified he wore an open cast for about a month and a half to two months. Petitioner testified he never returned to work for Respondent or anyone else given he could not use his arm properly. He testified he also got a staph infection in his leg that ate the skin off his shins, though clarified he was not alleging he injured his shins during the work accident. Petitioner testified he was receiving Social Security disability benefits since November of 2018. He testified to having difficulty

gripping items and that he did not have the same strength he used to. He also testified he still had pain in his arm which was at a seven at the time of the trial.

On cross-examination, Petitioner reviewed payment screens for his work with the Respondent. He noted they show payments to Bill's Painting and were not weekly or biweekly paid. He testified again he had never done any painting for Respondent. Petitioner also noted that, when Respondent had bought him clothes to wear, he had been wearing jeans and a Tupac shirt. He testified none of the clothes purchased for him had Respondent's name anywhere on the clothing. Petitioner testified he still had issues with the arm and was still treating for the issue every week or so, though he then clarified that it was actually for issues with his leg. He testified treatment for his arm went on for about a year or year and a half after the accident. Petitioner also testified he was not required to clock in or out, just to keep track of time. Petitioner testified he did not have any pay stubs. He testified Respondent had five or six employees, including himself, Mo, Bud (Orian Phillips) and Kenny, as well as Kenny's kids who were brought in sometimes.

Testimony of DAVID SCHWAGER

Dave Schwager testified first on behalf of Respondent at the trial. He testified he currently owns a company called Quality Building Renovation Services, which does general contracting. He testified on October 9, 2013, he was the sole owner of Respondent. He testified Respondent was an LLC, which also performed general contracting. He stated he started Respondent in 2004, but did not register with the State until 2008 or 2009. He testified the company is no longer in existence as it was dissolved in 2015 or 2016. Mr. Schwager testified Respondent did not have workers' compensation insurance on October 9, 2013 based on the way the business was set up as a general contractor. He stated he was the only person doing work for the Respondent, unless he retained other independent contractors. In that case, they would be required to carry their own insurance. He testified Respondent had general liability insurance based on discussions with his agent in which he inquired what insurance was needed as an LLC doing general contracting. His agent had instructed him he did not require workers' compensation given he was the only "employee" and would not be covered under workers' compensation policies. He testified he secured a balloon policy, which included workers' compensation coverage, after October 9, 2013 to protect himself and his company. He testified Respondent did a total of 30 or 40 jobs over the years he owned it, most of which were residential. The jobs all involved remodeling and most were small, such as kitchens and bathrooms, facelifts and painting, flooring and hardwood changes.

Mr. Schwager stated he would do most of the work himself, but if he needed assistance, he would usually find help with referrals from other contractors or some of his suppliers. Mr. Schwager testified anyone who did work for him was required to sign an independent contractor agreement, such as those signed by Mr. Kowalski, Petitioner and Mr. Phillips. Mr. Schwager specifically testified as to Respondent's Exhibit 1, which is the independent contractor agreement between Petitioner and Respondent. The top of the exhibit states the contract was entered into between Respondent and William Vrchota D/B/A Bill's Painting and Remodeling. There was writing on the front page which has both Mr. Schwager's and Petitioner's signatures, and the last page of the contract was signed by both parties. The contract was signed on March 1, 2013. Mr. Schwager testified he was present when Petitioner signed the contract. He testified anyone who did work for Respondent would have to sign a similar agreement. Mr. Schwager testified if someone had not

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done work for him in the year prior to a new job and wanted to do work, he would have them sign a new agreement. He testified that was why Petitioner's was signed March 1 despite having worked for Respondent before then. He testified the agreements were mostly the same, with some minor tweaks as the contracts were updated. Mr. Schwager testified he chose to use independent contractors rather than hiring employees because it was not often he needed other people to complete jobs for him and he generally preferred to do the work on his own. He also sometimes would need to bring in a licensed worker, for things such as plumbing or roofing, for which he would again use the independent contractor agreements.

In order to hire independent contractors, Mr. Schwager would call five or six different people and inform them he had a project coming up for which he would need help on. Of those, some sent a quote/bid for the job. Mr. Schwager would then pick the best bid. He would pay the independent contractors once the work was completed or once he got paid. He testified the contract would be paid per the bid, regardless of how many hours it actually took to do the work. Mr. Schwager testified Respondent did not take taxes out of payment for contractors. He testified anyone who did jobs for him would provide their own tools, though noted he would also have his tools present given he would generally also be working. He testified the bid would decide who provided materials as that would be part of the bidding process. He testified he did not instruct people when they had to appear, but he would give them a timeframe in which work would be allowed at a job site. He testified contractors could work for other companies while they were doing work for him as well. He testified he would be at most jobsites doing his own work, but had no say in how other workers did their jobs. He testified people could reject a job he offered them without repercussions and noted there were multiple instances when he had offered someone a job and they had rejected it, yet he had still called them later to offer more work. He testified his subcontractors could hire anybody they wanted as it had nothing to do with him. He testified people working for him did not wear any clothing bearing the Respondent's name or logo. He testified people who did work for him had no other benefits such as retirement or health insurance, and that there were times during the existence of Respondent in which they did not have work and no one was paid.

Mr. Schwager testified he was familiar with Petitioner as he met him several years prior through his sister. He testified Petitioner had performed work for Respondent doing one job in 2009 or 2010 when they first met. He testified they hired him to do some painting work, but that at the time it did not seem to be working and thus he did not bring him back for further jobs for some time. Mr. Schwager testified when they did hire Petitioner, they brought him in to do painting and cleanup work for light painting jobs, or for dry-walling and sanding. Mr. Schwager was asked on cross-examination why he would use Petitioner despite the fact he did not feel he was the best painter, and Mr. Schwager testified it was because Petitioner was cheaper.

Regarding the job on October 9, 2013, Mr. Schwager testified they had done some drywall work in the client's basement and were replacing all the hardwood floors in the upstairs of the house, as well as all the floor trim and quarter round in the house. Mr. Schwager testified Petitioner was called to paint and do clean up. He stated most of the hardwood had been done at that point. He testified he brought Petitioner to the job site on the first day he arrived to drop off hardwood given Petitioner lived nearby, and offered Petitioner the chance to do painting work. Petitioner provided Mr. Schwager with his estimation for how much the job would cost. Mr. Schwager testified he retained Mr. Kowalski to do the hardwood flooring, and Petitioner was the only other person on

the job. Mr. Schwager testified Petitioner had requested $300.00 to do the job, which Mr. Schwager had agreed to pay. Mr. Schwager testified this would have been how much Petitioner was paid regardless of how many hours it took to complete the work. Mr. Schwager also testified Petitioner had refused work from the Respondent in the past, yet was still offered this job. He testified the tools necessary for Petitioner's job would be sponge, broom, paintbrush, dustpan and tarp, all of which Petitioner would have brought in on his own. Mr. Schwager testified he had never retained Petitioner to do any carpentry job, either at this project or at prior projects. He testified he never provided Petitioner with a specific time to arrive, but did provide a time range when Petitioner could appear at work. Petitioner was never given a DD&G Development vehicle to drive, and did not have any direct supervisor watching his performance.

Mr. Schwager testified the saw present at the trial was the same saw on which Petitioner alleges he injured himself, which Petitioner confirmed at the Arbitrator's request was the same saw as well. He testified Mr. Vrchota did not require the use of the miter saw to perform his duties for his job, nor was he authorized to use the miter saw in the performance of his duties. He testified he was not aware of Petitioner having any training to use a miter saw. He testified he had purchased the saw possibly three weeks to a month before the alleged accident date, and that it was his saw. He testified he and Mr. Kowalski were both retained to do carpentry work, and that Petitioner was not retained to help or assist Mr. Kowalski in performing the carpentry work in any way.

Mr. Schwager testified October 9, 2013 was his birthday and he did not go to the job site at all that day. He testified both Mr. Kowalski and Petitioner were authorized to work without him present as they did not require his direct supervision. Mr. Schwager testified he first heard about the accident when he received a text from Mr. Phillips saying to call Mr. Kowalski. Mr. Schwager then went to the hospital where Petitioner was taken. Mr. Schwager testified he requested a drug test, which was never completed given the emergency room physician informed him they had already given him significant pain medications.

After leaving the hospital, Mr. Schwager returned to the job site, where he went to the room with the miter saw. He noted a little blood on the floor and another trail of blood leading outside. He testified no one had used the saw since the accident. He also testified he did not see any partially cut pieces of wood on which a blade had been caught. Mr. Schwager testified, given Petitioner's work had not been completed prior to the injury, he did have to bring someone in to complete the work. He brought in Mr. Phillips, his half-brother, who had a similar independent contractor agreement as Petitioner. He stated Mr. Phillips provided him with the cost of the job, but he did not take other bids given the job needed to be completed and he did not have time for such action.

The saw in question was in the hearing room during Mr. Schwager's testimony, which was confirmed by Petitioner. Mr. Schwager testified the only potential change was that the blade would have been replaced multiple times in the last few years. Mr. Schwager testified he never requested the blade guard be lifted as it made no sense and would not make cutting any faster. Mr. Schwager noted when the saw is in its initial position, the blade guard would cover the entire blade. He stated once someone started cutting wood, they would keep the blade in a locked position going straight down. He also testified there was an electric brake on the unit and two safeties. He stated the worker would have to pull a knob and then squeeze a trigger before the saw would turn on. As soon as the hand/thumb lifted from the trigger, the blade would stop immediately. He also testified,

given the power of the saw, that even a flat blade would still cut the wood and not pull the wood or person forward. Mr. Schwager testified the hardwood floor would have been about 3/4 inches thick and 3 inches wide. As such, the hand would be about three quarter inches above the plate and about 3 inches back from the backstop. Mr. Schwager testified, given the setup of the saw, it was irrelevant if someone was right or left-handed, but would hold the piece of wood with the left hand and bring the saw down with the right hand. He testified there would be no reason for an arm to be near the center region as the person cutting would keep the arm and hand holding the wood to the side while bringing the saw down. In overruling an objection regarding the demonstration of the saw, the Arbitrator noted he was hoping to see Petitioner go through the mechanism of the accident.

Mr. Schwager testified when he first started Respondent in 2004, he did have some people work for him, but that when he became an LLC in 2008, he only used independent contractors. He testified he never hired Petitioner, but he did contract him to do painting and cleanup, such as sweeping. He again noted the independent contract stated Petitioner would have been retained to do residential remodeling and painting services. He also testified if Petitioner did not secure an actual painting job, he could still bid to do some cleanup work instead, but it would still be done in the same general manner with a bid process for specific hours it would take him to complete the job. He stated the pay would be the same regardless of the amount of hours it took based on the bidding process. When asked how he discovered the business he believed to be Bill's Painting, he testified that was how Petitioner had presented himself, and that he provided business cards. Mr. Schwager was asked about a prior testimony from 2016 in which he stated he was unsure if he had received a business card from Petitioner, but stated had thought more and did remember he had in fact received a business card from Petitioner. He also noted the paystubs were made out to Petitioner, not Bill's Painting, which Mr. Schwager testified was a common practice. He also testified he did not always check whether independent contractors had insurance, but generally would only do so if it was a job in which he believed insurance might be necessary. He did not check Petitioner for insurance given he had only had them to painting and general cleanup, neither of which he believed were likely to involve injuries in his mind. Mr. Schwager testified Petitioner was known as a painter to the representatives at Sherman Williams and they had business cards of him on a board there as well.

Mr. Schwager testified he would be the one to generally discuss hours and other issues with the homeowner, but sometimes the other workers would have to discuss issues directly with them. Finally, he testified he did not understand how someone could accidentally sustain the injuries Petitioner had. He again testified Petitioner did not belong in the room with the saw, let alone use the saw itself. He was asked if the room with the saw was locked, and testified it might not have been given people had already appeared for work that day. On redirect, Mr. Schwager confirmed he had never hired any actual employees as DD&G Development and Restoration, LLC. He also confirmed that, if Petitioner worked less hours than had bid, he would still receive the full cost of the bid given he was not paid hourly.

Petitioner entered a prior deposition transcript of Mr. Schwager into evidence as Petitioner's Exhibit #5. The deposition was taken on May 3, 2016 for the civil claim also arising out of this accident, *William Vrchota v. DD& G Development*, 2014 L 005680. Without going into significant

detail, the Arbitrator notes Mr. Schwager maintained throughout this deposition Petitioner was an independent contractor, not an employee.

Testimony of ORIAN PHILLIPS

Mr. Phillips testified he was brought in to complete Petitioner's work after the injury on October 9, 2013. He testified he was brought in for the same job as Petitioner, and that at no point did these job duties require use of the miter saw. He was never asked to assist Mr. Kowalski in the wood cutting or carrying process. He testified his duties for the job involved just painting. He also testified he had an independent contractor agreement similar to the one signed by Mr. Kowalski and Petitioner. He testified he was paid by bid, not hourly, he set his own hours, and did not have any supervisor from Respondent overlooking his work.

Petitioner's Exhibit 6

Petitioner's Exhibit 6 is a payment screen for payments made by Respondent to Petitioner for his work from June 11, 2013 through August 12, 2013. The "original amount" and "paid amount" on all payments was equal. On 13 of the 18 payments, the memo line included Bill's Painting in some fashion. Finally, the Arbitrator notes the payments were not paid on a consistent biweekly or weekly schedule, with some payments being made on back to back dates, such as July 10 in July 11, 2013. Finally, the Arbitrator notes that Respondent made a total of $5,541.00 per the payment screens over the course of the payment period.

CONCLUSIONS OF LAW

Regarding issues (A) and (B), whether Respondent was under the Workers' Compensation Act and whether there was an employee-employer relationship between Petitioner and Respondent, the Arbitrator finds as follows:

No rigid rule of law exists regarding whether a worker is an employee or independent contractor. *Area Transportation Co. v. Industrial Comm'n,* 123 Ill. App. 3d 1096 (1984). In determining whether one is an independent contractor or employee, courts have considered several factors. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309 (1990). The single most important factor is whether the purported employer has a right to control the actions of the employee. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000). Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities and whether income tax has been withheld. *Wendholdt v. Industrial Comm'n,* 95 Ill. 2d 76 (1983). A factor of less weight is the label the parties place upon their relationship. *Earley.* When applying the facts of the present case to the factors set forth by the courts, the Arbitrator finds Petitioner was an independent contractor

The Arbitrator notes there are discrepancies in the multiple testimonies regarding a number of the factors. The Arbitrator finds the testimonies of Mr. Schwager, Mr. Kowalski, and Mr. Phillips more credible than the testimony of Petitioner. The Arbitrator finds the payment screens and check stubs particularly persuasive. Petitioner testified he worked 8 ½ to 9 hours a day, 6 days a week for Respondent making $15 per hour, but the payment screens show Petitioner averaged $307.83

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per week, which would only equate to about 20 hours per week. Petitioner never testified to having been underpaid by Respondent. Petitioner testified he never did painting jobs for Respondent, and that he had never heard the name Bill's Painting. The Arbitrator finds this unbelievable given Petitioner cashed at least 13 checks with a memo line of Bill's Painting, most of which were written before October 9, 2013, and he signed an Independent Contractor Agreement which specifically stated he would do painting. The Arbitrator notes the agreement was signed on March 31, 2013, well before the date of the accident, and indicated Petitioner would do painting and general labor. The Arbitrator also notes the payment screens do not show weekly or bi-weekly payments. Finally, the Arbitrator notes the memo lines on most of the payments contain a specific job (ie. Bill's Painting/Bosshart, Bill's Painting/Fisher, etc), which would indicate Petitioner was receiving payments for the specific jobs. The Arbitrator does not see any reason the jobs would be noted if Petitioner was an employee who was just paid by the hour.

Furthermore, Petitioner testified he had worked for Respondent for years prior to October 9, 2013 but, despite the fact he had not done any painting jobs, had only done 1 or 2 hardwood flooring jobs. Petitioner testified Mr. Phillips and Mr. Kowalski were both employees, but both testified they were independent contractors. Petitioner also testified he could not work for other companies because he would not have had the time, yet also did not deny he was working on another project for his ex-wife.

The Arbitrator finds the testimony of Mr. Schwager credible. He testified he did most of the work for Respondent, and that if he was unable to complete a job on his own, he would bring in independent contractors for help. He testified Petitioner was an independent contractor and verified the independent contractor agreement between Respondent and Petitioner. He testified he did not control Petitioner's work, his hours or the means by which he completed his tasks. He testified Petitioner was brought in to do painting, which was corroborated by the payment stubs (RX 2) and the payment screens (PX 6). He testified Petitioner could have rejected work and he still would have been offered jobs, and that Petitioner could have had concurrent employment while working for him. Mr. Schwager testified contractors would secure work via a bidding process, which Mr. Kowalski testified he witnessed happening between Petitioner and Respondent. He testified Petitioner was paid at the end of a job, which appears to be corroborated by the payment screens showing payments not made on a weekly or bi-weekly basis. Mr. Schwager also testified Petitioner would be paid the bid amount, regardless of whether he actually worked more or less hours than he bid.

The Arbitrator also notes Mr. Schwager's testified regarding the employment status for a civil claim (PX 5), throughout which Mr. Schwager maintained Petitioner was an independent contractor, despite the fact such testimony would have been against his interests in that case as owner of Defendant. The Arbitrator also finds Mr. Kowalski and Mr. Phillips were independent contractors based on their testimony regarding relevant factors, and the Arbitrator does not believe Petitioner would be the only employee of Respondent.

Based on the above testimony, the Arbitrator finds Petitioner was an independent contractor and was not an employee of Respondent. As such, Respondent did not sustain injuries which are compensable under the Workers' Compensation Act.

Regarding issue (C), whether an accident from an employment-related or neutral risk occurred that arose out of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Additionally:

Even assuming, *arguendo*, Petitioner was an employee, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment. Petitioner bears the burden of proving that his injury both occurred in the course of his employment and arose out of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). The fact that an injury occurred at Petitioner's workplace is not dispositive as it does prove the injury "arose out of" Petitioner's work activities. Instead, the arising out of question addresses whether "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003). There are three types of risk: employment-related, neutral and personal. Employment related risks exist when Petitioner is performing a task he was instructed to perform by the employer, one he had a common law or statutory duty to perform, or one the employer might reasonably expect Petitioner to perform incident to his assigned duties. The Arbitrator finds Petitioner's injury did not arise out of an employment-related risk given he was never assigned any work that required cutting wood, nor did his employer expect Petitioner, as a painter, to cut wood, especially given Petitioner had no specific training in carpentry.

The Arbitrator notes there is a significant discrepancy in the testimony regarding Petitioner's job duties. The Arbitrator finds Petitioner's testimony was not credible for the reasons laid out above. The Arbitrator finds Petitioner was hired to do painting and general labor, and was not hired to do carpentry. None of the witnesses, Petitioner included, testified the jobs of painting and general labor required the use of a miter saw. Instead, Petitioner testified he was hired to do carpentry, despite the fact he had no expertise in this field, unlike Mr. Kowalski, who was a former labor union employee. The Arbitrator also relies of the testimony of Orian Phillips, who testified he was brought in to the job after Petitioner's injuries. Mr. Phillips testified he never had to use the saw to complete the tasks Petitioner had been hired to do. Similarly, Mr. Kowalski testified he was hired to do the carpentry work, and did not ask Petitioner for help. He testified that if he ever needed help, he would bring one of his sons in to assist him, which Petitioner testified was also the case. Mr. Kowalski and Mr. Schwager both testified they did not believe Petitioner had any special training in carpentry work. The Arbitrator therefore does not see any reason Mr. Kowalski would have asked Petitioner to assist Mr. Kowalski or would have been hired to do any carpentry work. The Arbitrator notes the memo line in most checks contained "Bill's Painting", but none included anything about carpentry. For all these reasons, the Arbitrator finds Petitioner was not hired to do carpentry work, that he had no common law or statutory duty to perform carpentry work, and that Respondent had no reasonable expectation Petitioner would do carpentry work. As such, Petitioner's injuries did not arise out of an employment-related risk.

The next question is whether Petitioner's risk was neutral or personal. A neutral risk is one which has no particular employment characteristics, but is instead incidental to Petitioner's employment. The Arbitrator does not find this risk to be neutral as it is not a risk to which the general public is exposed. The Arbitrator again notes Petitioner had no valid reason for using the saw for any work-related purposes, and thus use of the saw was not even incidental to his employment.

The Arbitrator instead finds Petitioner's injuries arose out of a personal risk, and thus the injury is not compensable. In this regard, the Arbitrator notes the Petitioner's explanation of the accident was not credible for any legitimate use of the miter saw based on the description of the miter saw and demonstration of its use at trial. Petitioner testified he was cutting wood and the blade, which he testified was old and dull, stuck in the wood and pulled him forward. Petitioner testified he then reached out his left arm to protect his chest. Mr. Schwager testified the saw only turned on when someone pressed their thumb down on a button on the handle/lever, and he testified, undisputed, that the blade stopped immediately when the thumb released the button, as an emergency brake system. Mr. Schwager and Mr. Kowalski both testified the blade cover was on the blade on October 9, 2013, and both testified that lifting or removing the cover would not affect the speed in any way. The Arbitrator agrees with this testimony based on his examination of the saw, noting the blade cover automatically lifts when the blade is brought down to the wood. The Arbitrator also notes there is a backstop behind the wood which would prevent it from being thrown backwards, as Petitioner claims occurred. As the wood could not be thrown backward, Petitioner could not be pulled forward toward the blade.

The Arbitrator notes the saw held a 12-inch blade, which would mean 6 inches in diameter on the cutting end, and Petitioner was cutting a piece of wood 3 inches thick. The Arbitrator does not believe Petitioner could have brought his arm from holding the piece of wood, which would have been 3 inches in front of the blade, back around behind his chest and in front of the blade in less time than it took to remove his thumb from the emergency brake. The Arbitrator also notes Mr. Schwager and Mr. Kowalski testified the saw was fairly new on October 9, 2013, and thus does not believe the blade in question was dull. Finally, the Arbitrator notes the saw was present in the hearing room and Petitioner had a chance on rebuttal to demonstrate how his injury occurred, which the Arbitrator encouraged him to do, yet refused to do so. For all these reasons, the Arbitrator does not find Petitioner's explanation of the accident possible, and does not find Petitioner credible.

Based on the above, the Arbitrator finds Petitioner finds the testimony of Mr. Schwager, Mr. Kowalski and Mr. Phillips credible, and finds Petitioner was hired to do painting and clean-up work, none of which required use of the miter saw. The Arbitrator finds Petitioner was not employed to do any carpentry work, nor was he asked on to do any carpentry work or wood cutting on October 9, 2013. As wood cutting was not part of the job for which Petitioner was hired, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Regarding issue (C), whether Petitioner was intoxicated to an extent he was considered no longer in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

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Additionally:

Petitioner bears the burden of proving his injury occurred in the course and scope of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An employer may raise a defense of intoxication, though intoxication itself is not a complete bar against compensability. Instead, the employer must show that either (1) the intoxication was the sole cause of the employee's injury or (2) the intoxication was so excessive as to constitute a departure from the course of the employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468 (1989). A decision on compensability is one of fact, which involves a number of factors, and the Arbitrator notes neither the Workers' Compensation Act, the Commission nor the Appellate Courts have found a blood test necessary for an intoxication defense.

One way in which an employer can prove intoxication is by showing a significant difference in behavior before and after the intoxicating activity. Mr. Kowalski testified he was the first person to arrive on October 9, 2013. He testified Petitioner arrived a while later, likely around 8:30 or 9:00, at which time Mr. Kowalski and Petitioner had a short conversation. Mr. Kowalski testified Petitioner, during this conversation, was speaking in a normal tone, was standing normal, and did not look impaired in any way. Mr. Kowalski testified that after their conversation, Petitioner went to a corner of the garage, crushed up a pill, and snorted the pill. Mr. Kowalski testified Petitioner's eyes looked glassy after Petitioner snorted the pill, and that Petitioner started slurring his words. He testified Petitioner started swaying and stumbling, to the point he almost hit Mr. Kowalski with his head.

The Arbitrator notes Mr. Kowalski testified before Petitioner given he was deposed before the trial, and that Petitioner had an opportunity to respond to and deny the accusation he took drugs prior to the accident. The Arbitrator finds it compelling Petitioner never denied Mr. Kowalski's testimony that he crushed and snorted the pill, either during his case in chief or on rebuttal. As such, the Arbitrator finds the testimony of Mr. Kowalski to be undisputed and therefore accepts the factual basis of his testimony. The Arbitrator also notes Mr. Schwager testified he requested a blood test be done at the hospital, but that the hospital staff informed him Petitioner had already been given pain medications and it would therefore be impossible to determine what was in his system before the accident. The Arbitrator finds this claim is corroborated by the EMT records showing Petitioner was given pain medications in route to the hospital. The Arbitrator also notes the initial hospital records showed Petitioner had a medical history of drug abuse, and that the last medical record in the file is a drug test in which Petitioner tested positive for cocaine and another unprescribed medication. For all these reasons, the Arbitrator finds Mr. Kowalski's testimony regarding Petitioner's drug use more probable than not.

The Arbitrator also finds Petitioner's drug use either was the sole reason for Petitioner's injury or at least constituted a departure from the course of the employment. The Arbitrator finds, for reasons discussed above, Petitioner had no reason to use the saw as part of his employment, and that Petitioner's explanation for how his accident occurred does not make sense based on the demonstration of how the saw is used. The Arbitrator notes that the mitre saw present in the hearing room at trial, the Petitioner was invited to give a demonstration of how the accident occurred and declined to do so. The mechanism of injury remains a mystery. The Arbitrator ttherefore finds the

only way Petitioner could have injured himself as he did was because of his intoxication or intentionally operating the saw in an improper manner. The Arbitrator does not find Petitioner's testimony regarding the blade guard being taped up credible. He therefore can find no explanation for why the blade guard, which only raises a couple inches when the blade goes down, and would not expose the chest to the blade in any way, would not have protected Petitioner's arm from the blade if the accident happened as Petitioner alleges. The only reasonable inference to draw from the evidence presented is that Petitioner was intoxicated while using the miter saw or intentionally using the saw in an improper manner so much so that he was no longer in the course and scope of his employment.

Regarding issue (F), whether Petitioner's current condition of ill-being is causally related to Petitioner's work activities on October 9, 2013, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's condition of ill-being is not causally related to Petitioner's work activities on October 9, 2013.

Regarding issue (G), Petitioner's earnings in the year preceding October 9, 2013, the Arbitrator finds as follows:

The Arbitrator notes the only evidence in the claim regarding wages aside from testimony of witnesses was the wage information Petitioner himself entered as Petitioner's exhibit 6. The Arbitrator notes the wage information indicates, at the top, that it includes all payments made from January 2013 through December 2015. No ruling is made on this issue. The Arbitrator finds that Petitioner was an independent contractor, not an employee.

Regarding issue (J), whether medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, nor that Petitioner sustained an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's did not incur any medical bills for which Respondent is liable.

Regarding issue (K), whether Petitioner is owed any TTD benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Respondent does not owe any TTD benefits as a result of Petitioner's activities on October 9, 2013.

Regarding issue (L), whether Petitioner is owed any nature and extent benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner is not entitled to any nature and extent benefits as a result of his activities on October 9, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☒ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DELLA DOWNING,

Petitioner,

20IWCC0657

vs.

NO: 11 WC 9902

DELNOR COMMUNITY HOSPITAL

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits, nature and extent, maintenance, and permanency and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission vacates the award of maintenance and strikes paragraph 2 of the Order section of the Arbitrator's Decision.

Additionally, the Commission replaces paragraph 3 of the Order section of the Arbitrator's decision with the following:

> Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.
>
> Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this

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credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Lastly, the Commission strikes paragraph 4 of the Order section of the Arbitrator's decision and replaces it with the following:

Respondent shall pay Petitioner permanent total disability benefits of $1,080.12 per week commencing on January 20, 2016, as provided in Section 8(f) of the Act. Commencing on the Second July 15th after the entry of this Award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act. Respondent shall pay Petitioner compensation that has accrued from January 20, 2016 through June 8, 2018.

Regarding page 6 of 22 of the Arbitrator's decision, the Commission strikes the second sentence of the first paragraph. Referring to page 17 of 22 of the Arbitrator's decision, the Commission strikes the last paragraph of Section (J) in its entirety, and replaces it with the following:

Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.

Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Referring to the last paragraph under Section (K) at page 19 of 22 of the Arbitrator's decision, the Commission strikes the last two sentences of said paragraph. The Commission also strikes page 22 of the Arbitrator's decision.

Lastly, in the fourth sentence of the last paragraph at page 13 of 22 of the Arbitrator's decision, the Commission corrects a scrivener's error and revises "board-based" to "broad-based".

Petitioner met her burden of proving that her current condition of ill-being regarding her cervical spine is causally related to injuries sustained in the work accident of August 29, 2010, and that this condition has rendered her permanently and totally disabled.

The award of permanent total disability is supported by a consistent and continuing course of treatment relating to Petitioner's cervical spine from the time of the initial 19(b) hearing on June 9, 2011, through the date of trial. The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies.

Following the 19(b) hearing, Petitioner continued treating with her neurosurgeon, Dr. Brayton, for her cervical spine condition (Px1), and at various pain clinics. (Px2, Px5, Px10) Petitioner continued these visits up through the date of trial. (Px10)

In February 2012, Petitioner underwent another cervical MRI, the prior one having been performed on February 9, 2011. The MRI study of the cervical spine performed on February 16, 2012 revealed: "the posterior disc protrusion at C5-C6 is slightly more broad-based with the presence of an annular tear." (Px2)

On March 2, 2012 Dr. Brayton reviewed the MRI results and noted "the slight progression in the C5-C6 along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal spine tenderness..." (Px1) However, as Dr. Brayton observed other findings requiring further explanation, he referred Petitioner to Dr. Santwani, a neurologist, for further testing.

In March 2012, Dr. Santwani diagnosed the Petitioner with multiple sclerosis. Significantly, Dr. Santwani also noted Petitioner's increased neck pain and arm paresthesias. (Px4) Petitioner makes no claim that her multiple sclerosis or treatment for same is related to the August 29, 2010 work accident.

Although Petitioner missed some of her appointments at the pain clinic between March and October 2012, she consistently continued to complain of neck and arm pain. By December 31, 2012, Petitioner was presenting with continued pain, worse in her neck and shoulders. (Px2) Through mid-2013 Petitioner continued to voice complaints and received treatment at the pain clinic for same. (Px2)

On May 28, 2013 Petitioner underwent an EMG/NCV of the upper extremities. This was an abnormal study indicating acute C5 radiculopathy on the right and C6 radiculopathy on the left. (Px4)

On May 30, 2013 Petitioner began treating at the pain clinic at Kishwaukee Hospital for chronic neck pain. History reflects the "pain began in August 2010 when she was lifting a patient." (Px5) She treated with Dr. Gregory Arnold at the clinic through 2013. (Px5) He diagnosed Petitioner with cervical radiculopathy, fibromyalgia syndrome and prescribed opioid therapy along with cervical trigger point injections. (Px5)

By the end of 2013, Petitioner switched pain management clinics as her insurance would no longer cover visits to Dr. Arnold and she began treating with Dr. Todd Hagle.

On December 26, 2013 Petitioner was seen by Dr. Hagle whose diagnosis included

chronic neck pain and at which time he noted "she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this." (Px10) Petitioner continued to see Dr. Hagle on a monthly basis with complaints of pain in her neck and into her arms ranging from 8/10 to 10/10. (Px10)

On February 10, 2014 Petitioner complained of pain in her neck, shoulders and arms. She noted the pain was "severe, chronic and disabling." (Px10)

An updated cervical MRI performed on February 25, 2014 revealed persistent multi-level degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annular tear as well as right paracentral C5-C6 disc protrusion. (Px1)

In August 2014 Dr. Brayton related Petitioner's "severe, unremitting neck pain and cervicogenic headaches" to the work injury. (Px1)

A repeat cervical MRI performed on August 1, 2014 revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (Px7)

On October 22, 2014 Petitioner underwent provocative discography ordered by Dr. Brayton resulting in a positive provocation discogram at C4-C5 and C5-C6. (Px8)

On December 29, 2014 Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Throughout 2015 Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications. (Px10)

On December 29, 2014 Dr. Neil Allen conducted a medical records review at the Respondent's request. He did not examine Petitioner on this date. Although Dr. Allen opined Petitioner's current state of ill-being was related to multiple sclerosis, even he related Petitioner's upper extremity pain and in the back of her neck to the work injury. (Rx1)

On February 12 ,2015 Dr. Brayton met with Petitioner to review the results of the provocative discogram, the last MRI and to discuss further treatment options.

At the time of this visit, Dr. Brayton noted Petitioner had sustained a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic changes at C4-C5 and C5-C6. (Px1) Dr. Brayton also noted Petitioner had been diagnosed with multiple sclerosis and had dysesthetic pain in both the lower and upper extremities. (Px1) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6 with a negative control level at C6-C7. The MRI revealed a progressive large, broad-based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which had progressed since her last imaging study. (Px1) There was also an increase in the annular bulge and ventral CSF effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5.

(Px1)

In terms of future treatment, among options discussed were surgical intervention involving a C4-C5 anterior cervical decompression and fusion including the risk of accelerated spondylitic changes at C6-C7. (Px1) Petitioner chose to defer surgery and continue with pain management.

On February 26, 2015 Petitioner was evaluated by Dr. Allen at Respondent's request. Dr. Allen included the "cowl-like discomfort she has over her shoulder" as part of Petitioner's current state of ill-being. (Rx1) Dr. Allen also conceded that the decrease in pin-prick to both upper extremities and the cowl of her shoulders was consistent with Petitioner's work injury. (Rx1, p. 73) Dr. Allen also referenced a cervical MRI Petitioner underwent specifically indicating an early annular tear at C4-C5 which he testified explained neck pain. Dr. Allen also testified annular tears are very painful and some people are actually confined to bed with annular tears. (Rx1, p. 23) Dr. Allen also acknowledged that he never reviewed the discogram of Petitioner's cervical spine as he didn't understand them, was never trained in them and has a hole in his knowledge. (Rx1, pp. 88-89)

On January 21, 2016 Petitioner saw Dr. Brayton who noted Petitioner "continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain and cervicogenic headaches." Dr. Brayton opined these conditions were caused by her work accident on August 29, 2010 and were conditions distinct from her multiple sclerosis. (Px1)

Dr. Brayton further noted cervical disc herniation persists at C5-C6 and had not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (Px1) Disc disease was noted at the C2 through C4 levels which he deemed permanent. (Px1)

Overall, it was Dr. Brayton's opinion that Petitioner had a permanent disc injury at C5-C6. Considering Petitioner's concurrent multiple sclerosis diagnosis, Dr. Brayton was not in favor of surgery given the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the cervical fusion needed at C5-C6. (Px1) Dr. Brayton cautioned that surgery remained a future potential need but presently, he would advocate against surgery.

Dr. Brayton further indicated Petitioner would require "comprehensive and procedural pain management, chronic pain control and permanent disability as a consequence to her injury." (Px1)

Dr. Brayton determined Petitioner was "permanent disability" and issued a script dated January 21, 2016 indicating "permanent work restrictions of no lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent." (Px1)

In May 2016 Petitioner underwent a second Section 12 exam by Dr. Martin Herman at Respondent's request. Dr. Herman opined Petitioner sustained a disc herniation as a consequence

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of the August 29, 2010 accident but it had been effectively treated and she was at maximum medical improvement subsequent to her return to work with restrictions issued by Dr. Brayton. He further opined that in May 2016 Petitioner was *not* capable of returning to work but related same to the multiple sclerosis and not the work-related injuries. (Rx2, pp. 47-48, 60)

Dr. Herman failed to review films of the MRIs Petitioner underwent on February 16, 2012, May 5, 2013, August 1, 2014, January 21, 2015 and December 3, 2015, and the discogram performed on August 20, 2014. (Rx2, pp. 30-31) Dr. Herman also acknowledged that Petitioner's condition was multi-factorial. (Rx2, p. 43)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2016, 2017, and 2018. (Px10) She has continued to complain of neck pain radiating into her arms, as well as tingling and numbness. (Px10)

An accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003) *citing Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d 123, 127 (1967).

Notwithstanding Petitioner's ability to return to restricted work at various times subsequent to the work accident, Petitioner's work-related cervical condition continued to gradually worsen both in terms of the severity of her symptoms and as confirmed by multiple diagnostic tests.

Given the totality of the evidence, the Commission finds Petitioner's work-related cervical spine condition was a contributory cause in rendering her permanently and totally disabled. The Commission further finds Petitioner was permanently and totally disabled commencing on January 21, 2016 based on Dr. Brayton's opinion of permanent disability rendered on said date.

Additionally, the Commission vacates the award for maintenance benefits. Having found Petitioner was permanently and totally disabled effective January 21, 2016, the issue of Petitioner's entitlement to maintenance benefits subsequent to that date is moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for a period of 169 1/7 weeks, commencing June 10, 2011 through August 11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2014 through January 20, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for life commencing on January 20, 2016, as provided in §8(f) of the Act, for the reason that the injuries sustained caused the Petitioner to be permanently disabled. Commencing on the second July 15th after the entry of this award, Petitioner may

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become eligible for cost-of-living adjustments, paid by the rate adjustment fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 12 2020

Maria E. Portela

Thomas J. Tyrrell

MEP/dmm
O:091520
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Dissent

I respectfully dissent from the majority. I would find that Petitioner has not sustained her burden of proving that she is permanently and totally disabled as a result of her August 29, 2010, accident. Rather, Petitioner's permanent total disability is because of her progressive multiple sclerosis (MS) disease, diagnosed after her work-related accident and after she had returned to work as a registered nurse. While I empathize with Petitioner's suffering, for the following reasons I would award permanency on the basis of §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7 with permanent restrictions.

Prior §19(b) Hearing and Award

Before the work accident of August 29, 2010, Petitioner underwent a cervical spine MRI on January 22, 2010, and was diagnosed with neck pain and right cervical radiculopathy secondary to a herniated disc at C5-C6 for which she treated with Dr. Brayton, a neurologist, and Dr. Cherala, in Respondent's pain management clinic. (ArbX2, 1, PX1) After a §19(b) hearing, the Arbitrator deemed the August 29, 2010, accident resulted in: 1) an *aggravation* of a pre-existing herniated disc at C5-C6; and 2) a new disc herniation at C6-C7. (ArbX2, 4) (emphasis added)

The Arbitrator's §19(b) Decision notes that Petitioner underwent a cervical MRI on February 9, 2011, at Dr. Brayton's recommendation, to determine whether the C5-C6 herniation had worsened. "The radiologist's impression was that there was little change from the previous MRI *with the possible slight decrease in size of the C5/6 right disc herniation.*" (ArbX2, 2) (emphasis added)

The Arbitrator's §19(b) Decision further notes Dr. Butler's second IME of Petitioner on February 17, 2011, which states, "[t]he MRI finding *had actually improved to some degree.* Her symptoms were primarily subjective in nature and there was no objective neurologic deficit." (ArbX2, 3) (emphasis added) In the §19(b) award, the Arbitrator noted the improvement detected by the cervical MRI of February 17, 2011, most notably at C5-C6.

The Arbitrator awarded physical therapy (P.T.) as reasonable medical treatment and specifically denied the epidural steroid injection (ESI) that Dr. Brayton recommended concluding that, "Petitioner failed to prove the ESI prescribed by Dr. Brayton are (sic) reasonable and necessary medical treatment. However, she has not reached MMI and is entitled to further treatment with Dr. Brayton....Dr. Brayton has prescribed P.T., which is reasonable treatment for Petitioner's exacerbation." (ArbX2, 4-5)

The §19(b) Decision was appealed to the Commission where it was later affirmed and adopted. (ArbX2)

Post §19(b) Medical Treatment and Return to Work

After the §19(b) award, Petitioner called Dr. Brayton on August 1, 2011, and requested a release to return to work. Dr. Brayton imposed work restrictions of no lifting greater than 10 pounds, and to avoid excessive pushing and pulling. (PX1) On August 10, 2011, Petitioner saw

Dr. Yang at Delnor for pain management to obtain a repeat ESI, despite the Arbitrator's denial of the ESI. (PX2) Dr. Yang reviewed the MRI from February 9, 2011, and noted a "C6-7 minimal disc bulge." There is no evidence that Petitioner ever attended the P.T. awarded by the Arbitrator intended to address her cervical issues.

Petitioner began working full-time as a nursing supervisor at Loretto Hospital on August 12, 2011. (T, 25-26)

Petitioner returned to Delnor pain management clinic on October 21, 2011, and saw Dr. Hanna where Petitioner's past medical history was positive for migraines, chronic neck and back pain, chronic bronchitis, DVT, asthma, sleep apnea, IBD, Crohn's disease, hypothyroidism, anxiety/depression, ADD, obsessive-compulsive disorder, fibromyalgia, and endometriosis. (PX10, 10/21/11). Review of systems on that same day reflects that Petitioner complained of some nausea, stress incontinence, and joint swelling. Dr. Hanna noted only her pre-existing cervical disc at C5-C6 on the right side, omitting any reference to the C6-C7 level. Dr. Hanna found that a large segment of her pain is also myofascial related. Thus, he administered trigger point injections to the bilateral levator scapular muscles. (PX2)

On November 9, 2011, Petitioner saw Dr. Hanna for an ESI and medication management. Dr. Hanna administered a cervical ESI at C7-T1 and trigger-point injection to her bilateral levator scapular muscles. On December 12, 2011, Dr. Hanna administered additional trigger-point injections at the same level. Dr. Hanna noted a new diagnosis of "Abnormal neurologic examination with clonus. And Dysphagia."

Petitioner continued working full-time as a nursing supervisor for Loretto Hospital. On February 15, 2012, Dr. Hanna noted Petitioner's dysphagia has been increasing, and she had to bend her head forward or tuck her neck to swallow and that Petitioner has an abnormal neurologic exam with clonus. Dr. Hanna recommended a repeat cervical MRI and administered trigger point injections. (PX2)

Petitioner underwent the cervical spine MRI scan on February 16, 2012. The findings at C5-C6 were as follows:

> "There is a posterior disc osteophyte complex an associated right paracentral small posterior disc protrusion. The overall posterior extent of this disc protrusion *has not significantly changed* although there is slight broadening at the base of the protrusion and presence of an annular tear now identified. Mild effacement of the ventral CSF space is again noted. There is slight right facet degeneration resulting in minimal thinning of the right neural foramen, stable." (PX2) (emphasis added)

The radiologist's impression states: "The posterior disc protrusion and at C5-C6 *is slightly more broad-based on the current exam than when compared to previous although the posterior extent of the protrusion is stable. Remainder of findings are unchanged.*"(PX2) (emphasis added)

Dr. Brayton authored a letter to Dr. Branshaw, Petitioner's PCP, dated March 2, 2012. He notes that she "[h]as an extensive history of pain and radicular symptoms after a work related

injury of her neck causing a C5-C6 disc herniation on August 29, 2010. ... concerning symptoms of swallowing dysfunction, increasing spasticity of her upper and lower extremities especially noted in her lower extremities.... There is also hyperreflexia at the patellar tendon including crossed adductor reflexes and distribution of reflexes. There is an exaggerated wrist extensor reflex as well as brachioradialis reflex in the upper extremities, again with distribution of reflexes. There is sustained clonus bilaterally. There is also Babinski sign." (PX1)

Dr. Brayton advised the cervical spine results showed, "the *slight* progression in the C5-C6 (disc) along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her focal spine tenderness but it certainly does not explain her pathologic reflexes, hyperreflexia, clonus, and Babinski signs. There is no evidence of intrinsic cord lesion on the presented cervical MRI scan, but I am concerned that *she has evidence of diffuse upper motor dysfunction.*" (PX1)

Dr. Brayton further wrote, "In summary, the patient's neck pain may be explained by the *relatively modest changes* of the C5-6 disk herniation which does not exert any further compression of the neural elements combined with the facet disease at C5-6 and C6-C7, but it certainly does not explain the patient's rather concerning finds consistent with diffuse upper motor dysfunction." (PX1) (emphasis added)

On March 2, 2012, an MRI of the brain confirmed a brain lesion at the right aspect of the pons and loss of the surrounding white matter material around the brain stem. Thereafter, on March 30, 2012, a spinal tap and lumbar puncture ordered by Dr. Santwani was performed because of the brain lesion, or abnormal mass in Petitioner's brain, the clonus and the increased reflexes. The spinal tap confirmed multiple abnormal bands consistent with a clinical diagnosis of MS. (RX1, 19-21, PX4)

During this work-up that diagnosed MS, Petitioner continued working full-time as a nursing supervisor. However, Petitioner was terminated from her position at Loretto Hospital for labor/union reasons unrelated to her physical condition on May 20, 2012. Petitioner testified that she continued to look for work in the nursing field. (T, 26, 33) The fact that the Petitioner was still looking for work at this juncture shows the work injury did not disable Petitioner from working at that time, and further, that her work-related condition was stable and not worsening.

On August 23, 2012, Petitioner advised Dr. Brayton she wanted to return to work and requested new, more lenient restrictions. Dr. Brayton assigned restrictions of lifting 50 pounds frequently and 100 pounds occasionally. (T, 31) Petitioner testified that essentially if she went into the doctor and said, "I feel like I can do this" they were willing to adjust her restrictions so she could take a job she located. (T, 66)

Petitioner underwent an EMG/NCV some nine months later, on May 28, 2013, which showed "evidence of a *trace*, acute, C5 radiculopathy on the right and a *mild,* acute C6 radiculopathy on the left. There is no definitive electrophysiological evidence of a brachial plexopathy or peripheral neuropathy affecting the upper extremities at this time." (PX4) (emphasis added) This is at the level of Petitioner's pre-existing C5-C6 disc herniation, and the findings are

the same or similar to the EMG/NCV of October 20, 2010. These objective tests do not explain Petitioner's ongoing symptoms and complaints.

In 2013, Petitioner applied for Social Security Disability Insurance (SSDI) benefits. (T, 67)

Petitioner began working full-time as a float nurse on September 9, 2013, at DuPage Convalescent Center. (T, 18) Petitioner continued to work until January 5, 2014, at which time Dr. Santwani provided an off-work slip excusing Petitioner from work through January 9, 2014, citing a flare-up of her MS condition or from multiple falls. Dr. Santwani further excused Petitioner from work on February 23, 2014, February 26, 2014, and February 27, 2014, and February 23 through March 9, 2014, again for flare-ups of her MS condition, or from multiple falls. No off work slips were related to her work-related cervical condition. (PX4, work status notes)

On February 25, 2014, Petitioner underwent a cervical MRI which showed her objective results were unchanged from previous scans. By that time, however, Petitioner was exhibiting symptoms of left foot drop. According to Dr. Allen, absent lumbar spine disease, which was confirmed by MRI on February 25, 2014, the lesion causing this symptom had to be above that level, at the neck or in the brain. In fact, she had findings both in the neck, but particularly in the brain, that would explain the foot drop. (RX1, 25)

Dr. Santwani released Petitioner to return to light duty work on March 12, 2014, after an MS flare-up. Petitioner was released to return to work *with no* restrictions on March 13, 2014. (PX4) (emphasis added) Thereafter, on March 30, 2014, April 2, 2014, and April 3, 2014, Dr. Santwani excused Petitioner from work after multiple falls attributable to her MS and unrelated to her cervical condition. She also received an off work note from Dr. Santwani on April 5 and April 6, 2014, again for MS exacerbation and severe falls. (PX4) On April 21, 2014, Petitioner reported to Dr. Santwani that she was hospitalized for an MS flare up. Petitioner reported that her legs were weak, she reported frequent falling and memory problems, increased dysphagia and choking on liquids, her vision was blurred, and her body was weak with generalized pain. (PX4)

Petitioner testified that she was terminated from her position at DuPage Convalescent Center in May 2014, "for missing work for medical reasons." When asked if she missed work because of issues regarding her cervical spine, Petitioner testified that she did. (T, 32) However, Dr. Santwani's off-work notes from January, February, March, and April 2014, indicate Petitioner missed work because of MS flare-ups or falls and not the work-related cervical condition. (PX4))

Petitioner testified that she looked for work in nursing management thereafter until she was awarded SSDI benefits in 2015. (T, 71) Petitioner never looked for work after her award of SSDI. (T, 67)

Petitioner had not seen Dr. Brayton in two years, since he wrote Dr. Branshaw in 2012 and referred her to Dr. Santwani at that time. On August 19, 2014, however, Petitioner returned to Dr. Brayton. After reviewing the August 1, 2014, cervical MRI, Dr. Brayton advised Dr. Branshaw that the continued herniation at the C5-C6 level *has not progressed much* and does not significantly compress the neural elements and suggested a provocative discography of the cervical spine both

at the C5-6 level and control levels. (PX1) He did not mention the disc at C6-C7. Dr. Brayton saw Petitioner only two more times, on February 12, 2015 and on January 21, 2016.

Petitioner underwent a discogram at Kendall Pointe Surgery on October 22, 2014. The discogram report states, "[a]t both the C4-C5 and C5-C6 discs, the patient experienced posterior bilateral cervical pain. (PX8) The pain experienced was equal at both levels. At the C6-C7 disc, the disc appeared normal, and no pain was produced." (PX8) On February 12, 2015, Dr. Brayton reviewed the discogram.

On December 2, 2014, Dr. Santwani ordered a functional capacity evaluation (FCE) to assess Petitioner's capabilities at that time. Petitioner never underwent the FCE to quantify her work capabilities.

Before trial, on March 28, 2018, Petitioner underwent another cervical MRI. The radiologist's impression states, "small central protrusion of the disc at C2-3 and C5-6 contributing to mild central stenosis; 2) multilevel degenerative disease of the cervical spine; 3) no abnormal signal or enhancement of the visualized spinal cord."

Dr. Allen's Medical Opinion

Petitioner was seen by Dr. Neil Allen at Respondent's request pursuant to §12. Dr. Allen authored two reports dated December 29, 2014, and February 26, 2015, and testified via evidence deposition on August 10, 2015. Dr. Allen is board certified in both internal medicine and neurology but also published and involved in presentation and research of MS for 15-20 years. (RX1, 8-9) He testified that he reviewed Dr. Brayton's medical records from 2002 noting that seven years prior to 2003, Petitioner was kicked in the head during a soccer game and had migraine type headaches including in the back of her head. (RX1, 15, 84) Dr. Allen reviewed the August 29, 2010, cervical MRI and confirmed the only new finding was the C6-C7 diffuse disc bulge. (RX1, 16)

Dr. Allen agreed with Dr. Brayton's assessment of her symptoms and that the February 16, 2012, cervical MRI showing that the C5-C6 protrusion was slightly more broad-based than on earlier examination and that the "MRI didn't explain her increased reflexes and clonus in her legs, difficulty walking, and problems swallowing." (RX1, 19) An MRI of the brain was performed on March 2, 2012, which showed a brain lesion at the right aspect of the pons which turned out to be a demyelinating area, an area of local inflammation, and loss of the surrounding white matter material around the nerves of the actual spinal—of the actual brain stem itself, consistent with MS. (RX1, 20) She underwent a spinal tap or a lumbar puncture because of the clonus in her ankles, the abnormal mass in the brain and increased reflexes. The puncture showed multiple abnormal bands, consistent with MS. (RX1, 21)

Dr. Allen opined that Petitioner's falling was from the lesion noted in the pons of the brain. Her increase in memory problems could be from the narcotic medications; the difficulty swallowing was likely from the lesion in the pons as was the occasional choking on liquids. Petitioner's problems finding words and lack of coordination were from narcotics and the MS. (RX1, 27-28, 34)

Dr. Allen also testified that lesions in the brain can be caused by the MS, migraines and encephalitis. (RX1, 37) Petitioner's hyperreflexia was caused by interruption in the transmission of impulses from the brain stem spinal cord to lower extremities. It is a manifestation of MS, the tumor, and a vitamin B-12 deficiency, which Petitioner had in the past. (RX1, 38) There was no evidence of myelomalacia (spinal cord damage) or spinal cord compression. The physical examination of February 26, 2015, revealed Petitioner complained of migraines dating to 1995 when she suffered a Grade 2 concussion. (RX1, 41-42, 84).

Dr. Allen's impression after the February 2015 examination was that her current condition of ill-being appeared to be a loss of balance, increased frequency of headaches, occurring two to three times a week, and the cowl-like discomfort she has over her shoulders secondary to the cervical spine injuries that have been previously adjudicated. It was his opinion that none of the conditions of MS, hyperreflexia in her legs or fibromyalgia were related to the work accident. (RX1, 50) He opined any work restrictions that she has at this time would be related to migraines and would not be related to her work accident. (RX1, 52)

Dr. Allen opined the only symptoms related to her work injury, were "[p]ain in her neck, pain in her arm, any numbness or weakness that she had in her upper arm as found by other examiners which I did not go into since that information had already been adjudicated." (RX1, p. 53) No lower extremity findings, headaches, intermittent and episodic dizziness, light sensitivity, sound sensitivity, nausea, her gait, spasticity of her lower extremities, weakness, lack of attention, and difficulty with memory are related. (Rx1, 53-56)

When asked if Petitioner was capable of working with regard to her injury which had been adjudicated in the §19(b) hearing, Dr. Allen opined that, "[i]t was documented that she returned to work subsequent to her neck injury in 2010, and she returned to work in 2011. She was performing her full duties as a nurse at Loretto Hospital when she did, in fact, return to work and was also capable of exercising up to three time per week. (RX1, 56) Dr. Allen testified that on August 23, 2012, Dr. Brayton released Petitioner to return to work with restrictions of lifting 50 pounds and occasional lifting of up to 100 pounds, consistent with the duties of a registered nurse and he was in agreement with those restrictions. (RX1, 23, 88)

Dr. Brayton's Medical Opinion

On January 21, 2016, Dr. Brayton opined that Petitioner continued to be disabled by pain requiring high-dose analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches, caused by her work injury which is a separate condition from her MS. He also opined that Petitioner's MS was triggered by her work injury and disc herniation. Dr. Brayton further stated that the cervical disc herniation persists at C5-C6 and has not healed or improved but does not progress. Dr. Brayton described her disc disease at C2-3 and C3-4 levels that are unrelated to the August 29, 2010, work accident. He advocated avoiding surgery. Dr. Brayton provided one work status note that was handwritten that states, "Permanent work restrictions no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment-permanent. He also provided a hand-written note on a prescription pad that documents, "Permanent Disability."

Dr. Brayton never testified regarding his January 21, 2016, opinions.

Dr. Herman's Medical Opinion

Petitioner underwent a second §12 exam by Dr. Martin Herman, a neurosurgeon, at Respondent's request in May 2016. Dr. Herman testified that Petitioner has three ongoing problems: 1) a pre-existing condition of long-standing neck pain since 1995 with cervical degenerative disease; 2) the disc herniation (C6/7) that occurred in 2010; and 3) progressive neurological abnormalities due to her MS. The pre-existing disc disease and the herniated disc did not prevent her from working as a registered nurse. The symptoms from the MS would prevent her from returning to work as a registered nurse. (RX2, 42-43) Dr. Herman opined that her (C6-C7) disc herniation was very small according to her reports and it is not possible to attribute the large number of not associated symptoms and signs that she's having to this disc herniation because people with disc herniations do not get loss of coordination, blurry vision, memory loss, or the kind of weakness she's describing. (RX2, 43-45) Dr. Herman testified that a 50-pound and a 100-pound restriction at medium duty, roughly two years after her injury was completely reasonable in regard to her work-related condition. (RX2, 22) He found that Petitioner had reached MMI when she was returned to work with the restrictions Dr. Brayton imposed of 50-pounds and 100-pounds occasionally. Petitioner did not need additional treatment for her work-related condition. (RX2, p. 17)

Analysis and Conclusions

The majority finds that, "The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies." I disagree. The medical records show Petitioner's work-related condition was stable and this stable work-related condition did not prevent Petitioner from working. Also, the condition that was progressively worsening was her MS condition that Petitioner stipulated was not causally related to the work accident.

The sole new finding resulting from the work accident, the disc at C6-C7, was non-symptomatic. Moreover, the February 16, 2012, cervical MRI confirmed the pre-existing C5-C6 disc was almost completely stable and unchanged. Objectively, Petitioner's work-related conditions at C5-C6 and C6-C7 were stable some two years post-accident. Also, the May 28, 2013, EMG/NCV (6/8/18 Hearing, PX4) documents the same or similar results as the October 20, 2010, EMG/NCV. (6/29/11 Hearing, PX1)

Petitioner was able to return to work and did, in fact, return to work. Petitioner worked as a full-time registered nurse after the accident from August 12, 2011 – May 20, 2012. Shortly thereafter, in August 2012, Dr. Brayton updated his employability assessment imposing more lenient restrictions, 50-pounds frequently and 100-pounds occasionally. Petitioner was working from September 9, 2013 – January 5, 2014, until taken off by Dr. Santwani because of her progressively worsening MS symptoms that even required hospitalization. (PX4) Dr. Santwani's treatment from April 23, 2012, solely addressed Petitioner's progressing MS symptoms. The only condition that was progressively worsening both symptomatically and per the objective diagnostic studies was Petitioner's non-work-related MS condition not her work-related cervical condition.

It is noteworthy that only after the progressively worsening non work-related MS condition, did Dr. Brayton change her work restrictions and find she was unemployable.

The majority's reliance on *Sisbro* to award PTD benefits is misplaced. (citations omitted) The majority asserts that the Petitioner's cervical condition is a "contributing cause" to her permanent and total disability. It is the responsibility of the claimant to establish that he or she is entitled to permanent total disability benefits. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 IllApp.3d 1117, 1129, 864 N.E.2d 838, 309 Ill.Dec. 597 (2007). A claimant is required to establish the elements of his right to compensation under the Workers' Compensation Act. *Certified Testing v. Industrial Com'n.*, 305 Ill.Dec. 797, 856 N.E.2d 602, 367 Ill.App.3d 938 (2006). In order to establish entitlement to PTD benefits, a claimant must establish that she is incapable of performing services except for those for which there is no reasonable stable labor market because of the effects of the work injury. *Federal Marine.*

The Appellate Court in *Alano v. Industrial Commission* stated:

> [T]he focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability, and 'if an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, such employee is not totally and permanently disabled.' *Alano v. Industrial Com'n.*, 282 Ill.App.3d 531, 668 N.E.2d 21 (1996) citing *E.R. Moore Co. v. Industrial Com'n*. (1978), 7 Ill.2d 353, 361, 17 Ill.Dec. 207, 376 N.E.2d 206.

In this case, Petitioner's work-related medical disability is her cervical condition at C5-C6 and C6-C7. However, the C5-C6 disc was stable and did not prevent her from returning to work, albeit with restrictions, in 2011, 2012, 2013 or thereafter. In fact, Petitioner returned to work full duty at Loretto Hospital in 2011 until she was terminated in 2012, and also at DuPage Convalescent Center, until she was terminated in 2015. The condition of disability preventing Petitioner from gainful employment was the progressively worsening and debilitating non-work related MS condition. Petitioner has failed to show her work-related medical disability impaired her employability.

Dr. Brayton is the only doctor who opined that Petitioner is permanently and totally disabled as a result of the August 29, 2010, work injury. Dr. Brayton's credibility is tainted for a multitude of reasons. First, he allowed the Petitioner to dictate her work restrictions on multiple occasions. Second, Dr. Brayton did not testify and thus never provided the basis for his opinion, that the aggravation of a pre-existing herniated disc at C5-C6, which was stable or smaller on the cervical MRI on February 10, 2011, caused Petitioner's permanent disablement. Finally, Dr. Brayton's opinion on Petitioner's employability regarding her cervical spine restrictions, lacks foundation, and the purview of that opinion belongs to a certified vocational counselor. The Appellate Court specifically rejected a medical opinion regarding an injured employee's employability in *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 865 N.E.2d 342 (2007). In *Westin,* the court held:

> As far as we can tell, Dr. Coe had not ordered or reviewed any vocational or rehabilitative tests, conducted a labor-market survey on claimant's behalf,

> attempted to find claimant a position within his restrictions, or prescribed a functional capacity evaluation. In fact, Dr. Coe acknowledged on cross-examination that he never reviewed a job description for claimant's position, that claimant only told him "in general in his limited way" what his job duties entailed, and that he never ordered any vocational evaluation of claimant. Although Dr. Coe emphasized that claimant's limited knowledge of the English language restricted his ability to be rehabilitated in an occupation other than a painter, our supreme court has suggested that one's language skill is insufficient to support a finding of odd lot. *Valley Mould & Iron Co.*, 84 Ill. 2d at 548. [***41]

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 544-545, 865 N.E.2d 342, 358, (2007).

The evidence is clear Petitioner's work-related cervical condition had stabilized and she was able to return to gainful employment until her progressively worsening MS rendered her unable to do so. Therefore, Petitioner did not sustain her burden of proving that she was permanently and totally disabled as a result of the injuries caused by the work accident.

Therefore, I find that the opinions of Dr. Allen and Dr. Herman are more credible than Dr. Brayton's unsubstantiated opinion that Petitioner is permanently and totally disabled as a result of the work injury. Dr. Herman opined Petitioner sustained a disc herniation from the August 29, 2010, accident but it had been effectively treated and she was at maximum medical improvement with her return to work with 50/100 pound lifting restrictions imposed by Dr. Brayton in 2012, comporting with Dr. Allen's opinion. He further opined that as of May 2016 Petitioner was *not* capable of returning to work but because of the MS and not because of the work-related condition. (Rx2, 47-48, 60) Further, the off work notes provided by Dr. Santwani in 2014 for MS flare-ups are consistent with Dr. Herman's opinion that Petitioner could not work because of her MS, not her cervical condition.

Several Commission Decisions support the proposition that when a Petitioner is disabled from another medical condition(s) unrelated to the work accident, it is the Petitioner's burden to prove that she is entitled to an award of permanent and total disability for her work accident. See, *Hamilton v. A T & T*, 99 IIC1127, (Petitioner was diagnosed with carpal tunnel syndrome and she ultimately underwent bilateral carpal tunnel releases for her condition. Subsequent to her surgeries, Petitioner was diagnosed with left reflex sympathetic dystrophy and later with bilateral epicondylitis and fibromyalgia. Eventually Petitioner was diagnosed with sarcoidosis. In denying benefits, the Arbitrator found, and the Commission upheld, that Petitioner was taken off work completely due to an unrelated lung condition in February of 1997); *Tidemann v. Homes By Hemphill*, 09 IWCC 0330 (Commission reversed the Arbitrator's decision regarding permanent and total disability, finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent, however that Petitioner failed to prove a causal connection between her work related injuries of August 14, 1989, and her current condition of ill-being with respect to her nose, left hip, right and left feet, and pre-existing rheumatoid arthritis and awarded permanency on the basis of §8(d)2 and §8(e)); and *Karen McCurrie v. Grove Dental*

Associates 09 IWCC 0050 (Commission upheld Arbitrator's denial of permanent and total disability award, where Petitioner had a compensable accident on December 10, 2002, which did aggravate an underlying condition in her lower back. She also had prior to that work accident complaints of headaches and chronic fatigue among other symptoms, which eventually were diagnosed in 2005 as fibromyalgia and chronic fatigue syndrome. In reviewing the treating records following the accident of December 10, 2002, the Arbitrator/Commission held that Petitioner's condition of ill-being about her lower back was related to the accident of December 10, 2002, but her prior and subsequent and present complaints diagnosed as fibromyalgia, chronic fatigue syndrome, and headaches are unrelated to the accident of December 10, 2002. While the Petitioner may very well be unable to work at the present time, that inability to work is related to the non-work related conditions of fibromyalgia, chronic fatigue syndrome, and headaches.)

Based on a careful review of the evidence, I would award Petitioner permanency on the basis of loss of use of a person-as-a whole under §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7, resulting in permanent restrictions. Therefore, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOWNING, DELLA
Employee/Petitioner

Case# **11WC009902**

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

20IWCC0657

On 8/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1876 CZAPLA LAW
EDWARD A CZAPLA
1821 WALDEN OFFICE SQ STE 400
SCHAUMBURG, IL 60173

2965 KEEFE CAMPBELL & ASSOC LLC
SHAWN R BIERY
118 N CLINTON STE 300
CHICAGO, IL 60661

20IWCC0657

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ XXNone of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DELLA DOWNING
Employee/Petitioner

v.

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

Case # 11 WC 9902

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Wheaton**, on **6/8/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **8/29/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$84,249.36**; the average weekly wage was **$1,620.18**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

1. RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR 169 1/7 WEEKS, COMMENCING JUNE 10, 2011 THROUGH AUGUST 11, 2011; MAY 21, 2012 THROUGH SEPTEMBER 19, 2013; AND MAY 5, 2014 THROUGH JANUARY 20, 2016, AS PROVIDED IN SECTION 8(b) OF THE ACT.

2. RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $1,080.12/WEEK FOR 124 AND 1/7 WEEKS, COMMENCING JANUARY 21, 2016 THROUGH JUNE 7, 2018, AS PROVIDED IN SECTION 8(a) OF THE ACT.

3. RESPONDENT SHALL PAY PETITIONER THE REASONABLE AND NECESSARY MEDICAL EXPENSES INCURRED FOR THE CERVICAL SPINE AS IDENTIFIED IN PX.1., PX.2, PX.4, PX.5, PX.6, PX.7, PX.8, PX9, PX 10, PX.11, PX.12, PURSUANT TO SECTION 8 (A) AND 8.2 OF THE ACT AND SUBJECT TO THE MEDICAL FEE SCHEDULE.

4. RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR LIFE, COMMENCING ON JUNE 8, 2018, AS PROVIDED IN SECTION 8(f) OF THE ACT. COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(g) OF THE ACT. RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM 8/29/10 THROUGH 6/8/18, AND SHALL PAY THE REMAINDER OF THE AWARD, IF ANY, IN WEEKLY PAYMENTS.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

KSSteffen **July 28, 2018**

Signature of Arbitrator Date

AUG 10 2018

PROCEDURAL HISTORY

On June 9, 2011, a prior 19(b) Petition for Immediate Hearing was heard before an Arbitrator. The Arbitrator found that Petitioner's current condition was causally related to her undisputed work accident of August 29, 2010. Specifically, Petitioner was found to have sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator Ex.2) Petitioner was awarded temporary total disability benefits commencing September 10, 2010 through November 11, 2010; February 3, 2011 through February 4, 2011; February 27, 2011 through March 10, 2011; March 12, 2011 through March 16, 2011; and March 19, 2011 through the June 9, 2011 19(b) hearing. (Arbitrator's Ex. 2) The Arbitrator determined Petitioner had not reached maximum medical improvement and was entitled to further medical treatment with Dr. Brayton (Arbitrator's Ex.2).

The Arbitrator's 19(b) decision was affirmed and adopted by the Commission on August 2, 2012 (Arbitrator's Ex.2) A transcript of the 19(b) hearing was admitted into evidence. (Arbitrator's Ex.2)

On June 8, 2018, the matter was heard by the Arbitrator Ketki Steffen. The issues of accident, notice and causation were previously decided Petitioner stipulated that there was no claim for multiple sclerosis attributable to the August 29, 2010 accident at work.

Unpaid medical charges and unpaid lost time in the form of TTD and maintenance were alleged at hearing along with the request for a finding related to Nature & Extent if the Arbitrator were to agree that the evidence presented supports a finding of Petitioner having reached a state of Maximum Medical Improvement. Petitioner alleged odd-lot permanent disability applies in regard Nature & Extent.

Petitioner further stipulated that Respondent was entitled to a credit pursuant to Section 8(j) of the Act for any payment of Petitioner's medical expenses. Respondent's counsel acknowledged that he was not disputing Petitioner's claim for permanent total disability benefits pursuant to Section 8(f) of the Act.

FACTUAL HISTORY

Petitioner is a licensed nurse and had worked in that capacity at the time of her accident on August 29, 2010 when sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6.

The following history entails the medical and other relevant facts after the prior 19B/8A hearing and decision:

On July 14, 2011 Petitioner telephoned Dr. Brayton complaining of left and right arm numbness and pain. (PX.1.) Dr. Brayton's August 1, 2011 office note reflects Petitioner "called in req release to work still has neck and arm SX but must RTW due to financial situation." (PX.1) Dr. Brayton released Petitioner back to work at her request with a 10-pound lifting restriction and no excessive pushing/pulling (PX.1.)

On August 12, 2011 Petitioner went to work at Loretto Hospital as a nursing supervisor. Petitioner worked full-time until May 20, 2012 when she was terminated. The nursing staff unionized and Petitioner lost her job.

Petitioner continued to experience radiating neck pain and was referred by Dr. Brayton to the Delnor Hospital pain clinic for a series of cervical epidural steroid injections. (PX.1.) Dr. Yang examined Petitioner on August 10, 2011 and noted Petitioner's neck pain radiating to her bilateral upper extremities (PX.2.) Petitioner complained of numbness in all 5 fingers on both hands. Dr. Yang reviewed the

February 9, 2011 cervical MRI which showed a C5-C6 right sided paracentral disc herniation, C4-C5 small disc protrusion and C6-C7 disc bulge. (PX.2.) Petitioner was diagnosed with cervical radiculopathy, secondary to spinal stenosis, cervical degenerative disc disease with overlying myofascial pain. (PX.2.)

On August 17, 2011 Petitioner received the first of a series of cervical epidural steroid injections at Delnor Hospital. Dr. Hanna prescribed Vistaril, Zanaflex and Norco for Petitioner's cervical pain. (PX.2)

On October 21, 2011, Dr. Hanna prescribed a Duragesic patch for Petitioner's cervical pain and Petitioner received trigger point injections to the bilateral scapular and a second cervical epidural steroid injection. (PX.2) On November 9, 2011, Petitioner received a third cervical epidural steroid injection and bilateral scapular trigger point injections. (PX.2.)

Petitioner returned to see Dr. Hanna on December 12, 2011, complaining of increasing neck pain. While Petitioner reported pain relief with the injections and Duragesic patch she continued to experience muscle spasms along the neck, upper shoulders and lots of right arm pain. (PX.2.) Dr. Hanna continued to prescribe Norco, Zanaflex, Vistaril along with the Duragesic patch for Petitioner's chronic neck pain and cervical radiculitis. (PX.2.) Petitioner received 5 trigger point injections to the scapula, trapezius and cervical paraspinal muscle.

Petitioner saw Dr. Hanna on February 15, 2012 complaining of *"worsening neck pain down both arms with numbness and tingling into the hands."* (PX.2.) Dr. Hanna refilled Petitioner's Duragesic patch, Norco, and Zanaflex. Petitioner received bilateral trigger point injections to the trapezius and levator scapula for her myofascial pain. (PX.2.)

MRI study of the cervical spine performed on February 16, 2012 revealed:

"The posterior disc protrusion at C5-C6 is slightly more broad based with the presence of an annular tear." (PX.2.)

Dr. Brayton reviewed the MRI results with Petitioner on March 2, 2012 and noted *"the slight progression in the C5-C6 disc along with the more pronounced annular tear explains some of her increased neck symptoms and pain. The increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal cervical spine tenderness, but it certainly does not explain her pathologic reflexes, hyperreflexia, Clonus and Babinski signs."* (PX.1) Petitioner was referred to Dr. Santwani, a neurologist, for electrophysiologic testing.

Dr. Santwani performed a number of tests including a lumbar puncture and spinal tap and ultimately diagnosed Petitioner with multiple sclerosis. (PX.4.) Petitioner stipulated at the onset of the hearing that treatment for the multiple sclerosis was unrelated to her August 29, 2010 injury at work.

Dr. Hanna continued to refill Petitioner's narcotic pain medications throughout 2012. (PX.2,3) Dr. Hanna noted on December 31, 2012 that the *"pain was severe with significant impact on functions and quality of life."* (PX.2.) Petitioner returned to Dr. Hanna on February 25, 2013 *"complaining of worsening pain in her fingertips, with neck pain across both shoulders, radiating down both of her arms with spasms on 9-10-out of 10 in severity, constant numbness and tingling into the arms."* (PX.2.) Dr. Hanna continued the narcotic pain treatment.

Cervical MRI study performed on May 5, 2013 revealed:
C4-C5 small central disc protrusion with minimal early annular tear;

C5-C6 disc desiccation and mild loss of disc height with broad-based central right paracentral disc protrusion which moderately indents the ventral sac with the associated central annular tear; and C6-C7 small lateral spurs.

Petitioner's last treatment with Dr. Hanna was May 13, 2013. Petitioner's insurance changed and she needed to switch to a pain physician in her network. Petitioner's medications were refilled and she was referred by her primary care physician, Dr. Branshaw, to Kishwaukee Hospital for pain management. (PX.2.)

On May 30, 2013, Petitioner presented to the pain clinic at Kishwaukee Hospital for her chronic neck pain. History reflects the *"pain began in August 2010 when she was lifting a patient"*. (PX.5.) Petitioner described the pain as aching, burning, constant, numb, pressure, radiating, sharp, squeezing, tingling, and tiring. Petitioner successfully underwent an opioid assessment to determine if she was an appropriate candidate for continued opioid therapy. (PX.5.) On June 12, 2013, Dr. Gregory approved long term opioid therapy and prescribed the Fentanyl Duragesic patch and Norco for breakthrough pain. (PX.5.)

Petitioner treated with Dr. Gregory at the Kishwaukee Pain Clinic throughout 2013. (PX.5.) He diagnosed Petitioner with cervical radiculopathy and fibromyalgia syndrome. On August 8, 2013, Petitioner received 4 cervical trigger point injections for her neck pain. (PX.5.) Patient reported that off of opioid medications she is not able to get out of bed and function, but with the medications, she is able to function. (PX.5.)

On September 20, 2013, Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was let go because of missing work.

On October 31, 2013, Dr. Gregory noted that Petitioner's pain has been worse since she has been back to work. (PX.5.) Dr. Gregory continued to prescribe the

Duragesic patch and Norco. In December 2013, Petitioner had to switch pain management physicians because of insurance coverage.

On December 26, 2013, Petitioner saw Dr. Todd Hagle for her chronic neck and back pain. (PX.10) Petitioner was referred to Dr. Hagle, a pain management anesthesiologist, by Dr. Branshaw. Dr. Hagle diagnosed Petitioner with chronic neck and back pain and noted *"she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this."* (PX.10) Dr. Hagle initially prescribed Lyrica and Baclofen for Petitioner's neck pain but she experienced side effects with Lyrica and it was discontinued. Thereafter, Dr. Hagle prescribed the Duragesic patch, Norco and Baclofen for Petitioner's neck pain. (PX.10)

Petitioner treated with Dr. Hagle on a monthly basis for her chronic neck pain. On February 10, 2014, Petitioner complained of pain in her neck, shoulders, and arms. Petitioner noted the pain was *"severe, chronic and disabling."* (PX.10) Dr. Hagle continued to prescribe the Duragesic patch, Baclofen and Norco for Petitioner's neck pain. Dr. Hagle's May 12, 2014 office note states ***"she*** (Petitioner) ***lost her job recently due to many falls/sick days."*** (PX.10)

A February 25, 2014 cervical MRI revealed persistent multilevel degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annual tear as well as right paracentral C5-C6 disc protrusion. (PX.1.)

Petitioner returned to Dr. Brayton on August 14, 2014 to discuss the recent MRI findings. Dr. Brayton noted that while recovering from her cervical disc herniation she was diagnosed with multiple sclerosis. Petitioner complained of severe painful dysesthesias in her arms and legs as well as severe unremitting neck pain and

cervicogenic headaches. (PX.1.) Dr. Brayton noted Petitioner has persistent pain associated with her work injury causing a C5-C6 disc herniation. (PX.1.) Dr. Brayton ordered provocative discography at C5-C6 which was performed at Kendall Pointe Surgery Center on October 22, 2014. Discography demonstrated posterior bilateral cervical pain at C4-C5 and C5-C6. (PX.8.) Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications.

An August 1, 2014 cervical MRI revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (PX.7.)

On December 29, 2014, Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Petitioner was also experiencing diffuse pain secondary to her multiple sclerosis. Petitioner continued to see Dr. Hagle on a monthly basis throughout 2015 to refill her pain medications. (PX.10)

Dr. Brayton discussed the results of the discogram with Petitioner on February 12, 2015. He noted at that time that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Dr. Brayton further noted that Petitioner had been diagnosed with multiple sclerosis and had dysethetic pain in the upper and lower extremities. (PX.1.) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6. MRI revealed a progressive, large, broad based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which have progressed since her last imaging study. (PX.1.) There was also an increase in the annular bulge and central CFS effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a

strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5. (PX.1.) Surgical intervention involving a C4-C5 anterior cervical decompression and fusion with plating was discussed including the risk of accelerated spondylitic changes at C6-C7. (PX.1.) Petitioner wished to defer surgery and continue with pain management.

Petitioner continued to refill her pain medications with Dr. Hagle on a monthly basis throughout 2015. (PX.10) Petitioner was awarded Social Security Disability benefits in 2015. MRI of the cervical spine completed on December 3, 2015 revealed no significant interval change.

Petitioner returned to Dr, Brayton on January 21, 2016 to discuss the MRI results. Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her M.S."* Examination revealed continued myelopathy with spasticity in both upper extremities. Cervical disc herniation persists at C5-C6 and has not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (PX.1.) There were also disc disease at C2-C3 and C3-C4 which is permanent. (PX.1.)

Dr. Brayton noted that *"overall it appears the patient has a permanent disc injury at C5-C6 I would favor against surgery given the concurrent diagnosis of MS and the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the surgical fusion needed at C5-C6." (PX.1.)* Dr. Brayton further noted that Petitioner *"will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a*

consequence to her injury." (PX.1.) Petitioner was issued ***"Permanent work restrictions of no lifting, frequent breaks, with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent."*** (PX.1.)

Petitioner refilled her pain medications with Dr. Hagle throughout 2016. (PX.10.) A follow-up cervical MRI performed at Kishwaukee Hospital on November 23, 2016 revealed some mild degenerative changes at C5-C6. (PX.10)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2017 and 2018. (PX.10). On January 16, 2017 Dr. Hagle stated *"I don't have much I can help or offer Della if she doesn't want to consider interventional therapy in the form of CESI or medial branch blocks." (PX.10).* Dr. Hagle continued to fill Petitioner's prescription for Norco, Baclofen and the Fentanyl patch. (PX.10) MRI of cervical spine performed on March 26, 2018 revealed a small central protrusion of the disc at C2-C3 contributing to the mild central canal stenosis and a small board-based central disc protrusion and mild osteoarthritis at C5-C6. (PX.10) Based upon the new MRI findings and Petitioner's persistent headaches and chronic neck pain Dr. Hagle recommended a cervical epidural steroid injection to relieve Petitioner's inflammatory radicular pain. (PX.10) Petitioner received the C7-T1 injection on June 1, 2018.

FINDINGS/ANALYSIS

WITH RESPECT TO ISSUE (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING OF THE CERVICAL SPINE CAUSALLY RELATED TO THE AUGUST 29, 2010 INJURY AT WORK, THE ARBITRATOR FINDS AS FOLLOWS:

The Commission affirmed and adopted the Arbitration Decision and Findings that Petitioner's current condition of the cervical spine causally related to her undisputed work accident of August 29, 2010, having sustained a new herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator's Ex. 2.) Respondent does not dispute the causal relationship between Petitioner's cervical spine and the injury at work. However, Respondent denies that Petitioner's multiple sclerosis is causally related to the August 29, 2010 injury at work. Petitioner stipulated at the onset of the hearing that she was not making any claim relating to multiple sclerosis diagnosis and that her claimed injuries were confined to the cervical spine.

The Arbitrator notes that Petitioner has consistently sought medical treatment for her cervical spine through the June 9, 2011 19(b) hearing. The treating medical records admitted into evidence document Petitioner's chronic neck pain and bilateral cervical radiculopathy resulting from her August 29, 2010 injury at work. Dr. Brayton noted on February 12, 2015 that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Discogram revealed concordant pain at C4-C5 and C5-C6 consistent with the MRI findings which demonstrate a progressive, large, broad based annular bulge at C5-C6, annular bulge at C4-C5 and continued spondylitic changes at C6-C7. (PX.1.)

On January 21, 2016, Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her MS"* (PX.1.)

The Arbitrator has carefully reviewed and considered all medical evidence along with the credible testimony of the Petitioner. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she sustained injury to her cervical spine which is causally related to the August 29, 2010 accident at work. It is undisputed that Petitioner injured her cervical spine lifting a patient at work. The Commission previously found that Petitioner sustained a disc herniation at C6-C7 and aggravation of a pre-existing herniated disc at C5-C6. (Arbitrator's Ex. 2) The medical records clearly document that progression of Petitioner's cervical disc disease which include permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.)

The Arbitrator finds the opinions of Dr. Brayton, a neurosurgeon, to be credible and persuasive. Moreover, the Petitioner credibly testified to the progression of her symptoms associated with her cervical disc disease. The Arbitrator finds it significant that Petitioner sustained no subsequent trauma to her cervical spine after the August 29, 2010 injury at work. Therefore, based upon the credible medical evidence along with Petitioner's uncontradicted testimony, the Arbitrator finds that the current condition of Petitioner's cervical spine is causally related to the August 29, 2010 accident at work. Additionally based on the testimony of Dr. Allen (RX.1.) and Dr. Herman (RX.2.), the Arbitrator finds that Petitioner's multiple sclerosis is not related to the August 29, 2010 accident at work.

The Arbitrator further finds that the lower back and any care related to the multiple sclerosis diagnosis, or any other diagnoses unrelated to the cervical spine condition is specifically determined to have no causal connection to the work injury alleged and awarded.

WITH RESPECT TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator having found that Petitioner's current condition of the cervical spine is causally related to the August 29, 2010 accident at work further concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment Petitioner received for her cervical spine was reasonably required to diagnose, treat, relieve and cure Petitioner from the effects of her cervical injuries and the medical services are causally related to her work injury. Respondent shall pay Petitioner all the reasonable and necessary medical services related to treatment of the cervical spine as contained in Petitioner's Exhibits No. 1, 2, 4, 6,7,8,9, 10, 11 and 12 (listed below), as provided in Section 8(a) and 8.2 of the Act, and subject to the medical fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner's Medical Exhibits

- PX1-Neurosurgery and Spine Surgery Dr. Brayton--$0.00 per statement
- PX2-Delnor Hospital--$0.00 per statement

- PX4-Suburban Neurology Group--$1,699.42 total which includes $423.81 for 2012 codes 99215($145.71) & 99255($278.10); $707.79 for 2013 codes 95886(POC53.2=$148.96 x 2) & 95910(POC53.2=$308.03) & 99214($101.84); and $567.82 for 2014 codes 99213($67.02) & 99232($91.85 x 3) & 99254($225.25).
- PX6-Kishwaukee Hospital--$0.00 per statement
- PX7-Center for Diagnostic Imaging--$0.00 per statement
- PX8-Kendall Pointe Surgery Center--$1,478.49 for 2014 code 62291 ($490.82 x 3)
- PX9-Interventional Pain Specialists--$1,701.68 for 2014 code 62291($490.82), code 72285($837.20), code 77003($218.26), code 99144($81.11), & code 99202($74.29)
- PX10-APAC Centers for Pain Management—$108.18 for 2018 code 99214
- PX11-Fox Valley Medical Associates/Dr. Branshaw--$0.00 per statement
- PX12-Tri City Radiology--$0.00 per statement

In conclusion, $4,987.77 is awarded per Fee Schedule with regard to the exhibits entered into evidence in conjunction with the findings related to causal connection for cervical issues only.

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner continued to be restricted from all work activities following the June 9, 2011 19(b) hearing. Respondent continued to deny Petitioner's weekly TTD benefits. Consequently, on August 1, 2011, Petitioner requested Dr. Brayton release her back to work with a 10 # lifting restriction and no excessive pushing/pulling. (PX.1.) Petitioner testified that she went to work for Loretto Hospital as a nursing supervisor on August 12, 2011. Petitioner worked full time until she was fired on May 20, 2012.

From May 21, 2012 through September 19, 2013, Petitioner remained unemployed and restricted to 10# lifting with no excessive pushing/pulling. Petitioner testified she looked for work as a nursing supervisor. On September 20, 2013 Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was terminated for missing work. Dr. Hagle's May 12, 2014 office note states "**she lost her job recently due to too many falls/sick days.**" (PX.10) Petitioner has not worked since that time despite looking for a nursing supervisor position. Petitioner was awarded SSDI benefits in 2015.

On January 21, 2016, Dr. Brayton issued Petitioner the following permanent work restrictions:

"No lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent" (PX.10)

Dr. Brayton wrote a script stating this was a ***"permanent disability".*** (PX.10)

Petitioner seeks temporary total disability benefits from June 10, 2011 through August11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2016 through January 20, 2016. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized (i.e., whether the claimant has reached maximum medical improvement). Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132,142; 923 N.E.2d 266, 271; 337 Ill. Dec. 707 (2010). The Arbitrator notes that Respondent previously terminated Petitioner on May 7, 2011 and denied her claim for temporary total disability benefits.

Therefore, based on the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner's condition had not

stabilized and finds that Petitioner is entitled to temporary total disability benefits of $1,080.12 /week for 10 and 1/7 weeks commencing June 10, 2011 through August 11, 2011; 64 and 4/7 weeks commencing May 21, 2012 through September 19, 2013; and 89 3/7 weeks commencing May 5, 2014 through January 20, 2016.

Furthermore, the Arbitrator finds that Petitioner reached maximum medical improvement on January 21, 2016 when Dr. Brayton determined Petitioner was ***"permanent disability** as a consequence to her injury"* and issued her permanent work restrictions prohibiting her from gainful employment. (PX.10). Petitioner's subsequent demand for permanent total disability benefits pursuant to Section 8(f) of the Act was ignored by Respondent. (PX.13) Therefore, the Arbitrator finds that Petitioner is entitled to maintenance benefits of $1,080.12/week for 124 and 1/7 weeks commencing on January 21, 2016 through the date of the hearing.

WITH RESPECT TO ISSUE (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY AND ISSUE (O) Other §8(f) PTD BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8(f) of the Workers' Compensation Act provides in part:

> *In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of a total permanent disability as provided in subparagraph 18 of paragraph e of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for Life. (820 ILCS 305/8(f))*

Therefore, a Petitioner is entitled to permanent total disability benefits where there is evidence of **"complete disability which renders the employee wholly and permanently incapable of work."** An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of

wages to him. A.M.T.C. of Illinois v. Industrial Commission, 77 Ill.2d 482,487 (1979). Thus, a Petitioner is entitled to permanent total disability benefits if there is medical proof to establish that he cannot work. Continental Drilling Co. v. Industrial Commission, 155 Ill.App.3d 1031, 508 N.E.2d 1246 (5th Dist. 1987).

It is undisputed that Petitioner injured her cervical spine lifting a patient at work on August 29, 2010 sustaining an aggravation of a pre-existing herniated disc at C5-C6 and a new disc herniation C6-C7. (Arbitrator's Ex. 2) The condition of Petitioner's cervical spine continued to progress and has led to permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.) Cervical fusion surgery was discussed with Dr. Brayton who believes the risk is too great considering Petitioner's MS and the potential for flare-up caused by the surgical stress. (PX.1.)

Petitioner continues to receive opioid therapy treatment for her chronic neck pain. On January 21, 2016 Dr. Brayton noted *"she continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches."*. (PX.1.) Dr. Brayton further noted that ***"She will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a consequence to her injury."*** (PX.1.)

Dr. Brayton determined Petitioner was ***"permanent disability"*** and issued a written script along with ***"permanent work restrictions of no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment – permanent".*** (PX.1.)

Thereafter, Petitioner requested permanent total disability benefits pursuant to Section 8(f) of the Act. (PX.13) Respondent failed to issue Petitioner's permanent total

disability benefits or prepare a written vocational assessment as required under Section 7110.10 of the Rules Governing Practice before the Industrial Commission.

Petitioner testified she continues to receive the Fentanyl patch along with Norco and Baclofen for her chronic and disabling neck pain. Petitioner sees Dr. Hagle on a monthly basis for her narcotic pain medications. Petitioner testified she experiences muscle spasms across the neck and top of the scapula (paraspinal spasms) on a daily basis. She has pain and stiffness in both arms with ongoing radiculopathy that causes numbness in all five fingers in both hands. Petitioner testified the neck pain *"affects her entire life".*

Petitioner testified she no longer cooks or performs household activities and relies on her husband and sons to do most of the housework. Petitioner is unable to work in the yard or perform any overhead activities. Petitioner testified she spends most of her time in a recumbent position and lives in her bedroom. Petitioner eats her meals in her bedroom, where she watches TV and can access her computer. Petitioner testified her daily pain level is 6 out of 10.

Therefore, based upon the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner met the burden of establishing that she is totally and permanently disabled pursuant to Section 8(f) of the Act. This Arbitrator notes §8(f) of the Act provides that compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life. Respondent shall pay Petitioner permanent and total disability benefits of $1,080.12/week for life, commencing June 8, 2018, as provided in Section 8(f) of the Act.

With regard to the maintenance period of January 21, 2016 to present, the evidence presented does not support an award for maintenance due to the lack of qualification due to the stated lack of vocational effort.

Respondent shall have credit for amounts paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim Nyberg,

Petitioner,

vs. NO: 19 WC 730

Vine Industries,

Respondent.

21IWCC0170

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent disability, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. CAUSAL CONNECTION

The Commission modifies the Decision of the Arbitrator with respect to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

The Arbitrator ruled that the causal connection between Petitioner's injury and his current condition of ill-being terminated as of September 17, 2018, the date on which Petitioner reported to his treating physician, Dr. Brian Chilelli, that he was approximately "80-90% better overall." In so ruling, the Arbitrator accepted the opinion of Dr. Shane Nho, Respondent's Section 12 examiner. Given the facts and circumstances of this case as stated in the Decision, the Commission declines to find that the causal connection between Petitioner's accident and his condition of ill-being terminated on September 17, 2018 based solely on Petitioner's broad self-estimate on a single date, or broadly accept the opinions of Dr. Nho.

21IWCC0170

More significant is the November 19, 2018 surveillance video, which shows Petitioner engaged in activities expected of Petitioner as an electrician during a period when his treating physician had placed him off work. The video occasionally depicts Petitioner favoring his right leg and keeping weight off the left leg, but more often shows Petitioner placing weight on the left leg to descend from the porch or back of his van. Similarly, the video occasionally shows Petitioner leaning against the ladder in a manner to keep weight off his left leg, but more often depicts Petitioner standing on the rungs of various ladders using both legs as support. The video also tends to show Petitioner with a normal gait. In short, the video recording submitted in this case confirms that Petitioner was able to perform the job duties of an electrician, whether with restrictions or without, as of November 19, 2018. Conversely, Dr. Chilelli's treatment records do not suggest that Petitioner ever informed him of these activities, which may have affected Dr. Chilelli's decision to keep Petitioner off work rather than impose work restrictions, and the speed at which Petitioner was advanced to return to work.

Accordingly, after considering the record as a whole, the Commission concludes that Petitioner established a causal connection between his injury and his condition of ill-being that terminated as of November 19, 2018.

II. MEDICAL EXPENSES

The Arbitrator denied Petitioner's claim for $935.00 in physical therapy expenses between April 24, 2019 and May 30, 2019 based on the Arbitrator's determination that Petitioner reached maximum medical improvement (MMI) on September 17, 2018. The Commission determines that Petitioner reached MMI as of November 19, 2018, but Petitioner's claim is for medical expenses after this date. Accordingly, the Commission affirms the Arbitrator's denial of unpaid medical expenses.

III. TEMPORARY TOTAL DISABILITY

The Arbitrator concluded that Petitioner was entitled to temporary total disability (TTD) benefits from June 14, 2018 through September 17, 2018, the date on which the Arbitrator found Petitioner to be at MMI. Given that Respondent paid Petitioner more than the amount due under this calculation, the Arbitrator also awarded Respondent a credit for the difference to be applied against the permanency award. The Commission concludes that Petitioner is entitled to TTD benefits for a period of 22 and 5/7ths weeks, from June 14, 2018 through November 19, 2018, the date on which the Commission has determined that Petitioner reached MMI. In addition, Respondent is entitled to a credit of $5,621.29 in TTD benefits already paid against the increased TTD award.

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IV. PERMANENT PARTIAL DISABILITY

The Arbitrator awarded Petitioner permanent partial disability (PPD) benefits representing a 10% loss of use of the left leg. The Commission agrees with the award but writes additionally to elaborate on our view of the weight of the factors we considered in reaching our conclusion.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2016). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i), as the Arbitrator correctly noted that neither party submitted an impairment rating. The Commission places significant weight on factor (ii) because Petitioner continues to work for Respondent as an electrician, a job involving squatting, stretching, and climbing ladders, activities which Petitioner testified can aggravate his lingering symptoms. The Commission places some weight on factor (iii) because Petitioner is 51 years old, suggesting that his condition will be a factor in his work life, which may be expected to be as long as 14 years. Regarding factor (iv), the Commission observes that no direct evidence was submitted regarding Petitioner's future earning capacity and that Petitioner has returned to his job with Respondent and works as close to eight-hour days as possible, leading us to place no weight on this factor. Lastly, regarding factor (v), Petitioner testified that he still experiences pain, stiffness and soreness in his hip after a few hours of a little exertion. He stated that if he spends time squatting near receptacles, he would get a really bad charley horse in his calf. He also stated that he needs to rotate his sleeping position three or four times nightly or the hip becomes stiff and awakens him. According to Petitioner, "It's not horrible. It's just an annoying little pain." He added that he lost a lot of muscle mass but was regaining it slowly. Petitioner's testimony finds support in his treatment records, which suggested improving left lower extremity strength and neuromuscular deficits. The Commission places the greatest weight on this evidence.

Considering the statutory factors as a whole, but particularly the magnitude of Petitioner's current disability, the Commission affirms the Arbitrator's award representing a 10% loss of use of the left leg.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his left leg is causally connected to the accident alleged in this case, as the causal connection terminated as of November 19, 2018.

IT IS FURTHER FOUND BY THE COMMISSION that Respondent has paid all

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reasonable and necessary medical expenses incurred through November 19, 2018.

IT IS THEREFORE ORDERED that Petitioner's claim for additional unpaid medical expenses incurred after November 19, 2018 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.33 per week for the period from June 14, 2018 through November 19, 2018, a period of 22 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $5,621.29 in benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $264.00 per week for a period of 21.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for Penalties pursuant to §§19(k) and 19(l) of the Act, and Fees pursuant to §16 of the Act, is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 2, 2020 is hereby affirmed as modified herein.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2021
o: 4/1/21
BNF/kcb
045

/s/ *Barbara N. Flores*
Barbara N. Flores

/s/ *Christopher Harris*
Christopher Harris

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NYBERG, TIM
Employee/Petitioner

Case# **19WC000730**

VINE INDUSTRIES
Employer/Respondent

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On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0340 LAW OFFICES OF JOHN W TURNER
209 S MAIN ST
2F
MT PROSPECT, IL 60056

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tim Nyberg
Employee/Petitioner

v.

Vine Industries
Employer/Respondent

Case # **19WC 00730**

Consolidated cases: _____

21IWCC0170

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts** Arbitrator of the Commission, in the city of **Chicago**, on **8/22/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

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FINDINGS

On **6/13/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**22,880.00**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **50** years of age, married with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,621.29** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,621.29**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS CAUSAL CONNECTION BETWEEN THE ACCIDENT OF JUNE 13, 2018 AND THROUGH SEPTEMBER 17, 2018, ONLY.

RESPONDENT HAS PAID ALL REASONABLE AND RELATED MEDICAL BILLS INCURRED THROUGH SEPTEMBER 17, 2018. CLAIMED FOR ANY FURTHER MEDICAL BILLS/BALANCES/OUT OF POCKET PAYMENTS AFTER THAT DATE IS DENIED.

PETITIONER WAS TEMPORARILY TOTALLY DISABLED FOR A PERIOD OF 13 6/7'S WEEKS BETWEEN JUNE 14, 2018 AND SEPTEMBER 17, 2018. HE IS ENTITLED TO A SUM OF $293.33 PER WEEK FOR THAT 13 6/7 WEEK PERIOD. NO FURTHER TEMPORARY TOTAL DISABILITY IS DUE.

PETITIONER SUSTAINED ACCIDENTAL INJURIES TO THE EXTENT OF 10% LOSS OF USE OF THE LEFT LEG, UNDER SECTION 8(E) OF THE ACT. HE IS THEREFORE ENTITLED TO THE FURTHER SUM $264.00 PER WEEK FOR A PERIOD OF 21.5 WEEKS.

RESPONDENT IS ENTITLED TO A CREDIT OF $1,556.58 IN OVERPAID TEMPORARY TOTAL DISABILITY. THIS AMOUNT IS A CREDIT TOWARD THE FURTHER BENEFITS DUE PETITIONER.

CLAIM FOR PENALTIES AND ATTORNEYS' FEES IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 31, 2019
Date

JAN 2 - 2020

Tim Nyberg v. Vine Industries
Case Number: 19WC 00730

21IWCC0170

Statement of Facts Petitioner was employed with Respondent, his father's company, as an electrician, working one day per week about 30 weeks per year. (T.29) He described his duties as climbing ladders, pulling wire, bending pipe, and installing lighting for commercial customers. (T.8) When not working, Petitioner did work around the house, took care of his son, quoted customers for Respondent's business, and worked a hobby farm where he had an orchard, grew sweet corn, vegetables, and tended bees for honey. (T.29, 30) Petitioner also operated Vine Aquatic Designs, building fountains and ponds, although in calendar year 2018 Vine Aquatic Designs reported no income. (T.31, Resp.Ex.#2)

On June 13, 2018 he was working for Respondent at a bowling alley. As he stepped off a ladder, his foot slipped on the waxed alley and he landed on his left side. (T.10) He called his father and went home. (T.11) Petitioner did nothing June 14. On June 15, a Friday, he and his wife went up to Wisconsin for the weekend. (T.12) Petitioner testified he didn't do much up there, and that whenever he stopped down on his foot he felt "ungodly pain. I figured I had torn a muscle." (T.12)

Petitioner called his primary care physician and was given an appointment with Dr. Chilelli for June 25, 2018. (T.13) Petitioner admitted he was full weight bearing between June 13 and June 25, 2018, and that he did not make any attempt to seek emergency room or urgent care. (T.36, 37) On June 25, 2018 Petitioner reported left hip pain following the June 13, 2018 incident. Petitioner reported he had been able to bear weight on the left leg but did have pain with walking, standing or climbing stairs. X-rays performed by Dr. Chilelli on this date were negative for any fracture. The doctor suspected a stress fracture, abduction tendon injury or "other process." He ordered a MRI of the left hip. (Pet.Ex.#6)

MRI testing performed June 26, 2018 showed significant edema in the femoral head, suggesting a subchondral stress or insufficiency fracture. Transient osteoporosis was noted to already be present. A tiny linear tear of the musculoskeletinous junction was noted. (Id.)

Dr. Chilelli reviewed that MRI testing on June 28, 2018 as showing transient osteoporosis or an insufficiency fracture. He prescribed non-weight bearing and Vitamin D. (Id.) Petitioner testified he was told to "use crutches until early October and don't do any work." (T.14)

When seen in follow-up on August 6, 2018 Petitioner reported less left hip pain. He was directed to continue taking Vitamin D, to remain on crutches for two more weeks, and to not to work until a next exam September 17, 2018. (Pet.Ex.#6)

When seen by Dr. Chilelli on September 17, 2018 Petitioner reported he was "80% to 90" better. He reported some continued "discomfort" in the hip but had no report of weakness. He was directed to begin physical therapy and follow-up in six weeks. (Id.) At

trial, Petitioner stressed that he was still on crutches and keeping his left leg elevated. (T.39)

Petitioner admitted he posts on Facebook. On October 23, 2018 Petitioner admitted he posted ". . . trying to get these people to let me start working again, hopefully in a few weeks. I'm already sneaking out and doing things." A friend responded, asking Petitioner to come work on his salt water tank. Petitioner responded he was "sneaking in slowly." (T.41; Resp.Ex.#3)

At trial Petitioner claimed he was referring to having gone out fishing. He testified he went out with a buddy to fish on the Fox River for about three hours, off an 18 foot Skeeter bass boat. Petitioner claimed he just sat in the front chair on the boat for three hours. He also admitted to having gone to Port Clinton for two days in October, 2018, out 16 hours on a fishing charter on Lake Erie. (T.41 – 44) The arbitrator takes judicial notice that getting onto and ambulating on a boat on even the calmest days does require balance and weight distribution through the legs and into both hips.

Petitioner testified he was not released to return to work in any capacity until March 6, 2019, at which time Dr. Chilelli directed him to work part time and avoid climbing 8 – 10 foot ladders. (T.15)

On direct exam Petitioner admitted to performing electrical work at his sister's house in Park Ridge. He recalled being at the property from 9:00 a.m. to about 2:30 p.m. on November 19, 2018. (T.17-18) He testified he had asked his doctor about returning to work. (T.19) There is no reference to this request or that Petitioner was indicating any ability to return to work in any capacity in Dr. Chilelli's records. (Pet.Ex.#6)

Petitioner described the work at his sister's house as a "favor" and so that he could "gauge where my leg was so I could tell my doctor . . . and the therapist what was going on." (T.19) Petitioner testified his total work hours on that date was 1 ½ to 2 hours, and that he had to go inside the house a couple of times to take break and get the weight off his leg. (T.20) He admitted to using 2, 4 and 6 foot ladders, but claimed he put weight on his right leg and used his left leg "just like another third support, just a temporary balance measure . . ." (T.21) He described sitting atop the ladder so as to not put weight on his legs, sitting in a chair or with his back to the wall. (T.21) He described that if he had more than 20% weight on his left leg "the muscles would start shaking again. It was a really bad balance time." (T.22)

On cross exam Petitioner admitted he arrived in and climbed into and out of a Ford F250 van multiple times. He walked back and forth to obtain equipment and supplies from the van. He climbed up and down the ladders, bent, stooped, and stood. When asked if he brought or used his crutches, he stated "No, because it was in November." (T.47 – 51) When asked why at the next visit with Dr. Chilelli on December 6, 2018 he did not make mention of his trying to work or what he had done on November 19, 2018, Petitioner then said "I actually told the therapist because they were the ones trying to get me better." (T.51)

Petitioner's first physical therapy visit was with Fox Valley Physical Therapy November 28, 2018. He described "not pain as much as lack of strength." He described that he was "self employed: has 4-5 guys working for him." The therapist noted a standing prescription for a total knee replacement that Petitioner was hoping to put off until age 55. (Pet.Ex.#6) There is absolutely no report of Petitioner describing what he was doing on November 19, 2018 to the therapist on this or any subsequent visit. (Id.)

The Arbitrator notes that while Petitioner testified to prior injections for his knees at Dr. Chilelli's office, he did not disclose a pending knee replacement surgery nor discuss any impact his pre existing knee condition would have on his gait, ability to bear weight, climb ladders or work as an electrician full time.

When seen by Dr. Chilelli on December 6, 2018 he did report he was 80% better. He advised the doctor for some reason he had not yet been to physical therapy although clearly had commenced those services about a week before. Dr. Chilelli again ordered physical therapy. (Id.)

On January 24, 2019 Dr. Chilelli documented Petitioner was "significantly better." Physical therapy was continued as well as a "no work" status. (Id.)

On March 7, 2019 Dr. Chilelli again documented Petitioner was "significantly better." He noted Petitioner was in physical therapy. He was happy with Petitioner's progress. He noted Petitioner was in no acute distress. Petitioner demonstrated 90° of flexion, 10° of extension, 30° external rotation, with some pain with rotation of the hip and some mild trochanteric tenderness only. Dr. Chilelli ordered continued physical therapy due to some reported weakness and muscle deficits. He first cleared Petitioner to return to work in any capacity on this date. (Id.)

Dr. Chilelli reiterated continued therapy and restricted work April 18. On June 3, 2019 he noted Petitioner "appeared well." He was in no acute distress. Petitioner's sensation was intact. He had normal motor function, reflexes and pulse. He allowed Petitioner to return to full duty for half days and return to see him in six weeks. (Id.) At trial Petitioner testified he has not sought further medical attention with Dr. Chilelli or elsewhere, to date. (T.15)

Petitioner testified that with a few hours of exertion he feels some pain in his left hip, described as "stiffness, soreness." If he spent any time squatting, he got a "bad Charley horse" sensation in the upper part of his left leg. He needs to stretch and rotate. He described it as "just an annoying little pain." (T.26)

Petitioner continues driving a Ford F250 van and a 2006 Toyota Tundra pickup truck. (Id.)

Petitioner testified he returned to work for Respondent in May, 2019. He testified to working one job every week or two, on 8 hour jobs. (T.53) He described one at a

Bowlero in Glendale Heights, where he put a 50 foot, 4 head light atop a parking lot pole reached using a bucket lift. (T.53-54) He described a second job at Hosiden, where he installed a light fixture over a door while on a stepladder, after which he replaced LED lightbulbs in the ceiling of a hallway while on a six foot ladder. (T.55-56) He repaired a hot tub filter pump in his father's basement, cutting old PVC pipe, replacing and rewiring the pump. (T.56) Lastly, he climbed up two stairs and replaced a diesel transfer pump at another location. (T.57)

Gregory Spelson testified he is a private investigator working for Robison Group and hired by Respondent's carrier. He conducted and obtained surveillance of Petitioner on November 19, 2018. He positively identified Petitioner as the individual he shot surveillance of, at trial. (T.73-75)

On November 19, 2018 he followed Petitioner from his home in West Chicago to a gas station, obtained video at the gas station, followed Petitioner to a Menard's where he likewise obtained several minutes of video, then followed Petitioner to a private residence where he obtained several hours of video. T.76 – 79)

A highlight of the video shot by Mr. Spelson was viewed by the parties, at trial. (Resp.Ex.#5a). The full surveillance video was introduced into evidence and has now been viewed by the Arbitrator. (Resp.Ex.#5b) In pertinent part, the Arbitrator notes the following activities performed by Petitioner on November 19, 2019:

9:38 through 9:41 a.m. stands outside work van pumping gas. Ambulates without any obvious limp or difficulty.

10:26 a.m. walks from the van, across the street and to the Park Ridge address. Appears initially to have a bit of "drag" or limp in his step, but what appears to be even weight-bearing by the time he walks across the yard and steps up about 2 – 2 ½ feet onto the porch.

10:27 a.m. walks back to the work van, now without any noticeable limp or pause in his step.

10:29 a.m. walks back from van again, without obvious limp, climbing dirt incline up to left side of porch to hand off tools.

10:29 through 10:31 a.m., stands below porch level, appearing to be receiving instructions from an older gentleman (identified at trial as his father).

10:31 a.m. appears to try front door and finds it locked.

10:31 a.m. steps down from height of porch to ground with left leg first.

10:34 through 10:36 a.m. stands on porch discussing work with father.

10:36 a.m. steps down from 2 ½ foot porch height to ground on left leg first, walks to work van.

10:37 a.m. seen in back of van pulling out various pieces of equipment, stepping onto back bumper and then down with left leg to street level.

10:39 through 10:40 a.m. stands on smoke break outside porch, then walks across street to work van. Drives away.

10:54 a.m. walks across Menard's parking lot without limp.

10:59 a.m. inside Menard's store pushing cart, walking in rapid fashion without limp.

11:02 a.m. walks across Menard's parking lot carrying small bag, walking without limp.

11:18 a.m. back at Park Ridge home at ground level, bending forward and working with equipment/supplies.

11:19 a.m. standing on porch.

11:20 a.m. climbs ladder up four steps and begins working overhead on porch. Remains on ladder until 11:22 a.m., then climbs down.

11:23 a.m. bends forward to pick up small items and box from ground level, bending at knees and hips.

11:24 a.m. climbs a second ladder up three steps, using both feet to elevate self, then works overhead, remaining on ladder with arms extended overhead using tape measure until 11:25 a.m. when then descends ladder, bearing weight evenly on both legs as climbs down.

11:26 a.m. re-ascends same ladder, up three-rungs, using both feet and bearing weight evenly to again work overhead.

11:28 a.m. climbs down ladder, ambulating across porch with even gait.

11:29 a.m. again climbs up ladder with both feet, even weight-bearing.

11:33 a.m. ascends a third step ladder up 2 to 3 rungs, with both feet, to again work overhead. For next several minutes continues climbing and descending the ladders, to perform overhead work without break or interruption until 11:53 AM when walks back across street to van, walking with even gait and no obvious limp or disability.

Beginning at 11:55 a.m. seen bending forward while standing on porch, grabbing pieces of conduit and bending them, handing them to older gentleman on ladder. Continues with this activity until 12:05 p.m. when ascends up second step of step ladder to begin working overhead with conduit himself.

12:05 p.m. climbs three steps with left foot first and full weight bearing on left foot for some seconds before right foot placed on step ladder step. Then some seconds later climbs three steps back down, likewise with weight on left foot before right leg comes down on to step.

12:06 p.m. enters house with father, comes back out at 12:33 p.m.

12:35 p.m. walks on uneven ground in yard of property, descending from porch level to street level with even gait and no observable limp.

12:44 p.m. begins work up on ladder again.

Between 12:45 and 1:05 p.m. stands on porch observing and taking smoke break. At 12:59 and 1:01 p.m. steps down from height of porch about 2 ½ feet onto right foot, with all weight on left foot

1:03 p.m. begins bending conduit, bending forward, using right foot to step on conduit to bend with all body weight on left foot; repeats at 1:06 p.m., 1:12 p.m., 1:14 p.m.

Beginning at 1:13 p.m. seen bending forward at waist to porch floor to measure conduit, pick up equipment.

Continues in these activities until 2:22 p.m.

Petitioner was examined at Respondent's request by Dr. Nho on June 10, 2019. Dr. Nho was provided copies of medical records and the surveillance video. At the time of the examination Petitioner appeared in no apparent distress. He walked with non-antalgic gait. He demonstrated 5° loss of flexion in the left hip, a positive subspine but negative trochanteric pain, and a painful arc from 1 to 3 o'clock. He had normal strength, abduction and adduction, no tenderness and was neurovascularly intact. (Resp.Ex.#6)

Three x-rays taken on June 11, 2019 and personally reviewed by Dr. Nho showed no evidence of fracture, dislocation or acute abnormalities. Prior x-rays taken June 25, 2018 likewise showed no evidence of fracture, dislocation or acute bony abnormalities. The MRI of the left hip performed June 25, 2018 was personally reviewed and showed extensive bone marrow edema in the femoral head extending into the neck with a stress fracture of the femoral neck. (Id.)

Petitioner reported a dull achy pain rated 1 out of 10. He denied radiating pain. He reported pain worse with squatting, standing and working. Dr. Nho diagnosed a left hip

stress fracture with extensive bone marrow edema in the femoral head. He believed the work incident of June 13, 2018 resulted in that condition. He suggested Petitioner would have required a "no work" status for 12 weeks following the injury, but that Petitioner demonstrated he was capable full duty as the appointment with Dr. Chilelli September 17, 2018 when Petitioner reported 80 to 90% improvement.

Dr. Nho reviewed the surveillance of November 19, 2018 and concluded Petitioner demonstrated he was capable of working full duty per the activities demonstrated on the surveillance. Dr. Nho concluded Petitioner did not require work restrictions or treatment following September 17, 2018 when he reported he was 80 to 90% better and having little to no symptoms.

Conclusions of Law

Regarding F) is Petitioner's condition of ill being causally related to the injury, the Arbitrator finds the following:

Petitioner sustained an injury to his left hip when he slipped and fell while coming down a ladder on June 13, 2018. He did not require or seek immediate medical attention, accepting an appointment for June 25, 2018 with Dr. Chilelli's office. He continued weight bearing, climbing and walking on the left leg for that 15 day period. X rays taken June 26, 2018 and again June 11, 2019 failed to show any outright fracture; Dr. Chilleli diagnosed a subcondral stress or insufficiency fracture in the femoral head of the left hip per the MRI. Petitioner was directed to remain off all work duties until March 6, 2019, to be non weight bearing for at least three months following the injury and to participate in physical therapy he began November 28, 2018 and continued until May 30, 2019.

While Petitioner reported he was 80 – 90% better by September 17, 2018, he clearly did not disclose his outside activities or capabilities to either Dr. Chilelli or Fox Valley Physical Therapy at all. While on October 23, 2018 he provided on Facebook he was "trying to get these people to let me start working again," there is nothing to suggest he was making that request to any of his medical providers. He also confided in that same posting he was "already sneaking out and doing things."

Petitioner admitted to going out fishing with a friend on the Fox River, and on a two day, 16 hour fishing charter on Lake Erie.

While he admitted to doing a few hours' work at his sister's house on November 19, 2018, he claimed to have to go inside for breaks, and to sit or lean when performing work. The surveillance demonstrates Petitioner standing, walking and climbing while working for several hours, with only one half hour break. He was seen walking without a limp, stepping on and off a an approximately 2 ½ foot high porch, climbing up and down ladders with full, uncompromised weight bearing on his left leg, walking on uneven ground, bending to the floor to retrieve items, and bearing weight on his left leg while using his right foot to bend conduit. The Arbitrator concludes Petitioner demonstrated no evidence of any disability or inability to work by this date.

While noting treating physician Dr. Chilelli continued in his "no work" and therapy recommendations for the next several months, there is no evidence he was ever aware of Petitioner's actual activities and capabilities, and thus, those recommendations can be discounted.

Dr. Nho examined Petitioner at Respondent's request, reviewed all of the medical records, and viewed the surveillance. He concluded that Petitioner was actually at maximum medical improvement and capable of full duty by September 17, 2018, when Petitioner was demonstrating no continuing evidence of injury, to quote Dr. Chilelli just "discomfort" but "no weakness, and was reporting he was "80 – 90%" better.

The Arbitrator therefore finds causal connection through September 17, 2018 only, based on the fully informed opinions of Dr. Nho.

Regarding J) what medical bills are due, the Arbitrator finds the following:

Petitioner claimed $935.00 in medical bills incurred and paid by Petitioner for therapy between April 24 and May 30, 2019. Having found Petitioner at maximum medical improvement by September 17, 2018, claim for these medical charges is denied.

Regarding K) what temporary total disability benefits are due, the Arbitrator finds the following:

Petitioner is entitled to a sum of $293.33 per week for a period of 13 6/7's weeks, from June 14, 2018 – September 17, 2018, adopting the findings of Dr. Nho in this regard.

Regarding L) what is the nature and extent of the injury, the Arbitrator finds the following:

No impairment rating was offered by either party. Petitioner testified he is back to full duties for Respondent, working one day per week as he did before his injury. He is currently 51 years old. There is no showing the injury will result in any impact on his earning capacity. He testified to stiffness, soreness, an occasional Charley Horse sensation in his calf, and what he described as a "little, annoying pain."

The Arbitrator therefore finds Petitioner entitled to the sum of $264.00 per week for a period of 21.5 weeks, as the injury resulted in permanent partial disability to the extent of 10% loss of use of the left leg.

Regarding M) whether penalties and attorneys' fees should be imposed on Respondent, the Arbitrator finds the following:

Per the payment screen Respondent continued paying temporary total disability until November 7, 2018. Respondent continued paying medical bills incurred by Petitioner until mid December, 2018. (Resp.Ex.#1) Respondent received the surveillance

suggesting Petitioner was working as of November 19, 2018. Respondent notified Petitioner of suspension of benefits based on that information December 6, 2018. (Pet.Ex.#2) Respondent obtained Dr. Nho's exam finding Petitioner not entitled to temporary total disability or in need of medical care after September 17, 2018, thus solidifying the denial of further benefits.

For the foregoing reasons, claim for penalties and attorneys' fees is denied.

Regarding N) is Respondent due any credit, the Arbitrator finds the following:

Having found Petitioner entitled to $293.33 per week in temporary total disability for 13 6/7's weeks through September 17, 2018, a total of $4,064.71 would have been due. Petitioner was paid $5,621.29, and Respondent therefore has a credit of $1,556.58 toward the permanency due.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAVIER MORENO,

Petitioner,

vs. NO: 14 WC 32681

NOT JUST GRASS, INC.,

21IWCC0147

Respondent.

DECISION AND OPINION ON REMAND

This cause comes before the Illinois Workers' Compensation Commission ("Commission") pursuant to the Rule 23 Order of the Appellate Court, Second District, Workers' Compensation Commission Division (Appellate Court), No. 2-17-0736WC, entered January 14, 2020. The Appellate Court reversed the Circuit Court of Kane County, Sixteenth Judicial Circuit, Miscellaneous Remedies Division's ("Circuit Court") decision, 17-MR-64, confirming a decision of the Commission which affirmed and adopted the Arbitrator's Decision, and further remanded the matter to the Commission for further proceedings.

Based upon the Remand Order, an analysis of the Petitioner's work duties, the record in its entirety including the testimony, the medical evidence and expert opinions, the Commission reverses the Arbitrator's Decision regarding accident, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, awards TTD, reasonable, necessary, related medical expenses and prospective medical pursuant to §8(a) and §8.2, and remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

21IWCC0147

Background

On February 22, 2016, Arbitrator Brian Cronin issued a Decision in case number 14 WC 32681, finding that the Petitioner failed to prove the issue of accident, denying benefits, and rendering all other issues moot.

Petitioner timely filed a Petition for Review of the Arbitrator's Decision, raising issues of accident, medical expenses, prospective medical, temporary total disability (TTD), permanent disability and penalties under §19(k), §19(l) and §16. On November 1, 2016, oral arguments were heard in the matter, with both parties represented by counsel. On December 22, 2016, the Commission, after considering the issues raised by Petitioner, and being advised of the facts and law, affirmed and adopted the February 22, 2016, Arbitrator's Decision in its entirety and clarifying that the Commission based its decision on the Petitioner's testimony that he was injured when he bent over and finding that the act of bending over, or the act of bending forward, is movement consistent with normal daily activity and by itself is not an activity associated with a risk of employment. The Commission agreed with the Arbitrator that the Petitioner did not sustain his burden of proving accident under a neutral risk analysis relying on the court's analysis in *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC.

In *Noonan*, Petitioner alleged he hurt his right wrist when he leaned over in a rolling chair and fell while trying to retrieve a pen off the floor. He ultimately sought and received medical treatment, including surgery, for an injury to his right wrist.

The Court in *Noonan* held that the claimant's action of bending over or reaching while seated in his work chair, without more, was insufficient to establish a work related cause to his accidental injury. The risk of injury at issue was simply not one "distinctly associated" with claimant's employment. *Noonan v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152300WC, 65 N.E.3d 530.

In a specially concurring opinion in *Noonan*, Presiding Justice Holdridge emphasized "a claimant may not obtain benefits for injuries caused by activities of everyday living (such as bending, reaching, or stooping), even if he was ordered or instructed to perform those activities as part of his job duties, unless the claimant's job required him to perform those activities more frequently than members of a the general public or in a manner that increased the risk." quoting from *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC. "In other words, such injuries should be analyzed under neutral risk principles. *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 41. The Commission therefore concluded that the Arbitrator properly applied the neutral risk analysis and found the evidence to establish accident deficient under either the qualitative or quantitative analysis.

Petitioner sought judicial review in the Circuit Court of Kane County. On August 25, 2017, Judge David Akemann, Circuit Judge of the Sixteenth Judicial Circuit Court, affirmed the Commission Decision in its entirety and Petitioner filed a timely appeal to the Appellate Court,

Second District, Workers' Compensation Commission Division. In a unanimous Decision, with Justice Holdridge specially concurring, the Court remanded the case to the Commission. The Court held that the Commission employed an improper analysis in categorizing the risk of harm, the injury involved a risk incidental to his employment, thus, remand to the Commission is necessary. The Court relied on their holding in *McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶ 38, 430 Ill. Dec. 434, 126 N.E.3d 522, where a majority of the court rejected the neutral-risk analysis utilized in *Adcock* finding that *Adcock's* analysis was at odds with other decisions of the court, which did "not automatically exclude from the definition of an employment-related risk activities that might involve common bodily movements or *** 'everyday activities.'" *McAllister*, 2019 IL App (1st) 162747WC, ¶ 38. The Court further held that when presented with employment-risk and neutral-risk alternatives, the trier of fact should first consider whether the risk at issue had employment-related characteristics. *Id.* ¶ 68. Additionally, the *McAllister* Court stated the following:

> "[A]n 'arising out of' determination requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis."

McAllister v. Illinois Workers' Comp. Comm'n,, 2019 IL App (1st) 162747WC, ¶ 73,

The Appellate Court further reasoned that both the arbitration and Commission decisions reflect adherence to the *Adcock* analysis and application of the neutral-risk definition that was rejected in *McAllister*. "In other words, the Commission automatically excluded the claimant's risk of injury from the employment-risk category because the activity resulting in injury involved a common bodily movement. The Commission's decision reflects that, because it applied an *Adcock* analysis, it did not consider the nature of the claimant's employment and his required work duties before finding that the claimant's injury stemmed from a neutral risk." *Moreno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 170736WC-U, P29-P31, 2020 Ill. App. Unpub. LEXIS 54, *15-16

Given these circumstances, the case was remanded to the Commission so that it may apply the proper risk analysis, make necessary findings of facts and draw reasonable inferences from the evidence to determine whether the claimant's injury arose out of his employment.

Therefore, the Court reversed the circuit court's judgment confirming the Commission's decision, vacated the Commission's decision and remanded this case to the Commission with directions to employ the proper risk-analysis set forth in *McAllister v. v. Illinois Workers' Comp. Comm'n,* 2019 IL App (1st) 162747W, 2019 IL App (1st) 162747WC, 430 Ill. Dec. 434, 126 N.E.3d 522.

In accordance with the Remand Order, after considering the entire record, and being advised of the facts and law, the Commission reverses the Arbitrator's Decision regarding

accident. The Commission finds that the Petitioner's act of bending to pick up a gas can was incidental to his employment and that he has proved that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, based upon the following:

Since the subject case was appealed and the Appellate Court remand issued, the claimant in *McAllister* filed a petition for leave to appeal to the Supreme Court which was granted to settle the issue of whether a compensable injury can arise out of an employee's employment when the employee is injured while performing job duties that involve common bodily movements or routine "everyday" activities", such as bending, twisting, reaching, or standing up from a kneeling position. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P20, 2020 Ill. LEXIS 561, *7

The Supreme Court enunciated the proper risk analysis that should be applied in the context of sustaining injury while performing job duties that involve common bodily movements or routine "everyday activities" as follows:

> The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill. Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill. Dec. 359, 67 N.E.3d 571. ***, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident [**16] to his or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill. Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P46, 2020 Ill. LEXIS 561, *15-16

Confusion resulting from several Appellate Decisions culminated in the split between the majority and dissenting opinions in *McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, and those Decisions were analyzed in the special concurrence written by Justice Holdridge, and joined by Justice Hoffman (*McAllister v. Illinois Workers' Comp. Comm'n.*, 2019 IL App (1st) 162747WC, P78-P116). The divergent opinions were addressed by the Supreme Court as follows:

> *Caterpillar Tractor* prescribes [**27] the proper test for analyzing whether an injury "arises out of" a claimant's employment, when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. *Sisbro* and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the

> common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill. 2d at 58.

McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, P63, 2020 Ill. LEXIS 561, *26-27.

Further, the Supreme Court held that *Adcock* and its progeny required an additional unnecessary step in the risk analysis and as such were essentially overruled "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P64, 2020 Ill. LEXIS 561, *28.

Findings of Fact

Accident

Based upon the risk analysis as detailed by the Supreme Court in *McAllister* (citations omitted), we turn our analysis to Petitioner's job duties based on his testimony, the medical histories, and the expert opinions. Petitioner testified that he was employed as a general laborer for Respondent performing mowing, different types of construction on some jobs, and landscaping. (T, 18) Petitioner further testified that he did heavy lifting as part of his job duties, including lifting rocks, stones, heavy machines and trees, and mowing lawns and trimming trees. When he began working for Respondent he was completely fine to work and was never diagnosed with a herniated disc or sought treatment for lower back pain. (T, 19- 20) Petitioner testified to an incident on August 25, 2014, wherein his supervisor would not let him move heavy, "like 150 pounds each stone", with a Bobcat; instead his supervisor insisted that they move these flagstone stones quickly because they had to do something else. Petitioner helped his supervisor lift the stones from one pallet to another pallet and he started feeling a "low pain in my back, like real light in my lower back." (T, 21) He did not think it was an emergency or that he had to go to a doctor at the time. He did not report the incident at that time and kept working. (T, 21-22)

Petitioner continued to work through August 30, 2014. Thereafter, he was off for the Labor Day holiday and missed two days of work due to an unrelated incident and returned to work September 4, 2014. (T, 22-24) On September 5, 2014, Petitioner was working with two co-workers mowing lawns. He was getting machines ready, filling them up with gas. Petitioner testified that the gas can was six liters or about 30 pounds, and "then I bend over and I reach with my right hand

and when my body gets tense and I hear my back pop." (T, 25) He then testified that he bent over and grabbed the gas can but he never lifted it. The can was on the ground because when Petitioner bent over and felt his back pop, he could not move. (T, 26) Petitioner testified that his co-worker provided an Ibuprofen pill for pain, and massaged a cream on his back. (T, 29-30)

Petitioner reported the incident to his supervisor when he arrived at the next house, and he continued working that shift. He noticed "real sharp pain" in his lower back, and it started to go in his left leg and left testicle and he was not able to walk. He held his back all the time the whole day. (T, 30) Prior to September 5th, he had never felt pain going from his back down his left leg or into his left testicle. He reported the incident to his boss, Greg, the owner of the company, at the shop around 6:00 in the afternoon (sic). (T, 31)

Petitioner testified that he was off for the weekend and on Monday texted with his boss and reported he was going to the emergency room because his pain had not gone away over the weekend. (T, 36-38)

Greg Voirin, (Greg) the owner of the landscaping company, was called as an adverse witness by Petitioner. Greg testified that Petitioner worked for him as a laborer/landscaper. As part of his duties Petitioner cut grass, using a variety of equipment, i.e., riding mowers, walk behind mowers, trimming equipment. (T, 123) As part of his duties, if the machines run out of gas, they need to be refilled. There are different places where a gas can would be kept. A trailer would be one of them. If one of his employees moves the gas can from the trailer to the ground, he would have to pick it up to get gas to put in the trimmer or whatever equipment he was using. (T, 124-125) Depending on the job, it could be common for workers to pick up rocks or heavy debris. There are usually different sizes, whether it be landscaping materials and what not, and usually there is a one-to-two man carrying system and he would pick things up. That would be expected of his general duties. (T, 127) Greg also testified he does communicate with workers via text and recalled the text message exchange with Petitioner. Greg testified that he was in favor of Petitioner making a claim if he was hurt. If he was hurt, he should seek treatment. (T, 132-133)

Greg further testified light duty work would still require using hand tools and machines for various repairs and when Petitioner had asked for light duty work initially, he was taking Vicodin. Greg did not think that was a wise decision. Thus, if Petitioner was still taking prescription medications, such as Vicodin or Norco, Greg would not be able to offer him light duty work. (T, 133)

Petitioner treated at Rush Copley Medical Center on September 8, 2014. His chief complaint was back pain. The history stated that the symptoms started two days prior when he was trying to pick up a gas can. He started experiencing mild left testicular pain. The Assessment was left-sided back pain that radiates to the left groin. The differential diagnosis included back pain/flank pain, kidney stone, UTI, muscle strain. The diagnosis was noted to be a strain of the lumbar paraspinous muscle; acute back pain. He was discharged and released to return to work September 9, 2014. (PX1)

On September 23, 2014, the Petitioner presented to Dr. Samir Sharma, at Illinois Orthopedic Network, a board certified anesthesiologist, where his chief complaint was listed as low back pain. The history notes the following:

> This is a 32 year old gentleman who sustained a work related injury on September 5, 2014, while he was employed as a landscaper. He was doing a job including repetitive bending, lifting, twisting, moving locks (sic) that were over 100 pounds in weight when he felt a slight strain which was aggravated when the patient was bending to lift a gas can to fill a lawnmower. The patient states at that time he bent forward and felt a strain in his left low back aggravated it as he was going to a standing position around 10:30 a.m. on September 5, 2014, and it was reported to his supervisor at approximately 11:30 a.m. *** (PX2)

The Petitioner's history form stated that the "Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + con.t working." Dr. Sharma diagnosed the Petitioner with low back pain and left lumbar radiculopathy and instructed the claimant to remain off work. He prescribed medication, ordered an MRI and recommended physical therapy. (PX2)

On September 24, 2014, the Petitioner started physical therapy. On January 29, 2015, Petitioner was seen by Dr. Matthew Ross at Respondent's request pursuant to §12. Dr. Ross authored a report and documented the history that Petitioner provided to him. Dr. Ross noted that Petitioner is a laborer doing construction and landscape work. On September 25, 2014, Petitioner bent forward to pick-up a gasoline can to refill the tanks of the machines. He experienced immediate sharp lower back pain preventing him from standing upright. He states that he did not actually lift the can of gasoline. He slowly was able to stand back up. He notified his boss. The boss did not tell him to do anything about it. He continued working that day. He was off for the weekend. His pain continued to worsen. By Monday he was barely able to get out of bed. He then went to the emergency room for treatment. He first began experiencing back pain approximately a week earlier when he had to lift and carry heavy rocks weighing as much as 150 pounds. At that time, he had only "light" pain; he continued working. At the onset of pain, there was also some radiation of discomfort into his left testicle. After his emergency room visit he started treating with a chiropractor. He had had three months physical therapy with limited relief. After an injection he had pain radiating down his left posterior thigh to his lower leg and foot. Not sure if left leg will give out and has occasional numbness in the left leg and foot. He specifically denies any prior history of back pain or injury. He had an altercation 2 weeks (sic) before but was hit in the head. (PX22, RX3)

The Commission finds that based upon the Petitioner and the owner's testimony that as a general laborer working in the landscape business, the act of bending to pick up a gas can was incidental to the Petitioner's employment. Therefore, no additional analysis is required under

McAllister (citations omitted) and the Petitioner has sustained his burden of proving that he sustained an accident arising out of and in the course of his employment.

Causal Connection

On January 29, 2015, Dr. Ross, the expert retained by Respondent pursuant to §12, opined that there was "a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment." (PX22, RX3). Dr. Ross further stated that Petitioner had low back and left sciatic pain following his work incident and September 5, 2014, and noted the following:

> By history, Mr. Moreno started becoming symptomatic a week or two earlier with lifting heavy rocks at work. There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can. Although Mr. Moreno did not have an accident or overstress injury of his back on the date of major pain flare-up, his history of low level back pain following lifting rocks suggests that his injury actually occurred earlier. The L4-5 disc may have been initially injured lifting the rocks. The bending forward to lift the gas can may literally have been the straw that broke the camel's back. It is not uncommon to see disc herniation in evolution begin as back pain, and then erupt as sciatic pain following a trivial event. (PX22, RX3)

The Commission finds that based upon Dr. Ross's credible opinion, that the Petitioner's lumbar spine condition is causally related to the accident he sustained on September 5, 2014.

Medical

When Dr. Sharma saw Petitioner on September 23, 2014, the notes confirm that the Petitioner's pain was localized to the left lower back, with a moderate intensity described as an aching, throbbing sensation aggravated with any prolonged positioning including standing, sitting or walking for extended periods of time. (PX2) Petitioner had a lumbar spine MRI on September 25, 2014. The radiologist's impression noted a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On October 21, 2014, Dr. Sharma noted that Petitioner's pain was improved compared to initial evaluation with therapy; increasing with repetitive bending/lifting/twisting. His MRI showed a far lateral left L4-L5 disc herniation contributing to moderate lateral recess and foraminal stenosis as well as left facet joint effusion at the L4-5 level. Dr. Sharma's assessment/plan was to continue therapy. If he continued to improve, he would advance to work conditioning, followed by a functional capacity evaluation (FCE). If no improvement, he planned to discuss interventional options. Work restrictions included a maximum of 20-pound lifting, repetitively 10 pounds, with no repetitive bending, twisting, lifting, kneeling, crawling, or climbing ladders. (PX2)

On December 2, 2014, Dr. Sharma noted that the Petitioner's original pain subsided, however, now progressed to a burning sensation localized to his buttocks and his left posterior thigh with associated numbness and tingling involving his left leg, however, Petitioner denied any weakness involving the left lower extremity, radiculopathy or involvement with his right lower extremity. He completed eight weeks of therapy with persistent radicular pain. Options included a left L4-5 transforaminal ESI. He was to maintain current work restrictions of 20 pounds maximum and 10 pounds repetitive lifting, no repetitive bending, squatting, climbing ladders, or kneeling or crawling. Petitioner continued conservative treatment.

On January 9, 2015, Petitioner underwent an L4-L5 transforaminal epidural steroid injection (ESI). He underwent a second ESI on January 30, 2015.

On February 13, 2015, Petitioner presented to Dr. Goeffrey Dixon, an orthopedic surgeon. The history was somewhat inconsistent noting that Petitioner was lifting a large container of fuel for a lawnmower when he immediately began to have pain in his back. After the first ESI, he began to experience significant radiation into the left leg down to the knee and calf. Dr. Dixon's review of the lumbar spine MRI notes that it demonstrates a significant disc herniation at L4-L5 to the left extending into the lateral recess and foramen. There is a smaller disc protrusion at L5-S1 on the same side into the left lateral recess, however, Dr. Dixon thought this was likely asymptomatic. Dr. Dixon recommended an L4-L5 micro lumbar decompression and discectomy and opined that Petitioner should remain off work pending completion of treatment. (PX2)

On March 18, 2015, Petitioner underwent a second lumbar spine MRI at Fox Valley Imaging. The radiologist's findings document an L4-L5-moderate far left lateral herniated disc with an annular tear. The annular tear is identified on the axial images at the anterior aspect of the left neural foramen. There is hypertrophy of the facet joints and ligamentum flavum. There is resultant moderate to severe central spinal stenosis. There is moderate left neural foramen stenosis. At L5-S1, there is a small broad-based herniated disc. There is mild hypertrophy of the facet joints and ligamentum flavum. There is mild central spinal stenosis. The radiologist's impression was a far left lateral herniated disc at L4-L5 involving the left neural foramen. (PX3)

On March 20, 2015, Petitioner saw Dr. Dixon and discussed the findings of a new MRI which was obtained two days prior which again re-demonstrated the large left L4-L5 disc herniation within the lateral recess and foramen. His plan was to pursue workers' compensation authorization for the surgery, and Petitioner was to remain off work until such time as he has completed his treatment. (PX2)

Petitioner next presented to Dr. Dixon on April 17, 2015. The objective findings stated that Dr. Dixon reviewed the MRI which demonstrates a large left L4-L5 disc herniation causing central canal lateral recess and foraminal stenosis with increased T2 signal suggesting acute or subacute etiology as well as significant inflammation. The assessment/plan remained the same. Dr. Dixon again discussed the treatment options with Petitioner, comparing conservative therapy

with surgical intervention. He again recommended that he have a micro lumbar decompression and discectomy at L4-L5. He prescribed Norco 10/325. (PX3)

When Petitioner was seen for his §12 evaluation on January 29, 2015, Dr. Ross opined that the initial MRI was a poor quality study although documenting that it shows evidence of a left foraminal disc herniation at L4-L5. As a result, Dr. Ross was of the opinion that there is a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment. He recommended an updated MRI of his lumbar spine in a good quality scanner. The fact that the earlier scan was obtained when the patient was not really having leg symptoms suggests that it may not be an entirely accurate reflection of his current state. If the repeat scan continues to show a foraminal disc herniation at the L4-L5 level, Dr. Ross opined that he would agree that Petitioner would be an appropriate candidate for a left L4 (L4-5 foramen) selective nerve root block and transforaminal cortisone injection. The nerve root block would provide confirmation that this is the source of his pain complaints. If not, the patient could be a candidate for a lumbar discectomy.

Given Dr. Dixon's surgical recommendation, corroborated by Dr. Ross's opinion, the Commission finds that Respondent should provide and pay Petitioner's reasonable and necessary medical treatment related to Petitioner's lumbar spine injury and for prospective medical in the form of the surgery recommended by Dr. Dixon.

Temporary Total Disability

The combined work status notes reflect Petitioner was off work September 23, 2014, through October 21, 2014, then assigned restrictions with carrying, pushing/pulling, lifting less than 20 pounds, no bending, squatting, kneeling through January 26, 2015. When Petitioner saw Dr. Ross at Respondent's request on January 29, 2015, Dr. Ross opined that Petitioner was currently capable of working only in a sedentary position with a 15 pound lifting restriction. He would need to be allowed to vary his position from sit to stand or vice versa. Subsequent off work notes were authored by Dr. Dixon March 5, 2015, through April 17, 2015, with recommendation for surgery. The trial stipulation reflects Petitioner claimed lost time commencing September 23, 2014, through June 28, 2015. (ArbX2) The owner of the company, Greg Voirin, testified that he would not have light duty work if the Petitioner were taking Norco or Vicodin. (T, 133) There is no evidence in the record that after an initial inquiry, there was any further attempt to accommodate Petitioner's restrictions and there is evidence that he had pain prescriptions.

Given the Commission's findings regarding accident and causal connection referenced above, the Commission finds Petitioner has sustained his burden of proving that he is entitled to TTD commencing September 23, 2014, through June 28, 2015.

21IWCC0147

Conclusions of Law

Based upon the above evidence, the Commission reverses the Arbitrator's finding that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment on September 5, 2014, finds that Petitioner sustained his burden of proving accident because the act of bending to pick up the gas can was incidental to his employment, finds that the Petitioner's condition of ill-being as it relates to his lumbar spine is causally related to his work-accident, and awards the Petitioner TTD, medical expenses and prospective medical, however, the Commission declines to award penalties and fees based upon the existing legal precedent at the time of the accident and both the Arbitration Hearing and Commission review of the Arbitration Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 22, 2016, is hereby reversed on the issue of accident for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $400.00 per week for a period of 39-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary related medical services as set forth in Petitioner's exhibits four through fifteen, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall also provide and pay for prospective medical care limited to treatment as it relates to Petitioner's lumbar spine, including surgery and expenses attendant to recovery thereafter, which is reasonably required to cure or relieve from the effects of the accidental injury, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,100.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
KAD/bsd
O111020
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK DUPREE,

Petitioner,

vs. NO: 17 WC 09232

DIAGEO NORTH AMERICA, INC.,

Respondent.

21IWCC0148

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 21, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 31 2021
o- 3/23/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DUPREE, FRANK
Employee/Petitioner

Case# **17WC009232**

DIAGEO INC
Employer/Respondent

21IWCC0148

On 8/21/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.84% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1987 RUBIN LAW GROUP LTD
ARNOLD G RUBIN
20 S CLARK ST SUITE 1810
CHICAGO, IL 60603

2284 COZZI & GOGGIN-WARD
MARK ZAPF
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

FRANK DUPREE
Employee/Petitioner

v.

DIAGEO, INC.
Employer/Respondent

Case # 17 WC 9232

Consolidated cases: N/A

21IWCC0148

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **7/9/19 and 7/12/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On the date of accident, **2/15/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,656.00**; the average weekly wage was $**1,628.00**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay the further sum of $**3,300.40** for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bills of Physicians Immediate Care ($168.40) and Hinsdale Orthopedic ($3,132.00). The medical bills are awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule. The payment shall be sent directly to Petitioner's attorney in accordance with Section 7080.20 of the Rules Before the Illinois Workers' Compensation Commission.

Respondent shall authorize and provide payment for the medical treatment, including the pre-operative testing, MRI and surgery, recommended by Petitioner's treating physicians, Dr. Chudik. The authorization shall be in writing and forwarded to Petitioner's attorney.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Gerald Granada

8/20/19
Date

AUG 21 2019

FINDINGS OF FACT

This case involves Petitioner Frank DuPree, who alleges injuries sustained while working for Respondent Diageo North America, Inc. on February 15, 2017. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) date of accident; 3) notice; 4) causation; 5) medical expenses; and 6) TTD. The main point of contention - and the basis of the disputes - in this case is the date of Petitioner's alleged accident.

Petitioner initially filed an Application for Adjustment of Claim on March 28, 2017 alleging a date of accident on February 20, 2017 while working for Respondent. (AX 2) On June 5, 2017, Petitioner filed an Amended Application for Adjustment of Claim, in which the accident date was changed to February 15, 2017. (AX 3)

Petitioner's testimony

Petitioner testified that on February 15, 2017 he worked for Respondent as a maintenance mechanic or bottling technician. As part of his job duties, he serviced mechanical and electrical failures and fabricated new parts; lifted and carried up to 30 pounds on a normal day and 50 to 60 pounds on a stressful day; and used hand tools, measuring equipment and electrical equipment. Petitioner had worked for Respondent for four years prior to February 15, 2017. Petitioner is right handed. Petitioner worked from 6:00 in the evening to 6:00 in the morning, but his actual workdays changed from week to week and he did not always work from Monday through Friday. Petitioner testified that his supervisor was Yediel Melendez who had been Petitioner's supervisor for about a year prior to February 2017. Petitioner saw Mr. Melendez frequently during his work shift and they communicated about work orders, ordering parts and the condition of broken machinery. The communication with Mr. Melendez would be verbal, in writing or via text message on Mr. Melendez's cell phone. Petitioner's cell phone carrier is AT&T. Petitioner did not and does not have any relationship with Mr. Melendez outside of work.

Respondent's facility is located in Plainfield, Illinois. Petitioner normally worked in the machine shop. The facility had locker rooms. There are two locker rooms in the facility. Petitioner used the locker room in the main building. He accessed the locker room through the main corridor. To get to the locker room, Petitioner would go down the main hallway and then go through another hallway with a pair of double doors. He would opened the first door, go through a small hallway that has lockers and dirty clothes and then into a second hallway that led to the locker room. There is a small hallway that had a utility room and men's bathroom, which were located before the door to the locker room. The distance from the main hall to the first set of doors to the locker room is about 10 to 20 feet.

Petitioner testified that on February 15, 2017 at approximately 6:00 or 6:10 am, he was in the process of opening the door of the men's locker room. He grabbed the door handle with his right hand. The door handle is depicted in Petitioner's Exhibit 7. Petitioner pulled the door open a few inches. As he was pulling the door open, some men were coming out of the locker room. The men opened the door quickly while Petitioner's hand was still on the handle. When the door was pushed open, Petitioner's right arm and elbow were pushed backwards at a 90-degree angle. Petitioner was pushed back so far that he ended up leaning against the lockers. Petitioner let go of the door and tried to get out of the way. Petitioner did

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not know the names of the three individuals who exited through the door in a hurried manner. Following the accident, he noticed pain in his right elbow and biceps. After the accident, Petitioner got his coat from his locker, changed his shoes and went home. Petitioner testified that the accident happened on February 15, 2017.

When asked about the discrepancy in the accident dates as set forth in the original Application for Adjustment of Claim and the initial medical records, Petitioner testified that he was confused about the date of accident since the accident report was not filled out until March 10, 2017. Petitioner also testified that the medical records, which indicated a date of accident of February 20, 2017, were not correct and did not reflect the correct date of accident.

Petitioner testified that he was not scheduled to work on February 16, 2017. He did not report the injury on February 16, 2017 because he did not know what to do and it took him a while to figure out that he should call his supervisor. Although Petitioner confirmed that it was company policy to report accidents immediately (see RX 7), he did not report the accident on February 15, 2017 because he was on his way out of the building when the accident occurred, and he did not know where to find his supervisor at that time. Petitioner testified that he did not notice any bruising on his arm until after he left the work site.

On February 17, 2017, Petitioner noticed that his right biceps was bruised. Petitioner testified that pursuant to Respondent's policy, he was required to report the injury to his team lead Mr. Melendez. On that day, he called the cell phone number that he used for sending text messages to Mr. Melendez and reported the injury. (PX 6) Petitioner greeted Mr. Melendez and then reported the accident to him. He advised Mr. Melendez that there was an incident in the locker room and his arm was bruised. Petitioner said that Mr. Melendez advised that he would take care of it when he came to work. Petitioner did not recall calling Mr. Melendez on any other date.

Petitioner completed an accident report on March 10, 2017. (RX 9) Mr. Melendez was present when he completed the report. Petitioner filled out part of the report and gave it to Mr. Melendez. Petitioner did not complete the date of accident portion of the report. The accident report reflects a date of accident of February 20, 2017. Petitioner testified that the date is incorrect. The accident report was admitted into evidence. (RX 9) The accident report documented a date of accident of February 20 2017 in different handwriting than the rest of the report. (RX 9) The report stated that Petitioner was entering the locker room at the end of his shift when people were coming out. (RX 9) It was dark. (RX 9) As Petitioner reached for the door, he was struck in the arm with the door. (RX 9) Petitioner noticed bruising when he got home that became worse. (RX 9)

Petitioner continued to work for Respondent from February 15, 2017 to the date of the hearing. Petitioner testified that his right arm fatigued easily and he had limited lifting power. Petitioner compensated by using his left arm.

Mr. Yediel Melendez's testimony

Yediel Melendez testified on behalf of Respondent. Mr. Melendez is the operations manager for Respondent. In February 2017, Mr. Melendez was a maintenance team lead. Mr. Melendez's job duties

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included accident investigation. He worked for Respondent for eight years and at the Plainfield facility for four years. Mr. Melendez testified that he knew Petitioner. In 2017, Petitioner reported to Mr. Melendez, who was Petitioner's direct supervisor. He worked with Petitioner on a daily basis. Mr. Melendez testified that on February 22, 2017, Petitioner called him on his cell phone to report a work accident. He testified that Petitioner did not call him prior to February 22, 2017. Mr. Melendez did not recall Petitioner calling him on February 17, 2017 to report an accident. He testified that the first time that he heard about the accident was on February 22, 2017.

Mr. Melendez testified that he started an investigation of Petitioner's accident when he spoke with Petitioner on February 22, 2017. Mr. Melendez testified that he spoke with Petitioner on his cell phone about the accident on that date. The conversation continued at the plant. According to Mr. Melendez, the Petitioner advised him that he sustained an injury on February 20, 2017. Mr. Melendez testified that both he and the Petitioner completed the accident report, with Mr. Melendez completing the top portion of the accident report, including the date of accident, and Petitioner filling out the rest. (PX 9) The accident report was dated March 10, 2017. (PX 9) Mr. Melendez stated that he documented the date of accident of February 20, 2017 because that is what Petitioner told him. Mr. Melendez testified that the accident report was not completed until March 10, 2017 because he had to complete his investigation prior to filling out the report. Mr. Melendez testified that the accident report could have been completed on an earlier date, but he wanted to make sure that Petitioner received medical treatment prior to completing the accident report.

As part of the investigation, Mr. Melendez reviewed security footage from February 20, 2017. Mr. Melendez testified that Petitioner was seen going into the locker room. (RX 8) According to Mr. Melendez the video later shows, Petitioner leaving the locker room carrying something in each hand. (RX 8 at 5:56) Mr. Melendez testified that he was never notified that the date of accident changed from February 20, 2017. The video was viewed during Mr. Melendez's testimony at the arbitration hearing. While being shown the video, Mr. Melendez testified that he was sure the Petitioner was depicted in the video despite not being able to see the face of the individual who was purportedly the Petitioner. The video does not show the door where Petitioner claims to have injured his arm.

Mr. Melendez testified that Petitioner was a good employee and that he did not have any reason to doubt Petitioner's honesty. Mr. Melendez further testified that at the time of the accident his cell phone number was (787) 432-9105, which was a phone number issued in Puerto Rico. When asked whether he received a phone call from the Petitioner on February 17, 2017, Mr. Melendez testified "he was not qualified to answer the question." He later testified that based on his recollection he "know[s] for a fact" that Petitioner called him on February 22, 2017 to inform him of the incident. He did not recall having a conversation with Petitioner on February 17, 2017. Mr. Melendez would recall conversations of extreme importance. He testified that Petitioner contacted him on his cell phone on February 22, 2017 around 4:00 pm. Mr. Melendez testified that Petitioner called him just prior to the shift beginning at 6:00.

Mr. Melendez testified that he took Petitioner to Physicians Immediate Care. He did not recall the date, but it could have been on March 9, 2017. There was some confusion in the testimony of Mr. Melendez about why there was a delay in authorizing treatment for Petitioner. Mr. Melendez testified that he did not take Petitioner to Physicians Immediate Care at an earlier date because it was not recommended that

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the shift manager leave because it would stop work due to the shift schedule. The accident report was completed after Petitioner went to Physicians Immediate Care. He wrote the accident date of February 20, 2017 on the accident report because that is when Petitioner told him the accident occurred. Mr. Melendez agreed that Petitioner's description of the accident was consistent. The only difference was the date of accident.

Petitioner's phone records

Following the testimony of Mr. Melendez and the Petitioner, the Arbitrator granted leave for the parties to produce the Petitioner's complete phone records at a later date. Petitioner's Exhibit 6 is a copy of Petitioner's phone records from AT&T that show the Petitioner's phone activity for the month of February in 2017. The record shows a call to (787) 432-9105 on February 17, 2017. (PX 6) The number is listed at line number 93 and is highlighted on the Exhibit. (PX 6) The call was made at 3:31 pm to a number from Ponce, Puerto Rico. (PX 6) The phone records do not show any other calls made to this cell phone number from Puerto Rico. The parties stipulated that line number 137 of the phone records was a phone call from Petitioner to the Plainfield facility of Respondent on February 22, 2017 at 6:47 am. (PX 6) There is no record of a call being made to the (787) 432-9105 number from Puerto Rico on February 22, 2017.

Medical treatment

On March 9, 2017 Petitioner was initially examined at Physicians Immediate Care, which was arranged by the Respondent's company nurse. Mr. Melendez took Petitioner to this medical provider. The medical records from this provider document that Petitioner complained of right upper extremity pain since February 20, 2017. (RX 4) Petitioner was leaving the locker room in the corridor when three men opened the door and his right upper extremity was hit by the door pushing it backwards. (RX 4) Petitioner had a bruise on his arm and a "charley horse." (RX 4) The physician set forth that he had a spontaneous rupture of the tendon in the right upper extremity. (RX 4) Petitioner was referred to an orthopedic surgeon for the biceps tendon rupture. (RX 4) The records document that Dr. Koehler set forth that the mechanism of accident was not consistent with the MRI findings. (RX 4)

Petitioner underwent MRIs of the right elbow and right shoulder on March 20, 2017 at Naperville Imaging Center. (PX 2) The MRI of the right elbow revealed a complete radial collateral ligament tear, high-grade articular surface tear of the common extensor tendon, punctate interstitial tear of the common flexor tendon and trace olecranon bursitis. (PX 2) The MRI of the right shoulder revealed a full thickness tear of the proximal aspect of the long head biceps tendon with distal retraction of the long head biceps tendon to the level of the middle 1/3 of the humeral diaphysis and associated strain of the long head biceps tendon, the anterior to mid aspects of the distal supraspinatus tendon are not clearly visualized at the humeral insertion suggestive of a full thickness supraspinatus tear, mild subacromial/ subdeltoid bursal inflammation, no right humeral bone marrow edema and T2 hyperintense hepatic lobe lesion which may be a cyst. (PX 2)

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Dr. Chudik examined petitioner on April 7, 2017. (PX 3 & RX 5) Dr. Chudik documented that Petitioner complained of right elbow and right shoulder pain. (PX 3) Petitioner was injured at work on approximately February 20, 2017 when he was entering the locker room at work and his right arm was forced into the shoulder with extension of 90-degree flexion. (PX 3) Dr. Chudik set forth an impression of concern for proximal biceps rupture and rotator cuff tear post work injury of February 20, 2017, biceps rupture long and supraspinatus tear. (PX 3) Dr. Chudik recommended an MRI of the shoulder. (PX 3) Petitioner underwent the recommended MRI study of the right shoulder on January 26, 2018 at Hinsdale Orthopedic. (PX 4) The MRI revealed a full thickness supraspinatus tear, moderate infraspinatus tendinosis, suprascapularis tendinosis and a small undersurface tear, moderate supraspinatus muscle atrophy, long head biceps tendon rupture with retraction into the distal bicipital groove, superior labral degeneration and undersurface tearing and small glenohumeral joint effusion. (PX 4) On February 23, 2018, Dr. Chudik recommended surgery for the right rotator cuff and biceps tendon. (PX 3)

At the request of Respondent, Dr. Marra examined Petitioner on May 10, 2018. Petitioner testified that Dr. Marra agreed with the recommendations for surgery. Respondent did not offer into evidence Dr. Marra's report. However, the report was admitted as a Deposition Exhibit 6 at Dr. Chudik's deposition. (PX 5) Dr. Marra set forth that the mechanism of accident aggravated a pre-existing condition. (PX 5) He further recommended that Petitioner undergo surgery for the right shoulder condition. (PX 5)

Dr. Chudik last examined petitioner on January 7, 2019. (PX 3 & RX 6) Dr. Chudik documented that Petitioner had right shoulder pain, which worsened since the last visit. (PX 3) Petitioner had difficulty opening jars, using screwdrivers and overhead activity. (PX 3) He did not have any new injuries. (PX 3) Dr. Chudik set forth that Petitioner had a gross deformity of the right shoulder with proximal biceps tendon rupture deformity. (PX 3) He stated that Petitioner had right shoulder partial tearing of the undersurface subscapularis, tear of the supraspinatus retracted to the mid humerus and proximal biceps tendon rupture. (PX 3) He recommended surgery and possibly a repeat MRI study. (PX 3)

Dr. Steven Chudik's testimony

The evidence deposition of Dr. Steven Chudik was completed on January 14, 2019. (PX 5) Dr. Chudik documented a history that Petitioner sustained an injury in February 2017 to the right elbow and right shoulder. (PX 5 at 15) Petitioner was entering a locker room by pulling the door open when his shoulder was violently forced back with the elbow in 90 degrees of flexion. (PX 5 at 16) Dr. Chudik explained that Petitioner was opening the door and his right shoulder was forced back abruptly. (PX 5 at 17) If a person is pulling a door and it suddenly jerks the shoulder back, a sharp force is put on the biceps, which would be consistent with a rupture. (PX 5 at 17) It would also put forces on the shoulder, which is detrimental to the shoulder. (PX 5 at 17-18)

Dr. Chudik gave a diagnosis of rupture of the long head of the biceps and a supraspinatus rotator cuff tear. (PX 5 at 20) After reviewing the MRI study of January 26, 2018, Dr. Chudik stated that Petitioner sustained a right shoulder rotator cuff tear involving the supraspinatus and subscapularis and a rupture of the biceps tendon. (PX 5 at 23) Dr. Chudik testified that based on the medical history,

documentation, reports and MRI study, Petitioner sustained a right shoulder rotator cuff tear and biceps tendon injury. (PX 5 at 28) Petitioner had the subjective complaints of pain and limitation related to his right shoulder, which was consistent with the objective findings of the MRI, tears and pathology of the shoulder. (PX 5 at 29) Dr. Chudik recommended surgery for the rotator and biceps tendon tears. (PX 5 at 30) Dr. Chudik stated that the treatment was reasonable and necessary, and he also recommended pre-operative testing, which included an EKG, chest x-ray and laboratory work and a repeat MRI of the shoulder. (PX 5 at 33)

Dr. Chudik testified that the accident of February 15, 2017 directly caused the current condition of ill-being in Petitioner's shoulder and necessitated the need for medical treatment based on the mechanism of accident, reporting of the injury with elements of bruising, biceps deformity and objective findings. (PX 5 at 41) Dr. Chudik explained that when the shoulder is abruptly forced into extension the body will naturally resist and there is an eccentric contraction of the shoulder muscle. (PX 5 at 42) The eccentric contraction causes the tearing of the rotator cuff. (PX 5 at 42) The biceps crosses the shoulder joint when the arm is extended the biceps contracts to try to stabilize the joint and the extension forces cause injury to the biceps. (PX 5 at 43)

Dr. Chudik reviewed the reports of Dr. Marra. (PX 5 at 44) Dr. Chudik testified that Dr. Marra's history that Petitioner sustained an accident on February 15, 2017 was consistent with his history. (PX 5 at 45) Further, Dr. Marra's review of the MRI studies was consistent with Dr. Chudik's reading. (PX 5 at 45) Dr. Marra also agreed with Dr. Chudik's surgical recommendation and that the current condition of ill-being was causally connected to the work-related accident of February 15, 2017. (PX 5 at 46)

Dr. Chudik recommended restriction of minimal repetitive reaching or lifting away from the body. (PX 5 at 47) He further recommended no lifting more than 20 pounds. (PX 5 at 48) Dr. Chudik testified that Petitioner had not reached maximum medical improvement. (PX 5 at 48)

Dr. Chudik stated that he used the date of accident of February 20, 2017 in his medical records. (PX 5 at 51) He clarified that the fact that February 20, 2017 was repeated in his progress notes is not relevant since his office does not generally re-ask a patient the date of accident. (PX 5 at 53) Dr. Chudik stated that the progress note from Physician Immediate Care and Dr. Marra documented different dates of accident in February 2017, but contained a consistent description of the accident. (PX 5 at 59-60) Dr. Chudik testified that not all patients are good historians. (PX 5 at 61) Dr. Chudik testified that the actual date of accident did not change his opinions about medical causation. (PX 5 at 62) He relied on the specific mechanism of accident, which was consistent with the injury. (PX 5 at 62)

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based on the Petitioner's testimony and the preponderance of the documentary evidence, including the medical records and the accident report. All the records and the testimony of all the witnesses confirm that the Petitioner injured his right arm when he was opening a door to the Respondent's locker room at work. The history of Petitioner's mechanism of accident is consistent

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throughout the medical records, accident report and the testimony of all the witnesses. The facts presented at the arbitration hearing do not really dispute that Petitioner injured his right arm and that the incident arose out of and in the course of his employment with Respondent. Although Respondent presented video evidence that does not show any accident occurring on February 20, 2017 - notwithstanding the issue of the accident date - the video is not persuasive because it does not depict the door where the accident allegedly occurred, nor does it clearly show the Petitioner. Even Mr. Melendez's testimony does not refute the Petitioner's description of the mechanism of his accident. As noted at the onset of this decision, the main question is what is the date of Petitioner's accident.

2. Regarding the issue of accident date, the Arbitrator finds that the Petitioner's date of accident is February 15, 2017. This finding is based on the Petitioner's credible testimony and the documentary evidence, including the medical records, accident report and phone records. The Arbitrator notes that this is the main issue in dispute, the basis of the remaining issues, and a question of credibility. Petitioner claims that the initial accident date alleged of February 20, 2017 is incorrect and that due to his confusion, he initially used that date instead of February 15, 2017. The accident report, which was only partially completed by the Petitioner, indicates an accident date of February 20, 2017, and that date was subsequently reflected in the initial medical evidence. Notwithstanding the alleged date of Petitioner's accident, Petitioner's history of how he injured himself at work is consistent throughout the investigative and medical evidence. So the main question posed to the Arbitrator is whether the Petitioner's explanation - of his confusion regarding the date of accident - holds any credibility.

In assessing the Petitioner's credibility on this issue, the Arbitrator looks to the Petitioner's claim that he called his supervisor Mr. Melendez's cell phone on February 17, 2017 to report his February 15, 2017 accident. Mr. Melendez claims that Petitioner called him on his cell phone on February 22, 2017. Petitioner's phone records support Petitioner's claim and refute Mr. Melendez's testimony directly. The Arbitrator further found Mr. Melendez's testimony regarding the video evidence lacked credibility. Mr. Melendez testified that he was sure the Petitioner was shown in the video as he pointed to a certain individual seen in the video. In watching the video, the Arbitrator notes that the face of the individual purported to be the Petitioner is not clear. Furthermore, the video does not depict the area where the Petitioner claims to have been injured. Even assuming arguendo that the video is for the correct date of accident, its failure to clearly depict the Petitioner or the door responsible for Petitioner's injury undermines both the evidentiary weight of the video and the credibility of Mr. Melendez's testimony. The Arbitrator further notes that Mr. Melendez appeared to be evasive during his testimony, as seen when he responded that he "was not qualified to answer" when asked whether the Petitioner called him on February 17, 2017. On the other hand, the Petitioner appeared to be a meek and mild-mannered witness, who was honest in his admission that he was confused and at times did not know what to do in regard to his reporting, or that he could not remember what he may have said to his medical providers.

The Arbitrator further notes that Mr. Melendez initially documented the accident date of February 20, 2017. Petitioner's initial medical treatment was arranged through the company nurse and Mr. Melendez, and the records from the initial medical treatment reflect the date documented by Mr. Melendez. Given this meek and mild-mannered Petitioner's susceptibility to confusion and admitted lack of knowledge regarding the process of accident reporting, it is reasonable to conclude that Petitioner simply acquiesced to the accident date documented by Mr. Melendez, which was then used by the initial medical providers.

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Based on the above, the Arbitrator concludes that the date of Petitioner's accident is February 15, 2017.

3. With regard to the issue of notice, the Arbitrator finds that the Petitioner has met his burden of proof. As indicated above, the main dispute in this case is the date of Petitioner's accident. The testimony established that notice was provided either on February 17, 2017 or February 22, 2017. The Arbitrator finds that notice was provided on February 17, 2017 based on the phone records. However, either way, timely notice was provided since it is undisputed that Respondent had notice of the accident within 45 days, and thus cannot argue any prejudice based on the lack of sufficient notice.

4. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the witness testimony and the medical evidence, which all show that Petitioner sustained an injury to his right arm that has resulted in a rupture of the long head of the biceps and a supraspinatus rotator cuff tear – conditions which require surgical attention. Given the main issue in this case being the date of Petitioner's accident, there was little to no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill being in his right arm and shoulder are causally connected to his work accident from February 15, 2017.

5. With regard to the issue of medical expenses and consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner's medical treatment has been reasonable and necessary in addressing his work related arm injury. Therefore, the Arbitrator concludes that Respondent is liable for payment of the medical bills, subject to the Fee Schedule, from Physicians' Immediate Care in the amount of $168.40 and Hinsdale Orthopedics in the amount of $3,132. The Arbitrator further orders Respondent to make payment of the medical expenses to Petitioner's attorney pursuant to Section 7080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

6. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the prospective medical care recommended by Dr. Chudik - including the proposed surgery to address Petitioner's rupture of the long head of the biceps and a supraspinatus rotator cuff tear – is reasonable and necessary. Given the main issue in this case being the date of Petitioner's accident, there was no evidence introduced to rebut Petitioner on this issue. In fact, both Petitioner's treating physician, Dr. Chudik and Respondent's IME, Dr. Marra are in agreement on this issue in favor of Petitioner. Therefore, the Arbitrator concludes that Petitioner is entitled to payment for medical treatment recommended by his treating physician, Dr. Chudik, including the right arm and shoulder surgery, pre-operative testing and repeat MRI; and Respondent shall authorize and pay for said procedure.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES SHALES,

Petitioner,

vs.

NO: 12 WC 17815
14 WC 18638
16 WC 16860

STATE OF ILLINOIS-IDOT,

Respondent.

21IWCC0149

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical benefits, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner filed three worker's compensation claims which were consolidated for purposes of arbitration hearing – namely 12 WC 17815, 14 WC 18638, and 16 WC 16860. So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties and limit the incorporation of the Arbitrator's Findings of Facts to this extent. The Commission is also not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20

(1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission affirms the Arbitrator's ultimate decision to deny in their entirety Petitioner's claims in 12 WC 17815, 14 WC 18638, and 16 WC 16860. The Arbitrator found that Petitioner failed to prove that an injury arose out of and in the course of employment and that Petitioner failed to prove that his current conditions of ill-being were causally related to a workplace injury. The Commission further affirms the Arbitrator's denial of benefits.

The primary basis for the Arbitrator's denial of Petitioner's claim in 12 WC 17815 was Petitioner's lack of credibility, together with noted inconsistencies between Petitioner's testimony and the medical records, and omissions in evidence and testimony "that would add clarity and corroboration to the events of these claims." (Arbitrator's Decision, pg. 14). The Commission agrees and finds significant the various versions of how Petitioner hyperextended his left knee while in Respondent's parking lot on September 19, 2011, as well as the two-month delay in seeking treatment. The Commission further agrees with the Arbitrator's assessment and finds more persuasive the opinions of Respondent's Section 12 examiner, Dr. Cole, who also found the delay in treatment significant; Dr. Cole opined that he could not state that Petitioner's left knee injury was causally related to the September 2011 injury due to a lack of contemporaneous medical records.

With respect to Petitioner's second claim, 14 WC 18638, the Commission notes the Application for Adjustment of Claim and the Arbitrator's Decision were based on an accident date of March 19, 2014. The Request for Hearing form, the parties' Briefs, and the arbitration transcript refer to a February 22, 2014 accident date. Notwithstanding this, the parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of employment on February 22, 2014. The main issue herein was causal connection.

The Arbitrator found that the mechanism of injury – Petitioner driving Respondent's state vehicle into a hole on the roadway – did not comport with Petitioner's alleged complaints and symptoms to his bilateral shoulders, neck, back, left knee, and buttocks. The Arbitrator again noted that Petitioner did not seek immediate treatment.

The Commission relies upon and finds the opinions of Respondent's Section 12 examiner, Dr. Phillips, more persuasive than Petitioner's Section 12 examiner, Dr. Treister. Respondent had sent Petitioner to Dr. Phillips for an evaluation of the spine. Dr. Phillips also evaluated Petitioner's left shoulder but offered no opinion with respect to causation. Dr. Phillips noted a different date of accident, indicating February 15, 2014, but otherwise stated that after reviewing the records and evaluating Petitioner,

> I am not provided any evidence of this accident as provoking Mr. Shales' symptoms. He does subsequently when he presented to Dr. Montella in October 2014 describe the accident on February 3, 2014 in more detail. Assuming the information regarding the

> accident is actually correct and the accident is documented as occurring with Mr. Shales developing symptoms subsequent to this, I believe this would have at most caused a sprain/strain injury. (RX4).

Dr. Phillips stated that Petitioner's current spinal condition was most likely related to some underlying spondylosis.

On the contrary, Dr. Treister opined that as a result of the second work injury, Petitioner sustained a sprain/strain of the cervical and lumbar spine, a left shoulder rotator cuff tear and/or labral tear, a compensatory injury in the right shoulder, a perirectal abscess, and aggravation of Petitioner's pre-existing left knee condition. The Commission finds Dr. Treister's opinions equivocal and not persuasive. Dr. Treister testified, "I think it's related to the accidents. I can't say 12 percent to one and 70 percent to the other, but all these accidents fit together with this deterioration quite clearly." (PX21, pgs. 35-36).

The evidence demonstrated that the first medical record following the February 22, 2014 accident was from Petitioner's primary care physician, Dr. Gindorf, dated March 14, 2014 – about three weeks after the accident. At that appointment, Petitioner reported only neck and right shoulder pain; on March 21, 2014, Petitioner reported pain in both arms; and, on April 1, 2014, Petitioner reported back and rectal pain. The first time Petitioner's complaints were attributed to a work-related injury was Dr. Gindorf's letter addressed to "Dear Sirs" and dated April 8, 2014; that letter stated: "He reports pain in his shoulder and neck that he attributes to hitting potholes while driving around in his job as an inspector." (PX15).

Petitioner had also sought treatment with Dr. Flatt on March 19, 2014 – his chiropractor of 20 years for the neck and back. The medical record indicated that Petitioner had right arm pain that had been present for 11 days, or March 8, 2014, and the pain traveled from the neck to his wrist; Petitioner denied any trauma. After examining Petitioner's entire spine and right shoulder, Dr. Flatt diagnosed Petitioner with low back and thoracic spine pain, cervical spondylosis without myelopathy, right cervical radiculopathy, and right radial nerve irritation; however, the medical record indicated that the former three diagnoses had been present since June 29, 2012.

On April 4, 2014, Petitioner underwent an incision and drainage procedure for the perirectal abscess. The hospital and physical documentation stated that Petitioner had been experiencing rectal pain for the last week. There was no mention of the work accident. The left arm complaints appeared on April 11, 2014 in Dr. Flatt's records.

As to Petitioner's left knee condition, the arbitration record was void of any evidence of complaints or treatment from September 21, 2012 until Petitioner first saw Dr. Montella on October 6, 2014 – nearly eight months after the February 22, 2014 accident [Dr. Montella also had the wrong date of accident and noted February 3, 2014].

As in all workers' compensation claims, it is Petitioner's burden of proof; although it is the Commission's province to draw reasonable inferences from the evidence, the Commission's Decision must be supported by the record and not based on mere speculation or conjecture. *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)); *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 215 (2003).

The Commission finds that the evidence herein demonstrated a real disconnect between the accident date and the timeline of Petitioner's complaints, and a real disconnect with the medical evidence relating those complaints back to any alleged accident date. The medical records demonstrated a delay in complaints and treatment, and even then, not all of the injuries that Petitioner testified to were documented. Petitioner's complaints appeared in piecemeal over a course of up to eight months – with the injury to Petitioner's left knee finally appearing in Dr. Montella's office visit note dated October 6, 2014. The first time some of Petitioner's complaints were attributed to a work-related injury was on April 8, 2014, when Dr. Gindorf indicated that Petitioner attributed his right shoulder and neck complaints to "hitting potholes while driving around in his job as an inspector." (PX15).

In addition, and despite all the claimed injuries, Petitioner's testimony at arbitration narrowed his complaints following the 2014 accident to his neck and back. Drs. Treister and Phillips both opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease. However, Dr. Phillips found that Petitioner's current spinal condition was most likely related to some underlying spondylosis. This correlates with the record which demonstrated that Petitioner had a 20-year history of chiropractic treatment for his neck and back. The Commission therefore finds that Petitioner's current condition of ill-being with respect to his spine was pre-existing and unrelated to the second work accident in 2014.

For the remaining alleged injuries, Dr. Treister's significant diagnoses and favorable causation opinions related to Petitioner's shoulders, left knee, and perirectal abscess do not comport with the medical records that demonstrated a delayed onset of complaints and no documented work-related injury until months later as noted above. Additionally, with respect to Petitioner's right shoulder, Dr. Treister testified that it was the result of overuse causing irritation and bursitis and/or tendonitis. However, Petitioner testified that he attributed only his neck and back injuries to the 2014 accident; Petitioner did not testify to any overuse injury. He also denied any trauma with respect to any right arm pain [see Dr. Flatt's 3/19/2014 record], and the pain appeared to be related to Petitioner's neck injury.

Finally, as to Petitioner's alleged third injury in claim number 16 WC 16860, the Arbitrator noted that Petitioner reported injury to both shoulders, left knee, neck and back as a result of a collision while driving Respondent's vehicle on May 23, 2016. The Arbitrator found Petitioner incredible and noted the following: Petitioner misrepresented that the collision had been witnessed; there was no significant damage to the vehicle; there was no debris or skid marks on the roadway; Petitioner did not report the accident to his supervisor and misrepresented his conversation with the manager of the motor pool; and, "[h]e sought to deceive investigators

about his job duties and sought to mislead a claims adjuster about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle." (Arbitrator's Decision, pg. 17). The Commission further notes a significant discrepancy during Petitioner's testimony at arbitration. Petitioner testified that the collision occurred as he was turning into Respondent's IDOT parking lot "at the end of the night to return the vehicle." (T.40-41). However, both the Respondent's Employee Accident/Incident report and the Illinois Motorist Report from the Lake Zurich Police Department indicated that the collision occurred at approximately 1:40 PM. (RX7). The Arbitrator additionally noted Petitioner's delay in treatment, that Petitioner refused any ambulance and emergency treatment, and that "[h]e was not truthful in testifying he followed up with David Flatt." (Arbitrator's Decision, pg. 17).

The Commission agrees with the Arbitrator that issues of credibility exist with respect to the alleged accident date of May 23, 2016 and therefore affirms the Arbitrator's Decision denying Petitioner's claim.

In light of the foregoing and based on the evidence in its entirety, the Commission affirms the Arbitrator's ultimate conclusions. For claim number 12 WC 17815, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 14 WC 18638, Petitioner failed to prove that his current condition of ill-being is causally related to a workplace injury, benefits are denied. For claim number 16 WC 16860, Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 14, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAR 31 2021
TJT/pm
O: 3/3/21
051

Kathryn A. Doerries

Stephen J. Mathis

21IWCC0149

DISSENT

I respectfully dissent from the Majority Decision for the following reasons:

For the first claim, 12 WC 17815, Petitioner testified to one version of his September 19, 2011 injury at arbitration – that he slipped and hyperextended his knee while in his employer's parking lot. The remaining histories were found in the medical records and reports; many of which had erroneous dates of injuries or dates of tests and treatments. Petitioner argued by his Brief that Respondent did not contest the mechanism of injury, but instead disputed liability based on causal connection. By its Brief, Respondent requests that this panel affirm the Arbitrator's Decision, and indeed made no argument relative to the issue of accident. In fact, there was no cross-examination by Respondent with respect to the September 2011 incident. Respondent instead argued that Petitioner's left knee condition was due to pre-existing osteoarthritis and not the result of any work-related accident in September 2011. (Respondent's Brief, pg. 10).

In reviewing the evidence, the medical records provided slight variations of Petitioner's ultimate testimony that he had slipped and hyperextended his left knee on September 19, 2011; the medical records also indicated that the accident happened in November 2011, but by this date, Petitioner had sought treatment for a left knee injury that was listed as occurring on September 19, 2011. Additionally, Respondent did not contest or rebut Petitioner's testimony that he was at work at 3:00 AM on September 19, 2011 in preparation for a week-long training in Springfield. Respondent also stipulated to notice of the injury. There was no argument against the time and place where Petitioner had alleged he injured his left knee, and no argument with respect to the mechanism of injury. Based on the parties' evidence and arguments, or lack thereof, there is sufficient basis to reverse the Arbitrator's Decision and find that Petitioner sustained a work-related accident on September 19, 2011.

With respect to causal connection, Petitioner testified that he did not seek treatment for his left knee injury until November 2011 – approximately two months after the alleged accident date. I find that the two-month delay in treatment does not defeat Petitioner's 2011 claim; by Petitioner's Brief and testimony, he had just started in his new job position with Respondent and was sorting through new insurance, as well as the worker's compensation process. Respondent eventually sent Petitioner to its company clinic in November 2011. The evidence submitted at arbitration included the Initial Workers' Compensation Medical report dated November 11, 2011 which was signed by a physician from Central DuPage Business Health. Petitioner had been diagnosed with a left knee strain and prescribed Ibuprofen and physical therapy. The next record was a work status from Central DuPage Business Health dated December 6, 2011, allowing Petitioner to return to work full duty without restriction. However, the work status note still indicated that Petitioner required medication and physical therapy for the left knee. Thereafter, Petitioner began treatment with Dr. Elstrom and eventually proceeded with left knee surgery.

The chain of events in this case supports a finding of causal connection in favor of Petitioner. The only prior history related to the left knee was the unrelated procedure that

Petitioner had in 1978 for Osgood-Schlatter disease; thereafter, Petitioner testified that he did not have any problems, limitations, or medical care for the left knee for approximately 30 years. Following the September 2011 injury, Petitioner was rendered symptomatic, necessitated medical care and diagnostic imaging, and underwent a left knee arthroscopy, debridement, and synovectomy on April 30, 2012. Petitioner's post-operative diagnoses were chondromalacia patella and capsular synovial plica. Thereafter, Petitioner completed post-operative physical therapy and received two additional injections [for an overall total of three injections] to the left knee.

Petitioner's Section 12 examiner, Dr. Treister, reviewed the operative report and found that the surgical pathology supported a more recent injury rather than a chronic one. Dr. Treister noted no "kissing legion" which would have been present in long-standing, chronic patellar chondromalacia. He opined that a hyperextension knee injury could cause the patella to strike the femur and cause central cartilaginous damage resulting in residual chondromalacia, inflammation, and secondary adjacent synovitis "which may become manifest as a thickened synovial plica, which by rubbing can be a source of pain. There was no other intra-articular pathology described. The findings at surgery were consistent with symptom production as described and with the time interval as described." (PX4; PX11; PX21, pgs. 9-11; 17-19). Respondent's Section 12 examiner, Dr. Cole, could not state that Petitioner's left knee injury was causally related to the September 2011 accident due to a lack of contemporaneous medical records. However, he conceded that the mechanism of injury described by Petitioner and as indicated in Dr. Elstrom's January 2012 office visit note "certainly represent an injury that might or could incite pain related to preexisting arthritis and cause an aggravation." (RX6).

I find Dr. Treister's opinions more thorough and persuasive than Dr. Cole's. Dr. Treister specifically reviewed and commented on the intra-operative findings for the left knee and noted evidence of a more recent than chronic injury. Dr. Cole also conceded that the history of injury could be an aggravating factor to Petitioner's left knee.

For the second claim, 14 WC 18638, the Majority notes that both Dr. Treister and Dr. Phillips opined that Petitioner may have sustained a sprain/strain of the spine in the presence of pre-existing, multi-level degenerative disc disease, but nonetheless relied on Dr. Phillips' opinion that Petitioner's current spinal condition was due to a pre-existing condition and unrelated to the second work injury.

I respectfully dissent and instead find that Petitioner sustained a strain/sprain of the cervical and lumbar spine in 2014 as opined by both Petitioner's and Respondent's Section 12 examiners, Dr. Treister and Dr. Phillips. Notwithstanding any pre-existing spinal conditions, the medical demonstrated no significant or active chiropractic treatment to the spine until after the 2014 accident.

I concur with the Majority's decision on the remaining alleged injuries and issues in this second worker's compensation claim. I further concur with the Majority with respect to the third worker's compensation claim, or 16 WC 16860.

21IWCC0149

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **12WC017815**

14WC018638
16WC016860

STATE OF ILLINOIS-IDOT
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1414 O'CONNOR LAW GROUP LLC
BRYAN J O'CONNOR
140 S DEARBORN ST SUITE 320
CHICAGO, IL 60603

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305 / 14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner

v.

State of Illinois-IDOT
Employer/Respondent

Case # **12** WC **17815**

Consolidated cases: **14 WC 18638; 16 WC 16860**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **September 19, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally related to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-12-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **14WC018638**

12WC017815
16WC016860

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Shales
Employee/Petitioner
v.

Case # **14** WC **18638**

Consolidated cases: **12 WC 17815; 16 WC 16860**

Illinois Department of Transportation
Employer/Respondent

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **March 19, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**59,717.00**; the average weekly wage was $**1,148.40**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove that his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4-10-2020
Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHALES, JAMES
Employee/Petitioner

Case# **16WC016860**

12WC017815
14WC018638

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0149

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 14 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Shales
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **16** WC **16860**

Consolidated cases: **12 WC 17815; 14 WC 18638**

21IWCC0149

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **August 28, 2019; October 3, 2019; and December 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **May 23, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** **not** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**61,230.00**; the average weekly wage was $**1,177.50**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of benefits

Because Petitioner failed to prove an injury arose out of and in the course of employment and failed to prove his current condition of ill-being is causally connected to a workplace injury, benefits are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4.10.2020
Date

ICArbDec19(b)

APR 14 2020

James Shales v. State of Illinois-IDOT, No. 12 WC 017815; James Shales v. Illinois Department of Transportation, No. 14 WC 18638; James Shales v. Illinois Department of Transportation, No. 16 WC 16860.

Preface

The parties proceeded to hearing August 28, 2019, recessed and resumed to October 3, 2019, and recessed and resumed to December 5, 2019, on separate Requests for Hearing on these three cases. The hearing on 16 WC 16860 proceeded on a Petition for Immediate Hearing Under Section 19(b) of the Act. The parties, at the beginning of the hearing, indicated the following disputed issues. In 12 WC 017815: whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is related to the injury; what were Petitioner's earnings and average weekly wage; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to a period of temporary total disability of two weeks; and what is the nature and extent of the injury. In 14 WC 18638, the disputed issues are: whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; whether Petitioner is entitled to four and 6/7 weeks temporary total disability; and what is the nature and extent of the injury. In 16 WC 16860, the disputed issues are: whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is causally related to the injury; whether Respondent has paid all appropriate charges for all reasonable and necessary medical services; and whether Petitioner is entitled to a period of temporary total disability of 161 and 6/7 weeks. James Shales v. Illinois Department of Transportation, Nos. 12 WC 017815; 14 WC 18638; 16 WC 16860 (Cons.) Transcript of Proceedings on Arbitration, August 28, 2019, at 4-7; Shales, October 3, 2019, at 4-5; Arbitrator's Exhibit 1; Arbitrator's Exhibit 2; Arbitrator's Exhibit 3; Arbitrator's Exhibit 4.

Petitioner filed three Applications for Adjustment of Claim: 12 WC 17875 claiming a date of accident of September 19, 2011, injuring a leg; 14 WC 18638 claiming a date of accident of March 19, 2014, injuring his head, neck, and back; and 16 WC 16860 claiming a date of accident of May 23, 2016, injuring his neck and right side of body. Arbitrator's Exhibit 5; Arbitrator's Exhibit 6; Arbitrator's Exhibit 7. Those filings indicate Petitioner is alleging three distinct claims. 50 Ill. Admin. Code Section 9020(b). And so that is how the Applications will be addressed.

Petitioner testified, as well as Joseph Harris, Lauder Hampson, Ken Martin, Greg Williamson and via evidence deposition, Dr. Michael Treister. The parties offered nearly 60 exhibits, and a major obstacle to resolution of these cases was the failure of either party to refer an exhibit to the specific case to which it was applicable, and the repeated attempts of Petitioner, as well as Treister, to conflate the three claims. An Arbitrator can only decide a case on the testimony and evidence before them, and simply cannot make the case for either party, or searching the record and manipulate the testimony and evidence to cobble together a preponderance of evidence for Petitioner.

I also note that many of the exhibits submitted were compromised by underlining, the addition of notations, and other distortions. This is disturbing. None of those pages will be considered. Petitioner's Exhibit 3 is a manufactured medical record, submitted without certification or in response to subpoena. It is a poor attempt at fashioning would be medical evidence. I give it no weight whatsoever. Petitioner's Exhibit 27 is likewise given no weight because of the handwritten notations on the exhibit.

Findings of Fact

Since the time he was hired by the State of Illinois (Respondent), James Shales (Petitioner) was always a Staff Assistant with the Department of Transportation. Those job duties say nothing about vehicle inspections. The job duties of a Staff Assistant such as Petitioner are to be accountable for assisting the overall development and coordination of policies and directives regarding bureau programs for the Division of Traffic Safety. The position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. The Staff Assistant provides policy interpretation and analysis of policy and provides assistance to local agencies, elected officials, and the general public. The Staff Assistant serves as confidential assistant to the Deputy Director, serves as a liaison between the Deputy Director and the Governor's office, a legislator, and other state agencies, and serves as department spokesperson for bureau programs conducting presentations to departments (management), elected officials, and the general public. The Staff Assistant coordinates and assists in implementing policy initiatives, reports on the process to management, develops informational documents presenting background and options for addressing issues of policy concerns and develops appropriate policy recommendations to provide maximum benefits to the division and provides analysis and recommendations policy issues. Petitioner was laid off in September 2016 from the position, along with 40 others. He was hired in 2011. Shales, August 28, 2019 at 12, 44, 109-116; Shales, October 13, 2019 at 32.

Petitioner was apparently one of hundreds of individuals, many with political connections, hired by the Illinois Department of Transportation as Rutan-exempt Staff Assistants from 2003 to 2013. The sordid history of the Staff Assistant position can be found at shakmanillinois.com/special-master-filings1. It is well worth reading all the reports of the Special Master. Petitioner is specifically mentioned as being a candidate sponsored by the Governor's Office and hired between 2009 and 2013. The Special Master noted the lack of experience or qualifications for appointment to Rutan-exempt positions, or not requested by the Department. See Corrected Fifth Report of the Special Master at 23, 24 (Petitioner was candidate for Kane County Board).

Ken Martin, retired after 38 years with Respondent, in positions in which he was familiar with Petitioner, testified the decision was made in 2014 to lay off Staff Assistants and then after working with the unions for two years, the eventual layoff was in 2016. Martin testified there is a federal monitor in the Department of Transportation because of the actions taken with the Staff Assistant program. Shales, August 28, 2019 at 95-96, 110, 116.

Petitioner testified that on September 19, 2011, he was in Respondent's parking lot in Schaumburg at 3:00 a.m. He parked his car in the lot and got the keys to a state vehicle. He got

the vehicle and drove it to his car to unload bags and clothes, ". . . slipped approximately maybe five yards. . . ." Petitioner said he hyperextended his left knee, and heard a pop and a lot of pain. He did not indicate how he knew the knee was hyperextended or give any testimony indicating the mechanics of how his slipping led to a hyperextension. The slip was unwitnessed. Petitioner testified he previously had surgery on his left knee in 1978. Shales, August 28, 2019 at 18-20.

I would note at this point, the Application for Adjustment of Claim for this accident appears to be defective, as it fails to set forth a description of how the accident occurred. Arbitrator's Exhibit 1; 50 Ill. Admin. Code 9020.20(c).

Although Petitioner testified he reported the accident immediately to his supervisor in Springfield, he did not complete the CMS Workers' Compensation Employees' Notice of Injury until November 11, 2011, two months later, failing to detail how the injury occurred or at what time. Shales, August 28, 2019; Petitioner's Exhibit 1.

Petitioner testified he first saw his primary care physician, a Dr. Popli. There are no records from Dr. Popli, and no support for Petitioner's testimony. He did not say when he first sought treatment. Petitioner then testified he saw some doctor at the St. Charles facility. The only records from Central DuPage Business Health/St. Charles is a Work Status dated December 6, 2011, three months after the supposed slip. Petitioner was placed on full duty without restrictions and diagnosed with "left knee strain—delayed recovery." Delayed recovery is left unexplained. Petitioner was prescribed physical therapy and 800 mg Ibuprofen. The CMS Initial Workers' Compensation Medical Report dated November 11, 2011, gives a history of "stepped in a puddle at work slipped and hyperextended left knee." A Dr. Mather diagnosed Petitioner with left knee strain. Dr. Popli was not referenced as giving Petitioner any prior treatment. Shales, August 28, 2019 at 22; Petitioner's Exhibit 1A; Petitioner's Exhibit 2.

Petitioner testified Dr. Popli referred him to a Dr. Elstrom. He did not say when or why. The records of Centegra Health System, referencing Dr. John Elstrom of April 19, 2012, indicate Petitioner was referred January 30, 2012, with left knee pain. Petitioner told Elstrom he slipped in a parking lot while running. The admitting diagnosis was gonoarthrosis of the left knee [a degenerative condition] with meniscal tear. There is no record of diagnostic supporting a meniscal tear. Petitioner, said the note, "decided to go ahead with arthroscopy of the left knee." There are no records of a recommendation for arthroscopy. There is an operative note of April 30, 2012, that an arthroscopy, debridement, synovectomy of the left knee was performed. The post operative diagnosis was chondromalacia patella and capsular synovial plica. Petitioner testified he was off work a week or so following surgery and a couple of days in May 2012 for physical therapy. Shales, August 28, 2019 at 23, 25; Petitioner's Exhibit 4.

The records of Accelerated Rehabilitation Centers from May 8, 2012, in an Initial Evaluation indicate a referral by Dr. Ehlstrom. In a history, Petitioner tells the therapist his knee begins to bother him in "Oct/Nov." It also notes "NA Work Comp claim." This physical therapy is clearly related to Petitioner's knee surgery of April 30, 2012. Petitioner's Exhibit 22.

What is disturbing about a large portion of Exhibit 22 is the manufactured records on pages 13-16, as well as the Leave Request on page 17. Petitioner's Exhibit List refers to Exhibit

22 as "Accelerated Rehab note 5-8-12." That is a misrepresentation of its contents. Pages 13-17 are stricken from the exhibit. The alterations on pages 13-16 are particularly disturbing and unprofessional.

On September 17, 2012, Dr. Elstrom wrote a letter to Dr. Vincent Cannestra referring Petitioner to Cannestra's practice. Elstrom indicates he first saw Petitioner January 30, 2012, complaining of an injury November 10, 2011. He says Petitioner has gonarthrosis of the knee and notes an MRI of June 11, 2012, showed a joint effusion but was otherwise normal regarding the ligaments, joint surfaces, and menisci. What is revealing in the letter is Elstrom's telling Cannestra, Petitioner ". . . wanted to go ahead with arthroscopic evaluation of the knee," not that it was recommended. Petitioner's Exhibit 3A; Petitioner's Exhibit 3B.

It is conspicuous that Petitioner offered no testimony regarding Dr. Cannestra. Cannestra saw Petitioner once, September 21, 2012. During that visit, Petitioner told him he was in an icy parking lot when his left foot slipped into a hole. Petitioner's x-rays and an MRI showed no gross abnormalities. Cannestra's impression was chondromalacia patella of the left knee, commonly called "runner's knee." He noted Petitioner was doing an exercise program on his own at the gym. In the Medical History Form completed by Petitioner September 21, 2012, he indicated he was working, not off work. He omitted answering "Is legal action/litigation pending due to this injury." I note his Application was filed May 23, 2012, four months earlier. Petitioner's Exhibit 5; Arbitrator's Exhibit 5.

At this point, I note the submission of Petitioner's Exhibit 7, a "To Whom It May Concern" document dated March 2, 2017. It has been altered, by whom it is not known. On Petitioner's Exhibit List it is vaguely described and misrepresented as "Dr. Popli-PCP MD." I give this document, obviously prepared for use in litigation, and unsupported by any medical records, no weight whatsoever.

Petitioner submitted to an Independent Medical Examination by Dr. Brian Cole, the Associate Chairman and Professor, in the Department of Orthopedics at Rush University Medical Center, May 1, 2017. Subsequent to his report, he issued an addendum, February 27, 2019, regarding the alleged injury of September 2011. Petitioner told Cole he slipped in a puddle and hyperextended the left knee. Cole noted that there is no medical record validating Petitioner's being seen until January 2012, four months later. He noted Petitioner's Notice of Injury was done over a month later. Cole saw no evidence Petitioner had medical treatment in September to early November. He said the medical records do not support an aggravation of preexisting arthritis. Cole said there did not appear there was any significant trauma incurred to Petitioner's left knee to any large degree. Respondent's Exhibit 5; Respondent's Exhibit 6.

Dr. Cole indicated going by what the Petitioner told him, he thought he hyperextended his knee when stepping into a puddle. But that was not Petitioner's testimony at trial, or told to Dr. Cannestra, or to Accelerated Rehabilitation Centers, or to Centegra Health System. So, Cole's opinion here is based on a false premise. In any event, Cole said the medical records do not support or substantiate Petitioner incurred any significant traumas to his knee as a result of anything that happened in the September 2011 incident. Shales, August 28, 2019 at 20; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Respondent's Exhibit 6.

Dr. Cole noted there was no timely report of the injury or witnesses to those events. He noted Petitioner received no medical evaluation between September 2011 through December 2011. Cole said Petitioner had relatively moderate/advanced preexisting osteoarthritis that manifested symptoms. He diagnosed Petitioner's current condition as left knee osteoarthritis unrelated to workplace expose or workplace event of September 2011. He based that on the medical records and fact pattern as provided. Respondent's Exhibit 6.

Petitioner was evaluated by a non-treating physician, Dr. Michael Treister, selected by his attorney seven years after the alleged accident. Petitioner's Exhibit 11. Treister's evaluation will subsequently be addressed in its entirety.

While back at work with Respondent, Petitioner testified he was injured February 22, 2014. The majority of Petitioner's testimony was spent on irrelevant descriptions of what he did at special events and the 15,000 yard signs assigned for the events, not connected to any accident at all. Petitioner's attorney asked him how he got injured, but Petitioner wanted to continue talking about the events. Finally, Petitioner testified he was traveling back to the Respondent's facility in Schaumburg from an event at Rauner Family YMCA. He was unsure of the time. He then said the vehicle was stationed in one of four places. He then said he was on his way to the Toll Authority in Gurnee. His testimony devolved into a mudded description of where he was going. Petitioner, in a generalized testimony, said he drove into the right lane of a viaduct he was in that was "completely" filled with water. He said he hit the water. His van sunk into construction and that's how he got injured. He said he hit his head on the roof of the vehicle, hit his butt, hit his left knee, hit both shoulders. He said he did not report the accident for two days. Shales, August 28, 2019 at 31, 28-33, 34.

There is no testimony or evidence as to where the accident happened; what damage was done to the van; no employee notice of injury; no witnesses; no police activity; no immediate medical response or treatment; and no explanation as to why Petitioner's Application for Adjustment of Claim for this accident indicates an accident date, a month later, of March 19, 2014. Arbitrator's Exhibit 6.

Where Petitioner allegedly drove his vehicle has been described as either: construction; a sink hole; or a pot hole. Shales, August 28, 2019; Petitioner's Exhibit 15. There is, for the purpose of determining precise origin or cause of any injury, no clear, credible testimony.

Petitioner offered no evidence he sought emergency medical treatment, or even required it. He never testified he felt immediate pain or discomfort. Petitioner testified he saw a Dr. Gindorf following the accident. The records of Dr. Jeffery Gindorf indicate he saw Petitioner March 14, 2014, three weeks after Petitioner said he drove into the hole, complaining of right shoulder and neck pain. Petitioner falsely testified he saw Gindorf for his back, neck, both arms, and left knee. There is no record Petitioner told Gindorf he was in a vehicle accident. Without any diagnostics, Gindorf assessed Petitioner with displacement of cervical intervertegral disc without myelopathy, and prescribed medication. One week later, Gindorf had the same assessment. On April 1 2014, Petitioner saw Gindorf with rectal pain and rectal urgency. He was assessed with an abscess of the anal and rectal regions and given a rectal cream and

medication. On April 4, 2014, Gindorf referred Petitioner to surgery for worsening rectal pain. Shales, August 28, 2019; Petitioner's Exhibit 15.

Petitioner testified he had surgery April 4, 2014, on a rectal abscess. The records of Good Shepherd Hospital, of April 4, 2014, indicate Petitioner had been experiencing rectal pain for the last week. There is nothing in the preoperative history and physical about a motor vehicle accident. Petitioner was diagnosed with perirectal abscess. An Operative Report of April 4, 2014, diagnosed a perirectal abscess. The procedure performed was an examination under anesthesia with incision and drainage of perirectal abscess. Shales, August 28, 2019; Petitioner's Exhibit 35.

At this point, I note an Initial Workers' Compensation Medical Report, largely illegible, but likely by Dr. Gindorf, done four months after the alleged accident and two months after rectal surgery, on June 20, 2014, indicating Petitioner hit his head, neck, and tailbone. It said he had been treated by Dr. Gindorf and David Flatt. Petitioner's Exhibit 36.

Gindorf's records contain an unexplained letter of April 8, 2014, "Dear Sirs." It places Petitioner off work until further notice. He states Petitioner ". . . reports pain in his shoulder and neck that he attributes to hitting pot holes while driving around as an inspector." Petitioner's Exhibit 15. There is no mention of the abscess or surgery. There is no mention of a motor vehicle accident. He is parroting Petitioner's latest story line, not one sink hole or pot hole, but apparently many. Petitioner's misrepresentation to his doctor was contradicted by his trial testimony that by 2013 he was overseeing 50 grantees in the Chicagoland area, in a public relations job. Shales, August 28, 2019 at 28-29.

Petitioner testified he treated with David Flatt, a chiropractor, regarding his neck and back. Petitioner testified Flatt was his chiropractor and he had been seeing him for "adjustments" for neck and back, for 20 years. The records of David Flatt indicate Petitioner saw Flatt a month after he testified he drove into the hole, March 19, 2014. Flatt indicated Petitioner has degenerative arthritis of the cervical spine, as well as ADHD. There is no history of a motor vehicle accident. Flatt specifically noted "Denies antecedent trauma." Flatt treated Petitioner with manipulative therapy, exercise, re-education, and traction nine times through April 30, 2014. He indicates he reviewed x-ray results, but never indicated what they were. Shales, August 28, 2019 at 36-37, 23; Petitioner's Exhibit 8.

Petitioner testified he started treating with Dr. Montella in 2014 for his back and neck. The record of Midwest Sports Medicine and Orthopaedic Surgical Specialists and Dr. Bruce Montella indicate Montella saw Petitioner eight months after he said he drove into a hole, October, 2014. Petitioner complained of pain in his left neck, knee, upper back, forearm, and midback. Petitioner told Montella the onset of his pain was February 3, 2014, a month before he claims to have driven into a hole. Petitioner told Montella he was seen in an emergency room and admitted to a hospital. In the absence of evidence and testimony by Petitioner, that is a fabrication. Petitioner, in a seemingly calculated attempt to obscure his true condition, repeatedly conflates his alleged accident of September 2011, and alleged driving into a hole. Montella, without any noted diagnostics, assessed Petitioner with cervical disc herniation, lumbar disc herniation, and tear in medial meniscus knee. The treatment proposed was

nonoperative management. Montella's records are largely duplicative, and that is troubling. Shales, August 28, 2019 at 36; Petitioner's Exhibit 12A.

Petitioner offered no testimony of his medical treatment from 2014 onward. He said Montella authorized him to be off work May 20, 2015, through June 2, 2015, then December 10, 2015, through December 17, 2015. He did not say why. The records of Midwest Sports Medicine indicate that on January 5, 2015, Petitioner was working full duty without restrictions. On February 13, 2015, Petitioner was diagnosed with osteoarthritis of the knee and advised to consider a total knee replacement. On March 17, 2015, Petitioner was noted to be working full duty without restrictions. On December 9, 2015, almost two years after Petitioner claims to have driven into a hole, Montella, with no noted basis, or complaints of left knee and low back pain, in his treatment plan says "the patient was injured at work due to exertion and a work related accident." In medical terms, exertion is the expenditure of energy by skeletal muscles. It means nothing in this context. What work related accident? Montella does not say. He says Petitioner ". . . is recommended to take off work starting December 10, 2015 . . . to . . . December 17, 2015. He does not say why. On December 16, 2015, Montella's records indicate Petitioner can return to work without restrictions December 16, 2015, full duty, and is able to drive a State vehicle. Shales, August 28, 2019; Petitioner's Exhibit 12B.

In May 2016, James Sterr, a Bureau Chief with Respondent, had a concern about Petitioner that proved prescient. He was concerned, because of Petitioner's two prior denied workers' compensation claims, and because Petitioner was facing a potential layoff as a Staff Assistant, that Petitioner sought to expand his duties to feign injury. Respondent's Exhibit 7. He just misread how.

On May 19, 2016, Petitioner had asked Dan Thompson, Unit Chief of the Vehicle Inspection Program, for a "crawler" that would allow him to inspect the underside of charitable vehicles. Thompson told Petitioner he should not be leaving his vehicle to look for CV plates, simply drive and look at locations. He was advised doing otherwise would put Respondent at risk for a major labor grievance. Petitioner was specifically told many times not to get under buses and do any inspections. Respondent's Exhibit 8.

Nonetheless, Petitioner testified that in May 2016, he was still visually inspecting school buses, crawling and climbing under the buses. This fabrication was contradicted by Ken Martin, a long time official with Respondent who knew Petitioner and supervised him. He testified inspections were not in Petitioner's duties. Those were done by a different union. Shales, August 28, 2019 at 39; 94-100.

Petitioner testified he sustained an injury May 23, 2016. He said he was injured in front of Respondent's facility in Lake Zurich. He said he was turning left into the facility when a vehicle struck his van at "50-60" miles per hour. Despite completing an Illinois Motorist Report indicating the incident happened at 1:40 p.m., as well as an Employee Accident/Incident Report saying the same, Petitioner said it happened ". . . at the end of the night . . ." Petitioner testified his left shoulder hit the windshield, the right got jammed underneath the steering wheel, he banged his left knee, and whiplashed his neck and back. Shales, August 28, 2019 at 39, 40, 41; Respondent's Exhibit 7.

Petitioner testified he filled out a report with the Lake Zurich Police Department and talked to ". . . Kerry, something like that. . . ." He did not call an ambulance. He said, despite testifying he was struck at "50-60" miles per hour, he was not sure of damage to his vehicle. Then he said there was not a lot of damage. Petitioner omitted much about the accident and the aftermath. Shales, August 28, 2019 at 41, 60, 61.

Greg Williamson, an investigator with Respondent, was asked to look into the circumstances surrounding Petitioner's claim that he was in an accident May 23, 2016. He testified at the hearing. He said he interviewed Petitioner at the Lake Zurich facility. Petitioner also had a representative with him. Williamson testified as to his investigation and the subsequent report. Petitioner chose not to cross examine Williamson. Shales, December 5, 2019 at 10, 12, 13, 22.

Petitioner was interviewed two days after he claimed to be hit by a vehicle going "50-60" miles per hour. He was accompanied by his union steward. He admitted his responsibilities included traveling to various locations to locate charitable vehicles and verify their CV plates bore a valid sticker. He mislead investigators by telling them he checks for holes in the floor boards and tire treads. He admitted Ken Martin was his immediate supervisor, and that he was returning to Lake Zurich at 1:40 p.m. Respondent's Exhibit 7; Respondent's Exhibit 8.

Petitioner told investigators a silver older model Mercedes driven by a man struck his vehicle. He said he could hear the tires of the Mercedes screeching immediately before impact. He told investigators the impact caused a loud boom and his vehicle "jerked pretty good to the left." He said he got out and saw the other vehicle drive away, saying he reported the incident, not to his supervisor, but to Kerry Kern, who managed the motor pool. He said Kern was not sure what to do. Petitioner admitted telling Kern he didn't get hurt bad and declined an ambulance, preferring to see his regular doctor. Petitioner told investigators he drove to the Lake Zurich Police Station to report the incident. Kern told investigators he advised Petitioner not to follow the other vehicle, but Petitioner said he did, in attempting to catch him. Kern said he told Petitioner to submit an Employee Accident/Incident Report, and noted Petitioner's vehicle was equipped with a manual detailing actions employee should take in the event of an accident. Pat Kewenakhone, an engineer at the Lake Zurich yard, told investigators Petitioner asked him for directions to the Police Station, and said employees in the facility are able to hear traffic noises, but no one heard a loud boom during the time of the alleged accident. He took the photographs of Petitioner's vehicle. Respondent's Exhibit 7.

Petitioner told investigators the other vehicle should have damage to its right side and door, admitting there was very little damage to his vehicle, and he saw no debris or skid marks in the street after the alleged collision. During the interview, Petitioner admitted he could not give a clear description of the vehicle that hit him, or the driver. He denied initially describing the driver as a man. Petitioner told investigators he received no medical treatment as a result of the alleged accident, but had an appointment for June 8, 2016, 14 days after the accident, and planned to be off work until then. He told investigators he is in pain "24/7" but continues to come to work ". . . because he loves his job." He said he wanted to be on Workers' Compensation and would appreciate it if his claim was approved. Respondent's Exhibit 7.

The vehicle driven by Petitioner had minor scuffs to the bumper and a small semicircular dent to the right of the rear bumper. There was a small crack in the right side of the rear bumper near the bottom with red paint transfer. Petitioner told Lake Zurich Police the rear passenger bumper was struck by a silver four door Mercedes. Petitioner told Dr. Roger Chams he was hit at 50 miles an hour. Petitioner's Exhibit 20. Kern told investigators the dent in the rear bumper of Petitioner's vehicle was very common, and practically all motor pool vans have similar dents.

Williamson testified there were quite a few inconsistencies regarding the circumstances of the accident. Shales, December 5, 2019 at 15-20.

Petitioner testified he was still under Dr. Montella's care and continued to see him after the latest alleged accident. He said he was also seeing David Flatt, but did not say why. Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the 2016 accident. He offered no elucidation of what was done or why. Shales, August 28, 2019 at 42.

The records of Dr. Montella indicate Petitioner was seen June 1, 2016, complaining of motor vehicle related aggravation of pain in the neck and lower back. Petitioner told Montella his symptoms began after an auto accident. This stands in stark contrast to what Petitioner told investigators May 25, 2016, that he is in constant pain "24/7," and telling Kern the day of the accident he was OK, and laughing "just normal back and neck, but that always hurts." Montella, with no new diagnostics, gave an impression of impingement syndrome of right shoulder, impingement of left shoulder, intervertegral disc displacement lumbosacral region, cervical disc disorder with radiculopathy mid cervical region. He suggested conservative treatment, NSAIDs, and a rehabilitation program. Norco tablets were prescribed, even though Montella's records clearly reflect Petitioner was allergic to Norco. Montella falsely represents that "Petitioner had a work related motor vehicle accident in 2011." Petitioner's Exhibit 12C; Respondent's Exhibit 7.

On June 1, 2016, Montella prepared two documents. In an initial Workers' Compensation Medical Report, Montella wrote Petitioner was involved in a hit and run May 23, 2016. He parroted back Petitioner's complaints of neck, back, and shoulder pain and soreness. He indicated Petitioner was to be off work until his next scheduled appointment. That was in three weeks. At the same time, on the same date, Montella completed an Authorization for Disability Leave and Return to Work that was glaringly inconsistent with his treatment of Petitioner and subsequent work pronouncements. Montella signed the Physicians Statement, saying Petitioner had severe limitation of functional capacity and was incapable of minimal (sedentary) activity. He stated in his opinion Petitioner was temporarily totally disabled, and permanently and totally disabled for employment. Petitioner's Exhibit 12C.

Montella's records contain a June 2, 2016, denial of claim for Petitioner and Workers' Compensation from Tristar. Investigators of the alleged accident reviewed an audio recording of Petitioner with Tristar on May 23, 2016, in which he told them he would seek immediate medical attention and would go to the emergency room. He did neither. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

Two weeks after stating Petitioner was totally disabled for employment, June 15, 2016, the records of Montella reveal Montella wrote a Work Restriction Form, saying Petitioner may return to work without restrictions. At the same time, he restricted Petitioner to no lifting over 20 pounds and no climbing, bending, or sitting in a work chair all day. That same day, a laboratory report from Assured Toxicology to Midwest Sports Medicine done for medication monitoring, indicated Petitioner tested positive for cocaine, an illegal drug. Montella never commented on the report, acknowledged it, or confronted Petitioner. Office visit notes of Montella, on June 15, 2016, reveal x-ray findings consistent with glenohumeral joint AC joint arthrosis and spurring. Cervical and lumbar x-rays were consistent with multisegmental degeneration. Petitioner's Exhibit 12C.

Three weeks after stating Petitioner was totally disabled for employment, June 22, 2016, Montella completed a Work Restriction Form indicating Petitioner could return to work without restriction and was cleared to resume full duty as a visual vehicle inspector, and was able to drive a State vehicle. Montella's office notes of June 22, 2016, indicate Petitioner may return to work regular duty without restrictions. Petitioner's Exhibit 12C.

Three weeks later, July 13, 2016, six weeks after stating Petitioner was totally disabled for employment, Montella completed an Authorization for Disability Leave and Return to Work stating Petitioner had no limitation of functional capacity and was capable of heavy work. He wrote that Petitioner was able to resume his duties. His remarks say full duty. He neglected to indicate any response to the extent of disability. Just a week later, July 20, 2016, Montella signed a Work Restriction Form indicating Petitioner could return to work without restriction and must have an ergonomic work station. This is inexplicable in the face of Montella's instruction in a Work Restriction Form of June 22, 2016, indicating Petitioner should ". . . not be sitting at the desk doing paperwork. . . ." Petitioner's Exhibit 12C.

At the same time, June 22, 2016, Montella was clearing Petitioner to resume full duty and drive a State vehicle, a laboratory report by Assured Toxicology to Midwest Sports Medicine indicated Petitioner again tested positive for cocaine, an illegal drug. For the second time, Montella ignored the report. Petitioner's Exhibit 12C.

The depth and breadth of Petitioner's fabricated subjective complaints are laid bare in Progress Notes of ATI Physical Therapy of August 13, 2016, a scant two months after Montella stated Petitioner was totally disabled for employment. Petitioner's physical therapists wrote "Patient's subjective reports of physical pain and limitations are not consistent with patient's activity level. Patient was overheard talking about returning to jet skiing, jogging, bike riding, walking long distances, and working out at the gym. Patient's compliance with HEP has been questionable d/t inability to list exercises when asked are part of his program or frequently forgets how to perform exercises correctly." Astonishingly, Montella signed off on the notes. Just as he ignored Petitioner's cocaine use, he ignored the therapist's observations. The observations were repeated in the Discharge Summary two weeks later, August 25, 2016. Again, signed off on by Montella. Again ignored. Petitioner's Exhibit 12C.

The remainder of Montella's records are completely compromised and sprinkled with fantasy. A State Retirement Systems Temporary Disability Medical Report signed by Montella

indicates a left knee meniscus tear, intervertegral disc disorders, cervical disc disorders with radiculopathy, and left and right shoulder impingement with an onset date of September 14, 2016, four months post the alleged accident. Montella signed a Work Restriction Form September 14, 2016, placing Petitioner off work until further evaluation, less than two months after returning Petitioner to work without restrictions. Petitioner was well aware of his coming layoff as far back as early May 2016, and sought short term disability. By November 2016, Montella had referred Petitioner to Dr. Eugene Lopez for left knee surgery. An x-ray revealed an overgrowth of cartilage and bone, osteochondroma, that does not result from an injury. Lopez recommended excision of the left proximal tibial ossicle/exotosis. One of the most telling entries in Montella's records is an unsigned "To Whom It May Concern" of December 13, 2016, saying "Patient has been off work from 9/13/16-present and until further notice per Dr. Montella's discretion. . . ." As late as December 15, 2016, Montella was still misrepresenting Petitioner as a safety investigator for the Illinois Department of Traffic Safety, stating this is a work injury that happened in September 2011. Petitioner's Exhibit 12C; Respondent's Exhibit 7.

There are no records of treatment by David Flatt to support Petitioner's testimony he was seeing Flatt after the alleged accident. What records of Flatt there are indicate that by June 3, 2019, Petitioner's complaints were chronic neck and back pain. Flatt indicated "treatment for this patient is designed to reduce pain and dysfunction of acute flareups even though the condition is degenerative and chronic in nature." Petitioner's Exhibit 8A.

Petitioner testified he went to a Dr. Chams for a second opinion on his shoulders after the accident in 2016. That was untrue. The records of Dr. Chams reveal he saw Petitioner on July 24, 2017, almost a year after the alleged accident. Petitioner went to Chams claiming injury in 2014. Chams reviewed an MRI which was negative for rotator cuff pathology. He wrote "The patient was adamant about additional prescription of narcotic medication. The patient requested Percocet which was declined." Petitioner followed up with Chams September 5, 2017. He did "not proceed" with a high field MRI scan of his shoulder as ordered by Chams, nor physical therapy as ordered by Chams. The impression after examination was left shoulder bursitis, ruled out complete rotator cuff tear. Cham indicated "We have in the past declined narcotic medications for the patient." Petitioner never saw Chams again. Petitioner's Exhibit 20; Shales, August 28, 2019 at 42.

In 2017, Petitioner submitted to two independent medical examinations.

On May 1, 2017, Dr. Brian Cole, Associate Chairman and Professor in the Department of Orthopedics, Rush University Medical Center, and Chairman of the Department of Surgery, evaluated Petitioner's left knee, reviewing medical records and examining Petitioner. In his view, Petitioner's impairment and need for treatment are related to the progression of his osteoarthritis. He noted Petitioner's focus on a 2011 injury, and that the medical records do not support the notion Petitioner had persistent and consistent symptoms with consistent care through 2012 to 2014. He diagnosed Petitioner with mild to moderate osteoarthritis of the left knee. He could not state categorically whether Petitioner had a legitimate reaggravation of a preexisting condition. Respondent's Exhibit 5.

On June 29, 2917, Petitioner submitted to an independent medical examination by Dr. Frank Phillips, Director of Spine Surgery at Rush University Medical Center. Phillips performed a cervical, thoracic, and lumbar record review and medical and physical examination of Petitioner. Unlike Montella, he noted Petitioner twice tested positive for cocaine. Petitioner, in describing his treatment and injuries, never mentioned his rectal abscess. Petitioner denied an accident in 2016 aggravated his cervical or lumbar condition. Phillips noted no evidence of acute injury or disk herniation in a cervical MRI from June 22, 2016. He noted no instability or deformity in a lumbar x-ray from June 3, 2016. Dr. Phillips had no evidence of an accident provoking Petitioner's neck and low back symptoms. He did not believe Petitioner was in any current state of ill-being related to the cervical or lumbar spine as a consequence of a 2014 injury. Respondent's Exhibit 4.

Petitioner was referred to 77 year old Dr. Michael Treister for an orthopedic evaluation, by his attorney in 2018, two years after his third claim, four years after his second claim, and seven years after his first claim. Treister was in retired status from two hospitals and had sold his surgical practice four years earlier. He now does medical evaluations, largely for plaintiffs. Petitioner's Exhibit 10; Petitioner's Exhibit 11; Petitioner's Exhibit 21. His evaluation was no Section 12 examination, and he was not a treating physician of Petitioner.

Medical evidence should be treated and weighed as any other evidence. The character of the witness, his professional capacity, skill, and opportunity for observation, and state of mind of the witness himself are all proper factors to be considered in determining the weight to be given testimony. See Peabody Coal Company v. Industrial Commission, 289 Ill. 2d 449, 454 (1919). No doctor, who is not a treating physician, should be an obvious advocate or partisan in legal proceedings.

Petitioner's testimony omitted any reference to giving a history to or having an examination by Treister. Treister's testimony was taken by evidence deposition. He testified he examined Petitioner at the request of his attorney to determine whether or not there was a causal connection between his medical condition and a series of work accidents. He testified he did a report dated March 23, 2018. He got a history from Petitioner of three separate accidents. Petitioner's Exhibit 21 at 8-7. Treister's testimony is largely an uninterrupted narrative, combining speculation, irrelevant verbiage, and pure advocacy. He was seemingly able to run amok without objection, and without regard to the question. It appears he took everything that Petitioner told him as true. He became highly agitated during cross examination, when counsel asked, ". . . you've sort of editorialized throughout your IME, do you normally do that?" She was being polite, as we will see. Treister said, in answer, he was to speak at ". . . a major meeting I'm giving a lecture." He said, ". . . I'm giving a lecture at a major medical meeting about this issue." He said he puts his thoughts in italics. Such are normally used for emphasis, though rarely. He admitted he ". . . got a whole bunch of records. . . ." and did not know where he got portions of his report. He purposely and without being asked, savaged HMO Illinois, saying, "And by the way, HMO Illinois is one of the hardest ones, if there was a workman's comp they wouldn't pay." Treister was critical of Petitioner's initial treating physicians. Treister became agitated when backed into a corner regarding criticism of Dr. Phillips. Petitioner's Exhibit 21 at 65, 66, 67, 69, 70-75.

Treister's 22 page report of March 23, 2018, is repeatedly altered and highlighted, a disturbing and continuing practice by Petitioner.

He first saw Petitioner March 5, 2018, on his left knee and both shoulders. He was specifically told not to evaluate the spine. Treister called Petitioner's counsel and chastised him for not engaging him to evaluate the spine, in an extravagant statement of his purported talent, pushing counsel into expanding his evaluation. His report is based on Petitioner's telling him he had been a school bus inspector, kneeling and crawling under buses, until September of 2016. That was a lie, and that lie formed the foundation of Treister's report. Treister falsely wrote that Dr. Elstrom recommended arthroscopic surgery. That is nowhere in the records. Those records strongly suggest Petitioner told Elstrom he wanted surgery. Petitioner continued his attempted manipulation of Treister by insisting his course of conversation with his doctors no matter the difference in the doctors' records. Treister misrepresented when Petitioner had knee surgery, and misrepresented Dr. Cannestra's conclusions. Petitioner's Exhibit 11 at 1-6.

In his narrative about Petitioner's alleged second accident, all of Treister's information came from Petitioner. Incredibly, Treister wrote "I made no attempt at detailed review of [Petitioner's chiropractic care] records [through April 2, 2018]. If Treister had made even a cursory review of Flatt's records, he would have seen Petitioner denied a trauma, and never mentioned a motor vehicle accident. Treister is woefully misinformed and willfully ignorant of Petitioner's history. Treister admitted he did not have Petitioner's rectal abscess records, but wasted no time relying on Petitioner's medical expertise in connecting his rectal surgery to an accident. No doubt Treister neglected to review Petitioner's Workers' Compensation Medical Report, where he indicated not a sacro-cocygeal injury as Treister noted, but one of his tailbone. Treister is consistently wrong. He relies on Petitioner's story that he received over 50 massage therapy treatments recommended by Montella, at X-Sport Gym. There are no records to support this. Petitioner's Exhibit 11 at 6-8.

Treister continued to base his narrative on what Petitioner tells him over the reports of IME doctors. He questioned the ethics of those doctors and thought Dr. Phillips not fair or reasonable, devolving his examination into an argumentative lecture. Treister consistently falls for Petitioner's description of his job. Petitioner's Exhibit 11 at 10-16.

That is enough time spent on Treister's report. The rest is chatter without reason, facts, or support, highly speculative and designed to justify the 22 page "examination." It isn't an examination at all. Read closely in conjunction with the other exhibits offered and Petitioner's testimony, it is a shocking, empty screed.

There are so many examples of nonsense from Treister, that to catalog them all would push the length of this decision to 100 pages. Suffice it to list these examples of his medical professionalism: Petitioner was " . . . forced to use his private health insurance." As to alleged discrepancy in the medical records, "Was the date wrong so that MRI facility could get paid? Who knows." Then, there's "Mr. Shales continued to have significant discomfort, but since ongoing treatment was declined by Workers' Compensation, he went back to his work and did the best he could with his painful left knee under the circumstances." Shattering the myth of any impartiality--that this was an honest medical evaluation of Petitioner--there is this, ". . . Workers'

Compensation had over and over refused to approve or administer any rational medical care to Mr. Shales, and that as a result he was seeking out the most reasonable symptom relieving treatments that he could arrange and afford. That appears to have been an honorable attempt at symptom relief on his part, and it was not his fault that he could not go elsewhere or perhaps receive more appropriate care." Treister, ever the professional, wrote, "This appears to be a true medical tragedy." His "evaluation" crosses the bounds of medical evaluation into exaggerated testimonial advocacy, at best puffery, at worst deliberate distortion. Treister couldn't even get the date of Petitioner's knee surgery correct, bought the deception of what work Petitioner did before and after the alleged accidents, and concocted a connection between the second alleged accident and rectal surgery.

I give no weight to Treister.

Conclusions of Law

12 WC 017815, alleged date of accident September 19, 2011

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury.

A claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. First Cash Financial Services v. Industrial Commission, 367 Ill. App. 3d 102, 105 (2006). In the course of employment refers to the time, place, and circumstances of the injury. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980). Arising out of the employment pertains to the origin or cause of a claimant's injury. First Cash, supra at 105.

The credibility of a witness is always an issue and relevant. That determination involves the consideration of a witness' ability and opportunity to observe; their memory; manner while testifying; interest; bias; and previous inconsistent statements or actions. See e.g. Illinois Pattern Jury Instructions – Civil No. 1.01[5]. In all of these cases, Petitioner's credibility was repeatedly compromised. These will be discussed *ad seriatim*. There is a pattern that runs through Petitioner's medical records and statements made to examining doctors and medical providers that show he attempted to manipulate his medical treatment. There are glaring omissions in evidence and testimony on subjects that would add clarity and corroboration to the events of these claims. Together these cast a dark cloud over consideration of these claims.

In this claim, I find as a conclusion of law, Petitioner has failed to prove an injury arose out of and in the course of employment, or that his current condition of ill-being is causally connected to a workplace injury.

Petitioner testified that as he was unloading bags and clothes from his personal vehicle into a State vehicle and he ". . . slipped approximately maybe five yards, hyperextended my knee, heard a pop and a lot of pain behind the knee." Five yards. Fifteen feet. Petitioner's claim

of a hyperextension is his repeated creation of his alleged injury. It finds no support in medical records. Petitioner told five versions of his unsubstantiated slip: slipped in a puddle; in an icy [in September] parking lot stepped into a hole and slipped; slipped at work; slipped while running; stepped in a hole. Shales August 28, 2019; Respondent's Exhibit 5; Petitioner's Exhibit 5; Petitioner's Exhibit 22; Petitioner's Exhibit 4; Petitioner's Exhibit 11. In his Notice of Injury, he completely omits any detail of how the injury occurred. This is also true, although it is required by Rule, in his Application for Adjustment of Claim. Petitioner's Exhibit 1; Arbitrator's Exhibit 5; 50 Il. Admin. Code 9020.20(c) (a description of how the accident occurred). The date of the unwitnessed five yard slip is not even consistently set in the exhibits tendered by Petitioner. Petitioner's Exhibit 5 (November 2011), Petitioner's Exhibit 3A (November 10, 2011); Petitioner's Exhibit 22 (Oct/Nov). The Initial Evaluation of Petitioner by Accelerated Rehabilitation Centers, of May 8, 2012, in its history indicates "Oct/Nov left knee began to bother him." That evaluation, in the history, notes it is not a Worker's Compensation claim. Petitioner's Exhibit 22.

Petitioner did not report any incident for two months. Petitioner's Exhibit 1. He sought no medical treatment for four months. There is no corroboration of Petitioner's story and much to suggest it never happened. Respondent's Exhibit 6.

Petitioner had arthritis in his knee and that is not causally connected to any workplace injury. Respondent's Exhibit 6; Petitioner's Exhibit 3A; Petitioner's Exhibit 4.

Disputed issue **G** is what was Petitioner's average weekly wage. The claimant bears the burden of establishing his average weekly wage under 820 ILCS 305/10. Ricketts v. Industrial Commission, 251 Ill. App. 3d 809, 810 (1983). The evidence presented was less than clear or comprehensive. No pay stubs. No W-2. No documentation of any kind. The sum total of the evidence on this issue was Petitioner's testimony that when he was hired in August 2011, his salary was ". . . approximately $5000 a month, gross." He said it was roughly ". . . 58,000-60,000" a year. Shales, August 28, 2019 at 17. Liability under the Act cannot rest upon imagination, speculation, or conjecture, but out of facts established by a preponderance of the evidence. Lyons v. Michigan Blvd. Bldg. Co. Inc., 331 Ill. App. 482, 501 (1947).

The Act details the calculation of average weekly wage in Section 10. There are four methods to do so. Petitioner chose none of them to calculate his average weekly wage on the date he claimed as the date of accident, September 19, 2011. There is no concrete evidence of his actual earnings. Because I find Petitioner has failed to meet his burden of proof as to earnings and average weekly wage, no calculation can be made under Section 10. Any attempted scenario would be pure speculation.

Because Petitioner failed to prove an accident arose out of and in the course of employment or that his current condition of ill-being was causally connected to a workplace injury, Respondent is not responsible for medical charges; Petitioner is not entitled to a period of temporary total disability or permanent partial disability. Disputed issues **J**, **K**, and **L** are moot.

14 WC 18638, alleged date of Accident March 19, 2014

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and his employment. Navistar International Transportation Corporation v. Industrial Commission, 315 Ill. App. 3d 1197, 1202-1205 (2002). Here Petitioner claims his condition of ill-being involves his head, neck, and back. He testified he sought treatment for his back, neck, both arms, and left knee. Arbitrator's Exhibit 6; Shales, August 28, 2019 at 35.

I find as a conclusion of law, Petitioner has failed to prove that his current condition of ill-being is causally connected to a workplace injury.

Petitioner claimed date of accident is wildly inconsistent, with a month discrepancy. He offered no real mechanism of injury. He didn't report the accident for two days. He sought no emergency medical treatment, or even required it. He did not testify to any immediate pain or discomfort. He saw his primary care physician three weeks after he claimed he drove into a hole, and never told him he was in a vehicle accident. Petitioner misrepresented his job duties to Dr. Gindorf.

In the defining "mic drop" to this issue, when Petitioner saw his chiropractor on March 19, 2014, whom he had been seeing for 20 years, he "denies antecedent trauma." He never told David Flatt about a motor vehicle accident, and specifically denied having an accident. Petitioner told Dr. Montella the onset of his pain was a month before he claims to have driven into a hole.

As to disputed issues **J**, **K**, and **L**, because Petitioner failed to establish the existence of a causal connection between him and his employment, Respondent is not responsible to pay any medical expenses incurred by Petitioner. Petitioner is not entitled to temporary total disability benefits or permanent partial disability benefits.

16 WC 16860, alleged date of Accident May 23, 2016

Disputed issue **C** is whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. As discussed earlier, a claimant bears the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of employment. Both elements must be present in order to justify compensation. In the course of employment refers to the time, place, and circumstances of the injury. Arising out of the employment pertains to the origin or cause of a claimant's injury. An injured employee bears the burden of proof that there is a causal connection between his condition of ill-being and his employment.

Here Petitioner testified a vehicle struck his State van at "50-60" miles per hour, causing his left shoulder to hit the windshield, jamming his right shoulder under the steering wheel, banging his left knee and whiplashing his neck and back.

In this claim, I find as a conclusion of law, Petitioner was not in a motor vehicle accident and whatever Petitioner's condition, it is not related to his employment.

Petitioner's claimed accident, being hit by a silver Mercedes going "50-60" miles per hour, that jerked his vehicle to the left and caused a loud boom, was unwitnessed and uncorroborated. He misrepresented it being witnessed. No one at Respondent's facility heard a loud boom. There was no damage to his vehicle caused by a silver Mercedes going "50-60" miles per hour. There was no debris or skid marks in or on the roadway. Petitioner fabricated hearing tires screeching. The condition of the State vehicle Petitioner claims to have been in while struck at "50-60" miles per hour was not in any way consistent with being struck. Notably, there was red paint, not silver, transfer where Petitioner vaguely alluded to being hit, and his vehicle had only common motor pool dents.

Petitioner did not report the accident to his supervisor, and misrepresented his conversation with the manager of the motor pool. He sought to deceive investigators about his job duties and sought to mislead a claims adjustor about immediately seeking medical attention. He misled others about following the other vehicle, and deceived investigators about his ability to describe the other vehicle.

Petitioner sought no emergency medical treatment, declined an ambulance, and first saw a doctor long after he claims he was hit. He was not truthful in testifying he followed up with David Flatt. What medical records there are in evidence show Petitioner fabricated complaints of pain and physical limitations.

Because of this finding, Respondent is not responsible for charges for medical services, and Petitioner is not entitled to any period of temporary total disability.

Howard L. Ohr
Arbitrator

4-10-2020
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0150

vs.

No. 14 WC 024705

Radiac Abrasives, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical treatment, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the §19(b) Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. Although the Order portion of the Arbitrator's Decision specifies an award of 68-3/7 weeks of temporary total disability at the rate of $536.05/week, the Conclusion portion of the Decision indicates that the total award equals 73 weeks at $535.99/week. The Commission finds that the correct TTD rate is $536.05/week and the correct duration is 71-4/7 weeks for the periods covered by the Arbitrator's award.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

21IWCC0150

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is modified to reflect the award of $536.05 per week for 71-4/7 weeks for the periods between June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

No monetary award is made in this matter, so no appeal bond is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

o-2/4/21
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **14WC024705**

18WC004741

21IWCC0150

RADIAC ABRASIVES INC
Employer/Respondent

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0150

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **14** WC **24705**

Consolidated cases: **18 WC 4741**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **April 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**536.05** per week for **68-3/7**, commencing **June 17, 2014** through **September 7, 2015**, **February 11, 2017** through **March 14, 2017**, and **September 6, 2017** through **September 26, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Dr. Markarian, and to Dr. Fernandez, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS: 21IWCC0150

The petitioner testified that on May 27, 2014 he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Subsequent to May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner stated that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continues to have swelling and difficulty moving his hands and he indicated that he "can't do much" because activities bother his hands.

In March of 2018, the petitioner was terminated from his employment with Respondent. He was not under any active medical care at the time of his termination.

Following his termination, the petitioner filed an Application for Adjustment of Claim alleging that an injury to his right arm occurred on January 12, 2018. In April of 2018, the petitioner sought treatment for his right arm complaints with Dr. Markarian. That claim is the subject of the Arbitrator's Decision rendered in case number 18 WC 4741.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Respondent did not dispute that an accident arising out of and in the course of the petitioner's employment occurred on May 27, 2014. The Petitioner was first seen for medical care at the Rush Copley Medical Center on April 28, 2014 at which time he was diagnosed with bilateral carpal tunnel syndrome due to an overuse at work.

The petitioner then came under the care of Dr. Markarian who, likewise, diagnosed the petitioner with bilateral carpal tunnel caused by repetitive work activities. Dr. Markarian eventually performed bilateral carpal tunnel surgeries on the petitioner. Dr. Markarian performed the right carpal tunnel release on October 9, 2014 and the left carpal tunnel release on February 5, 2015.

When the petitioner continued to voice complaints, he was seen for a second opinion with Dr. John Fernandez. Dr. Fernandez performed bilateral trigger finger surgery on three of Petitioner's right fingers and three of Petitioner's left fingers. The left hand surgery was performed by Dr. Fernandez

on September 6, 2017 and the right hand surgery was performed by Dr. Fernandez on March 1, 2017.

Dr. Fernandez opined that the petitioner's condition of trigger digits (bilateral thumb index and middle fingers) should definitely be treated as work related. Dr. Fernandez reasoned that if the carpal tunnel syndrome and its surgery were treated as work related the same causative factors would be at stake, i.e. exposure, repetition, or frequency with gripping and grasping particularly of a more forceful nature in the operation of machinery and use of tools, with regard to the trigger digits.

Dr. Patari, Respondent's Section 12 examiner, opined that Petitioner's bilateral carpal tunnel was causally related to his work for the Respondent but he opined that the bilateral trigger fingers were not causally related. Dr. Patari did not find permanent restrictions were warranted.

The Arbitrator finds the opinions of Dr. Fernandez regarding causation and permanent restrictions to be credible and persuasive and to be more persuasive than those of Dr. Patari. Dr. Fernandez reiterated in his evidence deposition that Petitioner's bilateral, "carpal tunnel syndrome as well as trigger digits should be treated as work related reasoning that the petitioner had "reasonable causal factors including exposure to frequent gripping and grasping, including use of machinery and tools which is a very well-known and valid risk factor in the development of both carpal tunnel and trigger fingers." Dr. Fernandez also took issue with Dr. Patari's opinions concerning causation to be strange and wrong because the same causative factors that effect carpal tunnel effect trigger fingers.

Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. With regard to the petitioner's permanent restrictions, Dr. Fernandez opined that the petitioner's condition had not completely resolved. Dr. Fernandez opined that if the petitioner returned back to the activities that caused the problem, his condition could get worse, and at that his prognosis of doing well and returning back to that line of work was relatively poor. Dr. Fernandez felt these restrictions were permanent.

The Arbitrator notes Dr. Fernandez's credentials as an upper extremity specialist and finds his opinions to be credible, reliable, and persuasive. As such, the Arbitrator finds Petitioner's bilateral carpal tunnel and bilateral trigger finger conditions to be casually related to his work activities. The Arbitrator also finds the permanent restrictions imposed by Dr. Fernandez upon the Petitioner to be causally related. The Arbitrator further finds that the petitioner reached maximum medical improvement on January 4, 2018 and that his condition of ill-being as of that date is causally related to the injury of May 27, 2014.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

There was no dispute concerning the bilateral carpal tunnel surgeries and as such the medical expenses related to the petitioner's treatment for those conditions are awarded. While there was a

dispute concerning the trigger fingers treatment that Dr. Fernandez rendered to the petitioner, Dr. Fernandez testified that all of his treatment from May 25, 2016 through January 1, 2018 was reasonable and necessary and causally related. The Arbitrator has found the opinions of Dr. Fernandez to be credible and persuasive and to be more persuasive than those of Dr. Patari. As such, the Arbitrator finds that all the medical care and treatment rendered to the petitioner by Dr. John Fernandez, and the expenses related thereto, are reasonable, necessary, and casually related to the petitioner's accident of May 27, 2014.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The petitioner remained off work from June 17, 2014 through September 7, 2015, while undergoing treatment for his carpal tunnel syndrome. He again was off work from February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, while undergoing treatment for his bilateral trigger fingers. The petitioner was determined to be at maximum medical improvement with regard to these conditions in January of 2018. Petitioner has not received any further treatment in relation to the carpal tunnel syndrome or the trigger finger condition since January of 2018. Although there are disputes with regard to Petitioner's restrictions, it is noted that Petitioner had returned to an accommodated position.

The petitioner has alleged entitlement to additional Temporary Total Disability benefits from March 13, 2018 through the date of hearing. It is noted that the petitioner also claims entitlement to Temporary Total Disability benefits for the same period in the companion filing for the alleged accident of January 12, 2018. (Case No. 18 WC 4741) The Arbitrator notes that the petitioner had reached maximum medical improvement with regard to the bilateral hand conditions prior to January of 2018. As such, Petitioner would not be entitled to Temporary Total Disability benefits thereafter. The Arbitrator finds that the petitioner is not entitled to any Temporary Total Disability benefits after September 26, 2017, relative to the April 27, 2014 accident. As such, the Arbitrator finds that Petitioner is entitled to Temporary Total Disability from June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017.

The Arbitrator finds Petitioner to have been temporarily and totally disabled from June 17, 2014 through September 7, 2015 and from February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017, a total period of 73 weeks, at $535.99 per week.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that Petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2018 companion case. With regard to the 2014 case, Petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of TTD benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr.

Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to Petitioner, Respondent clearly had a good faith basis from which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claim for benefits through that date. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0151

vs.

No. 18 WC 004741

Radiac Abrasives,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability, and penalties and fees, and being advised of the facts and law, modifies the Section 19(b) Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. At arbitration, Petitioner alleged that he was entitled to temporary total disability benefits from March 13, 2018, the date Respondent terminated him, through the date of hearing, March 13, 2019. At the time of his termination, Petitioner was not actively treating for his work injuries, and Respondent was accommodating his restrictions by providing a sedentary position based upon the restrictions ordered by Petitioner's treating physician. Because the Arbitrator found that Petitioner was always capable of performing his sedentary job with Respondent, he declined to award any temporary total disability benefits for Petitioner's right elbow and right shoulder injuries.

On review, the Commission finds that Petitioner was entitled to TTD as a result of his 2018 injuries. However, it finds that the period of total disability did not begin on the date of his

21IWCC0151

termination by Respondent but on the date his treating physician took him off work for his shoulder and elbow injuries, March 21, 2018. From that date onward through the date of hearing, March 13, 2019, first Dr. Kalina and then Dr. Markarian kept Petitioner off work completely. The Commission finds the opinions of Petitioner's treating physicians more persuasive than those of the Respondent's expert and modifies the Arbitrator's Decision by awarding Petitioner TTD from March 21, 2018 through March 13, 2019, a period of 51-1/7 weeks. The Commission further finds that Respondent paid TTD in excess of the award for Petitioner's 2014 injury, which was modified by the Commission in 14 WC 024705, in the amount of $13,139.42, to be applied toward the total TTD awarded herein.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability benefits is reversed. Respondent shall pay Petitioner temporary total disability benefits of $536.05 per week for 51-1/7 weeks, or $27,415.13. for the period commencing on March 21, 2018 through March 13, 2019, as provided by §8(b) of the Act. Respondent is to receive credit for TTD payments totaling $13,139.42, the amount paid in excess of the TTD awarded in the consolidated matter, 14 WC 024705.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

21IWCC0151

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

Marc Parker

Barbara N. Flores

o-2/4/21
mp/dak
68

Dissent

I respectfully dissent from the Decision of the Majority. In his decision, the Arbitrator denied Petitioner's request for TTD benefits. The Majority reversed the Decision of the Arbitrator on that issue and awarded Petitioner 51&1/7 weeks of TTD. I would have affirmed and adopted the Decision of the Arbitrator including his denial of TTD benefits.

While Petitioner was on significant work restrictions, Respondent accommodated his restrictions and placed him in a sedentary position. Petitioner testified that he had no difficulty performing his light duty responsibilities and there was no evidence that Petitioner ever complained to Respondent that he was in any way unable to perform his duties. In addition, Petitioner did not demand vocational rehabilitation from Respondent in order to possibly help himself find a more suitable long-term occupation. The Majority appears to rely exclusively on the fact that doctors put Petitioner on no-work status on March 21, 2018 and had not released him from that status until the date of Arbitration, March 13, 2019. However, even though Petitioner was technically taken off work, he actually continued to work. To obtain TTD benefits, a claimant has the burden of proving that he is unable to work his normal job, due to his work-related disability, or that his employer has not been able to accommodate his restrictions. In addition, the Majority reasoning allows the possibility that a claimant could receive both his salary and TTD benefits simultaneously. This result would amount to unjust enrichment for claimants, and not contemplated in the Act. Because Petitioner was clearly able to work, and actually did work, during that period despite any alleged impairment, in my opinion, he is not entitled to TTD for that period.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator. Therefore, I respectfully dissent.

Deborah L. Simpson

DLS/dw
O-

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **18WC004741**

14WC024705

RADIAC ABRASIVES INC
Employer/Respondent

21IWCC0151

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0151

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **18** WC **4741**

Consolidated cases: **14 WC 24705**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **January 12, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **5** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**51,505.28** (paid in companion case) for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28** (between both claims).

ORDER

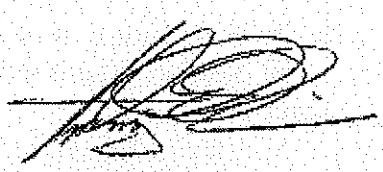
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Physicians Immediate Care, to Presence Mercy Medical, and to Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for reasonable and necessary medical services as prescribed for the petitioner by Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS:

The petitioner testified that he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Following a work related injury of May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. That injury is the subject of the Arbitration Decision issued in case number 14 WC 24705.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner testified that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continued to have swelling and difficulty moving his hands and he indicated that he couldn't "do much" because activities bother his hands.

The petitioner testified that on January 12, 2018, he sustained an injury to his right arm at work when he was withdrawing a mold from a press. The petitioner described that he reached in to the press to free a shim that was stuck, and he burned his right arm. The petitioner testified that he pulled his arm back quickly and felt a sharp "pull" in his right elbow. He testified that he then noticed that his right arm began to swell. The petitioner testified that he reported the work injury to his supervisor "Mike" the next day. On cross-examination, the petitioner testified that no supervisor was present on the day his injury occurred and that he reported the injury on the day that an accident report was completed.

A copy of the accident report that was completed was admitted into the record as Petitioner's Exhibit 12A. The accident report was signed by both the petitioner and his supervisor "Mike" and is dated January 16, 2018. The report describes that, "On January 12, 2018, the employee was completing a wheel and had the mold out of P15 press. The employee then noticed that the shim was still stuck on his upper side of the plate. The employee noted that this is a normal thing that occurs when working in the area. The employee while wearing gloves, reached into the press and placed his hand on the shim when he burned his right arm on the top plate. (350 degrees maximum during process). When the employee turned his arm, he jerked it away quickly from the press. The employee then noted that he had pain from his right thumb and right pinky finger, all the way up to his elbow on both sides of his arm."

The petitioner testified that following the last surgery by Dr. Fernandez, and prior to his injury on January 12, 2018, he did what was asked of him at work. The petitioner testified that on January 16, 2018, his job was changed to that of a production planning clerk.

The petitioner testified that after the accident report was completed, he was sent to Physicians Immediate Care. The records of Physicians Immediate Care demonstrate that the petitioner was seen there on January 16, 2018 and gave a history of injury to his left arm on January 12, 2018 when he was

pulling out a mold and touched the oven causing him to pull his arm away. The diagnoses included a burn of the left forearm, pain in the left forearm, pain in the left wrist, and pain in the left shoulder. It was noted that the forearm burn had healed and that the degree of pain in the left upper arm was not consistent with the mechanism of injury. The petitioner was released to return to work with no restrictions.

The petitioner testified that he then sought treatment at Presence Mercy Medical Center in Aurora and then began treating with Dr. Markarian.

The records of the Emergency Department of Presence Mercy Medical Center demonstrate that the petitioner was seen there on January 20, 2018 and reported pain in the right arm after heavy lifting at work. Examination reportedly revealed pain over the lateral epicondyles into the forearm. The petitioner was diagnosed with a right elbow strain/tendonitis and he was released with restrictions of no lifting over 25 Lbs. with the right arm. The petitioner was directed to follow-up with an orthopedic specialist for further evaluation of right arm pain. (PX 2A)

On March 12, 2018, the petitioner was terminated from his employment with Respondent following a verbal altercation with a supervisor.

The records of Dr. Gregory Markarian demonstrate that the petitioner was seen by Dr. Markarian on April 10, 2018. Dr. Markarian noted an alleged injury from "eccentrically" loading the elbow and shoulder when taking a mold out. Physical exam reportedly showed positive O'Brien Test in the right shoulder and pain with tenderness over the biceps. Dr. Markarian also reported positive Tinel's sign in the right elbow and positive elbow flexion test. Dr. Markarian recommended a CT scan to evaluate an osteochondroma and recommended an EMG for potential ulnar neuritis. On May 29 and June 26, 2018, Dr. Markarian stated that Petitioner had rotator cuff tendonitis and biceps tendonitis and recommended conservative management. On September 6, 2018, Dr. Markarian stated Petitioner was post right elbow lateral epicondylitis and right shoulder rotator cuff tendonitis and also stated that Petitioner had a C7 nerve root issue. At that time, Dr. Markarian injected the shoulder and elbow. The diagnoses remained tendonitis and AC joint arthritis. On October 4, 2018, Dr. Markarian indicated that he would put in a request for right elbow and right shoulder surgery. He described the proposed surgery as right shoulder arthroscopy, biceps tenotomy, arthroscopic distal claviculectomy, sub acromial decompression, possible rotator cuff repair and open sub pectoral biceps tenodesis. He states the right elbow would involve a lateral release, debridement and reattachment. (PX 3A)

Records from Imaging Centers of America demonstrate that MRIs of the petitioner's right elbow, right shoulder and cervical spine were completed on March 28, 2018. The MRI of the elbow reported increased fluid, sensitive hyper-intensity of normal caliber ulnar nerve that may be artefactual and clinical correlation with potential ulnar neuropathy was recommended. The shoulder was interpreted as showing articular sided fraying of the infraspinatus tendon and sessile osteochondroma off the medial aspect of the proximal humerus without cartilage cap. The cervical MRI was interpreted as showing mild spondylosis and mild narrowing of the right foramen at C3-4 without significant stenosis. (PX 4A)

An MRI arthrogram of the right shoulder was completed on April 27, 2018, at Niles MRI. The same was interpreted as showing tendinosis of the supraspinatus and subscapularis tendons, osteochondroma, mild changes of the osteoarthritis in the glenohumeral joint and mild degenerative changes in the acromioclavicular joint. An x-ray of the right shoulder reported an area of hypertrophic

bone at the level of the proximal humerus medially. (Dr. Markarian's interpretation of the imaging is reflected in Exhibit 3 was that the osteochondroma was benign). (PX 5A)

Records from Sage Medical Management reflect that Petitioner saw Dr. Kalina on March 21, 2018, at which time he reported neck and shoulder pain following the alleged injury of January 12. Petitioner alleges that he suffered a sudden onset of right forearm, shoulder and neck pain after the burn to the forearm on January 12. Dr. Kalina diagnosed cervicalgia, pain in the right elbow and pain in the right shoulder. Dr. Kalina prescribed the MRIs and provided work restrictions. Petitioner saw Dr. Lotfi, a chiropractor, on March 29. At that time, Petitioner again reported that he had suffered pain in the shoulder and neck area. Petitioner advised Dr. Lotfi that he had been working his regular duties without problem until the alleged injury of January 12. Dr. Lotfi diagnosed occipital cervico-occipital neuralgia, pain in the right forearm and pain in the right shoulder and recommended chiropractic treatment. Petitioner returned to Dr. Kalina on April 4 at which time he recommended orthopedic treatment. It was noted that Petitioner underwent an EMG on May 2, 2018, which was interpreted as showing very mild right sided C7 radiculopathy with no axonal loss which was also noted to be a sign of a good prognosis for complete and timely recovery. (PX 6A)

Records from Dr. Eugene Lipov reflect that the petitioner was seen on September 21, 2018 at which time it was noted that a cervical injection had been recommended. The petitioner reported that therapy was not helping and Dr. Lipov recommended ending the same. In the initial visit with Dr. Lipov on August 29, 2018, he states, "His complaint is essentially right neck pain radiating to the right shoulder as well as mild radiation to the right elbow." Dr. Lipov diagnosed cervical facet arthropathy. (PX 7A)

At the request of the respondent, the petitioner was examined by Dr. Kenneth Sanders on May 7, 2018. The May 7, 2018 report of Dr. Sanders was admitted into the record as Petitioner's Exhibit 8A and Respondent's Exhibit 2. Dr. Sanders noted normal range of motion in the neck and good range of motion in the shoulder with pain and some limitation in abduction and flexion. The exam was noted to be otherwise relatively normal. Dr. Sanders also noted tenderness over the medial epicondyle. Dr. Sanders diagnosed lateral epicondylitis at the right elbow, medial epicondylitis at the right elbow and mild right rotator cuff tendonitis. Dr. Sanders opined that there was a causal relationship between the alleged injury and Petitioner's symptoms and he recommended an injection to assist in defining the definitive pain generator. Dr. Sanders opined that any restrictions due to any work injury would be temporary. Dr. Sanders stated that Petitioner should avoid use of the right arm until a more definitive diagnosis has been delineated.

The petitioner was examined on September 9, 2018 by Dr. Peter Hopefner also at the request of the respondent. Dr. Hopefner's September 20, 2018 report was admitted into the record as Petitioner's Exhibit 9A and Respondent's Exhibit Number 3. Dr. Hoepfner noted diagnoses of right lateral epicondylitis and myofascial trigger points about the right shoulder without pathology and no positive proactive test involving the right glenohumeral or acromioclavicular joint. Dr. Hoepfner noted inconsistencies in testing Petitioner's grip strength. Dr. Hoepfner stated that there was no specific anatomic abnormality appreciated with regard to the right shoulder that would warrant additional treatment. With regard to the elbow, Dr. Hoepfner indicated that the epicondylitis was self-limited and would gradually subside with time. Dr. Hoepfner indicated that "judicious use" of cortisone injections could be considered. Dr. Hoepfner noted the cervical complaints but further noted that this was outside his area of expertise. Dr. Hoepfner confirmed that Petitioner was able to return to full duty employment.

Alejandra Alarcon, the respondent's human resources manager, testified that on January 16, 2018 the petitioner was moved from a lead role on the shop floor into Respondent's office in an administrative capacity in order to comply with Dr. Fernandez's permanent restrictions. Ms. Alarcon testified that when the petitioner was told on January 16, 2018 about his new light duty position, he reported the January 12, 2018 work injury. Ms. Alarcon also testified that the petitioner thereafter expressed his dislike for his new position. Ms. Alarcon testified that on March 12, 2018 the petitioner was terminated for insubordination. Ms. Alarcon also testified that she believed the petitioner to have been a reliable employee and that she believes that the January 12, 2018 accident described by the petitioner did occur.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

Petitioner testified that he suffered an injury to his right arm when he burned his forearm when removing a mold from an oven and pulled his arm back. This incident was unwitnessed but the petitioner did report the incident four days later. The accident report dated January 16, 2018, which was signed by both the Petitioner and his supervisor "Mike", describes how the accident occurred. The description contained in the accident report is substantially consistent with the petitioner's testimony and the histories of injury provided to the petitioner's treating physicians.

Alejandra Alarcon, the respondent's human resources manager, testified that the petitioner reported the accident to her on January 16, 2018 and that she had no reason to doubt that the January 12, 2018 accident occurred.

In light of the foregoing, the Arbitrator finds Petitioner to have sustained an accident that arose out of and in the course of his employment on January 12, 2018.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner testified that he experienced pain in his right arm following the occurrence. When the petitioner was sent for treatment on January 16, 2018 he reported pain in the upper arm and elbow and forearm beginning January 12. In a follow-up visit of January 20, 2018, Petitioner again reported pain in the right arm that appeared to be localized about the proximal forearm. However, after his termination, Petitioner also alleged cervical complaints. Considering that Petitioner's own testimony and the medical records confirm that Petitioner did not have any complaints involving the cervical spine until after his termination, and in the absence of a credible, persuasive, medical opinion which specifically relates any cervical condition to the January 12, 2018 work injury, the Arbitrator finds that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged occurrence.

With regard to the right shoulder and right elbow conditions, it is noted that the physicians at Physicians Immediate Care Center stated at the initial evaluation that Petitioner's symptoms were not consistent with the mechanism of injury. Dr. Markarian noted that imaging of the shoulder showed an osteochondroma, that Dr. Markarian opined was benign. The imaging also referenced findings suggestive of some tendonitis in the shoulder. The medical opinions are all consistent with a diagnosis of epicondylitis in the right elbow. As such, the Arbitrator finds that Petitioner suffered tendonitis in the right shoulder and epicondylitis in the right elbow as a result of the alleged occurrence.

The Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally relates the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes both Section 12 examiners causally relate both the shoulder and elbow injuries. Also, both Section 12 examiners believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner's current condition of ill being is causally related to the injury of January 12, 2018.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As noted above, the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident. Moreover, the petitioner's diagnosis is limited to shoulder tendonitis and epicondylitis in the elbow. A review of the records and billing submitted show that the treatment from Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute primarily involves the cervical spine. As such, the Arbitrator finds that the treatment rendered to the petitioner by Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute is not causally related to the January 12, 2018 work injury and is not awarded herein. The Arbitrator finds that the treatment rendered to the petitioner at Physicians Immediate Care, Presence Mercy Medical and by Dr. Markarian is reasonable, necessary and causally related to the January 12, 2018 work injury. The respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

As the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident, no prospective medical treatment for the petitioner's alleged cervical condition is awarded herein.

With regard to the proposed surgical treatment for the petitioner's right arm and shoulder, the Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally related the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes that both of the respondent's examining physicians believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner by way of surgery. While the Arbitrator questions the prudence of performing the recommended surgeries on the petitioner, the Arbitrator notes that the petitioner's treating physician is a physician in good standing, licensed to practice medicine in the State of Illinois, and defers to his recommendation.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Petitioner alleges entitlement to Temporary Total Disability benefits from March 13, 2018 through the date of hearing and continuing. It is noted that Petitioner was terminated on March 12, 2018 after a verbal altercation with a supervisor. Although there are conflicting allegations regarding the altercation, the Arbitrator is not charged with assessing the merits of the termination but is simply considering the same in the context of Petitioner's lost time.

Petitioner testified that, at the time of his termination, he was receiving treatment from Dr. Fernandez and Dr. Markarian. However, Dr. Fernandez had determined that the Petitioner was at maximum medical improvement and subject to permanent restrictions as of January 4, 2018. Moreover, Petitioner had last seen Dr. Markarian in December of 2015 after which he pursued treatment with Dr. Fernandez. The evidence demonstrates that the petitioner was not under any active medical treatment at the time of his termination. The evidence further demonstrates that the respondent was accommodating the permanent work restrictions placed on the petitioner by Dr. Fernandez, and there is no evidence that the petitioner was having any difficulty performing any aspect of his job at the time of his termination.

It is noted that Petitioner's job changed to a sedentary position on January 16, 2018 based upon the permanent work restrictions placed on the petitioner by Dr. Fernandez. After being notified of

this change in position, Petitioner then reported his alleged accident from four days prior. The incident itself was relatively minor as Petitioner alleges pulling his arm back after suffering a burn. Petitioner continued working his sedentary position without any apparent difficulty. On January 20, 2018, Petitioner received treatment at Presence Mercy Medical Center and the diagnosis remained right arm pain and tendonitis, and the petitioner continued to work without difficulty until his termination. After his termination, the petitioner's complaints increased, and the Petitioner sought treatment for cervical complaints as well as the right arm complaints. It is noted that while Dr. Sanders suggested that the petitioner refrain from using his arm, Dr. Sanders also noted that a more definitive diagnosis was needed. Additional testing was completed after Dr. Sanders' evaluation and the petitioner was then sent to Dr. Hoepfner as Dr. Sanders had retired. Dr. Hoepfner reviewed all of the notes, including the updated testing, and he noted inconsistencies in the petitioner's examination. Dr. Hoepfner indicated that the petitioner was able to perform his regular work activities with regard to his arm diagnoses. Based upon the above, the Arbitrator finds that the petitioner was always capable of returning to his sedentary position as a production clerk.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that the petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2014 companion case. (14 WC 24705). With regard to the 2014 case, the petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of Temporary Total Disability benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr. Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to the petitioner, the respondent had a good faith basis upon which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claimed benefits through that date. Additionally, the Arbitrator has found that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy D. Little,

Petitioner,

21IWCC0152

vs.

NO: 14 WC 35730 and
16 WC 36913

ADT Home Security,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitration Decision Form, and corrects a scrivener's error. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct one clerical error on the Arbitration Decision Form. In the Order, the Arbitrator mistakenly wrote that Respondent shall pay temporary total disability benefits from September 21, **2104**, through July 1, 2015. This is clearly a scrivener's error. The Commission thus modifies the above-referenced sentence to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of $744.00/week for 40-4/7 weeks, commencing **September 21, 2014,** through **July 1, 2015**, as provided in Section 8(b) of the Act.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

21IWCC0152

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $55,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

d: 2/23/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, RANDY D
Employee/Petitioner

Case# **14WC035730**

16WC036913

ADT HOME SECURITY
Employer/Respondent

21IWCC0152

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1357 RATHBUN CSEVENVAK & KOZOL
LUIS MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60431

2542 BRYCE DOWNEY & LENKOV LLC
JESSE LANSHE
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

21IWCC0152

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Randy D. Little
Employee/Petitioner

v.

ADT Home Security
Employer/Respondent

Case # **14** WC **35730**

Consolidated cases: **16 WC 36913**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 6, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **August 12, 2014 and September 20, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accidents.

In the year preceding the injury, Petitioner earned $**58,032.00**; the average weekly wage was $**1,116.00**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**24,279.32** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**24,279.32**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**744.00**/week for **40 4/7** weeks, commencing **September 21, 2104** through **July 1, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**24,279.32** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.60**/week for **50** weeks, because the injuries sustained caused the **10%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 - 2019

FACTS:

Petitioner, testified that he worked for the Respondent, from 2009 to 2016 installing security products at residential and commercial properties. He would travel to different locations in a truck that contained all necessary installation materials. Prior to 2014, he had not missed any work because of a back injury and had never treated for a back injury. In approximately August, 2014, or shortly before, Petitioner indicated that he began noticing lower back pain that he associated with the work van he was driving. He indicated that his van had been switched from a normal van to a small van shortly before he started noticing problems. He described the new van as, "very tight, cramped, couldn't put the seat back due to the racks in there. They were extremely overloaded with lots of wire. It was kind of like riding in a covered wagon." Petitioner testified that he believed there was a problem with the suspension and indicated driving the van was very rough riding. Petitioner testified that at that time, he was driving about 75 to 125 miles per day doing installations. Petitioner testified that on August 12, 2014, given his ongoing problems with his back and truck, he notified his immediate supervisor, Ms. Rita Last, of his issues. On that date, in a series of text messages, Petitioner stated, "I'm gonna need to see a chiropractor all these hours in this uncomfortable truck" and "my lower back feels like I'm getting hit w a bat daily bc this seat is so uncomfortable and I'm spending 3 he's (sic) a day driving." At hearing, Ms. Last testified that Petitioner made her aware of back pain related to his truck on August 12, 2014.

Petitioner testified that he sought medical treatment for his back pain with a chiropractor, Dr. Van Til on September 8, 2014. At that appointment, Petitioner indicated that he had back pain interfering with his sleep and aggravated by driving a work van for about two months. Petitioner testified he had never noticed lower back pain and symptoms prior to his work truck change. Despite his symptoms, Petitioner continued working until September 20, 2014. On that date, Petitioner testified after a long drive on a very bumpy road, which aggravated his back pain, he lifted a ladder off of the top of his truck and felt a major pinch and a pop in his lower back that caused him to fall over because of pain. Petitioner indicated his lower back symptoms were significantly worse after this incident and he contacted Ms. Last. Ms. Last confirmed that Petitioner texted her on the date of accident complaining about back pain on the way to the job site and then, about 10 minutes later, called her to tell her that he hurt his back getting the ladder off the top of his ADT vehicle.

Following September 20, 2014, Petitioner sought treatment at Silver Cross Emergency Room and then followed up with Dr. Harris Waheed on September 22, 2014. At that examination, Petitioner indicated that the van he travels in is very uncomfortable and he drives a lot causing him lower back pain and numbness. After an examination, Dr. Waheed referred him to a neurosurgeon and give him a referral for physical therapy. Petitioner sought therapy at River Valley Physical Therapy on October 2, 2014. On that date, the therapist, Katelin Fane, indicated that Petitioner was referred from Dr. Waheed, and she recorded a history from the Petitioner. In her history, Ms. Fane documents that Petitioner was suffering from, among other complaints, low back pain that he associated to a change to different work vans and driving for long periods of time. Ms. Fane also documented Petitioner reported lifting his ladder and his back giving out. Petitioner then began a course of physical therapy.

Due to ongoing lower back symptoms, Petitioner testified he followed up with Dr. Anthony Rinella on October 15, 2014. On that date Petitioner gave a history both driving extensively in the newer work truck causing lower back pain and the September 20, 2014 ladder incident. After a physical examination, Dr. Rinella reviewed Petitioner's previously taken lumbar MRI and prescribed another lumbar MRI because he believed Petitioner may have a pars defect in his lumbar spine. Dr. Rinella also prescribed a Medrol Dosepak and indicated Petitioner should remain off work. Petitioner

followed up with Dr. Rinella on November 5, 2014, at which time the doctor reviewed the CT scan of his lumbar spine and confirmed that Petitioner had a bilateral pars defect in his lumbar spine. Despite additional conservative measures such as therapy and epidural steroid injections, Petitioner's lumbar complaints continued and Dr. Rinella recommended an L4-5 transforaminal lumbar interbody fusion. Petitioner underwent the fusion procedure on May 20, 2015 and returned to see Dr. Rinella's physician's assistant, Doug Stevens, on June 3, 2015 at which time he reported being pleased with the results.

Following his fusion, Petitioner testified that his lumbar symptoms decreased and by, July 1, 2015, he returned to full duty work. At hearing, Petitioner testified that after he returned to work for ADT, he began working for another employer in approximately May, 2016. Petitioner further testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, (E.), Was timely notice of the accident given to Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner's diagnosed pars fracture was aggravated by driving his company vehicle after the van was switched to a smaller model. This condition was then aggravated to the point that fusion surgery was necessary after suffering further trauma after lifting the ladder. The evidence presented demonstrates Petitioner had continuous and ongoing lower back pain only after the Respondent changed the work truck that he drove to installation sites. Respondent verified Petitioner's testimony through the testimony of Ms. Last. Ms. Last confirmed Petitioner contacted her about his back pain after he began driving the new truck. Further, Respondent submitted an email between Ms. Last and ADT's area general manager, Mr. Travis Miller that substantiates Petitioner's complaints. In Respondent's Exhibit 5, Mr. Miller wrote, in part, "The tech claimed that his back has bothering (sic) him due to driving the ADT transit vehicle. He has made multiple requests to his manager to be transferred into a full-size van which have been denied due to full size vans no longer being available at ADT." (R5) Additionally, Respondent offered no rebuttal to Petitioner's testimony that the new van was uncomfortable and rode very hard. It appears clear that the breakdown date of accident is August 12, 2014, the date on which Petitioner directly texted his immediate supervisor, Ms. Last, of his back pain that he indicated would necessitate medical care. Petitioner reported to Dr. Van Til that his back hurt when he drove his ADT truck. Although he continued to attempt to work through the pain, Petitioner suffered the second accident on September 20, 2014, when lifting a ladder. Again, this accident was confirmed by Ms. Last and an accident report was filed by Respondent. (R4) In fact, on that day, Petitioner reported both to Ms. Last that his back hurt from driving to the location of the ladder incident and, shortly thereafter, he lifted the ladder that had substantially increased his lower back pain. This incident exacerbated Petitioner's condition to the point that surgery became necessary.

Dr. Rinella discussed both accidents in his testimony taken on August 3, 2016. On that date, he indicated that a pars fracture is a fracture of the bone between, in Petitioner's case, L4 and L5

and that Petitioner had the pars fracture for a period of time. Dr. Rinella testified that, although the pars fracture was present for a long time, it was aggravated by the work injury, specifically, the ladder incident on September 20, 2014. Further, Dr. Rinella considered that that Petitioner was having back pain while driving the ADT truck and stated, "he may have had periodic pain related to these pars fractures; but obviously, he didn't even know he had them, so they never required any specific diagnosis previously" and that the acute mechanism of accident got it to a point of surgical intervention.

The evidence presented supports Dr. Rinella's opinions. It is not disputed that Petitioner had continuous back complaints while driving his new ADT truck but that he continued to work until after the September 20, 2014 ladder incident. It is clear Petitioner had back pain caused by his work truck and the second accident involving the ladder aggravated his pars fracture symptoms to the point that surgery was necessary. Additionally, despite Respondent's contention, Petitioner reported the ladder incident. Ms. Last testified that Petitioner called her about the ladder incident on the day of accident and an accident report was created. Further, the ladder incident was recorded by Petitioner's therapist at River Valley Therapy even prior to Petitioner seeing Dr. Rinella.

Respondent relies on the testimony of Dr. Steven Mather who saw Petitioner for the purposes on an independent medical examination on March 25, 2013. Dr. Mather also offered opinions in an addendum report dated January 23, 2018. Dr. Mather opined that Petitioner's condition was pre-existing and not caused by the ladder incident or riding uncomfortably in his van. Dr. Mather further indicated that Petitioner's accident had no relation to the need for surgery. Dr. Mather's testimony ignores the facts of the evidence presented. Petitioner clearly had lumbar spine complaints that began only after driving his smaller ADT truck. There is no evidence that Petitioner had any low back complaints of any kind predating this. These symptoms got worse after he lifted the ladder on September 20, 2014. As discussed, Ms. Last confirmed that Petitioner called her immediately and reported that he hurt his back again after lifting the ladder off the roof of his truck. Petitioner then goes on a course of treatment that resulted in fusion surgery. Dr. Mather offers no explanation why Petitioner's symptoms only began with the change in his work truck and were worse after lifting the ladder on September 20, 2014. It is not simply coincidence that Petitioner's preexisting pars fracture was asymptomatic his entire life prior to the truck change and ladder accident.

Based on the greater weight of the evidence, the Arbitrator finds that both Petitioner's August 12, 2014 and September 20, 2014 work accidents arose out of and in the course of his employment with the Respondent.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's condition of ill being regarding his lumbar spine is causally related to both his August 12, 2014 and September 20, 2014 work accidents. The Arbitrator finds the testimony of Dr. Rinella sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner gave proper notice of both his August 12, 2014 and September 20, 2014 work accident. This was confirmed by the testimony of Ms. Last.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for payment of reasonable and necessary medical bills. During his deposition, Dr. Rinella was asked if he believed Petitioner's lumbar spine including surgery was reasonable and necessary based on the symptoms indicated. To this, Dr. Rinella responded, "I think all treatment for cervical, thoracic and lumbar was very reasonable and necessary." Respondent offered no evidence to the contrary.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's treatment was reasonable and necessary. The Arbitrator awards Petitioner unpaid medical bills as outlined in Petitioner's Medical Bills Exhibit submitted as exhibit 1, pursuant to the fee schedule.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for temporary total disability. Petitioner was given an off work notes from Silver Cross emergency room on September 20, 2014, then by Dr. Waheed on September 22, 2014 and finally from Dr. Rinella when treatment began on October 15, 2014.) Petitioner was continuously off work by Dr. Rinella's order until he returned to Respondent to work on July 1, 2015.

Based on the greater weight of the evidence, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 21, 2014 until July 1, 2015, a period of 40 4/7 weeks. The Arbitrator awards Respondent credit of $24,279.32 for paid Temporary Total Disability benefits.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered an aggravation of his pre-existing back condition which led to the necessity of an L4-5 transforaminal lumbar interbody fusion. The Petitioner testified that he currently continues to experience occasional muscle pain and stiffness in his lower back and has difficulty bending over. Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and

* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a residential alarm installer, and that the Petitioner has returned to that same type of work without much apparent difficulty. The Arbitrator therefore gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 30 years old at the time of the accident. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less likely to fully recover from his injuries. The Arbitrator therefore gives significant weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work with earnings that are the same. Because there is no evidence of any impairment to future earnings, the Arbitrator gives significant weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over. The Arbitrator notes that the Petitioner's current complaints are relatively minimal and evidence a good result from the treatment rendered to him. These complaints are corroborated in the medical records of the Petitioner's treating physicians. The Petitioner's complaints as supported by the medical records, evidence some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), and the Petitioner's relatively minimal current complaints, the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 10% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse: Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANATOLY DAVYDOV,

Petitioner,

21IWCC0153

vs.

NO: 16 WC 23007

SUPERIOR BROKERAGE SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner sustained his burden of proving he sustained a work-related accident on April 28, 2016 which caused his current condition of ill-being in the right shoulder and awards benefits.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner worked for Respondent as a truck driver for eight years and had been a truck driver his entire life. During his employment with Respondent, the medical records reflect that Petitioner previously suffered a work-related injury to his left foot and ankle while working for Respondent on September 16, 2015. Petitioner underwent treatment with Dr. Sergey Kachar and Dr. Thomas Tingle, who are in the same practice, for that injury.

Petitioner then saw Dr. Kachar at Northwest Orthopedic Surgery for evaluation of the right shoulder on November 3, 2015. He reported some mild intermittent pain for many months, maybe up to a year. About three months previously, Petitioner reported that he was swatting a bee and felt a sharp pain in the shoulder and had been having some increasing pain recently. Petitioner had some pain with reaching, lifting, overhead activities as well as pain with activities of daily living. Dr. Kachar ordered x-rays, which showed mild degenerative changes of the

glenohumeral joint. Dr. Kachar diagnosed Petitioner with a right shoulder injury, pain, and impingement. He administered an injection, prescribed physical therapy, and ordered an MRI.

Petitioner acknowledged that he had shoulder pain prior to his first visit to Dr. Kachar in November of 2015. He first reported shoulder pain while on light duty for his ankle and in physical therapy for his ankle. Petitioner did not recall reporting the mechanism of injury or all of the symptoms identified in Dr. Kachar's record because it was long ago, but testified that he would not dispute the medical records indicating that he made those statements. Petitioner testified that the cortisone injection decreased his pain and he was feeling pretty good, working his job until the time of the injury.

Petitioner underwent the recommended MRI on November 5, 2015. The interpreting radiologist found a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant muscle atrophy. More specifically, the radiologist noted a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. He also found that a majority of the tendon is increased in signal and thickened likely related to fraying and tendinosis, and there is also tendinosis of the infraspinatus tendon. The radiologist further noted findings of external impingement and degenerative changes at the glenohumeral joint space with abnormal appearance of the majority of the labrum likely degenerative in origin.

Petitioner also underwent an initial physical therapy evaluation on November 5, 2015 for his right shoulder. The evaluating therapist, Dorota Kus, P.T. (PT Kus), noted an onset of right shoulder pain on August 21, 2015 while sleeping and driving his truck. He reported that he was swatting a fly with his right arm and that it hurt a lot and had been more sore now. Petitioner also underwent his continued physical therapy for the left ankle.

Petitioner returned to Dr. Kachar the following day reporting persistent right shoulder pain and 30% relief from the injection. Dr. Kachar noted that Petitioner had the MRI and recommended continued conservative treatment including physical therapy. Dr. Kachar diagnosed Petitioner with a superior glenoid labrum lesion of the right shoulder and a rotator cuff tear. He indicated that they would consider arthroscopic surgery if he was not improving.

On November 19, 2015, Dr. Kachar noted that Petitioner was doing well with improvement of his right shoulder symptoms. He recommended continued physical therapy. On December 28, 2015, Petitioner was discharged from physical therapy after deciding to go to a facility closer to home. PT Kus noted that Petitioner felt minimal soreness after exercises and no pain.

The following day, December 29, 2015, Dr. Kachar noted that Petitioner was improving overall and functionally better, but he still had some persistent pain. Dr. Kachar continued physical therapy for another six weeks.

On February 25, 2016, Dr. Kachar noted Petitioner's "follow up for work-related injury, right shoulder rotator cuff tear." Petitioner reported that his pain was worse, describing pain at night, and he reported difficulty lifting heavy objects. Petitioner denied any recent traumatic

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injuries. On physical examination, Dr. Kachar noted positive impingement signs. He administered another injection and referred Petitioner to Dr. Tingle for evaluation of right shoulder rotator cuff tear and released him from treatment to follow up as needed.

Petitioner testified that he continued to work through this treatment and that his shoulder felt "better, much, much better" after the injection. He was able to do some home therapy and exercise. Petitioner testified that he did not believe that he needed to see Dr. Tingle and continued to work.

Then, on April 28, 2016, Petitioner testified that he sustained an accident affecting his right shoulder at work, which Respondent disputes. While decoupling a trailer from the cab and pulling on the handle with his right arm he hurt himself and almost fell down when he pulled on the handle. Petitioner testified that "[i]t's really pain, like almost crying, you know, it's so painful." He explained that the pain was worse, "20 times more[,]" than the pain he had previously.

B. Medical Treatment

Petitioner was sent for treatment that day and presented to Dr. Reese at Alexian Brothers' Medical Group. The medical records reflect Petitioner's report of right shoulder pain while pulling on a trailer hitch earlier that day. He reported some shoulder pain a year ago, physical therapy, and improved symptoms. Dr. Reese noted that Petitioner now complained of pain over the side of the shoulder. On physical examination, Petitioner had tenderness of the right deltoid, full range of motion, and normal sensation. Dr. Reese diagnosed a right shoulder sprain, especially over the right deltoid. An ice pack was applied and Dr. Reese prescribed Naproxen and restricted Petitioner from lifting/pushing/pulling over 10 pounds. Petitioner was instructed to follow up on May 4, 2016.

On April 29, 2016, Petitioner presented to Dr. Tingle for an initial orthopedic consultation for right shoulder pain status post work-related injury. The following history was noted:

> The patient is a 68-year-old right-hand-dominant male presents today for an orthopedic consultation regarding right shoulder injury sustained yesterday on 04/28/2016. He works as a truck driver. Apparently, he was pulling on a trailer when he developed a sharp pulling tearing sensation over the anterior aspect of his shoulder. He developed immediate pain. He reported the injury to work, was seen by an occupational medicine physician. He was given work restrictions, placed on naproxen and recommended ice his shoulder. He describes pain and weakness with reaching, lifting and overhead activity. Pain localized primarily over the anterior aspect of his shoulder, but some discomfort feels deep inside, has some clicking or popping sensation with motion of his shoulder. He denies any neck pain, numbness and tingling and radicular symptoms. Symptoms are worse with activity, improved with rest. The pain was initially severe. Now, it is mild to moderate with treatment and rest.

On physical examination, Dr. Tingle noted nearly full passive range of motion with discomfort at end ranges, 4/5 strength in scaption, and positive Neer and Hawkins impingement signs. He diagnosed Petitioner with right shoulder pain, placed him on light duty work restrictions, and ordered an MRI.

The MRI was performed the same day. The interpreting radiologist's impression was of a large full-thickness rotator cuff tear and degenerative arthritis. Specifically, he found the following:

> There is mild to moderate glenohumeral and acromioclavicular degenerative arthritis. There is marginal spurring from the inferomedial humeral head. There is thinning of the glenoid labral cartilage.
>
> There is a large full-thickness rotator cuff tear involving the supraspinatus tendon with portions of the tendon retracted over a length of 3.5 cm. The tear extends to the most anterior band of the infraspinatus tendon. There is considerable coexistent supraspinatus and infraspinatus tendinopathy.
>
> The teres minor and subscapularis tendons are intact. The superior labrum is not ideally visualized probably due to chronic degeneration although a SLAP tear cannot be completely excluded. Visualized portions of the labrum otherwise unremarkable.
>
> Minimal joint effusion. Small to moderate subacromial bursal effusion.

On May 3, 2016, Petitioner returned to Dr. Tingle reporting some improvement in his overall comfort level, with some pain with overhead-type motion, and some continued weakness. Dr. Tingle noted the MRI results and diagnosed Petitioner with a massive rotator cuff tear as well as probable superior labral tear significantly worse after work-related activity. Dr. Tingle discussed non-operative and operative treatment options noting there did not appear to be any musculature atrophy, and the natural history of a rotator cuff-deficient shoulder and likelihood of progression of arthrosis. He recommended an arthroscopic rotator cuff repair, and restricted Petitioner from any lifting or carrying over 20 pounds but allowed him to drive a truck. Dr. Tingle noted that Petitioner was going to consider his options and report whether he wished to proceed with surgery.

Petitioner returned to Dr. Tingle on June 10, 2016 reporting difficulty lifting his arm above shoulder level, 6/10 pain, and 10/10 pain with sleep. He also reported that Respondent had not been able to accommodate his restrictions. Petitioner attended the session with his son-in-law and indicated that he wished to undergo surgery. Petitioner reported a previous shoulder problem "which was completely resolved with rehabilitation prior to his work injury." Dr. Tingle noted his review of a previous MRI dated November 5, 2015. He found that it showed a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant atrophy. The tear measured 1.5 cm with a 2 cm retraction, tendinosis of the infraspinatus tendon, findings of external impingement, and degenerative changes at the glenohumeral joint and labrum. Dr. Tingle noted that Petitioner "had a previous rotator cuff tear

managed conservatively with rehabilitation managed by another physician, which was aggravated and increased in size after work injury. The tear increased in size from 1.5 cm to 3.5 cm in length after the work injury. The rotator cuff tear now extends in[] the infraspinatus tendon when comparing MRI's." He noted that Petitioner wished to undergo the right shoulder arthroscopy with rotator cuff repair and subacromial decompression surgery, which might involve implantation of instrumentation to be determined intraoperatively. Dr. Tingle maintained Petitioner's work restrictions of no lifting with the right arm.

On August 30, 2016, Petitioner returned to Dr. Tingle who noted "some apparently insurance issue[] in regards to the approval from the Workman's Comp versus his private insurance carrier. He is here for repeat evaluation." Petitioner reported pain ranging from 3-5/10 with overhead reaching and at night, and continued discomfort with any overhead lifting or reaching as well as some weakness. Dr. Tingle noted their discussion about the large size of his tear which has enlarged after once again an occurrence at work. Dr. Tingle noted that they would proceed with surgery at Petitioner's earliest convenience and the possibility of inability to repair the tear if he waits too long. He recommended continued home exercises and no lifting or carrying over 10 pounds or overhead lifting.

Petitioner underwent a third MRI on October 4, 2016, which was compared to the April 29, 2016 MRI. The interpreting radiologist noted no significant change compared to the prior MRI. He again found a full-thickness supraspinatus tendon tear as well as moderate infraspinatus and mild subscapularis tendinopathy with small interstitial tears in both tendons. The radiologist also noted mild glenohumeral and acromioclavicular joint osteoarthritis, a small glenohumeral joint effusion, and an abnormal signal in the superior glenoid labrum, for which a tear cannot be excluded. The radiologist issued an addendum report the same day specifying that the supraspinatus tendon tear measured 2.1 cm in anteroposterior dimension and retraction of the tendon stump by 3.5 cm.

On October 6, 2016, Petitioner underwent the recommended surgery with Dr. Tingle. Pre-operatively, he diagnosed a right shoulder rotator cuff tear and impingement syndrome. Dr. Tingle performed an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, he diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome.

Petitioner returned to Dr. Tingle for post-operative follow up care beginning on October 7, 2016. Petitioner remained in an immobilizer for a time and was then referred to physical therapy, which he underwent at AthletiCo. Use of the right arm sling was discontinued on November 23, 2016. Additional physical therapy was ordered on December 20, 2016 and January 20, 2017.

By February 24, 2017, Dr. Tingle noted that Petitioner was doing extremely well and had been discharged from physical therapy. Petitioner reported that he felt very good and very pleased with his progress, and quite functional. However, Petitioner still had some occasional

mild weakness. Dr. Tingle recommended a continued home exercise program for functional strength, and Petitioner was released from treatment to follow up on an as-needed basis. Petitioner testified that he last saw Dr. Tingle on February 24, 2017, at which time he was released to full work and from treatment.

C. Deposition Testimony – Dr. Tingle (Petitioner's Orthopedic Surgeon)

Petitioner called Dr. Tingle as a witness and he gave testimony at an evidence deposition on August 29, 2018. He discussed his treatment of Petitioner and gave opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Tingle testified that he was a board-certified orthopedic surgeon and performed surgery on a regular basis. He first saw Petitioner on April 29, 2016 for severe right shoulder pain after hurting it at work. Dr. Tingle understood the mechanism of Petitioner's injury to be that he was pulling a trailer when he developed a sharp, pulling, tearing sensation over the anterior aspect of his shoulder. Dr. Tingle was aware that Petitioner had a right shoulder problem and that he had received treatment prior to seeing him from his partner [Dr. Kachar] in the same practice, and those notes were available for his review.

Dr. Tingle reviewed all of Petitioner's MRI films from his 2015 and 2016 scans. In comparing the November 2015 MRI to the April 2016 MRI, Dr. Tingle felt that it was significantly worse because the large tear was now a massive tear, the centimeter findings of retraction [changed], and there was involvement of another tendon (the infraspinatus) that was not present of the 2015 films according to the radiologist's readings, which he felt had enlarged. Dr. Tingle opined that the findings in the April 2016 MRI were consistent with Petitioner's symptoms and his exam, and also with the mechanism of injury as described.

Dr. Tingle issued a narrative report at the request of Petitioner's counsel. Therein, he referred to a report of Dr. Hennessy on behalf of the employer dated July 27, 2016. Dr. Tingle disagreed[1] with Dr. Hennessy's opinion explaining that "I don't think the literature necessarily

[1] The Commission notes that there were no express rulings made on either parties' objections or motions at either Dr. Tingle or Dr. Hennessy's depositions. Here, Respondent objected to Dr. Tingle's testimony regarding any medical literature on which he relied based on *Ghere* asserting that it had not been provided with such literature 48 hours in advance of the deposition. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). Respondent made additional objections, maintained a "standing" *Ghere* objection, and moved to strike various portions of the doctor's testimony. The Commission finds the Arbitrator implicitly overruled both parties' objections at both depositions, as well as Respondent's *Ghere* objection and explicitly overrules it here. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, *16-17 (2011) (*citing In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003)). The Court went on to specify that such opinions are "only as valid as the reasons for the opinion." *Id.* (citing *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998)). Dr. Tingle's reference to medical literature at the time of his deposition is the type of testimony that can be expected from a medical expert when explaining the reasoning for causal connection opinions particular to a patient. Moreover, Respondent suffered no harm as a result of the testimony. Respondent's Section 12 examiner, Dr. Hennessy, was later deposed and even agreed with some of the propositions set out by Dr. Tingle regarding the medical standards identified. In addition, both physicians reviewed the other's written reports and had the opportunity to explain any disagreement and the bases therefore. As such, the Commission finds no harm to

supports that that's the natural progression of a rotator cuff tear in a 69-year-old gentleman over five months. I mean there was - - I mean there's literature out there that basically had studied this and for a full thickness tear the incidence of increased retraction, about 22 percent of those full thickness tears will increase at the two-year mark, so I followed these patients for an extended period of time, and 50 percent will increase over a five-year period. And the other thing they noted, the main thing was someone had progression of a tear was that their pain increased significantly." Dr. Tingle identified this as a JBJS article by Keenan and Ken Yamaguchi from Washington University in St. Louis.

Dr. Tingle maintained his opinion that the tear in the April 2016 MRI was larger and there appeared to have some more retraction compared to the 2015 MRI. He opined that the accident aggravated Petitioner's previous condition and was a factor leading to his treatment and surgery. Dr. Tingle maintained his opinion regarding the MRIs from 2015 to 2016 explaining that he reviewed the MRIs himself, but he would defer to the radiologists that read the MRIs that are board-certified and have better software to interpret films. He also maintained his opinion, throughout his testimony, that Petitioner's pre-existing condition was aggravated by the accident.

On cross-examination, Dr. Tingle testified that Petitioner was referred to him by Dr. Kachar, another orthopedic surgeon, for a surgical consultation for the diagnosis of rotator cuff tear. He was asked about Petitioner's prior treatment with Dr. Kachar, and he acknowledged that Petitioner underwent a previous injection, physical therapy, and was taking anti-inflammatories. He agreed that Petitioner was symptomatic at that time, and he reported that he was asymptomatic when he first saw Dr. Tingle. Dr. Tingle acknowledged that Petitioner's prior symptoms were not documented in his "history of present illness" at his initial visit. However, Dr. Tingle pointed out that Petitioner's prior symptoms were "already documented in the chart."

Dr. Tingle agreed that the 2015 and 2016 MRIs both showed a large full thickness tear of the rotator cuff, degenerative joint disease in the glenohumeral joint space, and degenerative tears in the labrum. He agreed that the small to moderate bursal effusion noted in his initial note could possibly be related to degenerative changes and could be read either to indicate an acute injury or not. The November 5, 2015 MRI showed tendinosis, which are changes caused by chronic inflammation and could be a precursor to tearing of the tendon. Dr. Tingle testified that there was also some degenerative joint disease.

Dr. Tingle acknowledged that rotator cuff tears do not heal on their own. When asked whether one can employ conservative treatment to "calm it down," Dr. Tingle answered in the affirmative. He also agreed that the rotator cuff tear is always going to be there, and injections typically wear off eventually. However, he testified that not all rotator cuff tears are symptomatic and he disagreed with the proposition that a 69 year-old man with a previous rotator cuff tear and arthritis would have continued progression of the tear because he has some arthritic findings in the shoulder. With regard to the onset of Petitioner's rotator cuff tear before the November 5, 2015 MRI, Dr. Tingle believed it would have begun a year or two prior because there was not much muscle atrophy.

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either party by the Arbitrator's consideration of the testimony of the physicians in its entirety and, likewise, considers the testimony of both physicians in its entirety assigning appropriate weight, if any, to the physicians' opinions as explained in the conclusions of law.

Dr. Tingle acknowledged that patients with asymptomatic rotator cuff tears are not referred for a surgical consultation. He agreed that when he first saw Petitioner, he reported pain and difficulty with reaching, with lifting, and with overhead activities. Petitioner also reported difficulty with lifting heavy objects when he saw Dr. Kachar on February 25, 2016. Petitioner also had impingement signs both before and after the accident, as well as some weakness. However, Dr. Tingle pointed out that at Petitioner's November visit [with Dr. Kachar] Petitioner had a negative drop test, which was "significantly different from [his] exam from April 29, 2016, when [Petitioner] had difficulty with active motion above 90 degrees so basically [he] did not have full range of motion actively, his strength was four out of five which is a specific test to evaluate the rotator cuff strength" in addition to the positive Neer and Hawkins impingement signs. Dr. Tingle also acknowledged that is was possible for a degenerative SLAP tear to lead to progression of a rotator cuff tear over time absent trauma.

On redirect examination, Dr. Tingle testified that Petitioner presented to him as an emergency add-on appointment for severe shoulder pain. He explained that they get as much information as possible but may not cover every single detail of the patient's complete care. Notwithstanding, Dr. Tingle testified on direct, cross-examination, and re-direct examination that Petitioner's prior right shoulder problems and treatment were documented in the office file and he was aware of it. Dr. Tingle maintained the opinion that there was change in Petitioner's November 2015 and April 2016 MRI findings, and those findings were consistent with his opinion that the accident aggravated Petitioner's condition. Dr. Tingle testified that is was possible for Petitioner to have become asymptomatic from February to April 2016.

D. Section 12 Reports and Deposition Testimony – Dr. Hennessy (Respondent's Section 12 Examiner)

On July 27, 2016, Dr. Ryon Hennessy performed a records review and rendered various opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work. At the time, Dr. Hennessy did not have MRI films to review. In his report, he diagnosed Petitioner with a large, full thickness rotator cuff tear with 3.5 cm retraction and a supraspinatus tear likely at 1.5 cm and found the remaining pathology to be degenerative in nature. He diagnosed progression of a rotator cuff tear with regard to retraction as well as persistent tendinopathy of supraspinatus and infraspinatus and degeneration of the labrum. Dr. Hennessy opined that Petitioner's condition was degenerative, that the retraction was consistent with the natural progression of a full thickness rotator cuff tear in a nearly 69 year old man, and that the incident of pulling on a trailer at work would not cause retraction. He further opined that the alleged incident at work did not cause any new pathology. In the remainder of his report, Dr. Hennessy maintained that there was "clearly no acute injury."

On June 1, 2018, Petitioner submitted to a Section 12 examination with Dr. Hennessy at Respondent's request. Dr. Hennessy reviewed various records including Petitioner's post-accident treatment records, and examined Petitioner. He was provided with Petitioner's MRI scans, but was "unable to open the disc however on three separate computers." Dr. Hennessy stated "[b]riefly, the opinions I generated in my chart review in July 2016 remained unchanged."

He added that "[a]fter review of further records as well as interview with Mr. Davydov, my opinions were strengthened."

On June 23, 2018, Dr. Hennessy issued an addendum report in which he noted his review of November 3, 2015 x-rays, and all three of Petitioner's right shoulder MRIs. Dr. Hennessy was also provided with Dr. Tingle's narrative report. Dr. Hennessy's ultimate opinions did not change after reviewing diagnostic films. He found the November 2015 MRI to reflect a 23 mm [2.3 cm] by 36.6 mm [3.66 cm] rotator cuff retraction. He found the April 2016 MRI to be "essentially the same as the 11/5/2015 film" reflecting a 22.4 mm [2.24 cm] tear. He then found the October 2016 MRI to be "unchanged from April 2016[]" and again reflect a 22.4 mm [2.24 cm] tear with a 36 mm [3.6 cm] tear on one image and a 38 mm [3.8 cm] on another image. Dr. Hennessy believed that the radiologist had underread the films. He agreed that the treatment rendered by Dr. Tingle was appropriate, but unrelated to an accident at work.

Dr. Hennessy also disagreed with Dr. Tingle's narrative report and noted that Dr. Tingle made no comparison between the November 2015 MRI and the April 2016 MRI. He also stated that Petitioner made no mention of his prior right shoulder complaints, which were "directly refuted" by Dr. Kachar's February 2016 note. Dr. Hennessy reiterated his belief that the radiologist that read Petitioner's November 2015 MRI under-read the films, which were in his opinion "essentially identical" to the October 2016 MRI. He also indicated that "regarding retraction of rotator cuff tears over 18 months to 5 years" his "personal review of the MRI films would be consistent with the literature Dr. Tingle cited."

Respondent called Dr. Hennessy as a witness and he gave testimony at an evidence deposition on October 2, 2018. He discussed his Section 12 reports and opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Hennessy testified that he was a board-certified orthopedic surgeon. About 70% of his practice involved general orthopedics and about 30% involved treatment of the spine. He sees 80 to 90 patients, performs 4-10 surgeries, and performs about one to two Section 12 examinations a week. He reviewed Petitioner's medical records and issued three reports.

Initially, Dr. Hennessy only had the MRI reports and not the actual films. He noted that the November 5, 2015 MRI report showed a full-thickness rotator cuff tear measuring 1.5 cm with 2 cm of retraction, moderate infraspinatus and mild subcapularis tendinosis, with fluid along the supraspinatus muscle and subacromial without atrophy, moderate AC joint arthritis with anterior acromial spurring and thickened coracoacromial ligament, and labral degeneration/tearing of the superior, anterior, posterior and anterior inferior aspects. The MRI report from April 29, 2016 indicated a full-thickness rotator cuff tear with 3.5 cm retraction, supraspinatus and infraspinatus tendinopathy, degeneration of the labrum, and a small amount of subacromial fluid. Otherwise, the labrum was considered normal.

Dr. Hennessy noted that based on the November 2015 MRI report, the labrum tearing and rotator cuff tear pre-dated April 2016. The second MRI just noted labrum degeneration. However, the labrum would not have repaired itself in the interim. In interpreting the MRI reports, Dr. Hennessy the rotator cuff "tears were likely similar." While there was some

progression of the retraction, "it would have been more due to the pre-existing condition and the natural history of that pre-existing condition as full thickness rotator cuff tears could progress or can progress with further retraction." Both he and Dr. Tingle agree about Petitioner's diagnosis, however, Dr. Hennessy believed the retraction represented a natural progression of the underlying pre-existing disease. Based on the MRI reports, Dr. Hennessy opined "that it would be highly unlikely there would be a 1.5 centimeter change in retraction in just six months. That's highly unlikely." When asked why, Dr. Hennessy testified that "[i]n six months, retraction happens a little more slowly over years. It doesn't happen acutely like that. Actually it was a five-month interval. That would be highly unlikely." Dr. Hennessy explained that retraction is a generally degenerative rather than an acute process.

Dr. Hennessy found no acute findings in either of the MRI reports. There had been persistent weakness when Petitioner was discharged from physical therapy in December 2015. He did not appreciate any new rotator cuff injury in the second MRI and the pre-existing rotator cuff tear was symptomatic prior to the accident. Therefore, he found no exacerbation, acceleration, or aggravation of the pre-existing condition. Dr. Hennessy believed that all treatment provided to Petitioner was appropriate, though he believed the need for surgery was the underlying condition and not the work injury.

Two years after his initial records review, Dr. Hennessy examined Petitioner, reviewed additional records, including records from before the accident, and issued another report. It was noted that on November 3, 2015, Petitioner reported to Dr. Kachar that he had shoulder pain for up to a year with associated difficulty lifting heavy objects, and positive impingement signs. Petitioner also reported that the pain increased when he swatted at a bee three months earlier. Petitioner treated with Dr. Kachar through February 25, 2016, at which time he referred Petitioner to Dr. Tingle for a surgical consultation.

Dr. Hennessy reviewed the operative report. Dr. Tingle noted that the rotator cuff tear was 3.4 cm by 3 cm, which he agreed was massive. Dr. Tingle also noted that the tendon was mobile and therefore, in Dr. Tingle's opinion, more consistent with an acute, rather than chronic, injury. Dr. Tingle also noted some granulation, which he posited was more consistent with an acute injury than a chronic one. He also debrided an old biceps rupture injury. When asked whether he agreed with Dr. Tingle's assessment that the injury appeared acute, Dr. Hennessy responded that the biceps injury was clearly an old one and he was "not sure the granulation would necessarily tell us acute versus chronic;" he really hadn't seen that. "But as far as the size of the tear, [it] would be documented by [Dr. Tingle's intraoperative] pictures. He said it was 3.4 by 3. That's probably what it was."

When asked whether he would "agree or disagree that these were acute injuries as opposed to chronic injuries[,]" Dr. Hennessy responded that "[w]ithout seeing the actual pictures I have to take [Dr. Tingle's] report on its face value. Pictures of the surgery, except for the biceps which everyone seems to say which was old." Nevertheless, he concluded that the rotator cuff injury was chronic and not an acute injury. Petitioner had an uneventful postop recovery and was released from treatment within five months.

At the time of Dr. Hennessy's physical examination of Petitioner, he reported to Dr. Hennessy that he did not remember his February 2016 visit to Dr. Tingle and therefore could not relate whether he had pain at that time, but reported that his right shoulder was pain free at some point. At the time of his exam, Petitioner had returned to work driving a truck with a manual transmission but did have to load/unload the truck. He had stopped that about 10 years earlier, though he still had to pull the pin of the trailer and operate the fifth wheel of the trailer. Petitioner complained of 1-3/10 shoulder pain with occasional tingling in right fingers.

On examination, Dr. Hennessy found that Petitioner was pleasant and cooperative the entire visit, and never gave any undue behaviors. Petitioner had full strength in his rotator cuff but showed some reduced range of motion and mildly positive impingement signs on the right shoulder. He had very little decreased motion considering the size of the tear. In Dr. Hennessy's opinion, Petitioner had a good surgical result.

Dr. Hennessy was eventually able to read the actual MRI films. His examination of Petitioner and his review of the additional medical records did not change his original opinions. Dr. Hennessy noted that the infraspinatus remained intact and it would be highly unlikely that the rotator cuff tear could widen that much without also affecting the infraspinatus. There just is not that much width of the supraspinatus, and it would be highly unlikely for such worsening to occur in that time frame. Petitioner also had a long history of right shoulder pain. In February 2016, Dr. Hennessy noted that Petitioner was being actively treated for his right shoulder, had another cortisone injection, and was assessed as having failed conservative treatment and had been referred for a surgical option. In his opinion, it was very common to see rotator cuff tears in patients of Petitioner's age (70-71) and the probability of developing rotator cuff tears increases with age. The rotator cuff would not have healed between February 2016 and the work accident.

Dr. Hennessy also thought it was significant that the April 2016 MRI report did not include a comparison to the November 2015 MRI. "You had two markedly different measurements of films, and yet it would have been nice at the onset of all this had they just looked at the two films and made a direct comparison contemporaneously." Dr. Hennessy ascribed "some of the difference in terms of the width to me could just be observer error."

Dr. Hennessy diagnosed symptomatic large full-thickness rotator cuff tear documented in a November 2015 MRI with long-standing rupture of the long-head biceps tendon both of which predated April 2016. Dr. Hennessy testified that surgery had been "recommended" just over a month prior to his accident. Petitioner was at maximum medical improvement and did not need any additional medical treatment.

Dr. Hennessy testified that June 23, 2018 was the first time he was able to see the actual MRI films, and he testified consistent with the measurements and opinions rendered in his addendum report. To him, the MRI from April 2016 was almost identical to the November 2015 film; he "did not appreciate any significant progression or retraction." The three films were all almost identical.

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Dr. Hennessy also reviewed the statement of Dr. Tingle, in which he opined that prior to the instant accident Petitioner was essentially pain free, had full functionality of his right shoulder, and the accident caused permanent aggravation of his condition and made it symptomatic again. He disagreed with Dr. Tingle's opinion that Petitioner suffered increased retraction. Initially, Dr. Hennessy opined that it would be extremely unlikely that Petitioner would show such increased retraction in such a short time span. After he saw the films, he found there was no retraction. He also questioned Dr. Tingle's conclusion that Petitioner was pain free in February 2016, because he administered an injection at that time.

On cross examination, Dr. Hennessy agreed that he saw no treatment records between February 25, 2016 and April 28, 2016. He acknowledged that, while Petitioner told him he could not remember the February 2016 visit to Dr. Tingle, he reported that at some point he was pain free. Dr. Hennessy also admitted that while the condition itself would not cure itself, [the patient] could be asymptomatic.

On cross-examination, when asked whether he disagreed with the opinions of the radiologists, Dr. Hennessy testified that "I would say in terms of magnitude and the size of the tears on the different films, I think we all, Dr. Tingle, myself, and the radiologist all agreed on the basic premises that he had a full thickness rotator cuff tear and biceps tendon rupture from 2015 and as well as the two MRI's that he had in '16. So my disagreement was more in the magnitude … and the fatty atrophy being present in 2015." He had no reason to question Dr. Tingle's intraoperative measurements, but he added that they were consistent with his reading of the MRI. He did not agree that the tear went from large to massive.

On redirect examination, Dr. Hennessy agreed that the cortisone injection administered on February 25, 2016 was intended to relieve pain and their lasting effects are highly variable ranging from very little relief to sometimes relief for months.

E. Additional Information

Petitioner testified that he had no other accidents affecting his shoulder other than the one on April 28, 2016.

Regarding temporary disability related to this accident, Petitioner testified that he worked light duty until May 18, 2016 and was then off work until he was released back to full duty work on February 24, 2017.

Regarding his current condition of ill-being, Petitioner testified that currently he had pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects. Sometimes he takes over-the-counter pain medication, which helps a bit.

Regarding his medical bills, Petitioner testified that they were paid by Medicare and through a Medicare supplemental insurance policy, which Petitioner paid for.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner proved he sustained a work-related accident on April 28, 2016. The Commission agrees.

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Moreover, the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828 further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment. *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny and found that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner gave uncontroverted testimony that on April 28, 2016 he sustained an accident affecting his right shoulder at work while decoupling a trailer from the cab and pulling on the handle with his right arm. He explained that the pain he experienced was 20 times worse than the pain he had previously experienced in his shoulder. Respondent sent him for treatment at an occupational health clinic that day. The records of the examining physician, Dr. Reese, at Respondent's designated occupational health clinic corroborate Petitioner's testimony about the acute mechanism of injury and severity of his symptoms following the traumatic incident earlier that day. It is plausible that Petitioner, a truck driver, would decouple a trailer from his truck. No evidence was presented that he was precluded from doing so. Regardless, it was an act that Petitioner might reasonably be expected to perform incident to his assigned duties as a truck driver. *McAllister*, 2020 IL 124828, ¶ 46. Moreover, Petitioner's reported mechanism of injury and immediate onset of symptoms were clinically correlated by the most contemporaneous medical evaluation performed at the occupational health clinic.

Thus, the Commission affirms the Arbitrator's conclusion that Petitioner has met his burden of proof and established that he suffered a compensable accident at work on April 28, 2016 as claimed.

B. Causal Connection

While finding that Petitioner had suffered an accident at work, the Arbitrator found that Petitioner did not sustain his burden of proving that the accident caused his current condition of ill-being of his right shoulder. Accordingly, the Arbitrator denied compensation and, in so doing, gave greater weight to the opinions of Dr. Hennessy over those of Dr. Tingle. In reviewing the record, the Commission is not similarly persuaded.

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also *a* causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981). A claimant may rely on the "chain of events" in his or her case to demonstrate the aggravation or acceleration of a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC, ¶¶ 25-29.

In this case, Petitioner was an older, long-time truck driver that suffered an acute accident causing a breakdown in his condition due to an occupational cause when he pulled a pin to decouple his truck from a trailer. There is no question that Petitioner had a pre-existing right shoulder condition. Indeed, he was receiving treatment from Dr. Kachar after an onset of symptoms prior to November 2015 affecting his right shoulder. He first sought treatment for a right shoulder condition with Dr. Kachar, the physician treating him for an unrelated left ankle and foot injury, on November 3, 2015. He underwent a right shoulder MRI two days later that confirmed a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. Dr. Kachar treated Petitioner's right shoulder condition conservatively with injections and physical therapy thereafter noting that surgery might be an option if his condition did not improve. Petitioner continued physical therapy through January 6, 2016. Petitioner returned to Dr. Kachar on February 25, 2016 at which point he was released from care and referred to his colleague, Dr. Tingle, for a surgical consultation. Petitioner did not undergo treatment after February 25, 2016 until the date of accident or see Dr. Tingle. He testified that he was able to work and did not feel that he needed to see Dr. Tingle at that time.

Respondent asserts that "[w]hile there was *some* controversy about the size and magnitude of the tear (i.e.[,] a large tear versus a massive tear), all doctors agree [P]etitioner had a rotator cuff tear that was objectively sympto[ma]tic and present on radiographs several months before the work accident." (Emphasis added). In sum, Respondent urges the Commission to find that the presence of an objectively symptomatic rotator cuff tear prior to the accident at work with a surgical consultation referral should preclude recovery of benefits, finding the opinions of its Section 12 examiner to be persuasive. The Commission cannot so find given the objective medical evidence in this case.

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The pre-accident MRI and post-accident MRIs were read by three different radiologists who measured the size and extent of Petitioner's rotator cuff tear and retraction. The radiologists' measurements indicate a significant increase in tear size from 1.5 cm to 3.5 cm as well as significant retraction increase from 2 cm to 3.5 cm. In order to find the opinions of Dr. Hennessy persuasive in this case, the Commission would have to ignore the interpretation of three different radiologists regarding the magnitude of Petitioner's right shoulder tears as reflected in the 2015 and 2016 MRIs. Such a finding would also require the Commission to ignore Dr. Tingle's interpretation of the pre- and post-accident MRI films, which he had access to in his chart at the time of Petitioner's initial visit with him, contrary to Dr. Hennessy's assumption. Indeed, Dr. Tingle testified that Dr. Kachar's records were in his chart, so he was aware of the entirety of Petitioner's treatment with his partner and he could compare Petitioner's reports to him with the prior treatment records.

Conversely, the Commission would further have to accept Dr. Hennessy's opinion that it was "highly unlikely" that Petitioner's MRIs would show such a significant increase in retraction between November 2015 and April 2016 solely to degeneration, and the change should be attributed to human error, not only by the radiologists, but also by Dr. Tingle. The Commission finds it more likely that Dr. Hennessy refused to detach from his initial opinions regardless of any objective evidence to the contrary. Dr. Hennessy's initial records review, in which he had no access to the MRI films, resulted in the opinion that Petitioner's condition was degenerative. Years later, after overcoming technical difficulties with the initial MRI films provided, Dr. Hennessy ultimately opined that his reading of all three films only strengthened his initial opinions and that the marked differences observed by other professionals in this case were due to observer error. Dr. Hennessy's final opinion after seeing the MRI films that there was no difference whatsoever among them undercuts the reliability of all of his opinions.

In sum, the Commission does not find the opinions of Dr. Hennessy to be persuasive given the objective diagnostic findings of four different physicians, including Petitioner's orthopedic surgeon who always had access to all of Petitioner's prior treatment records and films, to the contrary. Rather, we find that the opinions of Dr. Tingle, which are corroborated by the diagnostic interpretations of three radiologists, to be persuasive and based on a complete and accurate understanding of Petitioner's presentation at his initial visit and thereafter.

In addition, the "chain of events" in this case support's Petitioner's claim of causal connection. Petitioner was able to perform his work activities prior to the accident whereas he was not after the accident. Petitioner needed no treatment from the last injection on February 25, 2016 until the instant accident, but experienced pain and symptoms that prevented him from working immediately after the accident as corroborated by Respondent's occupational health clinician immediately thereafter.

The Commission observes that in denying compensation, the Arbitrator questioned Petitioner's credibility. As noted above, the Commission finds ample objective medical evidence to corroborate Petitioner's medical condition contemporaneous to his reported accident at work and complaints to the various evaluating physicians. While Petitioner did not require a translator at the hearing, a cursory evaluation of the transcript reflects that Petitioner had

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difficulty expressing himself and understanding questions posed on direct and cross-examination. The Commission does not find Petitioner's testimony to be evasive and notes that, while he did not recall certain reports as specifically as posited on cross-examination, he readily admitted that he had a pre-existing shoulder condition, treatment for the condition, and periods of repose where he felt no debilitating symptoms. The Commission finds Petitioner to be credible overall.

Thus, the Commission finds that Petitioner's pre-existing right shoulder condition was aggravated and is causally related to the traumatic incident at work on April 28, 2016.

C. Temporary Total Disability

On the issue of temporary total disability (TTD), Petitioner seeks benefits from May 18, 2016 through February 24, 2017. Petitioner claims that Respondent was no longer able to accommodate his restrictions as of May 18, 2016 and he did not return to work until he was released to full duty as of February 24, 2017. The medical records reflect that Petitioner was either placed off work or on restrictions during the claimed period, and Dr. Tingle noted Petitioner's report in June 2016 that Respondent did not accommodate the restrictions. No evidence was presented to the contrary. Therefore, the Commission awards Petitioner TTD benefits as claimed totaling 40 and 3/7ths weeks.

D. Medical Expenses

As explained above, the record reflects that Petitioner sought immediate care and treatment of the right shoulder after his accident at work, and the Commission finds the opinions of Petitioner's treating physician, Dr. Tingle, to be persuasive in this case. On the issue of medical expenses, the evidence establishes that Petitioner's right shoulder treatment after the accident at work was reasonable and necessary to alleviate Petitioner of the effects of his occupational injury. Indeed, while finding that Petitioner's condition was wholly degenerative, Dr. Hennessy testified that all of the treatment that Petitioner received after April 2016 was appropriate. Thus, the Commission finds Respondent responsible for the payment of Petitioner's charges for reasonable and necessary medical services related to his right shoulder injury pursuant to §8(a) and §8.2 of the Act and the fee schedule.

E. Permanent Partial Disability

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i) because there is no impairment report. The Commission places some weight on factor (ii), noting that Petitioner continues to work as a

truck driver. Regarding factor (iii), the Commission places greater weight to Petitioner's age (68) at the time of his injury, given that Petitioner likely will remain in the workforce for a less prolonged period. The Commission places some weight on factor (iv) due to the lack of evidence regarding Petitioner's future earnings capacity compared to his pre-injury position.

The Commission places significant weight on factor (v). Petitioner ultimately underwent an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, Dr. Tingle diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome. Petitioner testified that he continues to experience pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects and sometimes takes over-the-counter pain medication to manage his symptoms.

Having considered all of the statutory factors, the Commission finds that Petitioner suffered a permanent partial disability representing a 10% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $574.02 per week for a period of 40 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses under the fee schedule and pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $516.62 per week for a total of 50 weeks because the injuries sustained resulted in the permanent loss of the use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

21IWCC0153

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 5 - 2021

Barbara N. Flores

BNF-MP/dw
O-2/4/21
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Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. The Arbitrator found that Petitioner did not prove that his alleged work-related accident caused his current condition of ill-being, his rotator cuff tear, and denied compensation. The Majority reversed the Decision of the Arbitrator, found causation, and awarded benefits. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

First, while the Arbitrator found accident, he did so "with hesitation." He found Petitioner's testimony lacked credibility because his testimony was at odds with the medical records. His skepticism of Petitioner's veracity forced him to question whether Petitioner even had an accident, despite the fact that there was no evidence specifically rebutting his testimony. The Arbitrator specified that "Petitioner's demeanor changed dramatically between direct examination and cross examination." His memory appeared selective in nature. His recollections became much more complete on direct than cross, and "almost in all instances where Petitioner did not remember [or] recall an event favored his case." Most notably, Petitioner appeared to be evasive and untruthful about the extent of his symptoms and treatment prior to the instant accident. I find no reason for the Majority to substitute its assessment of credibility for that of the Arbitrator who actually observed the Petitioner's testimony.

Prior to the instant accident, Petitioner treated with Dr. Kachar for his right shoulder condition since November 3, 2015. At that time, he reported that he had shoulder pain for at least a year and had aggravated it a couple of months earlier "swatting a bee." He reported "some pain with reaching, lifting, overhead activities as well as pain with activities of daily living." Dr. Kachar administered an injection, prescribed physical therapy, and ordered an MRI. The MRI dated November 5, 2015 showed a large, full-thickness tear of the rotator cuff. Petitioner last saw Dr. Kachar before the instant accident on February 25, 2016, only two months before the alleged accident. At that time, Dr. Kachar administered another injection and referred Petitioner for a surgical consultation.

The Arbitrator also found the opinions of Respondent's Section 12 medical examiner, Dr. Hennessey, more persuasive than those of Dr. Tingle. Contrary to the Majority, I concur with

the Arbitrator's assessment of the persuasiveness of the doctors' opinions. Dr. Tingle, one of Petitioner's treaters, based his opinion that Petitioner's condition was causally related to the accident on his assumption that Petitioner was pain free from February 25, 2016 up to the date of the accident. That assumption is not sustainable because on that date Dr. Tingle's partner, Dr. Kachar, administered an injection and referred him to surgery because he had failed conservative treatment for his large rotator cuff tear. Dr. Tingle agreed that injections are not provided, and surgery is not indicated, for patients with asymptomatic rotator cuff tears. Therefore, it is clear that Petitioner was substantially symptomatic for a large rotator cuff tear prior to the accident.

The Majority relies mostly on the radiologist's report that the rotator cuff tear grew from 2 cm to 3.5 cm from November 5, 2015 to March 29, 2016. This interpretation was at odds with that of Dr. Hennessey. He explained that retraction is degenerative in nature and he would find it difficult to believe that a rotator cuff tear could retract that much is such a short period of time, that such retraction was not consistent with the mechanism of injury reported, and explained how an error in the calculation of retraction could have happened. I agree with Dr. Hennessey that it does seem unlikely that there could have been such dramatic increase in retraction over a few months, especially because the injury Petitioner described cannot be considered extremely traumatic. Finally, Petitioner's testimony about the accident itself was sketchy. He did not testify as the amount of force necessary to decouple the trailer and he simply testified that he pulled the handle and felt pain.

The Majority accepted Petitioner's questionable testimony that his symptoms resolved completely after the injection on November 3, 2015. As Dr. Hennessey explained it is extremely unusual for an injection to completely resolve rotator cuff pain. In this instance, I find it much more conceivable that Petitioner's prior symptoms returned as the effects of the injection wore off. That was why the second injection was administered. Petitioner had his first injection on November 3, 2015 and the second on February 25, 2016. The fact that Dr. Kachar referred Petitioner to a surgeon on February 25, 2016 shows that he did not believe Petitioner's treatment for Petitioner's shoulder condition was completed and that surgery was indicated. In addition, Dr. Hennessey noted that the MRIs showed "fatty atrophy" which indicated the chronicity rather than acuity of Petitioner's condition.

Because the Arbitrator observed Petitioner's testimony and found him not credible, because Petitioner had extensive pre-accident treatment for the same shoulder condition prior to the accident, because Petitioner had actually been referred for a surgical consultation prior to the accident, and because Dr. Hennessey explained that the presence of fatty atrophy points to a chronic rather than acute shoulder condition I would have affirmed and adopted the Decision of the Arbitrator, found Petitioner did not sustain his burden of proving that a work-related accident caused his current condition of ill-being and denied compensation. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

DLS/dw
O-2/4/21
46

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY DAVIS,

Petitioner,

vs. NO: 18 WC 18489

TYSON FOODS,

Respondent.

21IWCC0154

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: APR 5 - 2021

Christopher A. Harris

Barbara N. Flores

Marc Parker

CAH/pm
d: 4/1/21
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DAVIS, TIMOTHY
Employee/Petitioner

Case# **18WC018489**

TYSON FOODS
Employer/Respondent

21IWCC0154

On 9/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0656 GLASS & KOREIN LLC
MICHAEL H KOREIN
7012 W MAIN ST
BELLEVILLE, IL 62223

0000 WIEDNER & McAULIFFE LTD
JUAN ARIAS
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Timothy Davis
Employee/Petitioner

v.

Tyson Foods
Employer/Respondent

Case # 18 WC 18489 .

Consolidated cases: n/a

21IWCC0154

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 26, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Did Petitioner exceed two choices of medical providers**

FINDINGS

On the date of accident, May 25, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $10,607.04; the average weekly wage was $505.10.

On the date of accident, Petitioner was 49 years of age, single with 0 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $33,440.07 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $33,440.07.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary partial disability benefits of $512.09, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $336.73 per week for 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, January 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the fusion surgery recommended by Dr. David Raskas.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

September 21, 2020
Date

SEP 24 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 25, 2018. According to the Application, Petitioner "slipped and fell on banana in the employee only breakroom" and sustained an injury to his "low back and right ankle" (Arbitrator's Exhibit 2). Petitioner sought an order for payment of medical bills, temporary total disability benefits and temporary partial disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. Respondent also disputed liability for a portion of Petitioner's medical expenses on the basis Petitioner had exceeded two chains of medical providers (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018; January 8, 2019, through July 21, 2020; and August 22, 2020, through August 26, 2020 (the date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits of 75 4/7 weeks, commencing June 8, 2018, through October 23, 2018; and January 8, 2019, through January 30, 2020 (Arbitrator's Exhibit 1).

In regard to temporary partial disability benefits, Petitioner claimed he was entitled to temporary partial disability benefits of 15 2/7 weeks, commencing October 24, 2018, through January 7, 2019; and July 22, 2020, through August 21, 2020. Respondent claimed Petitioner was entitled to temporary partial disability benefits of 10 6/7 weeks, commencing October 24, 2018, through January 7, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a crane operator in the shipping department. Petitioner's job duties included pulling and picking up pallets and scanning them. Petitioner was also required to lift items which weighed 15 to 50 pounds. Prior to the accident of May 25, 2018, Petitioner had no low back or leg pain.

On May 25, 2018, Petitioner was in the employee breakroom and he slipped/fell when he stepped on the skin of a banana. Petitioner testified he fell at an angle and experienced left lower back pain and pain in his right leg/ankle.

At the direction of Respondent, Petitioner was evaluated at Midwest Occupational Medicine by Dr. Bradley Breeden on May 25, 2018. When seen by Dr. Breeden, Petitioner complained of left lower back and right ankle pain. Dr. Breeden diagnosed Petitioner with a lumbar contusion and right ankle strain. He directed Petitioner to use an Ace wrap on his ankle and use over the counter medications for pain. He authorized Petitioner to return to work the following day, May 26, 2018. This was the only occasion Petitioner sought Dr. Breeden (Petitioner's Exhibit 1).

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. Dr. Stark saw Petitioner on May 29, 2018. At that time, Petitioner advised Dr. Stark that he had sustained an injury at work when he slipped on a banana. Petitioner stated he hurt his right ankle and fell on

the left side of his lower back. Dr. Stark treated Petitioner through June 18, 2018, and imposed work restrictions (Petitioner's Exhibit 2).

At trial, Petitioner testified he went to the ER of SLU Hospital on June 10, 2018, because he was having severe low back pain and pain/numbness in his right leg. According to the medical record, Petitioner sustained a work-related injury and was seen by the company's physician who "did nothing." Petitioner complained of low back pain and burning pain down the right leg. Petitioner was diagnosed with low back pain with sciatica, given pain medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently seen in the ER of Touchette Regional Hospital on June 14, 2018. At trial, Petitioner testified that on June 14, 2018, he had a work restriction of doing a sit down job, but Respondent assigned him to work duties inconsistent with his restriction. Petitioner said he worked for about an hour and, because his back pain became intense, he went to HR. Petitioner was informed he could leave and went directly to the ER of Touchette Regional Hospital.

The ER record of Touchette Regional Hospital noted Petitioner had sustained a work injury on May 26, 2018, and had low back and right leg pain. Petitioner was diagnosed with a lumbosacral sprain with sciatica, prescribed medication and discharged (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. David Raskas, an orthopedic surgeon, on June 19, 2018. At that time, Petitioner advised Dr. Raskas of the work-related accident of May 25, 2018, and that he had low back pain which radiated into the right lower extremity. Petitioner also complained of numbness/tingling in the right leg. Petitioner advised Dr. Raskas he was seen in an ER on June 16, 2018 because of severe low back pain (Petitioner's Exhibit 5).

Dr. Raskas authorized Petitioner to be off work and ordered an MRI scan. The MRI was performed on July 10, 2018. According to the radiologist, the MRI revealed disc bulges at multiple levels and a right paracentral protrusion at L5-S1 resulting in a mass effect on the right S-1 nerve root. Dr. Raskas saw Petitioner on July 17, 2018, and reviewed the MRI. At that time, Dr. Raskas recommended Petitioner undergo a right epidural steroid injection, but Petitioner declined to undergo same. Dr. Raskas ordered physical therapy and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Petitioner received physical therapy at Touchette Regional Hospital from July 27, 2018, through September 17, 2018. According to the physical therapy records, Petitioner was diagnosed with lumbar radiculopathy (Petitioner's Exhibit 4).

When Dr. Raskas saw Petitioner on October 16, 2018, he noted Petitioner still had complaints of low back and right leg pain. He again reviewed the MRI and opined it revealed a herniated disc at L5-S1. He referred Petitioner to Injury Specialists for an epidural steroid injection on the right at L5-S1 (Petitioner's Exhibit 5).

Petitioner was seen at Injury Specialists on December 21, 2018, and January 2, 2019. On those occasions, Dr. Tong Zhu administered epidural steroid injections on the right at L5-S1 (Petitioner's Exhibit 6).

On January 3, 2019, Petitioner was driving his car in St. Louis and his back "locked up" on him. At that time, Petitioner was a couple of blocks from Barnes-Jewish Hospital. Petitioner went to the ER of Barnes-Jewish Hospital. According to the ER record, Petitioner sustained an injury approximately six months prior and had a steroid injection about one week ago. On January 3, 2019, Petitioner experienced an "acute worsening" of his low back pain with radiation in to the right buttock/leg. Petitioner was diagnosed with an acute exacerbation of chronic low back pain and sciatica on the right side (Petitioner's Exhibit 8).

Dr. Raskas again saw Petitioner on January 8, 2019. At that time, Petitioner advised Dr. Raskas that Respondent required him to perform work duties inconsistent with his restrictions. Petitioner continued to work until the pain became so severe he sought treatment at the ER of Barnes-Jewish Hospital on January 3, 2019. Dr. Raskas ordered various lab tests and indicated that if they were abnormal, he would order a new MRI with and without contrast. He also authorized Petitioner to be off work (Petitioner's Exhibit 5).

Petitioner underwent the lab tests which were ordered by Dr. Raskas. Based upon the number of abnormal test results, Dr. Raskas ordered the MRI with and without contrast (Petitioner's Exhibit 5).

The MRI with and without contrast was performed on March 25, 2019. According to the radiologist, the MRI revealed central broad-based protrusions at L3-L4 and L4-L5 and a central focal protrusion at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on April 29, 2019. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and diagnostic studies provided to him by Respondent. Dr. deGrange opined Petitioner had a herniated disc at L5-S1 which was caused by the accident of May 25, 2018. He recommended Petitioner undergo a microdiscectomy at L5:S1; that Petitioner could work with restrictions and was not at MMI (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Raskas saw Petitioner on May 6, 2019, and Petitioner continued to complain of low back and right leg pain. Dr. Raskas reviewed the MRI and opined it revealed a protrusion at L5-S1. He opined Petitioner had a herniated lumbar disc with lumbar radiculopathy. Given the fact Petitioner had back problems for over a year and did not get improvement with injections, therapy and activity modifications, he recommended Petitioner undergo discography at L3-L4, L4-L5 and L5-S1 with a CT scan to determine if an annular tear was the cause of his pain symptoms (Petitioner's Exhibit 5).

In a narrative report dated June 10, 2019, Dr. Raskas noted Respondent had authorized a microdiscectomy for Petitioner. He opined this procedure would likely fail and renewed his recommendation Petitioner undergo discography. Dr. Raskas also opined that, in all likelihood, Petitioner would need either a fusion or disc replacement at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included the records of Dr. Raskas in which he recommended Petitioner undergo discography. In a report dated July 11, 2019, Dr. deGrange opined that there was no "reasonable medical basis" for

Petitioner undergoing the discography recommended by Dr. Raskas. Dr. deGrange referenced a number of authoritative studies/articles which concluded discography had a high error rate and increased the risk of disc problems in patients (Respondent's Exhibit 3; Deposition Exhibit E).

Dr. Raskas saw Petitioner on August 13, 2019. At that time, Petitioner informed him the "other physician" had recommended a microdiscectomy and did not believe in discography. Dr. Raskas noted there were some shortcomings of discography, but there were positive attributes in the treatment and diagnosis of chronic low back pain. Dr. Raskas specifically noted the North American Spine Society's Coverage Policy recommendations regarding discography which noted it could be used effectively in diagnosis and treatment of chronic back pain (Petitioner's Exhibit 5).

On September 16, 2019, Petitioner underwent a discogram at L3-L4, L4-L5 and L5-S1. According to the radiologist, the study was negative at L3-L4 and L4-L5, but positive at L5-S1. At L5-S1, Petitioner complained of severe central low back pain and the study revealed annular tears into the epidural space. A post discogram CT scan was performed which revealed a fissure/protrusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas subsequently saw Petitioner on November 15, 2019, and reviewed the diagnostic studies. He opined Petitioner should have surgery, either disc replacement or a fusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas again saw Petitioner on December 27, 2019. At that time, Petitioner informed him he wanted to undergo fusion surgery. Dr. Raskas noted this would be a "staged" surgical procedure which would consist of two separate surgeries. The first surgery would be a lumbar discectomy and fusion with cage/plating. The second surgery would be a facet fusion with decompression (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included reports of the discography and CT scan as well as Dr. Raskas' surgical recommendation. Dr. deGrange opined there were "confounding results" and inconsistencies in Petitioner's complaints. He opined the discography and CT scan were medically unnecessary and disagreed with the recommendation Petitioner undergo fusion surgery. Further, Dr. deGrange opined that it was not clear that any surgery would benefit Petitioner and he rescinded his prior recommendation Petitioner undergo a microdiscectomy (Respondent's Exhibit 3; Deposition Exhibit F).

Petitioner was last seen by Dr. Raskas on March 30, 2020. At that time, Dr. Raskas reviewed Dr. deGrange's report of January 30, 2020. Petitioner's complaints and findings on examination were consistent with what they had been previously. Dr. Raskas noted he disagreed with Dr. deGrange's opinion that surgery would not benefit Petitioner. He continued to impose light duty/sedentary work restrictions (Petitioner's Exhibit 5).

Dr. deGrange was deposed on June 2, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. deGrange's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. deGrange testified that when he examined Petitioner on April 29, 2019, he diagnosed Petitioner with a

herniated disc at L5-S1 and recommended Petitioner undergo a microdisectomy (Respondent's Exhibit 3; pp 16-19).

In regard to the discography and CT scan, Dr. deGrange testified these were not medically necessary. He also stated a staged fusion was not medically necessary and recanted his prior surgical recommendation (Respondent's Exhibit 3; pp 24-27, 34-37).

On cross-examination, Dr. deGrange agreed that the treatment and diagnostic studies Petitioner underwent prior to his examination of him were medically appropriate. He also agreed Petitioner's subjective complaints were consistent with the objective findings on examination and diagnostic studies. Dr. deGrange was questioned about the "inconsistencies" of Petitioner's symptoms in what he told him and what he read in the records; however, he could not specifically identify what they were. Dr. deGrange reaffirmed his opinion that surgery was not appropriate for Petitioner, but he had no treatment recommendations (Respondent's Exhibit 3; pp 70-74, 82-83).

Petitioner testified that Respondent terminated his employment on March 16, 2020. However, Respondent continued to pay Petitioner temporary total disability benefits through June 8, 2020. When Petitioner's temporary total disability benefits were terminated, he subsequently obtained a part-time job on July 22, 2020, with Hire Level, a temporary employment agency. Hire Level provided Petitioner with work which conformed to his work restrictions until August 21, 2020. At that time, Petitioner stopped working because being on his feet too long and bending aggravated his back symptoms to the point to where he could no longer work.

Petitioner testified he has had low back pain since he sustained the accident. Petitioner continues to have right leg pain as well as numbness and shock type sensations. Petitioner stated he is fallen several times because of his right leg symptoms. Petitioner wants to proceed with the fusion procedure as recommended by Dr. Raskas.

Petitioner worked for Respondent with restrictions from October 24, 2018, through January 7, 2019. Respondent did not dispute its liability for temporary partial disability benefits during this period of time; however, Respondent did not pay any temporary partial disability benefits to Petitioner. Petitioner tendered into evidence Petitioner's wage records for that period of time as well as a computation of the temporary partial disability benefits owed which were $154.77.

From July 22, 2020, through August 21, 2020, Petitioner worked for Hire Level. Petitioner tendered into evidence his paycheck stubs for that period of time as well as a computation of the temporary partial disability benefits owed to him which amounted to $357.32.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of May 25, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on May 25, 2018.

The Arbitrator acknowledges that when Petitioner initially sought medical treatment following the accident, he complained of left lower back pain. It was not until Petitioner was seen in the ER of SLU Hospital on June 20, 2018, that Petitioner complained of right leg pain.

The fact that Petitioner did not experience right leg pain immediately after or shortly after the accident, does not, in and of itself, constitute a basis to dispute causal relationship.

There was no dispute Petitioner was diagnosed with a herniated disc at L5-S1 by Dr. Raskas, Petitioner's treating physician, and Dr. deGrange, Respondent's Section 12 examiner.

Further, Dr. deGrange agreed the herniated disc at L5-S1 was causally related to the accident of May 25, 2018.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The dispute regarding the reasonableness and necessity of medical services is primarily limited to the discography and CT scan ordered by Dr. Raskas.

Dr. deGrange, Respondent's Section 12 examiner, opined that discography was not appropriate and referenced authoritative studies/articles which concluded that there was a high error rate and increased risk of disc problems in patients.

Dr. Raskas, Petitioner's treating physician, acknowledged there were some shortcomings with the use of discography, but there were positive attributes in their use for the treatment and diagnosis of chronic back pain. Dr. Raskas specifically noted the North American Spine Society Coverage Policy recommending the use of discography.

The discography at L5-S1 was positive, which was a finding consistent with the prior diagnosis of disc pathology at that level.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (K) Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment, including, but not limited to, the fusion surgery recommended by Dr. Raskas.

In support of this conclusion the Arbitrator notes the following:

Dr. Raskas has treated Petitioner for approximately two years. Dr. Raskas initially treated Petitioner conservatively with physical therapy and injections. Ultimately, Dr. Raskas recommended Petitioner undergo either disc replacement or fusion surgery. Petitioner has decided to undergo fusion surgery.

Respondent's Section 12 examiner, Dr. deGrange, opined Petitioner had a herniated disc at L5-S1 and recommended a microdiscectomy. However, Dr. deGrange subsequently recanted that recommendation and presently has no recommendation whatsoever for treatment.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (L) Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary partial disability benefits of $512.09.

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, June 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020.

In support of these conclusions the Arbitrator notes the following:

Respondent did not dispute Petitioner's entitlement to temporary partial disability benefits of 10 6/7 weeks and Petitioner's computation of temporary partial disability benefits owed was unrebutted.

Petitioner was under active medical treatment and either authorized to be off work completely or subject to work restrictions which were not accommodated by Respondent.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not exceed his two choices of chains of medical providers.

In support of this conclusion the Arbitrator notes the following:

Following the accident, Petitioner was directed by Respondent to go to Midwest Occupational Medicine where he was evaluated by Dr. Bradley Breeden. While Dr. Breeden apparently provided some treatment, he was not a medical provider chosen by Petitioner.

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. This was Petitioner's first choice of a medical provider.

As noted herein, Petitioner later sought medical treatment at three emergency rooms. At trial, Petitioner testified he sought treatment on those occasions because of his severe low back and right leg symptoms.

Section 8(a) of the Act, excludes "emergency treatment" as one of the medical providers "chosen by the employee."

In the case of *Wolfe v. Industrial Commission*, 416 N.E.2d 280 (Ill. App. 4th Dist. 1985) the Appellate Court held that Petitioner's seeking treatment at an ER constituted a choice of a medical provider. In that case, Petitioner testified he went to the ER because his treating physician was not available to see him. However, Petitioner was, in fact, seen by his treating physician the same day he went to the ER and made no effort to contact his physician prior to going to the ER. Under these circumstances, the Arbitrator ruled Petitioner's seeking treatment at the ER was a "choice" of a medical provider. This ruling was then upheld by the Commission, Circuit Court and Appellate Court. *Wolfe* at 286.

The factual circumstances in the *Wolfe* case are clearly distinguishable from the circumstances in the instant case. On all three occasions, Petitioner sought "emergency treatment" because of his severe low back and right leg pain.

None of the three ER visits made by Petitioner constituted a choice of a medical provider under Section 8(a) of the Act.

When Petitioner sought treatment from Dr. Raskas, this was the second choice of a medical provider.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse no occupational disease	☐ Second Injury Fund (§8(e)18)
X NO CC, compensation denied	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DALE BASIL,

Petitioner,

vs. NO: 16 WC 16172

PATTON MINING, LLC.,

Respondent.

21IWCC0155

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, causal connection, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner is 61 years old, married and resides in Kincaid, Illinois. After he graduated from high school, he enrolled at Lincoln Land Community College studying to become an arborist. He did not receive a degree or certificate. Petitioner testified he worked in the coal mines for 33 years, all underground. He testified that he had regularly been exposed to coal dust, silica dust and roof bolting glue fumes. (T.7-9)

Petitioner was employed as a mine shuttle car operator for Respondent since 2011. Petitioner first started working in coal mines in 1977 at Peabody Coal Company in Pawnee, Illinois. He was hired as a supply-man. This entailed loading supplies and transporting them to certain sections. In that position he went all over the mine; he did that job for a couple of years. (T.12-13)

21IWCC0155

Petitioner also worked as a recovery-man. After the coal was mined, they went in and removed everything out of a section and transported it to the belt section. This included removing I-beams which caused it to cave in. Petitioner testified that that was a very dusty job. When they recovered the belt line, there was coal mine dust left on the fan line. They flipped it to take it somewhere else, which was a very dusty job. They had to pull the pillars and the air would hit you in the face. Petitioner performed that job for about 6-7 years. (T.13-15)

At Peabody Mine, Petitioner also performed roof bolting which involved drilling into the top and anchoring a bolt in at least a foot of rock. He would place the bolt in, secure and tighten it. In the 1980's, they just had a "cob" which spread and tightened it up. At that time, they were not using glue pins. Roof bolting was the last position he held at Peabody. (T.15-16)

Petitioner next worked at Crown III, owned by General Dynamics, starting in 2000-2001, as a shuttle car operator. In that position, he ran a ram car, a shuttle car without a cable. The car was battery operated and he would run the car up to the miner, get a load of coal, return to the belt and drop it off. He would go up to the face where they were cutting out the coal. Petitioner testified the dust level was pretty bad as the coal was coming off of the tail of the miner and coming right at him. Petitioner performed that job for 4-5 years. (T.16-17)

Petitioner then obtained a job hauling rock dust in a ram car. The dust was hauled and spread to make the coal mine white and prevent fires. When he went to the location, he would hit a lever and it paddled the dust, slinging it everywhere. Petitioner had to keep pushing the dust to the paddles until it was empty and then return for another load. Petitioner described this as driving the car in the middle of a dust storm. Petitioner held that position for 4-5 years. Petitioner also performed roof bolting when people were not there. (T.17-19)

When Petitioner performed roof bolting at Crown, it was different than at Peabody. Times changed, he testified, and they started using glue pins. Petitioner had to drill the hole and get to a foot of rock. Before he put the pin in, he put in a stick of glue and pushed and spun it. He stated that would mix the glue and tighten it for about 90 seconds. Petitioner testified the glue sticks would break open emitting a very strong odor. At times the odor would take your breath away. He had performed all 3 jobs at Crown. (T.19-20)

Petitioner next worked at mine Federal #2 in West Virginia for about 11-12 months to get his medical card. In the mine, Petitioner performed the roof bolting job. Petitioner testified the mine there was very similar to the Illinois mines. Petitioner then returned to Illinois. (T.20-21)

Petitioner started at Respondent's mine, Patton Mining or the Deer Run Mine, as a shuttle car operator in 2011. This entailed driving the machine to the miner, loading the coal and taking it to the belt. He did not perform roof bolting there because they thought he was getting too old for that job. (T.21-23) Petitioner last worked at Deer Run Mine on March 25, 2015. He was 58 at that time. Petitioner testified that he was exposed to coal mine dust on that date. On that day, they had a hot spot/fire and the mine had ceased operating. He chose not to seek other mining employment after that time. He ran a tree service, Midland Tree Service, after that with his son where he trimmed trees, took down trees and ground tree stumps. He did not climb; he worked out of a bucket. He earned between $20,000 and $50,000 annually. The decline in business was because

he did not have stamina any longer. He testified he was "getting too old or something." Petitioner has had no other jobs since that time. (T.9-12)

Petitioner testified that in the early 1990's, he started noticing breathing problems. At that time, he noticed he was not able to walk as far, and testified it was "just my stamina." When he went back into the mine, the breathing problems started to get worse. Since the time he left mining up until the Arbitration hearing, Petitioner testified, his breathing problems have gotten a little worse. (T.23-24)

Petitioner does not take any medications for breathing. With activities of daily living, he stated he likes to walk and exercise, but he is not able to go as far; he can probably walk about a mile. When asked how many stairs he is able to climb before he has to rest, Petitioner testified he does not really know, and he tries to stay away from using stairs. When asked if there were other things specifically in life that breathing affects, he responded, "No." Petitioner testified he used to be able to cut a big tree and clean it up with no problem. Petitioner stated he now tries to leave the big trees for his son to do as he does not have the energy to do it like he used to. (T.24-25)

Petitioner treated with Dr. Manson, his family doctor, until Dr. Manson's retirement. Since then, Petitioner has seen Dr. Del Valle. Petitioner testified he did not really talk to his doctors about his breathing issues. His main concern was his throat and acid reflux. Petitioner testified that his doctors were aware he was a coal mine worker. He testified that he has never been a smoker. (T.25-26)

Petitioner indicated his acid reflux began when he had problems swallowing and he had gone to West Virginia. He had his throat stretched 5 times since his return from West Virginia. He was on a pill for acid reflux and cholesterol. Aside from the breathing issues, acid reflux and throat issues, Petitioner testified that he has had no other health issues. Petitioner was still taking a cholesterol pill, but his doctor wanted to take him off it soon. Petitioner was taking no other medications. (T.26-28)

On cross examination, Petitioner testified that he was hired by Respondent around November 14, 2011. He agreed he had left Respondent's mine as a result of a mine fire. He was laid off. Had he not been laid off, Petitioner would have reported to his next shift as he had a mortgage and still needed to keep going. The mine had been sealed off around January 2016 and he was let go at that time. (T.28-29)

Petitioner agreed he had worked for Peabody and Freeman Coal or General Dynamics at Crown III. They were both UMWA mines. Petitioner did receive his pension from his mine employment. He received credit for 27 years. He testified they took 48% as he was not yet 55 years old. (T.29)

Petitioner testified he had gone to West Virginia for the medical card. With UMWA if you had 20 years you could get a medical card. When he left Farmersville mine he did not have the card so he had to go elsewhere for it. Petitioner was on the Peabody panel so he went to West Virginia and got his medical card locked in before he returned home. The medical card pays for everything less a $20 co-pay. The pension he received was for his years with UMWA. He had not

yet applied for social security but would do so in June given his age. (T.29-31)

Petitioner agreed his attorney sent him to Dr. Suhail Istanbouly for an examination. He had also gone to Methodist Hospital located in Henderson, Kentucky, for testing at Respondent's counsel's request. Other than those two sites for testing, Petitioner had not seen anyone else regarding this case. (T.31-32)

Petitioner agreed he treated with Dr. Manson and Dr. Del Valle in Taylorville, Illinois. He testified that he had been honest with the doctors about his complaints. (T.32-33)

Petitioner agreed over the years, from time to time, he had x-rays, screening by NIOSH for Black Lung. He believed he had been told the x-ray results, but it had been a long time ago and he did not recall the results. He did not bring any letters to the hearing. (T.33)

Petitioner testified the tree trimming business is a very physical job. He stated he has a 60-foot bucket truck and you start trimming trees and as you go up, taking off limbs. Then you "chunk" it as you come back down and clean up with a woodchipper and backhoe. Petitioner testified he does not have a CDL and it is not required because the bucket truck is not that big or heavy. Petitioner testified the work requires quite a bit of lifting and carrying and that is why he has a backhoe. He testified some of the logs can weigh in the tons, but he does not personally lift those. He does not lift over 50 pounds. The time it takes to take down a tree depends on the size and situation. He stated some can be 2-3-day jobs. (T.33-36)

Petitioner testified he tries to walk regularly for exercise in the summer. He used to walk 2-3 miles, but he cannot walk that far anymore. He has a small dog that he does not walk. He stated he walks and does the tree service business. He no longer has hobbies. He did some woodworking, making small things like baby rockers as his specialty. In his shop he was doing a little bit of woodworking and he watches TV when not doing tree service. (T.36-37)

Medical Records

The medical records of Springfield Clinic (RX 4) show numerous visits beginning in 1994. On January 25, 1994, Petitioner's chest x-ray showed an essentially normal chest radiograph. During 1998, Petitioner returned regarding ear problems. At that visit, a respiratory exam revealed good air bilaterally and no adventitious sounds. No complaints related to breathing were noted. Petitioner was seen on April 22, 2004, for an evaluation of a right inguinal hernia. Physical examination of the chest revealed the lungs were clear to auscultation. The chest x-ray performed on that date showed no active cardiopulmonary disease. No complaints related to breathing or cough were noted.

On February 7, 2006, Petitioner complained of purulent productive deep cough associated with sore throat. Tremendous amount of nasopharyngitis and oropharyngitis was noted. The chest was noted as clear on examination. Petitioner returned on November 8, 2008, for an elevated blood pressure issue and complaining of light headedness. Physical examination of the chest revealed lungs were noted as clear to auscultation. No rales or wheezes were noted. No complaints related to breathing or cough were noted. (RX4)

On March 25, 2012, Petitioner returned complaining of a sore throat, headache, body ache, temperature, and fatigue. He was noted to have a productive cough of brown sputum. No complaints related to breathing were noted. (RX 4)

Petitioner was seen on July 6, 2012, complaining of choking and difficulty swallowing. The assessment was dysphagia. He returned on August 16, 2012 and underwent a chest exam revealing normal findings. A review of systems revealed no pulmonary symptoms.

On November 19, 2013, Petitioner complained of fever and aches. A productive cough with yellow sputum was noted. Petitioner denied chronic respiratory illness. No shortness of breath or chest discomfort was noted. It was noted Petitioner is a non-smoker. Lungs were noted as clear. Petitioner had multiple procedures over time regarding dysphagia. (RX 4)

Petitioner returned to the Springfield Clinic on July 29, 2014, complaining of dysphagia and choking. Petitioner denied shortness of breath, chest pain or chest tightness. Petitioner was diagnosed with GERD. Petitioner had a past history of bronchitis it was noted and never smoked. Respiratory exam revealed clear to auscultation bilaterally, no wheeze. No complaints related to breathing or cough were noted. An esophagogastroduodenoscopy was performed. (RX 5)

Petitioner was seen on October 25, 2014, complaining of headache, sinus drainage, sore throat, and a productive cough for 4 days with occasional colored sputum. Petitioner had reported then that several miners had similar symptoms. The record notes Petitioner has a history of sinus infections in the past. No history of asthma or allergies. Positive history of GERD; no other chronic illnesses. No breathing complaints were noted. (RX 4) A November 12, 2014, emergency room visit was noted regarding his back. No complaints related to breathing, cough were noted. (RX 4). Petitioner returned on December 29, 2014, for unrelated stomach issues. No complaints related to breathing or cough were noted. (RX 4).

On September 18, 2015, the Springfield Clinic medical records indicate Petitioner has a long history of GERD and dysphagia. An EGD was performed on that date which showed a tremendous amount of inflammation and scarring at the gastroesophageal junction. (RX 4) In 2016, Petitioner presented at Springfield Clinic regarding an eye issue. No complaints related to breathing or cough were noted. (RX 4) Petitioner returned on May 4, 2017 and completed a new patient questionnaire. He denied lung disease, asthma and shortness of breath.

He returned on November 2, 2018, for an EGD consult reporting problems swallowing and GERD. Physical exam of the chest revealed the lungs were clear to auscultation and percussion. Review of systems revealed no shortness of breath or cough. (RX 4) An operative report dated November 12, 2018, showed Petitioner underwent esophageal dilation. The 12/18/18 record notes a history of dysphagia. Petitioner's problems were listed as Barrett's esophagus, dysphagia, pre-op GI exam, hyperlipidemia, and GERD. No history of breathing complaints was noted. (RX 4)

Petitioner was seen on May 13, 2019, for EGD. He denied shortness of breath, dyspnea on exertion or proximal nocturnal dyspnea. His review of systems showed he had good exercise tolerance. Physical examination showed the lungs were clear to auscultation bilaterally without

any wheezing. (RX 4)

Petitioner underwent an x-ray examination on May 2, 2016, which was interpreted by Dr. Smith, a B-reader. His interpretation was mild interstitial fibrosis p/p, bilateral mid to lower zones involved, profusion 1/0. No chest wall plaques or calcifications. Simple CWP with small opacities, primary p, secondary p mid to lower zones involved bilaterally. The film quality was noted to be 1. (PX 2)

Spirometry was performed for Black Lung screening on October 4, 2016 and found to be within normal limits. (RX 3)

Testimony of Dr. Istanbouly

Dr. Istanbouly is a physician specializing in pulmonary and critical care medicine. He is board certified in internal medicine, pulmonary medicine and critical care medicine. He has been in practice in southern Illinois for 11 years. His practice is mixed between inpatient and outpatient. In the course of his practice, he has had numerous occasions to treat coal miners and former coal miners. The lung diseases he treats include emphysema, COPD, chronic bronchitis, asthma, CWP, and lung cancer patients. He is affiliated with numerous hospitals and holds privileges at many others in the area. (PX 1, p. 5-7)

Dr. Istanbouly examined Petitioner on August 30, 2016, at Petitioner's attorney's request. He authored a report of his findings of that exam and he identified RX 2 as a copy of his report. He testified he obtained a detailed history from Petitioner, including occupational history. He reviewed the x-ray and spirometry testing. He did a detailed physical exam before he made his conclusions. He noted Petitioner had been a coal miner for 33 years and worked underground. He noted Petitioner had no history of smoking. Petitioner had mentioned that he had a long history of intermittent occasional coughing triggered by strenuous activity or brisk walking. Petitioner reported the cough as mild to moderate in intensity and used to produce milky, mild dark black sputum. But at the time he saw Petitioner, it was clearing up. (PX 1, p.7-9)

Dr. Istanbouly testified the cough and data qualified as chronic bronchitis. He noted Petitioner reported he had the ability to walk 3 miles without breathing problems and had not noticed any decline in respiratory capacity in the prior 6 months. Petitioner had noted wheezing and runny nose on occasion and Petitioner had reported a history of GERD, but that was apparently now under control with medication. As to a runny nose, he testified Petitioner had postnasal drip which was perennial rather than seasonal. He stated wheezing indicated bronchospasm. Chronic bronchitis (cough) is a manifestation of bronchospasm as well, so there was a correlation. The sinus drip indicated inflammation of the nasal mucosa. The mucosa was the same lining affected when you have chronic bronchitis, except further into the bronchial area. (PX 1, p.9-10)

Dr. Istanbouly agreed Petitioner had pulmonary function testing performed and it was within normal range. The FEV1 was 3.65 liters, 144% predicted. The FVC was 4.72 liters, 112% predicted. The FEV1/FVC was 78%. Dr. Istanbouly testified the x-rays revealed mild interstitial changes bilaterally consistent with mild CWP. He stated the profusion, per the B-reader, Dr. Smith, was 1/0. He had decided whether it was positive or negative before he looked at Dr. Smith's report.

He does not use the same terms as a B-reader he stated. Dr. Istanbouly testified, within a reasonable degree of medical certainty, that Petitioner has chronic bronchitis. He stated the cause in this case, or "main culprit", was the long-term coal dust inhalation. (PX 1, p.10-12)

Dr. Istanbouly testified further that per Petitioner's occupational history, chest x-ray, and symptoms, he has CWP caused by long-term coal mine dust inhalation. Dr. Istanbouly testified the Petitioner had normal spirometry, but that is not uncommon, especially with early to mild cases of CWP. Chronic bronchitis is one of the chronic obstructive pulmonary diseases. With the normal pulmonary function test, it did qualify Petitioner to have early stage COPD, which he would put under CWP. (PX 1, p.12-13)

Dr. Istanbouly testified that in light of Petitioner's diagnoses of chronic bronchitis, CWP and COPD, Petitioner should have no further exposure to that environment as it would subject Petitioner to high risk of progressive lung damage. (PX 1, p.13-14) He testified it is medically advisable for Petitioner to permanently avoid further coal dust inhalation. (PX 1, p.14)

Dr. Istanbouly testified that after 33 years of coal dust exposure, a certain percentage of the coal dust Petitioner had inhaled will stay inside his lungs permanently. He agreed the weight of a coal miner's lungs can be accounted for by the trapped coal mine dust in his lungs but was unsure if it was 50% of the weight of the lungs. He agreed the trapped coal dust would be exposed to the lung tissue for the rest of his life. There is still the coal dust trapped in Petitioner's lungs and that, though not active current exposure, could still lead to further lung damage. Lung function and lung damage keeps getting worse despite quitting the coal mining career. (PX 1, p.14-15)

Dr. Istanbouly testified that the most accurate way to diagnose CWP would be pathologic versus radiologic. He agreed that the combination of a positive x-ray for CWP along with sufficient exposure to cause CWP, was sufficient for him to diagnose CWP. He testified a negative x-ray would not necessarily rule out the existence of CWP. He would agree a recent study showed that 50% of long-term coal miners were found to have CWP on autopsy, even though it was not found on x-ray during their life. He stated the pattern of progression of CWP may vary. He agreed over decades, miners have died from advanced CWP. At some point they would have had CWP seen at a pathogenic level. It possibly would have progressed to 1/0 level, early radiologic significant CWP and possibly continued to progress to be at the life-threatening stage and eventually took their life. (PX 1, p.15-18)

On cross examination, Dr. Istanbouly agreed he had seen Petitioner one time at Petitioner's attorney's request. He does 5-7 such exams per month, for state Black Lung claims, always at the request of claimants' attorneys. He has been doing that for about 7 years. (PX 1, p.18.)

Dr. Istanbouly agreed Petitioner relayed no past history of respiratory disease. Petitioner had relayed an occasional cough that had only been triggered by strenuous activity or brisk walking, not dust, smoke or fumes. He agreed currently the cough produced little sputum. Petitioner had reported no significant dyspnea. Petitioner had suffered from a runny nose on a perennial basis; it could be associated with cough. He agreed Petitioner was not taking any medications for breathing and he had no history of ever taking breathing medications. Petitioner was taking medication for GERD and that condition is associated with cough. (PX 1, p.18-20)

Dr. Istanbouly testified that he had reviewed medical records regarding Petitioner. He reviewed the exam and narrative report of Dr. Smith, a B-reader, before he examined Petitioner. He agreed Petitioner's O2 saturation was normal at 96%. He agreed Petitioner's chest exam revealed no adventitious sounds, including wheeze. Dr. Istanbouly agreed there was no sign of disease on the physical examination of Petitioner's chest stating, "It was within normal range." He agreed Petitioner's Forced Vital Capacity, evaluated by spirometry, was 112% of predicted which was normal. He did not perform lung volumes on Petitioner which, he agreed, would be the best test. He agreed Petitioner's Forced Expiratory Volume was 114% of predicted, which was normal. He agreed FEV1/FVC ratio was 78%, which was greater than predicted, and was normal. This ruled out obstruction. (PX 1, p.20-22)

Dr. Istanbouly testified he subscribes to the GOLD (Global Initiative on Obstructive Lung Disease) standard to diagnose COPD. He agreed the GOLD standard states that spirometry is required to make a clinical diagnosis of COPD. He stated spirometry ruled out COPD per PFT criteria, but not on a clinical basis. On a clinical basis, the diagnosis was made per the history indicating long-term coal dust inhalation and a long history of intermittent coughing and wheezing. He stated it was early stage because the spirometry test was normal. The clinical diagnosis was based on what Petitioner told him, Petitioner's occupational history and the x-ray findings. (PX 1, p.22-24)

Dr. Istanbouly testified if one comes to him as a coal miner, he does not necessarily have a higher suspicion of the presence of COPD. He stated he does not diagnose COPD frequently, but he does know they have a risk factor for COPD. Dr. Istanbouly agreed Petitioner did not report he left work due to respiratory problems or symptoms. He further agreed Petitioner did not tell him he had difficulty performing the duties of his last job in the mine. (PX1, p.24)

Dr. Istanbouly testified he does not possess the standard ILO films used to interpret chest x-rays for Black Lung. He agreed he was neither an A-reader nor B-reader. Dr. Istanbouly agreed when he interprets films for Black Lung, he classifies them as early, moderate or severe and he classified Petitioner's films as early Black Lung. He agreed with Dr. Smith who noted the only opacities present in Petitioner's lungs were in the mid and lower lung zones. Dr. Istanbouly agreed he did not provide profusion ratings for the films and he could not say whether this film had a 1/0 or 0/1 profusion. (PX 1, p.24-25)

Dr. Istanbouly agreed his sole diagnosis listed in his report was coal worker's pneumoconiosis, early stage. (PX 1, p.26)

Testimony of Dr. Meyer

Dr. Meyer is a board-certified radiologist and certified B-reader, through 12/31/18. He graduated from the University of Virginia in 1983 with a BS in chemical engineering, graduated with honors, the highest distinction. He attended Washington University School of Medicine in St. Louis and obtained his M.D. in 1987; he is a member of Alpha Omega Alpha the medical honor fraternity. He did an internship from July 1987 to June 1988 at Tripler Army Medical Center in Honolulu and he completed his residency in diagnostic radiology at Walter Reed Army Medical

Center in D.C. (RX 1, p.4-8)

Dr. Meyer was Chief Resident at Walter Reed from 1991 to 1992. He became board certified in radiology and has been certified since 1992. He became Chief of Thoracic Imaging at Madigan Medical Center in Tacoma in 1992. There he was in charge of all imaging procedures related to the chest, which included chest x-rays, CT scans and all biopsy procedures. He was also in charge of training Army residents in thoracic imaging and preparing them for their boards. He remained at Madigan until 1996 when he became an Assistant Professor of Radiology at the University of Maryland Medical System in Baltimore. (RX 1, p.8-10)

Dr. Meyer testified that at the University of Maryland, the subjects were fairly diverse in chest imaging, including interpretation of conventional chest radiograph, interpretation of films in the intensive care unit, high resolution CT of the chest, and some subspecialty in high resolution CT, like small airways. He was also the primary interventional chest radiologist, teaching residents how to perform biopsy procedures. There, he often reviewed articles and manuscripts for various professional journals for possible publication. He served and continues to serve on several journals as a manuscript reviewer with his expertise in thoracic imaging. (RX 1, p.10-11)

Dr. Meyer became an Associate Professor of Radiology at University Hospital in Cincinnati in 1998. His area of subspecialty was thoracic imaging. He taught interventional chest radiology, interpretation of chest x-rays, CT scans, and high-resolution CT scans. He had received the Spitz award for excellence in teaching residents. (RX 1, p.11-12)

Dr. Meyer became an Associate Professor of Radiology at Indiana University Hospital in Indianapolis in 2000. He also taught at Indiana University. He returned to Cincinnati in 2003 and for a time was in private practice and then joined University Hospital. (RX 1, p.12-14)

Dr. Meyer remained there until 2010 when he accepted his current position as Vice Chair of Finance and Business Development and Professor of Diagnostic Radiology at the University of Wisconsin Hospital in Madison. He had been contacted by Wisconsin University and recruited to join them in his current position. He works in clinical radiology about 50% of the time, interpreting x-rays and CT scans 2-3 times per week. About 20% of his time is academic and he also performs administrative work. He reviews 200-250 chest x-rays per week and 20-40 chest CT scans per week. (RX 1, p.14-18)

Dr. Meyer agreed when he was in Cincinnati in 2008-2009, he was recognized with the Benjamin Felson Medical Student Teaching award, an honor for teaching medical students. He noted Dr. Felson was considered the father of chest radiology and one of the originators of the B-reading classification system. (RX 1, p.19-20)

Dr. Meyer stated B-reading is an epidemiologic evaluation of the chest x-ray. He stated there is a very specific form developed to evaluate the chest x-ray for the presence or absence of occupational lung disease. They describe the quality, limitations of the x-ray and the classifications of the abnormalities. They describe any small nodular opacities or linear opacities and based on size and appearance of the small opacities, assign them a letter score. He stated P, Q, R are nodular opacities; S, T, U are linear opacities. They describe the distribution of the findings. Different

pneumoconiosis are seen in different regions of the lung. He stated it was important as CWP is typically predominantly an upper zone process and other idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. It is very important to show small opacities and their distribution on the form. (RX 1, p.23-24)

Dr. Meyer stated the last component of the lung involvement piece for small opacities is the extent of lung involvement, the so-called profusion. That is the most difficult component of the classification system for most radiologists and varies from 0/0 (normal) to 3/+ which is the most abnormal. The large opacities are separate categories for pleural disease. There are also miscellaneous findings like atherosclerotic calcifications (granulomas). (RX 1, p.24-25)

Dr. Meyer indicated the P, Q, R opacities are for progression of size. The S, T, U opacities are for progression of the linear. He agreed the film must be graded first. He indicated on a regular camera it is easy to over or under expose and the same was true for analog x-ray. If underexposed, they are extremely white and have a tendency to artificially increase the look of opacities in the lung parenchymal. If overexposed, it is too dark and this can artificially make the small opacities disappear. If there is mottle on the x-ray, the film may look grainy and that can simulate small opacities. When underexposed it tends to accentuate pulmonary vasculature and you have to be careful not to mistake that for a nodule or opacity. If a film is graded as UR, or unreadable, they do not complete the rest of the form. (RX 1, p.26-29)

Dr. Meyer indicated it was important to identify opacities as specific opacity types. Silicosis and CWP are characteristically small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, are described by small linear or small irregular opacities. The B-reader describes primary and secondary, to decide which the predominant shape is. Often they are mixed. You can see 2 different sizes of round opacities. Sometimes a primary could be Q and secondary R. (RX 1, p.29-30)

Dr. Meyer testified the distribution of dust exposure depends on the particles involved. Small particles like silica and coal are upper zone processes. He stated they expect CWP and silicosis early in disease to be upper zone predominant. (RX 1, p.30-31)

Dr. Meyer agreed profusion is the hardest definition. It is trying to define density of the small opacities in the lung. If normal, it is profusion "0". The most abnormal would be 3. Threshold implies mild amount of disease. A "2" would be medium profusion and "3", severe involvement of the lung. He indicated 0/1 he would say normal, but may be a little abnormal. He indicated a 1/0 would be borderline between abnormal and normal. (RX 1, p.31-32)

Dr. Meyer stated it was important to be able to recognize simple variations between normal and abnormal. Radiologists who are used to chest x-rays can compensate for over or underexposure on x-rays. (RX 1, p.36-37)

Dr. Meyer reviewed the digital PA chest radiograph from Harrisburg Medical Center, dated 5/2/16. He stated the film was quality 1. He stated the film revealed the lungs were clear. There were no small or large opacities. There were some mild degenerative changes in the thoracic spine, but the exam was essentially normal. Dr. Meyer testified there was no evidence of CWP on

Petitioner's chest x-ray. (RX 1, p.41-42)

On cross examination, Dr. Meyer agreed that, notwithstanding Petitioner having a negative reading, he could still have CWP. He agreed CT scans have not been accepted by NIOSH for purposes of B-reading. They do not need contrast CT scan to evaluate interstitial lung disease like CWP. (RX 1, p.42-45)

Dr. Meyer agreed most B-readers prefer not to know anything about the patient, they just want to look at the films for anything consistent with abnormalities of CWP. He assumes when asked to interpret a chest x-ray for B-reading that there was appropriate exposure history and he looks for evidence of CWP. He agreed two B-readers can disagree whether they're seeing small opacities or not. He stated distinguishing between 1/0 and 0/1 opacities is one of the most difficult processes for a B-reader. He stated the issue is making sure the person interpreting the exam has ample experience reading them and can sort out what is a normal variation. Dr. Meyer testified you have to recognize the spectrum of normal. He spent his career as a chest radiologist looking at chest x-rays all day to establish a spectrum of normal. (RX 1, p.47-50)

Dr. Meyer agreed it is possible for one to appreciate the existence of CWP on a CT scan that may have been missed on an analog x-ray. CT scans have a high opportunity to identify abnormalities. He stated symptomatic disease should be evidenced on analog chest x-rays. Dr. Meyer testified pulmonary function testing would not change his opinion of what he read on x-ray, nor would patient complaints of shortness of breath. He testified he treats the x-rays as a piece of hard data and symptoms can vary by individual. (RX 1, p.51-52)

Dr. Meyer agreed long-time coal miners are going to come out with some dust deposits in the lungs; the majority will not have changes in the lungs that qualify for CWP. He stated the manifestation of CWP is based on the body's ability to clear the dust. Dr. Meyer stated there is actually very little inflammation reaction to pure coal dust. He stated what occurs is there is a buildup of dust over time to the point, depending on level of exposure, the amount of dust can be as much as half the total weight of the lungs. A large component is the dust that fails to clear. He stated the presence of coal macule is the pathologic lesion that defines CWP. The coal macule is a conglomerate of white blood cells with the coal dust in it. It may be emphysema on the edges. He stated there may be some mild fibrosis around the coal macule. He stated the lung reacts to coal dust because the dust is typically fairly inert. He stated you see an immunologic response and collection of the white blood cells, some associated with mild fibrosis, adjacent to the macule. (RX 1, p.53-56)

Dr. Meyer agreed whether measurable or not there would be some change in the function of the lung. He agreed that with mixed dust exposure (i.e., coal and silica dust), there may be more toxicity to lung tissue. The macules then may be different shapes, sizes and locations in the lungs. It is called coal workers pneumoconiosis (not coal pneumoconiosis) as there are mixed dusts in the mine, not just coal dust. (RX 1, p.56-57)

Dr. Meyer agreed the macule of CWP is a permanent abnormality. It can progress depending on the individual macule or more dust. He testified that to his knowledge, there is no medication to stop or reverse the progression; however, it may improve by removing the exposure.

He agreed CWP can be considered a chronic progressive disease in some coal miners, and it can progress after leaving the mine exposure. Dr. Meyer agreed if a miner had CWP in their lifetime, they probably had it at some level when they left the mine. He agreed a susceptible host can progress to progressive massive fibrosis; it can impair pulmonary function. It can progress to involve the heart with cor pulmonale, which can be life threatening if significant enough. (RX 1, p.57-59)

Dr. Meyer agreed x-rays can be interpreted as demonstrating findings of emphysema or COPD. On chest x-ray they often look for secondary signs of emphysema, often directly seeing the lung destruction on CT scan. A finding of COPD or emphysema can be consistent with hyperinflation. Often the diaphragm will flatten. CWP may first appear radiographically and then become more significant, affecting pulmonary function. (RX 1, p.59-61)

Dr. Meyer agreed CWP is a chronic, slowly progressive disease; not acute, sudden onset. Not all coal miners develop a tissue reaction to the dust. Some may be sensitive and have extreme reaction; it depends on composition of the dust itself. Dr. Meyer agreed it was possible for a miner to work 30-40 years and develop radiographically significant CWP after they leave the mine. (RX 1, p.73-76) Dr. Meyer agreed it is possible for a miner to have CWP determined by pathology and not appreciated radiographically. It is possible a miner can have differing radiograph B-reader opinions and found CWP on autopsy/biopsy. He stated it shows radiograph has limitations relative to looking at tissue samples. (RX 1, p.86-87)

On re-direct examination, Dr. Meyer agreed pathologic basis would mean looking at lung tissue under a microscope. Dr. Meyer stated typically simple CWP will not progress once exposure ceases. He testified that Petitioner has neither progressive massive fibrosis nor cor pulmonale. He testified the films did not show evidence of bulla or hyperinflation. (RX 1, p.89-90)

Dr. Meyer's 11/9/16 B-reader report noted film quality 1. He noted no radiographic findings of CWP. He disagreed with Dr. Smith's interpretation. (Dep. Exhibit 3)

Testimony of Dr. Castle

Dr. Castle is a pulmonologist. He is board certified in internal medicine and his subspecialty is in pulmonary disease. He graduated from West Virginia School of Medicine in 1969. He completed his first-year internship at Charlotte Memorial Hospital and later attended University of Florida for internal medicine. He completed his residency in 1972. He joined the Navy Reserve in medical school and deferred entry to the military until finishing school. He went in the Navy as a pulmonary physician at Naval Regional Medical Center in Philadelphia and then Roanoke and opened his practice in 1977. He had been in practice there for 30 years. (RX 2, p.4-7)

Dr. Castle stated his practice is limited to pulmonary disease and chest disease, including critical care medicine, and he later became involved in sleep medicine. He saw usual things like COPD, asthma, pneumonia, interstitial lung disease, and occupational lung disease. He had some patients who had CWP, some simple, some complicated CWP. The biggest group of occupational disease cases were asbestos exposure cases from a railroad engine company. He had older patients

who had significant exposure to asbestos and many had asbestosis. He also did pharmaceutical studies over the years and taught medical students regarding lung disease. (RX 2, p.7-10)

Dr. Castle stopped seeing patients in 2007 and remains semi-retired. He continues with occupational lung disease to the present time. Dr. Castle testified that he became a B-reader in 1985 was certified to 6/30/17. (RX 2, p.10-14) He started doing medicolegal work around 1985 as a minor part of his practice. He performs a complete physical with chest x-ray, spirometry, blood gas, and EKG, sometimes CT scans also. The majority of the cases are federal cases. He may perform 5-6 forensic exams per month. He has performed exams for the Department of Labor. (RX 2, p.14-19) Dr. Castle indicated his forensic reviews of records and films was done primarily for coal mines or employers rather than employees.

Dr. Castle reviewed medical records and films regarding Petitioner at Respondent's counsel's request. He reviewed records of the Springfield Clinic. He reviewed a radiographic report of 1/25/94, indicating the lungs were clear of infiltrates, negative x-ray. He noted there were a number of office notes pertaining to the cardiorespiratory system. There were records of unrelated conditions. He noted records reflected that Petitioner did not smoke and had worked in coal mining and tree trimming. Dr. Castle noted the x-ray report of 4/22/04 that noted no cardiopulmonary abnormality and lungs clear with no mass or effusion. Petitioner had other treatments for lacerations and respiratory infections. The records dated 3/25/12, noted Petitioner was seen for sudden onset of sore throat, headache, body ache, and cough producing brown sputum; lungs were noted clear. Assessment was bronchitis. Dr. Castle stated the 8/6/14 record noted various issues and there was minimal infiltrate or atelectasis in lung bases, more left. He noted various records indicating pain and symptoms of choking and Petitioner had an esophagus issue with dilation. (RX 2, p.21-25)

Dr. Castle reviewed the medical records of Dr. Istanbouly who examined Petitioner on 8/30/16. Those records noted Petitioner had worked in coal mines, underground, for 33 years to 3/15. Petitioner's last job in the coal mine was noted as roof bolting machine operator. Petitioner never smoked. Petitioner's wife smoked, but outside. He had no history of asthma. Petitioner reported cough occasionally and his cough was triggered by strenuous activity or brisk walking. Petitioner had some sputum but recently started to clear. He had nocturnal dyspnea but denied exertional dyspnea. The record noted Petitioner was able to walk three miles without breathing problems and he had not noticed any decline of respiratory capacity in the prior six months. Petitioner did wheeze occasionally. He had frequent heartburn and Petitioner had a normal spirometry test. (RX 2, p.25-26)

Dr. Castle noted Dr. Istanbouly had reviewed a chest x-ray of 5/2/16 and said it indicated interstitial changes bilaterally consistent with simple CWP, profusion 1/0, per Dr. Smith a B-reader. The chest exam revealed normal respiratory effort and lungs clear to auscultation. Dr. Castle noted Dr. Istanbouly's assessment was CWP early stage related to long history of coal dust exposure and had noted spirometry was valid and normal. The record included Dr. Smith's report that indicated p/p opacities in mid to lower lung zones with 1/0 profusion. Diffusing capacity was noted as valid, normal. (RX 2, p.26-28)

Dr. Castle reviewed the records of Dr. Meyer. This included the report of Dr. Meyer on

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the 5/2/16 film indicating no parenchymal abnormalities consistent with CWP, lung fields clear. Dr. Castle testified that cough is not considered to be an objective determinant of pulmonary impairment. He stated chronic bronchitis is a chronic cough productive of sputum, on most days, for 3 consecutive months for 2 years per the definition of the American Thoracic Society. Dr. Castle testified that chronic bronchitis does not appear anywhere in the treatment records he reviewed. (RX 2, p.28)

Dr. Castle agreed Petitioner was diagnosed with GERD and dysphasia with choking. He stated that is associated with a cough, particularly with GERD. Dr. Castle stated it does not have to get up into the lungs or laryngeal area, but it can stimulate the lower esophagus and cause a cough. The same would be true with sinus congestion and drainage. Dr. Castle testified that pulmonary function testing was normal. He stated there was no evidence of obstructive or restriction whatsoever. Dr. Castle agreed the gold standard on obstructive lung disease requires FEV1/FVC to be below 70% to make a clinical diagnosis of COPD. He questioned how you can have chronic obstructive pulmonary disease if there is no obstruction. (RX 2, p.28-30)

Dr. Castle testified, within a reasonable degree of medical certainty, that Petitioner does not have COPD. That diagnosis was nowhere in treating records. He agreed diffusing capacity was 103%, which is normal. Dr. Castle testified there was no evidence of impairment in gas exchange. (RX 2, p.30)

Dr. Castle is familiar with the AMA Guidelines to the Evaluation of Impairment, 6th edition. He indicated that applying table 5-4 of the guides to results obtained in pulmonary function, Petitioner would fall in a class "0". Dr. Castle testified that, in his opinion, Petitioner was capable of heavy manual labor. (RX 2, p.30-31)

Dr. Castle agreed he stated that he had reviewed the chest x-ray, dated 5/2/16, on CD-ROM from Harrisburg Medical Center. Dr. Castle stated that in his opinion there was no parenchymal abnormalities consistent with CWP. In his opinion Petitioner did not have radiographic evidence indicating the presence of CWP or any coal mine dust induced lung disease. (RX 2, p.31-34)

Dr. Castle testified there was no lung pathology in the medical he reviewed. He found no clinical significance to sub radiographic pneumoconiosis stating, "The term simply means that you have an individual that may have pathological evidence of pneumoconiosis but the x-ray doesn't show anything." He stated there was no clinical significance of any scarring in the lung based on Petitioner's diffusion capacity. (RX 2, p.34-35)

Dr. Castle stated it was unlikely for simple CWP to progress once exposure has ceased. (RX 2, p.35-36).

Dr. Castle testified that, within a reasonable degree of medical certainty, based on a thorough review of all the data, including medical history, physical exams, radiographic evaluation, physiologic testing, hospital records and other data, that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust while working in the mining industry. Dr. Castle stated Petitioner certainly did work in the coal mining environment for a sufficient amount of time to have developed CWP, if he was a

susceptible host. (RX 2, p.36-37)

Dr. Castle testified that Petitioner did not demonstrate any consistent physical findings indicating the presence of interstitial pulmonary process. He did not have any consistent findings of rales, crackles or crepitation. Dr. Castle stated the majority of radiographic reports indicated no findings of CWP. Dr. Castle stated only Dr. Smith noted the minimal changes consistent with CWP and had described the film showing p type opacities in middle and lower lung zones with 1/0 profusion. He stated that would seem to mean Dr. Smith also considered the film as negative. (RX 2, p.37)

Dr. Castle stated Dr. Meyer, a radiologist and B-reader, found no parenchymal abnormalities consistent with CWP. Dr. Castle stated that he had personally reviewed the same film and, in his opinion, within a reasonable degree of medical certainty, there were no changes indicating presence of CWP. He had only reviewed one spirometry test and that study was entirely normal. His function was exactly what would be expected for his age, height, race, and sex. Dr. Castle stated Petitioner's diffusion capacity was also entirely normal. Dr. Castle opined Petitioner had no evidence of respiratory impairment occurring as a result of his occupational exposure to coal mine dust. In his opinion, Petitioner does not suffer from any pulmonary disease or impairment occurring as result of his occupational coal mining exposure during his employment. (RX 2, p.37-39)

Dr. Castle agreed no matter what he saw or did not see on an x-ray, it did not rule out the possibility Petitioner could have CWP pathologically or on autopsy. He agreed recent studies indicate as many as 50%+ of autopsies performed on long term coal miners found pathology significant for CWP that was not appreciated on x-ray exams during their life. (RX 2, p.44-45)

Dr. Castle agreed if a person has CWP they would have impairment of the function of the lung at the site of scarring and emphysema. He stated the scar tissue can restrict or obstruct causing measurable pulmonary impairment. He testified the onset is slow and insidious. (RX 2, T.50)

On re-direct examination, Dr. Castle agreed he had opportunity to review records of Dr. Istanbouly. He agreed Dr. Istanbouly took a history of Petitioner regarding cough and sputum and he did take that into consideration as to whether Petitioner suffered from chronic bronchitis. Dr. Castle testified that Petitioner did not suffer from asthma, hyper airways disease, or emphysema. Dr. Castle testified none of the B-readers interpreted Petitioner's films to find evidence of emphysema. (RX 2, p.80-81)

Dr. Castle testified that Petitioner does not suffer from progressive massive fibrosis nor cor pulmonale. He stated it would be extremely unlikely Petitioner would develop those conditions.

Conclusions of Law

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 999 N.E.2d 382, 389, 376 Ill. Dec. 499, 506 (5th Dist. 2013); citing *Anderson v. Industrial Comm'n*, 321 Ill. App.

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3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Where conflicting medical testimony is presented, it is for the Commission to determine which testimony is to be accepted. *Martin v. Industrial Comm'n*, 91 Ill. 2d 288, 294, 437 N.E.2d 650, 63 Ill. Dec. 1 (1982).

§1(d) of the Occupational Diseases Act ("ODA") states, in pertinent part:

> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists... If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

§1(e) of the ODA states, in pertinent part:

> "Disablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body.

§ 1(f) of the ODA states, in pertinent part:

> No compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease.

In the present case, the experts differed as to whether chest x-rays performed on 5/2/16 proved the presence of coal worker's pneumoconiosis ("CWP"). While it is true that Dr. Meyer agreed that a negative x-ray does not necessarily rule out CWP, that is not the same as saying that Petitioner in fact suffers from the disease. Instead, Petitioner bears the burden of proving by a preponderance of the credible evidence all the elements of his claim, including the threshold consideration of whether he has an occupational disease, including CWP.

Furthermore, while it is true that Petitioner worked as a coal miner for 33 years, the provisions set forth in Section 1(d) of the Occupational Diseases Act – wherein a rebuttable presumption exists that a coal miner's pneumoconiosis arose out of such employment if he or she was employed for 10 years or more in one or more coal mines -- does not apply, by a plain reading of the statute, unless and until it is shown that the claimant has CWP.

The evidence shows Petitioner last worked in the mine on 5/25/15. Petitioner is a non-smoker, but his wife does smoke, albeit outside. Petitioner testified that in about the early 1990's he started noticing breathing problems. At that time, he testified, he noticed he was not able to walk too far; he had a lack of stamina. Petitioner testified when he went back into the mine his breathing problems started to get worse. Petitioner testified from that time on, his breathing problems had gotten a little worse. (T.23-24)

Petitioner testified he does not take any medications for breathing. He testified he liked to walk and exercise, but he could no longer go as far, and he tried to stay away from stairs. He could not say other things in life it affected. Petitioner was able to cut big trees and clean up with no problem before and now he leaves the big trees for his son stating he did not have energy as he did before. However, a review of the record of primary care physician Dr. Manson who retired and then Dr. Del Valle during the period leading up to Petitioner's last day of work in the mines (5/25/15), reveals no references to any breathing complaints, other than to several episodes of GERD and having dilation of his throat several times because of swallowing issues.

It is noted there were some complaints with headaches, sinus drainage, sore throat, and a productive cough on a few occasions, as well as some fatigue. However, in 1998, his respiratory exam was normal. An exam in 2008 found no rales or wheeze and Petitioner presented no complaints related to breathing or cough. No history of any allergies or asthma was noted. Petitioner denied any chronic respiratory illness, there was no shortness of breath, and no chest discomfort in November 2013. Other than complaints of sinus drainage and productive cough for 4 days in October 2014, there were no complaints noted regarding breathing issues or cough through December 18, 2018. A November 6, 2018 visit regarding his esophageal condition exam noted as lungs clear to auscultation bilaterally, non-labored respiration.

The Commission finds significant that Petitioner stopped working for Respondent after a mine fire that closed the mine. Petitioner did not cease mining work because of any respiratory issues but he ceased because he was laid off. Petitioner opted to pursue his tree trimming business rather than seek further mining work.

Petitioner also claims that his breathing has gotten worse since he left Respondent's employ and that it affects his daily activities. The medical records fail to reflect any ongoing complaints relative to a diagnosis of CWP or any other chronic respiratory ailments during this period, and, in fact, much of his current complaints voiced at Arbitration could just as easily be explained by the limitations with fatigue, his chronic esophageal condition and GERD.

Dr. Istanbouly, a pulmonology and critical care doctor, not a B-reader, testified Petitioner's chest exam was within normal range. His Forced Vital Capacity, tested by spirometry, was normal. Petitioner's Forced Expiratory Volume was likewise normal. His FEV1/FVC ratio was also normal, ruling out obstruction. Dr. Istanbouly did not perform lung volumes testing on Petitioner which he admitted would be the best test. He indicated Petitioner's cough and the data he reviewed qualified as chronic bronchitis. Dr. Istanbouly indicated it was not uncommon with early CWP to have normal spirometry and he also indicated the pulmonary function test qualified Petitioner to have early stage COPD, related to long-term coal dust inhalation. He opined Petitioner had CWP,

early stage, but, as he was not a B-reader, he stated profusion was 1/0 per the B-reading of Dr. Smith (5/20/15). Dr. Istanbouly and Dr. Smith both believed Petitioner had simple CWP.

Dr. Smith, board certified radiologist and B-reader, interpreted the May 2, 2016 chest x-ray as positive for pneumoconiosis, profusion 1/0 with p/p opacities in bilateral mid to lower zones involved. No chest wall plaques or calcifications were noted.

In contrast, Dr. Meyer and Dr. Castle both read the 5/2/16 chest x-ray as normal, finding no evidence of CWP or other pulmonary condition. They had also noted that with CWP, the opacities would be found in the upper lung zones which was not the case here. Also, a profusion finding of 1/0 is considered open for interpretation by equally qualified B-readers. Petitioner had had normal chest exams over the years and did not report breathing issues from 1998 through 2018 at Springfield Clinic.

Furthermore, Petitioner has failed to prove he suffers from any obstructive respiratory disease given his normal pulmonary function test with which all doctors agree.

Therefore, upon a thorough review of the evidence, including the deposition testimony of the Drs. Meyer, Castle and Istanbouly, the Commission finds the opinions of Respondent's §12 physicians, Drs. Meyer and Castle, to be more persuasive and worthy of greater weight than those offered by Petitioner's §12 physicians, Drs. Istanbouly and Smith.

Based on the above, and the record taken as a whole, particularly the opinions of Drs. Meyer and Castle, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffers from an occupational disease that arose out of and in the course of his employment on or about 3/25/15, and failed to prove that said condition was causally related to his employment.

The Commission further notes that even if Petitioner had proven the presence of an occupational disease, he failed to prove disablement within two years of the date of last exposure, as required by the Act. More to the point, while Dr. Istanbouly agreed that patients with CWP should avoid the coal mining environment, there is no evidence that any physician specifically restricted Petitioner from returning to work due to an occupational disease. In fact, Petitioner chose not to seek other mining employment and operated his own tree trimming service. Indeed, Dr. Castle opined that from a respiratory standpoint, Petitioner was capable of heavy manual labor. Thus, disablement has not been shown to have occurred within two years of the date of last exposure, and as a result Petitioner's claim would likewise be denied.

Accordingly, Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated 5/5/20 is vacated and Petitioner's claim for compensation is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

21IWCC0155

DATED: APR 5 - 2021
o-2/9/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BASIL DALE
Employee/Petitioner

Case# **16WC016172**

PATTON MINING LLC
Employer/Respondent

21IWCC0155

On 5/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
JULIE A WEBB
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

21IWCC0155

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

DALE BASIL
Employee/Petitioner

Case # **16** WC **16172**

v.

Consolidated cases_____

PATTON MINING, LLC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **February 20, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Disease/Exposure, Causation and Sections 1(d)-f of the Occupational Disease Act**

FINDINGS

On **03/25/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$57,551.52**; the average weekly wage was **$1,106.76**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**N/A** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

- The respondent shall pay the petitioner the sum of $664.05/week for a further period of 30 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 6% MAW.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/29/20
Date

MAY 5 - 2020

STATEMENT OF FACTS

Petitioner, Dale Basil of Kincaid Illinois was 61 years old at the date of arbitration with the birth date of June 18, 1958. He is married to Debra Basil. He graduated high school from South Fork Community high school in Kincaid Illinois. After high school he took a couple years of schooling at Land of Lincoln College to become an arborist. He did not obtain a certificate or a degree. He worked 33 years in the coalmine industry all of which were underground. In addition to coal dust he was regularly exposed to and breathed silica dust and roof bolting glue fumes.

His last day of employment in the coalmines was March 25, 2015. He was working for Patton Mining at the Deer Run mine in Hillsboro, Illinois. He was 58 years old with the job classification of a shuttle car operator. He was exposed to coal dust on that day. That was his last day of employment because there was a fire in the mine and the mine was shut down. Since leaving the mine he has continued employment running his own tree trimming service that is called Midland Tree Service. Petitioner indicated that he had made as much as $50,000 a year in the tree trimming business but now is down to under $20,000 a year. The reason for this is that he just does not have the stamina that he once did to do the job. That is the only job he has had since he left the mine.

Petitioner began his mining career in 1977 working in Peabody Coal Company. This mine is located in Pawnee, Illinois. He was hired in as a supply man. Petitioner describes this job as taking supplies to all of the sections of the mine. He then became a recovery man. A recovery man takes the equipment and things that are left in a section that has been mined out and move it to another section of the mine. Petitioner describes this as a very dusty job. When you recover the belt line all the coal dust that was left on the line falls off it when you flip the belt. Petitioner did this job for about six or seven years. Petitioner also roof bolted at Peabody. Roof bolting is when you drill into the top of the mine until you hit one foot of rock then a bolt is placed in and anchored to help secure the ceiling. Petitioner next worked at Crown III and that would have been around 2000 or 2001. He was hired in as a shuttle car operator. A shuttle car operator operates the shuttle that takes the coal from the face of the mine and runs it back to the belt and dumps it off. Petitioner described how the coal dust coming off the tail of the continuous miner would come right into the ram car and create quite a bit of dust. Petitioner did this job for four or five years. Petitioner then began hauling rock dust in the ram car and taking it to all the sections in the mine. While he would haul the dust there would be paddles on it that would sling the dust everywhere so that it would cover the mine. This was done to prevent fires. Petitioner did this job for around four or five years. Petitioner also roof bolted for Crown III. He described the process as being somewhat different than the previous roof bolting, that they used glue pins to secure the bolts into the roof. Petitioner described these glue pins breaking and admitting a very strong odor that at times would take your breath away. Petitioner then went out and took a job at a coalmine in West Virginia for approximately a year. This mine was called Federal Number 2, which was close to Morgantown, West Virginia. Petitioner roof bolted for this mine and did this for approximately twelve months before moving back to Illinois. Petitioner took a job at Patton Mining in Hillsboro he was hired back into the shuttle car operator and stayed in that position until he retired.

Petitioner first started noticing breathing problems back in the early 1990's. He noticed that he just wasn't able to walk as far and his stamina wasn't the same as it use to be. From the first time he noticed breathing problems in the mine until he left the mine his breathing seemed to get worse. Since the time he left mining up to the time of this trail his breathing has continued to get a little worse. He does not take any breathing medication Petitioner describes not being able to walk as far for exercise as he once did. He testified that he can walk probably about a mile before becoming short of breath. He also testified that he tries to stay away from climbing stairs Petitioner also described how his breathing has slowed down his tree trimming business.

Petitioner's family doctor is now Dr. DelValle. It was Dr. Manson before his retirement. Petitioner was never a smoker. In addition to his breathing difficulties Petitioner has described how he has had to have his throat stretched several times because he has trouble swallowing. He also suffers from acid reflux. Petitioner also described breaking his jaw in the 1980s and having hernia surgery in the 1990s. He also takes a cholesterol pill.

Deposition of Dr. Suhail Istanbouly

At Petitioner's attorney request Petitioner was examined by Dr. Suhail Istanbouly Dr. Istanbouly is board certified in internal medicine, pulmonary medicine, and critical care medicine. (rx1, p5) He is currently affiliated with SIH hospitals including Herrin Hospital, Memorial Hospital of Carbondale, and St. Joseph Hospital (rx1, p6) Petitioner gave a history of no smoking. He mentioned a long history of intermittent occasional coughing triggered by strenuous activities or brisk walking and according to Petitioner, the cough is mild to moderate in intensity and used to be productive of milk duct – mild dark black sputum, but recently, close to the time that he was seen by Dr. Istanbouly it was clearing up. (rx1, p8-9) Petitioner also mentioned a history of occasional wheezing. He does have history of acid reflux disease, but apparently that was well controlled by taking pantoprazole. Petitioner mentioned a history of runny nose, postnasal drip, which was perennial rather than seasonal. (rx1, p9-10) Dr. Istanbouly testified that Petitioner's wheezing indicates bronchospasm. And chronic bronchitis, which means chronic cough, is a manifestation of bronchospasm as well. (rx1, p10) Petitioner's pulmonary function testing is within a normal range. FEV1 365 liters, 114% predicted. FVC 4.72 liters, 112% predicted. FEV1/FVC 78% (rx1, p10-11) Dr. Istanbouly testified that the x-ray he reviewed did reveal mild interstitial changes bilaterally consistent with simple coal worker's pneumoconiosis. Dr. Istanbouly testified to reasonable degree of medical certainty that Petitioner has chronic bronchitis with the main culprit being long-term coal dust inhalation. (rx1, p11) Dr. Istanbouly went on to testify to a reasonable degree of medical certainty that he feels Petitioner has coal worker's pneumoconiosis, which was caused by long-term coal dust inhalation. (rx1, p12) In light of his diagnosis of chronic bronchitis and coal worker's pneumoconiosis Dr. Istanbouly testified that the Petitioner could no longer have any further exposure to the environment of a coal mine without endangering his health. (rx1, p13) That would be permanent medical preclusion (rx1, p14)

Dr. Henry Smith

At Petitioners request, B-Reader, Dr. Henry Smith, who reviewed a grade one chest x-ray dated May 2, 2016. Dr. Smith found an interstitial fibrosis of classification p/p, bilateral mid to lower zones involved, or a profusion 1/0. There are no chest wall plaques or calcifications. His impression was finding a simple coal-worker's pneumoconiosis with small opacities, primary p, secondary p, mid to lower zones involved bilaterally, profusion 1/0.

Charges of Dr. Castle

Petitioners exhibit 3 shows the charges for Dr. Castle are $3,850.00.

Deposition of Dr. Castle

At Respondents request Dr. James Castle did a records review of Petitioners case. Dr. Castle testified within a reasonable degree of medical certainty, the Petitioner has no evidence of any respiratory impairment occurring as a result of his occupational exposure to coal mine dust in the mining industry. (rx1, p38-39) On cross examination Dr. Castle acknowledge that recent studies have shown that as many as 50% of long-term coal miners have pathological coal workers pneumoconiosis that was not appreciated by a radiographic study during their life. (rx1, p45) Dr. Castle admitted that to have the most accurate assessment of a patient he would always want to do his own examination if possible. (rx1, p47) Coal workers pneumoconiosis is basically a trapped coal dust in a part of the lung, which ends up wrapped in scar tissue and can be accompanied by emphysema around it. (rx1, p49) Dr. Castle confirmed that the affected tissues there of the scar and the emphysema, that tissue itself cannot perform the function of healthy normal lung tissue. (rx1, p49-50) Therefore by definition of a person who has coal worker's pneumoconiosis, they would have an impairment in the function of the lung at the sights of the scarring and emphysema. (rx1, p50) Dr. Castle also answered affirmatively to the fact that a person can have radiographically significant coal worker's pneumoconiosis yet have normal spirometry, normal pulmonary function in all areas, normal blood gases, normal physical exam of the chest, and maybe even no complaints. (rx1, p50-51) If they do have complaints shortness of breath is the most likely one. (rx1, p51) A person can have mixed dust pneumoconiosis from coal mining, which could include silica. Silica is toxic to the surrounding lung tissues. (rx1, p55) Dr. Castle testified that the coal dust that is trapped within the lungs is always going to be there for the rest of the coal miners life. (rx1, p55-56) The only treatment for coal worker's pneumoconiosis is to remove the miner from any further exposure. (rx1, p56) Dr. Castle agreed that the scarring of coal worker's pneumoconiosis does not return to normal healthy lung tissue. (rx1, p57)

Deposition of Dr. Christopher Meyer

At Respondents request Dr. Christopher A. Meyer read a PA Chest Radiograph from Harrisburg Medical Center dated May 2, 2016. (rx1, p41) Dr. Meyer testified that it was a quality 1. The lungs were clear. There was no small or large opacities. There was some mild degenerative changes of the thoracic spine. The examination was essentially normal. (rx1, p41-42) Dr. Meyer did not find any pneumoconiosis. (rx1, p42) On Cross-examination Dr. Meyer

testified that to his knowledge there is no medicine or anything modern medical science can do to stop or reverse the progression of coal workers pneumoconiosis. Removing the worker from the exposure is the best response. (rx1, p57) Dr. Meyer testified affirmatively under cross-examination that coal worker's pneumoconiosis can be considered a progressive chronic disease that can progress even after the coal miner leaves the exposure. (rx1, p58) If a person has coal workers pneumoconiosis at any time in their life it would be true that they probably had coal worker's pneumoconiosis at some level when they left the coal mine. (rx1, p58) Dr. Meyer testified that it is true that when a coal worker has coal workers pneumoconiosis the rate of progression would vary from miner to miner rather than be exactly the same in all miners. (rx1, p62) The silica in the coal mine generally comes from the rock that's associated or intermixed with the coal that's being mined. (rx1, p63-64) It is Dr. Meyer's understanding that certain occupations in the mines such as roof bolting or drilling or shooting where you disturb the coal and where there may be rock involvement those occupations in the coal mine would tend have greater silica exposure. (rx1, p64) Dr. Meyer agreed that it would be fair to say that a miner who has 1/0 pneumoconiosis probably won't even know he has it, probably won't complain to his doctors until he gets a B-reading that tells him he has it, he probably just won't know. (rx1, p66) It is possible that a coal miner would find the first manifestations of coal workers pneumoconiosis toward the end of his career or even the first year after. (rx1, p75-76) Dr. Meyer agreed that there are studies that show autopsy as much as 50 percent of coal miners are found to have abnormalities of coal workers pneumoconiosis when they might not have been apparent radiographically during their life. (rx1, p88)

Medical records of Methodist Hospital

This is a pulmonary function report dated 10/4/2016.

Springfield Clinic records

Medical records of Springfield Clinic dated June 23, 2017. He has history of bronchitis. (rx1, p50) On an office note dated October 25, 2014, under chief complaint patient presents with headaches, sinus drainage, sore throat, productive cough x 4 days. Under subjective Dale is a 56 year old coal miner who presents to Prompt Care with complaints of a headache and sinus congestion and drainage, sore throat and cough, occasional productive colored sputum. He has had symptoms for about 4 days. … Dale has had a history of sinus infections in the past. (rx1, p108) Office note dated March 25, 2012, under subjective a 53 year old white male presents with sudden onset of illness a day and a half ago. He has had sore throat, headache, body aches. He has had cough productive of brown sputum. He has mild sinus congestion. He is not a smoker he does wok in a coalmine. (rx1, p156) An office note dated February 7, 2006, patient presents complaining of a purulent productive deep cough associated with a sore throat. (rx1,p186)

Updated Springfield Clinic records

Medical records of Springfield Clinic dated November 7, 2019, these medical records pertain to an esophagogastroduodenoscopy procedure that was done on May 13, 2019.

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), which was caused by his exposures as a coal miner. He worked as a coal miner for 33 years, all of which were underground. He is a lifelong never smoker of cigarettes. The Arbitrator found Petitioner to be a candid and credible witness.

At Petitioner's request, he was examined by Dr. Istanbouly on 8/30/16. Dr. Istanbouly reported that Petitioner coughs occasionally and intermittently, and that his cough is triggered by strenuous activity or walking. It is mild to moderate in intensity. It was formerly productive of mild, dark black sputum but recently had begun to clear up. Dr. Istanbouly reported that Petitioner denied significant exertional dyspnea, and is able to walk three miles without breathing problems. Petitioner wheezes occasionally and complains of a runny nose and postnasal drip, which is perennial rather than seasonal. Petitioner's spirometry was within the range of normal. Dr. Istanbouly reviewed Petitioner's chest x-ray, and found it to reveal mild interstitial changes bilaterally, consist with simple CWP. He reported that the same film was read as 1/0 by Dr. Smith. Dr. Istanbouly found that Petitioner's long-term coal dust exposure is a significant contributor to his current respiratory symptoms of intermittent and exertional-related cough, wheezing and occasional nocturnal dyspnea. From a medical standpoint, he advised Petitioner to avoid any further coal dust exposure to prevent progression of his pneumoconiosis. The Arbitrator assigns significant weight to Dr. Istanbouly's complete examination and conclusions.

Dr. Castle did not examine Petitioner, but performed a records review at the request of Respondent. The evidence reviewed consisted of medical records from the Springfield Clinic and evidence developed for this claim as well as the reports of Dr. Istanbouly, Dr. Meyer, and a diffusion capacity study performed at Methodist Hospital on 10/4/16 at Respondent's request. Dr. Castle also read Petitioner's chest x-ray of 5/2/16. The Arbitrator notes that the Springfield Clinic records apparently contained three radiographic studies; two chest x-rays from 1/25/94 and one from 4/22/04, and one CT scan of the abdomen and pelvis dated 8/6/14. While the x-rays from 1994 and 2004 were not apparently read by any expert witness, Petitioner continued to work as an underground coal miner for 21 years following the 1994 x-ray and 11 years following the 2004 x-ray. As such, they are given no weight in resolving the question of whether Petitioner suffered from CWP by 2017, within two years of his date of last exposure. It is not clear whether or not Dr. Castle reviewed the CT scan of the abdomen and pelvis of 2014; however, the Arbitrator notes that the report in the medical records indicates there were abnormalities in the lung bases. Neither Dr. Meyer nor Dr. Castle noted any abnormalities in the lower lungs; however, both Dr. Smith and Dr. Istanbouly did find abnormities which they assigned to CWP. The Arbitrator considers this significant in assigning greater weight to the readings of Dr. Smith and Dr. Istanbouly than to those of Dr. Meyer and Dr. Castle. In addition, while Dr. Castle did not find that Petitioner suffered from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust, he did report that Petitioner's 33 years of coal

mining was sufficient exposure to cause CWP in a susceptible host. He also confirmed that Petitioner is a lifelong never smoker.

Dr. Castle reported that Dr. Smith found minimal changes of p-type opacities in the middle and lower lung zones in a profusion of 1/0. He surmised that Dr. Smith's description of the CWP abnormalities meant that Dr. Smith also considered that the x-ray may be negative. He further confirmed that Dr. Meyer found no parenchymal abnormalities consistent with pneumoconiosis. The Arbitrator believes that a competent reader who finds an x-ray to be positive at the threshold level of 1/0 also considered the possibility that it might not be negative. The Arbitrator also believes that a competent reader who finds an x-ray to be negative would consider that it could possibly be positive before arriving at a final conclusion that it is negative. Such would only be prudent and thorough in making such determination of positive versus negative. Regarding the testimony or reporting of either Dr. Meyer or Dr. Castle that they disagree with contrary conclusions of other witnesses to be self-serving and unnecessary. The conflicting reports speak for themselves.

Dr. Castle also reported that Petitioner's pulmonary function testing was within the range of normal; however, the Arbitrator notes that it is the unrebutted testimony that with simple CWP, it is expected that the pulmonary function testing will be normal, as will the physical examination of the chest. It is also not necessary that there be respiratory complaints for there to be CWP.

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of treatment records and the other medical data developed by the parties for this claim. Dr. Castle, who performed the records review, has been retired for a number of years, and his practice consists of records reviews and depositions such as he did here. He did not examine, speak to, nor see Petitioner. In addition, Respondent sent Petitioner to Methodist Hospital in Kentucky for a diffusing capacity measurement on 3-24-16, but did not have any other pulmonary function testing administered. The Arbitrator considers the fact that Respondent limited the scope of the evidence it developed to be significant.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. He cited studies that show that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. And there are older studies that show a much higher incidence than that. The Arbitrator notes that Petitioner worked as an underground coal miner for 33 years. This qualifies him as a long-term coal miner. Based on the studies cited by Dr. Meyer, having no medical evidence at all, it could still be likely that Petitioner could have CWP. The Arbitrator is not speculating that Petitioner would be one of the miners found to have

CWP if an autopsy were taken at his death. However, this evidence regarding the nature of CWP and the likelihood of its existence is a significant fact to be considered along with the rest of the evidence regarding CWP, particularly since it was offered by Respondent's witness.

According to Dr. Meyer, it is possible for a miner to work 30 to 40 years in a mine, develop radiographically-significant CWP, but not have it manifest itself until the last year or even the first year after he leaves the mine. Further, when a miner has CWP that progresses, the rate of that progression could vary from miner to miner, as could the exact shape, size, and location of the macule. These things could also vary within an individual miner.

Dr. Meyer defined the difference between a positive x-ray and a negative x-ray when looking for CWP. He testified that if he has read an x-ray to be positive and the miner has a sufficient history of exposure to cause CWP, such would warrant a diagnosis of CWP; however, if he finds the x-ray to be negative, such could never rule out the possibility that the miner has CWP. Further, regarding the nature of pathologic CWP, he testified that the abnormalities found pathologically, which were not found radiographically, would have the same constitution as the macules or nodules that would be apparent on x-ray, just perhaps smaller. They would still be subject to potential progression as any other CWP abnormality might be. He added that not all miners have the same reaction to coal mine dust.

In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He compared it to prostate cancer or colon cancer: most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lungs of a miner can be as much as one-half the total weight of the lung itself. He said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle did not disagree with Dr. Meyer.

The Arbitrator notes that while none of the above-mentioned evidence may determine the outcome by themselves, each adds weight to Petitioner's case and is significant. In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. Petitioner has met his burden.

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court.

Issue (L): What is the nature and extent of the injury?

The Arbitrator finds Petitioner to be disabled to the extent of 6% MAW. In arriving at this conclusion, the following factors were taken into consideration:

(i) Impairment rating. Petitioner's pulmonary function testing was within the range of normal. As per the universal testimony, such does not rule out CWP. No weight is given to this factor.

(ii) Occupation of Injured Employee. The Arbitrator notes that coal mining involves daily exposure to coal mine dust, and that the unrebutted testimony of Petitioner was that he was also regularly exposed to silica dust. The clear preponderance of the evidence, as well as a ruling of the Appellate Court establish that when a miner has CWP, he has an impairment in the function of his lungs whether such can be measured or not. It also establishes that there is no safe level of coal mine exposure for a miner who has been diagnosed with CWP. Based on the evidence in this case, the coal mine environment contains many exposures in addition to just coal dust, which present a significant risk to the miner's pulmonary health. The Arbitrator finds this to be significant.

(iii) Petitioner's age. Petitioner was in his mid-50's when he ended his coal mine employment with Respondent. The Arbitrator considers it significant that he was not precluded from further coal mine work because of his age.

(iv) Petitioner's future earning capacity. Petitioner's determination to end his coal mine employment has caused a reduction of his earning capacity. By the universal testimony, a miner with CWP is medically precluded from further coal mine work, and such was the only type work Petitioner engaged in since his early 20's. The Arbitrator finds this to be significant.

(v) Evidence of disability. The Arbitrator concludes that Petitioner's CWP provides sufficient evidence of disability to result in the award of 6% person as a whole as described above.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Ratfield,

Petitioner,

21IWCC0156

vs.

NO. 17WC002176

Ventra Plastics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical, permanent disability, temporary disability being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2021

Stephen J. Mathis

Thomas Tyrrell

SJM/sj
o-3/3/21
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0156

RATFIELD, JERRY
Employee/Petitioner

Case# **17WC002176**

VENTRA PLASTICS
Employer/Respondent

On 6/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0522 THOMAS MAMER & HAUGHEY LLP
ERIC CHOVANEC
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

21IWCC0156

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD
Employee/Petitioner

v.

VENTRA PLASTICS
Employer/Respondent

Case # **17** WC **2176**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **1/14/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

21IWCC0156

FINDINGS

On **2/2/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,968.00**; the average weekly wage was $**634.00**.

On the date of accident, Petitioner was **57** years of age, ***single*** with dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act. Respondent is entitled to credit for all bills paid by its group health care plan.

ORDER

Arbitrator finds that Petitioner did not sustain and accident that arose out of the course of his employment for the Respondent. All compensation is hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Jason C. Myatt

Signature of Arbitrator

6/10/19
Date

JUN 14 2019

STATE OF ILLINOIS)
)ss
COUNTY OF WINNEBAGO)

21IWCC0156

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD, Employee/Petitioner)
)
v.)
)
VENTRA PLASTICS, Employer/Respondent)

Case # 17-WC-2176

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified he began working for Respondent in 2012, having worked there for approximately 4-5 years as a full-time material handler and forklift driver, working 10-15 hours a day, 4 days a week. He testified his duties included operating a standing forklift, pulling boxes of parts from bins in the stock room and transporting the boxed parts to the assembly line. The parts were for the assembly of bumpers and cars for Chrysler. Petitioner testified he loaded the boxes onto a pallet, transported them to the assembly line and then removed the boxes from the pallet on the forklift and placed them into racks on the assembly line. The boxes weighed about 60 pounds. On the assembly line, the materials were placed waist height or slightly higher than waist height. He testified that he did that all day long as the assembly line constantly needed more material to continue. (Trans. 6-9)

Petitioner's application for adjustment of claim alleges a work accident that took place on 2/2/2016. Petitioner testified that at some point he started having problems doing his job. He woke up one morning with a sore back and he don't know what had happened. He didn't remember the exact date. (Id.,12).

Petitioner was asked by his attorney, "Were you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id., 14).

Petitioner testified that he went to work and talked to his supervisor, Jason Funkman, about it and was told to try to work through the day. He continued working that day, then had two days off work, and sought treatment the day after his days off.

Petitioner testified he did have some back treatment prior to 2016. In 2013, he had undergone physical therapy and returned to work without restrictions as of May 2013. Petitioner testified that he did not experience any back problems between May of 2013 when he returned to work without restrictions and February of 2016. He was able to do his regular job, on a full-time basis, without pain or limitations.

On 2/6/16, Petitioner presented to his primary care provider, Dr. Shobha Iyengar, who noted a history of pain in the right lateral lower back and right anterior area groin area for the last 2 weeks. The doctor further noted Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night". (PX.1, p. 22). Dr. Iyengar referred Petitioner to Dr. Borchard. (Id.).

On 2/16/16, Dr. Iyengar noted Petitioner's complaints of persistent lower back pain. X-ray was significant for wedge compression deformity and osteopenia in L4 with and L5 S1 lumbar disc changes and facet arthritis.

(Id., p. 20). Dr. Iyengar noted she would try to obtain MRI results from "a few years ago" . (Id.) . Petitioner was referred to Dr. Borchard. (Id.)

On 3/23/16 Petitioner presented to Dr. Robin Borchard at OrthoIllinois with a history of back pain since around January of 2016. (PX.2) Additionally, the doctor noted Petitioner has had lower back pain for the last couple of years. Dr. Borchard reviewed a 2013 MRI and recommended Petitioner obtain further imaging. (*Id.).*

On 3/30/2016 Petitioner presented for MRI which was reviewed by Dr. Borchardt on 4/6, 2016 at which time the doctor noted a large disk herniation at L4-5 that was a "new finding" not present on the 2013 MRI. (Px. 2)

Dr. Borchard recommended an epidural steroid injection which Petitioner underwent approximately a week a later. (*Id.).* Petitioner returned to see Dr. Borchard on 4/20/16 reporting that although his pain level had improved, he was still experiencing symptoms. (*Id.).* At this point, Petitioner was working without restrictions. Petitioner underwent one additional epidural steroid injection on 6/1/2016. (*Id.).*

On 8/9/16 Dr. Richard Broderick at OthoIllinois noted Petitioner presented with a history of low back pain beginning in 2/16. Petitioner reported low back, bilateral radiating pain aggravated by any movement. He was taking Gabapentin, Mobic/Meloxicam, and Norco. (Id.).

Dr. Broderick reviewed lumbar MRI from 2013, noting herniated nucleus pulposus ("HNP") right L/5 S1 with degenerative disc disease ("DDD") at L4/5. (Id., 144). The doctor compared the 2013 MRI to one taken on 3/30/2016 noting, a large herniation at L4/5 with central stenosis. (Id., p. 145). Regarding the mechanism of injury, the doctor noted "unknown". It was noted Petitioner was still working without restrictions for Respondent and had undergone 2 injections by Dr. Mackenzie, the last injection had improved his pain according to the medical records. (*Id.).* Dr. Broderick recommended a trial of physical therapy ("PT") noting Petitioner's past PT had been very effective. (Id). If PT proved to be ineffective surgery would be considered. (Id.).

On 8/18/16, Petitioner presented for initial evaluation at Belvidere Physical Therapy with Tim Seppelt PT, DPT, who noted a history of low back pain beginning in February of 2016. (PX 2, p. 184) Petitioner reported being a "stand up forklift driver at Ventra Plastics in Belvedere, IL." The therapist further noted Petitioner "is required to stand for 2 hours at a time without a rest break. His work duties include lifting 10-20# from floor to waist frequently and pushing/pulling 40-50 pounds occasionally." (Id.). Petitioner reportedly could not perform his work duties without pain. He noted 5/10 resting low back pain although at the end of his work shift, his pain increased to 8/10. (Id.). Petitioner reported his pain was aggravated by standing, walking, ascending stairs, and work activities." (Id.). Petitioner reportedly was unable to stand or walk for more than 15 minutes without pain. A one month, three times per week PT plan was proposed. (Id.).

On 10/4/16, Dr. Broderick again reviewed MRI imaging of Petitioner's lumbar back noting "a large central herniated disc with superior extrusion at the L4-5 level causing sever central stenosis and bilateral lateral recess stenosis." (Id., p. 139). Dr. Broderick recommended a microscectomy left L4/5, "possibly bilateral". (Id.).

Following some additional conservative treatment, Petitioner underwent surgery consisting of right L4-5 hemilaminotomy, microdiscectomy, and foramenotomy on 10/20/2016. (Px. 2). Petitioner ceased working for Respondent as of the date of surgery. Petitioner testified that the surgery did decrease his pain, but did not resolve it. He underwent physical therapy postoperatively from 12/20/2016 through 12/30/2016. On December 28, 2016, it was noted he had slipped going up the steps and was experiencing left hip pain. (Px. 2). He went to the emergency room on January 2, 2017 due to low back and left leg symptoms after slipping and catching himself on the railing of the stairs. (Px. 4). Dr. Broderick recommended additional injections on January 18, 2017 due to Petitioner's ongoing symptoms, which were provided on January 24, 2017, February 7, 2017, and February 14, 2017. (Px. 2). Due to ongoing symptoms, another surgery was recommended. (Px. 2).

On March 16, 2017, Petitioner underwent a lumbar fusion from L4-S1. (Px. 2). Petitioner testified that the fusion relieved some of the numbness in his leg. Physical therapy was started on June 9, 2017 and performed through July 21, 2017. On September 19, 2017, Dr. Broderick recommended a Functional Capacity Evaluation to assess his ability to return to work. (Px. 2).

On 10/16/2017 Petitioner saw Dr. Broderick reporting pain and numbness. Petitioner noted a history of being on the floor "cleaning some tile on his hands and knees and had difficulty getting back up." (*Id.)*.

On 10/19/17 Petitioner saw Dr. Broderick who told him to follow up in approximately 6 months. (*Id.)*. On 4/3/2018 Dr. Broderick noted Petitioner was ambulating without difficulty. An x-ray showed a stable fusion. (*Id.)*. Petitioner was told to return in one year. No discussion of work restrictions are contained in this note. (*Id.)*.

Petitioner consulted with Dr. Jeffrey Coe, board certified in occupational medicine who rendered an expert opinion in this case. Dr. Coe is a Pediatrician and practices occupational medicine. Petitioner saw Dr. Coe on 10/10/2017. (PX.5) It was Dr. Coe's opinion that a causal relationship existed between Petitioner's repetitive work activities and his current lower back and lower extremity symptoms. Dr. Coe noted the repetitive strain injuries were a factor aggravating or accelerating pre-existent degenerative disc disease and degenerative arthritis and causing break down of the L4-5 disc. (*Id.)*. It was Dr. Coe's understanding that Petitioner was a forklift operator who used a forklift described as poorly sprung. (*Id.)*. Petitioner reported he frequently lifted weights of 50 pounds or more and occasionally lifted 100- pound weights while working for Ventra Plastics. Petitioner noted his job was fast paced and required twisting and bending. (*Id.)*.

Dr. Coe agreed that it was a possibility that Petitioner's back condition may have simply progressed to this point as a result of age and not in connection to his work for Respondent. (*Id.)*.

Respondent sent Petitioner to Dr. Carl Graf for an Independent Medical Examination on June 13, 2018 and he testified via deposition on October 15, 2018. (RX. 1) Dr. Graf is a board certified Orthopedic Spinal Surgeon.

Dr. Graf noted Petitioner claimed a single traumatic accident on February 2, 2016 when he was moving some empty totes by hand, indicating they had to be done in order to get them for the standup forklift. Petitioner noted that he twisted and felt a stabbing pain in the low back on that date. Petitioner denied any previous back pain to Dr. Graf. (*Id.)*.

It was Dr. Graf's opinion that Petitioner's current condition of ill-being was not causally related to his alleged work accident. Dr. Graf opined that while Petitioner claimed and described a specific injury to him, the medical records did not reflect that specific injury. (*Id.)*. Dr. Graf stated that until Dr. Coe's independent medical examination, there was no comment regarding a work-related injury in any of the medical records. In addition, Dr. Graf opined that further there was no evidence of a repetitive injury, according to the medical records, and no scientific basis for any repetitive type injury causing this lumbar disk herniation. Dr. Graf stated that, regardless of causation, he believed Petitioner was at MMI as he had essentially been released by his treating physicians and wasn't undergoing any care at that time. Lastly, Dr. Graf stated that based upon his physical examination, he believed Petitioner could return to work with no restrictions. (*Id.)*.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner has failed to sustain his burden with respect to the issues of accident and causal connection.

According to Petitioner's application for adjustment of claim. He is alleging a work accident that took place on 2/2/2016. During his testimony Petitioner's description regarding his injury was extremely brief:

Q. At some point you started having problems doing the job?
A. Yes.
Q. What kind of problems were you having?
A. I woke up in the morning, and my back was really sore, and I don't know what had happened.
Q. Do you recall around when that was?
A. No, I don't remember the exact date. (Trans.12).

Additionally, he testified that he wasn't having any problems doing his actual job. (*Id.).* Petitioner was asked by his attorney, "[W]ere you having any problems doing your actual job?" to which he replied "No". (Id.,13-14).

Petitioner was also asked by his attorney "[W]ere you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id.,14). That is all the information Petitioner provided during his testimony to support his alleged claim.

Petitioner gave the Arbitrator insufficient information during his testimony as to what caused his back condition.

Dr. Iyengar's records from the alleged accident date, 2/6/2016 note a history of right lower back and groin pain for 2 weeks. It was noted that Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night", however, Petitioner does not report he believes his pain was caused by his work duties. (PX1

A careful review of Petitioner's medical records shows that Petitioner routinely denied any known injury. Every report from Dr. Borchard and Dr. Broderick state that Petitioner's pain began in January or February of 2016 with no known injury. (PX2,3)

Contrary to the history reported in his treating medical records, Petitioner told Respondent's IME doctor that he did have a specific and concrete accident on February 2, 2016 which is the alleged accident date from Petitioner's Application for Adjustment of Claim. (RX1) This statement to Dr. Graf puts Petitioner's testimony in doubt as he told two different stories about how his back condition and its relation to work. During this visit, Dr. Graf notes Petitioner denied that he had experienced a previous back condition which was clearly false based upon his treatment with Dr. Borchardt prior to the accident. (RX3)

During all of Petitioner's treatment, including two different surgeries over the course of two and half years, he repeatedly denies any work injury which is documented in note after note. Petitioner doesn't obtain a causal opinion from either of his treating doctors and instead, consults Dr. Coe, a pediatrician and occupational medicine doctor. He then sees Dr. Graf at the request of the Respondent and reports a specific injury on the alleged accident date.

While Petitioner described the duties of his job, he gave the Arbitrator scant information as to how those duties bothered his back or whether anything he did at work actually gave him discomfort while he was working. Petitioner testified that he woke up in the morning and his back was sore and he had no idea of when that happened. (*Id.).*

The evidence contained in the record with respect to an alleged accident is inconsistent and unreliable. The Arbitrator finds Petitioner has failed to sustain his burden with respect to this issue.

Assuming Petitioner did prevail on the issue of accident, the Arbitrator would find that he failed to prove his current condition of ill-being was causally related to his alleged work injury, adopting the opinion of Dr. Graf.

In conclusion, all claims for compensation are denied based upon both a failure to prove a compensable accident and failure to prove his current condition was causally related to the alleged accident.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the arbitrator's decision issue J. is herby denied.

K. Is Petitioner entitled to any prospective medical care?

Based upon the arbitrator's decision issue K. is hereby denied.

L. What temporary benefits are in dispute?

Based upon the arbitrator's decision issue L. is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IVETTE PEREZ RODRIGUEZ,

Petitioner,

21IWCC0157

vs.

NO: 18 WC 17917 18 WC 17792

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitioner for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

On June 10, 2018 Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right hand and thumb with a manifestation date of April 16, 2018. On June 15, 2018 Petitioner filed an application for benefits asserting that she sustained injury to her left thumb on November 13, 2017 that occurred while carrying GPS equipment. The matters were consolidated for trial.

Petitioner had been employed by IDOT as a land surveyor for 18 eighteen years and is 53 years of age. She testified that in her work she utilizes a device known as a controller. This is a GPS device attached to a pole which combine to weigh 10-15 lbs. and is carried from one

21IWCC0157

location to another over the course of her workday. Petitioner uses both hands to type and rotates her wrists continually while recording data which measure roads, buildings, sidewalks and trees on the controller.

On November 13, 2017 Petitioner consulted Dr. Michael Birman for symptoms of numbness, tingling and pain in both hands. Dr. Birman diagnosed Petitioner with left carpal tunnel syndrome, trigger finger in the left thumb and right de Quervain's tenosynovitis. Dr. Birman administered a steroid injection in Petitioner's left thumb.

Petitioner returned to Dr. Birman in follow up on December 20, 2017 at which time a recommendation was made for surgery on Petitioner's left hand. On April 16, 2018 Petitioner underwent a bilateral EMG of the upper extremities which revealed moderate to severe bilateral median neuropathies at the wrist. The left wrist was more symptomatic. Petitioner elected to proceed with surgery. Throughout this time Petitioner continued to work full duty.

On May 1, 2018 Dr. Birman performed a left carpal tunnel release and left trigger finger release. Post-operatively Petitioner had work restrictions which included no forceful grip and no lifting, pushing or pulling. On June 12, 2018 Petitioner had surgery on her right hand which included trigger thumb release, carpal tunnel release, and first extensor tunnel release. Petitioner was off work and undergoing occupational therapy. She returned to full-duty work on August 27, 2018 and was discharged from care by Dr. Birman in September 2018.

Petitioner testified that she continues to experience occasional numbness and pain in both thumbs which she treats with Tylenol. She also experiences a loss of hand strength overall which is more pronounced on the right.

Dr. Birman, Petitioner's treating physician authored a report on August 5, 2019 which was received in evidence (PX4) which expressed the opinion that her described work activities "could have" aggravated the condition in her hands. He notes that an EMG performed on April 16, 2018 which was diagnostic for bilateral carpal tunnel syndrome. He additionally diagnosed right and left trigger thumbs, right de Quervain's tenosynovitis, and right and left thumb carpometacarpal joint arthritis.

In his report Dr. Birman comments that Petitioner's description of her work activities which include forceful and sustained use of her thumbs could be aggravating factors in her symptomatology. Petitioner's testimony at hearing describes work activities that would support causal connection.

Respondent retained Dr. Andrew Zelby as a Section 12 expert who examined Petitioner on May 22, 2019. Dr. Zelby characterized the EMG study as "equivocal" and did not believe that her subjective complaints could be ascribed to any kind of neurological condition of her neck or upper extremities. He maintained that Petitioner had undergone bilateral carpal tunnel releases

21IWCC0157

and had "essentially normal motor and sensory exams of both hands" and failed to demonstrate causal connection. The Commission finds it notable that Dr. Zelby did not offer any opinion concerning Petitioner's de Quervain's tenosynovitis or trigger fingers.

The Arbitrator denied Petitioner's claims on both hands finding that the medical opinion on causal connection stated by Dr. Birman was equivocal and ambiguous. He found the opinions expressed by Dr. Zelby to be persuasive. The Commission views the evidence differently and finds that the causation opinion expressed by Dr. Birman concerning Petitioner's condition of ill-being in her right and left thumbs supports the claim. Petitioner has met her burden of proof and the Commission hereby reverses the Arbitrator's Decision on the causal connection concerning injury to Petitioner's thumbs and affirms all else.

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as he considered the issue of nature and extent moot. The Commission having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner 30% loss of the use of the right thumb and 30% loss of the use of the left thumb.

(i) Impairment rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of the Injured Employee:
(iii) Petitioner's Age:
(iv) Petitioner's Future Earning Capacity:
(v) Evidence of Disability:

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards 30% loss of the use of the right thumb and 30% loss of the use of the left thumb for Petitioner's bilateral hand condition.

For the foregoing reasons the Commission reverses the Decision of the Arbitrator filed on January 28, 2020 in claim numbers 18 WC 17792 and 18 WC 17917 with regard to the condition of ill being in Petitioner's right and left thumbs and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is reversed in part for the reasons stated above, as to the causal

21IWCC0157

connection of the condition of ill-being in Petitioner's right and left thumbs and is affirmed in all else.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 17 weeks, commencing May 1, 2018 through August 27, 2018, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses detailed in Petitioner's Exhibits 1 & 2, namely the bill from Alexian Brothers Medical Center totaling $11,685.43, and Hand to Shoulder Medical Associates totaling $4,696.00, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for amounts paid on behalf of Petitioner on account of said accidental injuries under its group health plan pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8 (e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the right thumb. Respondent shall also pay Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the left thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

DATED: APR 6 - 2021
SJM/msb
D: 2-26-21
44

Stephen J. Mathis
Stephen Mathis

Marc Parker
Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs. NO: 12 WC 25446

Elgin Police Department and
City of Elgin,

21IWCC0158

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0158

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **12WC025446**
15WC021342

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0158

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0158

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **12** WC **25446**

Consolidated cases: **15 WC 21342**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **December 17, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,516.20**; the average weekly wage was $**1,586.85**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BLOOD ON DECEMBER 17, 2011, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 – 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 15 WC 21342 (DOA: August 12, 2012). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Rick Demierre testified that he has worked for Respondent Elgin Police Department for 18 years. He is currently a sergeant and supervisor of the Community Initiative Division which coordinates community events for officers to attend.

On December 17, 2011, he was working as a patrol police officer in the gang crime unit. He was wearing plain clothes. He and three other officers responded to a male subject with a weapon on E. Chicago Street. The subject was in the middle of the roadway, covered in blood, and pretty much naked. The subject was aggressive and resisted arrest. The officers took him to the ground as he struggled for several minutes. Petitioner was exposed to a significant amount of blood on his hands, arms, and legs while restraining the subject. Petitioner had no open cuts or sores. Petitioner completed an employee's injury report stating he was exposed to a large amount of blood on his legs and hands. The subject's name was Marvin Finklea (PX 2). Petitioner testified that the subject died about a week after December 17, 2011. Petitioner did not know if Respondent tested him for HIV or Hepatitis. Respondent completed an exposure report documenting a December 17, 2017 exposure to blood on intact skin. Petitioner was wearing leather gloves and blue jeans as protective barriers. He removed the leather gloves and blue jeans, and placed them in a bio hazard bag at the police department jail (PX 3).

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). He reported that he was involved with an individual who was extremely bloody. He was wearing gloves at that time, but he got some blood on his pants and on his wrist areas just proximal to the gloves. He had no open areas at the time. He had no symptoms since the exposure. Physical examination noted no physical findings. The handwritten exam notes small healing abrasions on his wrists which were not there when exposed. The impression was body fluid exposure 15 days ago. Blood was drawn for testing for hepatitis B, C, and HIV. Petitioner could continue with regular work. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination. Petitioner testified he believes he was vaccinated for Hepatitis B. He does not recall if he had or was vaccinated for Hepatitis A.

Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner testified that he had an additional exposure to the saliva of an infant, as more fully detailed in the decision in the consolidated case 15 WC 21342 decided in conjunction with this matter.

Petitioner underwent additional blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner

appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr. John J. Koehler, performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on December 17, 2011 when he was required to restrain a subject. Petitioner admits he suffered no physical injury in doing so, but came in contact with the subject's blood. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to blood from the subject on December 17, 2011. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. Petitioner presented no evidence that the subject tested positive for a blood borne disease such as HIV or Hepatitis. He does not know if the subject had an infectious disease.

Petitioner's blood tests performed at Sherman Health on January 11, 2012, February 6, 2012, August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding

Hepatitis C testing. Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the blood exposure on December 17, 2011. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of December 17, 2011.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), our supreme court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related incident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any documented exposure and the negative blood testing, the

Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to blood on December 17, 2011.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the December 17, 2011 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs.

NO: 15 WC 21342

21IWCC0159

Elgin Police Department and
City of Elgin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0159

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **15WC021342**

12WC025446

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

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If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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STATE OF ILLINOIS)
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- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **15** WC **21342**

Consolidated cases: **12 WC 25446**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **August 12, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**84,149.99**; the average weekly wage was $**1,618.25**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BODILY FLUIDS ON AUGUST 12, 2012, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 - 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 12 WC 25446 (DOA: December 17, 2011). A single transcript was prepared although the Arbitrator is entering separate decisions.

is currently a sergeant and supervisor of the Community Initiative Division which coordinated community events for officers to attend.

On December 17, 2011, Petitioner was involved in an incident that resulted in exposure to blood as more fully described in the decision in the consolidated case 12 WC 25446 decided in conjunction with this matter.

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). Blood was drawn for testing for Hepatitis B, C, and HIV. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner had an additional exposure as an initial responder for an infant in cardiopulmonary arrest. He initiated CPR before the paramedics came. He was an emergency medical technician and CPR EEG instructor licensed in the State of Illinois. He opened the infant's mouth with his hands to check for an impeding airway and for resuscitation. His fingers were exposed to the infant's saliva. He was not exposed to the infant's blood. He performed chest compressions. The postmortem autopsy for the infant was positive for HIV and Hepatitis A (PX 4, PX 5, RX 20). The Petitioner testified that Respondent contacted him and advised him to undergo blood testing because the infant had diseases. Petitioner did not know if the infant had HIV.

Petitioner was seen at Sherman Health on August 21, 2012. He had no fevers, chills, sweating, weaknesses, fatigue. He had no recent illnesses, sore throat, chest pain, shortness of breath, cough, abdominal pain, nausea, vomiting. He had no jaundice or scleral icterus. He had no loose stools, numbness, tingling, or focal weakness. His physical exam revealed a well-developed, nourished male, in no acute distress. His skin was without any lesions and he had no rashes or ulcers. The assessment was bodily fluid exposure. The doctor ordered tests for Hepatitis C and B, and HIV 1 and 2. Petitioner was returned to work without restrictions. Petitioner underwent blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months.

Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr John J. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on August 12, 2012 when he initiated CPR and opened the infant's mouth with his hands to check for an impeding airway and for resuscitation, exposing his fingers to the infant's saliva. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to the infant's saliva on August 12, 2012. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. While the infant did test positive for HIV, Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. Petitioner's blood tests performed at Sherman Health on August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3--4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing. Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed Petitioner to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the fluid exposure on August 12, 2012. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of August 12, 2012.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), the Supreme Court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related accident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any likely exposure and the Petitioner's negative blood testing, the Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to bodily fluids on August 12, 2012.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the August 12, 2012 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYLVIA MORALES,

Petitioner,

vs. NO: 12 WC 37862

STAFFMARK,

Respondent.

21IWCC0160

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, medical, temporary total disability, permanent partial disability, penalties and fees and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed March 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back, and right elbow. All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she also proved, in part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner failed to establish her condition of ill-being after January 2013 is causally related to work incident. Further medical benefits and TTD benefits are denied.

21IWCC0160

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 5% loss of use of the person-as-a-whole..

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties and attorney's fees is denied. The Commission finds no basis to award any attorney's fees to the Vrydolyak Law Group.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury including a credit of $3,960.00 for temporary total disability benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 1.19.21

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Stephen Mathis

Thomas J. Tyrrell

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on January 19, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

21IWCC0160

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MORALES, SILVIA
Employee/Petitioner

Case# **12WC037862**

STAFFMARK
Employer/Respondent

21IWCC0160

On 3/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
30 N LASALLE ST SUITE 1750
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
LILIA Y PICAZO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21IWCC0160

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
****CORRECTED****
ARBITRATION DECISION

SYLVIA MORALES
Employee/Petitioner

v.

STAFFMARK
Employer/Respondent

Case # **12** WC **37862**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JANUARY 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other: **Former attorney's fee petition**

FINDINGS:

On **OCTOBER 9, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**18,720.00**; the average weekly wage was $**360.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**3,960.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**11,019.89** for other benefits, for a total credit of $**14,979.89**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER:

ACCIDENT/CAUSATION:
Based upon the evidence considered in its entirely in this matter, the Arbitrator finds Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back and right elbow because All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

ACCIDENT/CAUSATION: MID-BACK
Petitioner has proven by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she has also proven in-part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner has failed to establish her condition of ill-being after January 2013 is causally related to the work incident. Further medical benefits and TTD benefits are denied.

Respondent shall pay Petitioner the sum of **$220.00 per week** for a further period of **25 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a **5% loss of use of the person-as-a-whole**.

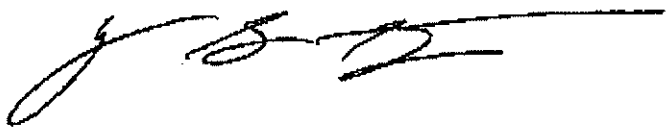
Respondent is entitled to a credit of $3,960.00 for TTD benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Petitioner's claim for penalties and attorney's fees is denied.

The Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

March 13, 2019
Date

MAR 14 2019

SILVIA MORALES v. STAFFMARK

12 WC 37862

****CORRECTED DECISION****

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on January 29, 2019. The issues in dispute were accident, causal connection, medical bills, TTD, penalties and attorney's fees, attorney's fees for the Petitioner's former attorney, and the nature and extent of the injury, if any. Arbitrator's Exhibit 1. The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. Arbitrator's Exhibit (*hereinafter*, AX) 1.

FINDINGS OF FACT

Petitioner testified she began working for Staffmark on August 25, 2012. Tx at 15. Petitioner first started working as a trimmer and later worked in quality control. Id. at 15-16. Petitioner testified she was required to pull a cart with uniform-filled boxes and place it near a desk. Id. She then would place the boxes on a desk. Id. Petitioner testified the heaviest box she would lift on her own weighed between 30-35 pounds. Id. at 17. Petitioner testified the carts were heavy and taller than her. Id. at 17-18.

On October 9, 2012, Petitioner testified she was getting ready to take her break and leave her cart between two desks when a co-worker threw her cart to make it go in place. Id. at 20. Petitioner testified the cart came back and she felt impact in her back. Id. She testified the cart was empty. Petitioner testified she was not able to breathe but managed to grab onto a desk. Id. at 21, 23. Petitioner testified she felt pain throughout her back. Id. at 25. She was transported to the company clinic and MacNeal Hospital by taxi. Id. at 25-26.

The medical records indicate Petitioner was seen at MacNeal Hospital on October 10, 2012. An interpreter was present, and a good history was taken from Petitioner. She stated she was bumped in the back with a metal cart. She complained of generalized midback pain as well midback pain upon moving her left shoulder. She reported the cart did not touch her shoulder. She did not fall, hit her head or lose consciousness. She denied numbness and tingling

throughout her body, headaches and neck pain. X-rays taken of the lumbar and thoracic spine revealed very mild degenerative changes. X-rays of the left shoulder revealed unremarkable findings. Petitioner was diagnosed with a backache and contusion of the back. She was prescribed hydrocodone. PX 3.

On October 11, 2012, Petitioner presented to Rehab Dynamix by referral from MedLegal. Tx. at 30. She was seen by chiropractor Krysten Kuk. Petitioner reported she was struck in her back by a heavy metal cart weighing 300 pounds and approximately five feet tall and three feet wide. Petitioner testified she reported pain in her entire back. Tx. at 30 She complained of mid back pain, low back pain without radiation, and left shoulder pain. On a symptom survey sheet, Petitioner checked approximately 50 of the 76 symptom boxes listed on the survey, stating she was also feeling nervous, irritable, depressed, fatigued, and generally run down. She was diagnosed with lumbar intervertebral disc syndrome without radiation, thoracic strain, internal derangement of the left shoulder, and muscle spasms. PX 2.

On October 18, 2012, Petitioner presented to Dr. Paul Marsiglia of Chicago Pain and Orthopedic Institute. Petitioner reported she was pushing a cart full of uniforms with a height of 6ft and boxes of 50 pounds each when she noticed she was struck from behind by another cart being pushed by another employee. Petitioner stated she was almost sandwiched in between the two carts and noticed immediate back pain. She did not report falling forward or hitting a table. She reported she was undergoing physical therapy, but she was unsure if she made any significant gains. She complained of pain in the cervical, thoracic and lumbar spine with radiation down the left lower extremity over the left lateral calf. Straight leg raise was positive bilaterally. No significant radicular components were noted. She was diagnosed with cervicalgia, lumbar radiculopathy, and myofascial pain syndrome. A lumbar MRI was recommended, and continued physical therapy was prescribed. PX 5.

Petitioner continued to undergo treatment with Rehab Dynamix. She reported consistent improvement with exercises. On November 8, 2012, Petitioner stated she temporarily discontinued therapy due to personal issues. She stated she was seen in the hospital where she was worked up and discharged with unremarkable findings.

On November 8, 2012, Petitioner returned to MacNeal Hospital complaining of back and neck pain. Pain was rated 1 out of 10. She testified she was transported by ambulance due to her panic attacks. Tx. at 33. Her son served as an interpreter. The report indicates a good history was obtained from Petitioner. Petitioner gave a history of left-sided neck pain from a prior work accident where a box fell on her back. Petitioner denied the statement at trial. Tx. at 35. On exam, Petitioner denied significant complaints of low back pain. She denied symptoms of radicular numbness in the lower and upper extremities. X-rays taken of the cervical spine revealed normal findings. Petitioner was diagnosed with a trapezius strain and torticollis. PX 3.

She testified she was given a pill which made her feel out of this world and was discharged for the day. Tx. at 35.

On November 12, 2012, Petitioner underwent an MRI of the lumbar spine. The radiologist discerned diffuse lumbar spondylosis and multilevel degenerative disc disease along with a small focal superimposed left lateral recess disc protrusion at L5-S1. PX 8.

On November 16, 2012, Petitioner underwent an MRI of the left shoulder. The radiologist discerned a full thickness tear involving the supraspinatus insertion, a one-centimeter ganglion cyst adjacent to the superior aspect of the distal clavicle and acromioclavicular joint, mild subacromial/subdeltoid bursitis, and diffuse osteoarthritic changes.

On November 19, 2012, Petitioner presented to Dr. Jain. She reported worsening pain. She complained of severe left-sided neck pain extending into the left upper extremity with numbness and tingling along the left upper extremity. She also complained of pain down the thoracic and lumbar spine with radiation and paresthesias into the left lower extremity. She reported ongoing panic attacked requiring a recent trip to the emergency room where she was diagnosed with benign positional vertigo. Dr. Jain diagnosed cervical facet syndrome, lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. A left L5-S1 facet injection and cervical MRI was recommended. Petitioner was prescribed Prozac for her anxiety, and tramadol. PX 5. Then, on November 24, 2012, Petitioner underwent an MRI of the cervical spine. The radiologist discerned disc bulges at C3-5 and left foraminal narrowing along with bulges at C5-T1. PX 8.

On November 26, 2012, Petitioner returned to Rehab Dynamix. She reported 40% improvement with overall activities. On December 4, 2012, the chiropractor indicated continued improvement overall. Petitioner was able to handle new exercises. Petitioner reported she was recommended shoulder surgery. On December 19, Petitioner reported a palpable mass along the lower ribs on the left. X-rays findings were unremarkable. On January 7, 2013, Petitioner reported pain over the weekend due household chores such as washing and sweeping. On January 30, Petitioner reported 50% improvement with exercises. She was discharged from care pending left shoulder surgery. PX 2.

On December 3, 2012, Petitioner presented to Dr. Steven Sclamberg. She reported she was struck in the back, left side, and left shoulder by a metal pallet while at work on October 9, 2012. She complained of pain in her shoulder radiating down her deltoid without numbness or tingling. On exam, she exhibited mild lateral deltoid tenderness. Left shoulder was negative for SC clavicular or AC tenderness. She was able to forward flex with extension to 140 degrees.

Passive range of motion was near full. Dr. Sclamberg noted a left full-thickness supraspinatus tear. PX 5.

On December 7, 2012, Petitioner underwent an x-ray of the left shoulder which revealed unremarkable findings. PX 8. Petitioner then returned to Dr. Sclamberg and Dr. Jain from December 10, 2012 to February 13, 2013. Petitioner complained of ongoing left lumbar and leg pain, neck pain and left upper extremity pain. On February 13, 2013, she complained of new onset of right chest wall pain with spasms in her neck. Her diagnosis remained unchanged. Cervical and lumbar injections were recommended along with continued physical therapy. PX 5.

A Section 12 examination with Dr. Zelby was scheduled for December 19, 2012. Petitioner failed to attend the appointment. RX 10.

On March 1, 2013, Petitioner underwent arthroscopic left shoulder rotator cuff repair, subacromial decompression, and synovectomy with debridement. PX 5 and 6. Subsequently, on March 20, 2013, Petitioner returned to Rehab Dynamix for post-surgical chiropractic care. On April 9, Petitioner stated she was in a lot of pain due to activities performed over the weekend. On April 11, Petitioner was seen by Alix Crone, DC. She reported severe pain was causing extreme anxiety. Alix Crone noted psychosomatic manifestations of pain. On May 8, 2013, active flexion of the left shoulder was 150 degrees. On June 3, 2013, abduction was at 160 degrees. PX 2.

Petitioner also continued to undergo treatment with Dr. Jain and Dr. Sclamberg. Petitioner complained of worsening pain, dizziness and shortness of breath to Dr. Jain. She was continuously recommended cervical and lumbar epidural injections and to follow-up with her primary care physician. She reported improved pain in her left shoulder to Dr. Sclamberg. Exams revealed good range of motion and she was able to walk with ease. On May 13, 2013, Petitioner began complaining of right shoulder mild motion restriction. On June 21, 2013, Petitioner complained of significant pain in the right shoulder and down the deltoid. On exam she exhibited positive impingement signs on the right. Dr. Sclamberg diagnosed right shoulder impingement syndrome and gave her an injection. PX 5.

On May 31, 2013, Petitioner saw Dr. Axel Vargas. She complained of cervical axial pain, low back pain, and bilateral upper extremity and lower radicular pain. On exam, Petitioner walked with a limp favoring her left lower extremity. Dr. Vargas diagnosed cervical discogenic radiculopathy, cervical facet syndrome, lumbar discogenic radiculopathy, lumbar discogenic pain syndrome, lumbar facet syndrome, and right shoulder derangement. On June 28, 2013, Dr. Vargas reviewed and disagreed with IME opinions of Dr. Zelby. PX 5.

Petitioner continued chiropractic care at Rehab Dynamix from June 4, 2013 to July 3, 2013. Petitioner reported continued improvement of left shoulder symptoms. She did not

complain of right shoulder symptoms. On July 3, 2013, Petitioner reported 60% improvement. She was released to Dr. Sclamberg. PX 2.

On July 23, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6. Petitioner then continued treatment with Dr. Vargas and Dr. Sclamberg. On August 5, 2013, Petitioner stated both her left and right shoulders were improving. On August 9, 2013, Petitioner reported improvement following the previous injection, but she continued to complain of distal lower back pain with intermittent left-sided L5-S1 radiculopathy, neck pain, upper extremity radiculopathy, and right shoulder pain. PX 5. Thereafter, on August 27, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6.

On September 13, 2013, Petitioner returned to Dr. Vargas. She stated there was no improvement after the second injection, and her symptoms worsened. At trial, she testified she heard a buzzing sound after the injection. Tx. at 39. The doctor recommended a provocative lumbar functional discogram with post CT prior to a neurosurgical evaluation for surgical decompression and possible fusion of the lumbar spine. Dr. Vargas also recommended a neurosurgical evaluation for cervical spine surgery. PX 5.

On September 20, 2013, Petitioner followed up with Dr. Sclamberg. She complained of left shoulder and right elbow pain. Dr. Sclamberg diagnosed right medial epicondylitis, and he administered an injection in each area. PX 5.

On December 13, 2013, Petitioner returned to Dr. Sclamberg. She noted she had not been doing any physical therapy, was awaiting neurosurgical evaluation, and had been to the County clinic. On exam, Petitioner had negative impingement signs. Dr. Sclamberg recommended starting physical therapy again for the left shoulder. PX 5.

On December 20, 2013, Petitioner returned to Dr. Vargas. The doctor noted Petitioner presented previously with clear signs of congestive heart failure and he had recommended she seek treatment before moving forward with any procedures. Petitioner was instructed to follow up with Dr. Sclamberg and a neurologist at Cook County Hospital to discuss a cyst visualized on a November 2012 cervical spine MRI. PX 5.

On January 15, 2014, Petitioner presented to Cook County Health and Hospital Systems. She was diagnosed with low back pain, migraines, obstructive sleep apnea and obesity. On January 29, 2014, she returned complaining of headaches, only. On April 8, 2014, Petitioner was diagnosed with depressive disorder, low back pain and obesity. PX 9. However, prior to that diagnosis, on March 7, 2014, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg placed Petitioner at MMI for the left shoulder with no mention of right shoulder symptoms. PX 5.

On April 25, 2014, Petitioner returned to Dr. Vargas. Dr. Vargas noted Petitioner saw an internist at Cook County Hospital for congestive heart failure. Dr. Vargas also recommended Petitioner see a neurologist for her persistent headaches. Petitioner reported she saw one, but the neurologist dismissed the findings as emotional in origin. Petitioner also noted this doctor told her she had nothing going on and should return to work, but then referred her to the Cook County pain clinic for further evaluation and injections. Dr. Vargas again recommended a lumbar discogenic provocative functional discogram before referring her to neurosurgery. PX 5.

Petitioner did not return for care from April 25, 2014 to October 10, 2014 when she presented to Dr. Amish Patel. She complained of neck pain left greater than right, occipital headaches, thoracolumbar pain, and lower extremity radicular pain left greater than right. She stated she tried going back to work but her pain was too significant. Petitioner also stated she saw her primary care physician in July of 2014. No issues arose at that time. Diagnosis remained unchanged from prior visits. Dr. Patel noted Petitioner showed symptoms of possible autoimmune disease and recommended follow up with her primary care physician. PX 5.

On October 14, 2014, Petitioner presented to Dr. Amit Mehta who performed bilateral L5-S1 transforaminal epidural steroid injections and trigger point injections at the bilateral trapezius, splenius capitus, and paracervical erector spinae muscles. PX 6.

On November 10, 2014, Petitioner was examined by Dr. Thomas Pontinen. She reported the injections provided some relief, but she was experiencing increased left leg pain. Petitioner was diagnosed with lumbago, radicular low back pain, neck pain and cervical radiculopathy. PX 5.

On December 15, 2014, Petitioner returned to Dr. Pontinen. She reported she was recently told by a GI doctor and rheumatologist that had gastritis and osteoarthritis. Petitioner did not provide the names of the GI doctor or rheumatologist. On exam, she exhibited a positive left straight leg exam, but she had a normal gait and no sensory deficits. Dr. Pontinen recommended bilateral L3-S1 medial branch nerve blocks followed by bilateral L3-S1 radiofrequency ablation for her back pain. He also recommended a surgical consult. Petitioner underwent the procedures on February 10, 2015 and March 24, 2015. PX 5 and 6.

On April 20, 2015, Petitioner followed up with Dr. Pontinen. She complained of neck pain and continued radicular pain down the left leg. The doctor recommended repeat cervical and lumbar MRIs and referred Petitioner to neurosurgery. PX 5. Shortly thereafter, on April 22, 2015, Petitioner underwent an MRI of the lumbar spine. The MRI revealed chronic and very minor L3-L4 disc bulge narrowing the right foramen, and chronic very minor L4-L5 disc bulge minimally narrowing the foramina. PX 8.

Petitioner also underwent an MRI of the cervical spine. The MRI revealed progressive mild diffuse C4-C5 disc bulge and chronic C3-C4 minimal disc bulge with disc-osteophyte complexes narrowing the left-side foramina; and chronic minimal bulging of the C6-C7 and C7-T1 discs, with residual C5-C6 disc bulge. Facet joints were unremarkable throughout with no significant foraminal narrowing. PX 8.

Petitioner did not return for care from April 22, 2015 to September 14, 2016 when she presented to Dr. Ignas Labanauskas at Holy Cross Hospital. Petitioner complained of low back pain and neck pain. She reported she had not worked since 2012 because of her pain. Petitioner reported her left shoulder was recovered. She complained of right shoulder pain. Dr. Labanauskas recommended and Petitioner MRI of the right shoulder on September 16, 2016. PX 10.

On September 21, 2016, Petitioner returned to Dr. Labanauskas. Petitioner reported right shoulder symptoms beginning three years prior, but she was told the right shoulder was not related to her work injury. Petitioner was recommended right shoulder surgery, which she underwent on March 16, 2017. Petitioner last presented for follow up on June 20, 2017. She was 70-80% improved in her right shoulder. PX 10.

Section 12 examinations with Dr. Arbindi and Dr. Zelby

On March 20, 2013, Petitioner was examined by Dr. Ram Aribindi at Respondent's request pursuant to Section 12 of the Act. Dr. Aribindi performed a physical exam, took a history and reviewed Petitioner's medical records. Dr. Aribindi diagnosed a back contusion. He opined Petitioner did not need any further medical and placed Petitioner at MMI as it related to the neck and back. He also opined Petitioner's left rotator cuff condition not related to the October 9, 2012 work injury. Dr. Aribindi specifically opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. He recommended left shoulder surgery if the MRI showed a full thickness tear. He opined the surgery was unrelated to the work injury. RX 2.

Petitioner returned to Dr. Aribindi for a second IME exam on January 6, 2016. Petitioner reported she was not working due to her back and right shoulder pain. Petitioner denied specific injury to her right shoulder. Dr. Aribindi opined Petitioner reached MMI for the unrelated left shoulder condition on March 7, 2014. She could return to work without restrictions. Dr Aribindi assigned a 0% impairment rating. RX 3.

On May 22, 2013, Petitioner was examined by Dr. Andrew Zelby at Respondent's request. Dr. Zelby took a history from Petitioner, performed a physical exam, and reviewed medical records. Dr. Zelby opined Petitioner sustained a soft tissue spinal strain or contusion at

most. He noted mild degenerative spondylosis in the cervical and lumbar spine but opined there was no evidence the conditions were caused, aggravated, exacerbated, accelerated, or even made symptomatic because of Petitioner's reported injury. Dr. Zelby opined Petitioner did not require any further treatment including narcotics, medications, or injections. He opined Petitioner was able to work full duty without restrictions and reached MMI by January 2013 at the latest and required no more than 3-4 weeks of physical therapy. RX 4.

Petitioner returned to Dr. Zelby for a second IME on January 11, 2016. Petitioner complained of pain from the top of her head to the tip of her toes. She stated her symptoms were exacerbated by anything and nothing gave her relief. Dr. Zelby diagnosed mild cervical spondylosis without radiculopathy, mild lumbar spondylosis without radiculopathy, and spinal strain. Dr. Zelby noted Petitioner's complaints did not follow any neurologic or dermatomal distribution. The complaints inconsistent with a condition of the spine or the nervous system. Dr. Zelby opined Petitioner's subjective complaints were unrelated to the October 2012 work injury. He maintained medical treatment was unreasonable, irrespective of cause, and Petitioner could have returned to full duty work by January 2013. PX 5.

At trial, Petitioner testified she felt initial pain throughout her entire back. She testified she reported pain in her back to MacNeal Hospital and Rehab Dynamix. Tx. at 27. Petitioner testified she was recommended a discogram by her providers, but it was never performed because the procedure was too dangerous. Id. at 40. She testified she was never advised of heart concerns. Id. Petitioner recalled left shoulder pain upon questioning from her attorney.

Petitioner also testified she worked as her son's caregiver and was paid by the State of Illinois from January 2015 to August 2015. Tx. at 43. She testified she would assist him with taking medication, assist him getting into a bath, washing clothes and cooking. Id at 43-44. Petitioner testified she also worked for Ron's Staffing packing boxes of Jell-O. Id. at 45. She testified she was unable to complete her work because of pain in spine and left leg. Id. Petitioner testified she was offered a job as a dishwasher during St. Joseph's carnival. Id. She testified she was required to wash plastic containers. Id. Petitioner testified she did not have the strength to continue performing the job. Id. at 46. As of the date of trial, Petitioner testified to continued pain in her spine, hands and below her bilateral legs. She also complained of swelling in her left shoulder. Id. at 50-51.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue C: *Accident*

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, ***Edward Don v Industrial Commission,*** (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** 44 Ill.2d 207. When an employee has a pre-existing condition, he must "show that a work-related accident injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connect to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition. ***Sisbro Inc. v Industrial Comm'n,*** 207 Ill. 2d at 205, 797 N.E.2d at 7473.

Petitioner testified a co-worker threw a cart, which hit her back and caused pain throughout. She testified she reported back pain to her company clinic and MacNeal Hospital. In review of medical records entered into evidence, initial medical records from MacNeal Hospital corroborate Petitioner was hit in the mid-back area by a cart. The cart did not hit her left or right shoulder, lower back, neck or right elbow. PX #3. The Arbitrator notes Petitioner did not testify to left shoulder pain until led by her attorney. Further, Petitioner did not complain of right shoulder or right elbow pain until after she underwent left shoulder surgery in 2013. An Application for Adjustment of Claim and Employee Incident Report signed by Petitioner further support a mid-back injury.

After carefully considering Petitioner's testimony and medical records entered into evidence, the Arbitrator finds Petitioner sustained a minor mid-back injury which arose out of and in the course of her employment with Respondent.

The Arbitrator finds Petitioner's testimony as it relates to the left shoulder, right shoulder, low back, neck and right elbow not supported by initial accounts of Petitioner's work incident. As such, Petitioner's injuries as it relates to the left shoulder, right shoulder, low back, neck and right elbow did not arise out of her employment and her claim for compensation is denied. All other issues relating to these body parts are therefore moot.

Issue F: *Causal connection*

The Arbitrator finds Petitioner's current condition of ill-being as it relates to the mid-back causally related through January 30, 2013. Petitioner's condition of ill-being after January 30, 2013 is not causally related to the work incident of October 9, 2012. In so finding, the Arbitrator relies on the Application for Adjustment of Claim signed on October 10, 2012 and filed on October 31, 2012, Employee Incident Report signed on October 12, 2012, the unrebutted medical records of MacNeal Hospital from October 10, 2012, as well as the opinions of Dr. Aribindi and Dr. Zelby. Further, Petitioner lacks credibility. Accordingly, her claim for benefits is denied and all other issues are moot.

As discussed above, Petitioner testified she was hit by a cart that was thrown forward by a co-worker. The cart came back and hit her back due to the speed of the cart. Petitioner caught herself on a desk. While the Arbitrator does not question a cart bumped into Petitioner's back, the Arbitrator notes inconsistencies.

First, the Arbitrator notes Petitioner reported the metal cart was heavy. Medical records entered into evidence suggest the cart may have weighed 300 pounds. The Arbitrator cannot reason a 300-pound metal cart could be thrown so easily and return back to hit her. Additionally, Petitioner testified she was placing her cart in an aisle near her work station desk when she was hit from behind. Petitioner did not testify she turned her body to the side to catch herself from falling or losing her balance. Petitioner reported she "noticed" a cart had hit her.

Second, Petitioner indicated injury to her mid-back, only, in an Application for Adjustment of Claim. RX 6. She also claimed injury to her back in an Employee Incident Report. RX 8. The documents were in English. During direct examination, Petitioner affirmed she was able to read and speak some English. Tx. at 49.

At trial, it was stipulated, and Petitioner testified she signed the Application for Adjustment of Claim on October 10, 2012. Tx. at 55-56. Petitioner also testified she completed and signed an Employee Incident Report. She testified she signed the document on October 12, 2012. The incident report indicates Petitioner was placing a metal cart back in place when she felt something hit her back. Petitioner did not indicate pain or injury to her shoulders, head, neck or right elbow. She did not indicate she caught herself on a desk. RX 6.

Contrary to her prior testimony during direct examination, Petitioner was no longer able to recall the contents of the Application for Adjustment of Claim or Employee Incident Report despite previously confirming her signature. Tx. at 58. Petitioner reasoned she was unable to understand the English statements. Id.

Third, Petitioner testified she was sent to MacNeal Hospital on October 9, 2012. The medical records entered into evidence affirm she was seen on October 10, 2012. Petitioner complained of pain in her back. While Petitioner complained of some arm pain, Petitioner specifically denied the cart hit her shoulders. She did not lose consciousness or report injury to her neck or head. During direct examination, Petitioner was only able to recall left shoulder pain upon direction from her attorney. Petitioner did not question the validity of the history provided in the MacNeal Hospital records until she was questioned regarding her specific denial of a cart hitting her shoulders during cross examination. Tx. at 59. The record indicates Petitioner was diagnosed with a contusion of the back, only. She returned to MacNeal Hospital on November 8, 2012 complaining of panic attacks. She denied any specific pain to her low back. Again, the note is absent any indication of left or right shoulder pain or injury. Petitioner was diagnosed with a trapezius strain and wry neck.

Fourth, the Arbitrator notes inconsistent histories of pain amongst the various providers from Rehab Dynamix, and Chicago Pain and Orthopedic Institute. Specifically, chiropractic notes from Rehab Dynamix indicate continued improvement, while records from Chicago Pain & Orthopedic Institute indicate severe complaints of pain to the left shoulder, low back and neck. Electric stimulation and hot packs were further administered to the low back throughout chiropractic care, despite Petitioner complaining of pain mostly in her upper back. The Arbitrator notes MRIs of the lumbar spine and cervical spine revealed normal degenerative findings. On December 3, 2012, near full passive range of motion of the left shoulder was noted; however, Dr. Sclamberg maintained a surgical recommendation. PX 5.

The Arbitrator also notes medical records from Alix Crone, DC indicate psychosomatic manifestations of pain. PX 2. Medical records from Dr. Vargas indicate Petitioner had seen a neurologist and was advised her complaints were emotional in origin. PX 5 Medical records from Dr. Patel indicate Petitioner showed signs of an autoimmune disease. PX 5. Medical records from Dr. Pontinen indicate Petitioner was seen by a rheumatologist in 2014 and

possibly diagnosed with osteoarthritis. PX 5. The Arbitrator finds it difficult to understand how a cart hitting Petitioner's mid-back area could result in bilateral rotator cuff tears, cervicalgia, lumbar radiculopathy, myofascial pain syndrome and epicondylitis.

Lastly, the Arbitrator notes Petitioner did not complain of any right shoulder or right elbow pain until seven months after the October 9, 2012 work incident. Petitioner specifically stated she did not have any pain complaints until after the left shoulder surgery in March 2013. Petitioner's statements are corroborated by normal right shoulder exams in 2012.

The Arbitrator ultimately finds the causation opinions of Dr. Vargas, Dr. Jain, Dr. Sclamberg, Dr. Patel and Dr. Pontinen were based on questionable statements and material misrepresentations made by Petitioner. The Arbitrator places greater weight on the IME opinions of Dr. Aribindi and Dr. Zelby

Specifically, Petitioner inconsistently reported pain complaints to her treating providers. Petitioner also reported she was unable to work since October 9, 2012. However, she testified she obtained employment with Ron's Staffing and at a pizzeria. She also testified she applied and was approved by the State of Illinois to work as a caregiver for her adult son over a period of nine months in 2015. Tx. at 62. Petitioner's son was 25-26 years old at the time and weighed around 170 pounds. Tx. at 63-64. While employed by Staffmark, Petitioner testified the heaviest box she lifted on her own weighed 30-35 pounds. She was assisted by co-workers if the boxes weighed greater than 30-35 pounds. She did not testify to any assistance while serving as her son's state-appointed caregiver.

Dr. Aribindi and Dr. Zelby opined Petitioner sustained a contusion to her back. Dr. Zelby opined Petitioner required no more than 3-4 weeks of directed physical therapy. Dr. Zelby opined Petitioner could return to full duty work without restrictions by January 2013. Dr. Aribindi also opined Petitioner reached MMI for her back condition in 2013. He opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. The Arbitrator notes Petitioner was able to recall attending the IMEs with Dr. Aribindi and Dr. Zelby when questioned by her attorney during direct exam. Tx. at 50. During cross examination, Petitioner was no longer able to recall seeing either doctor. Tx. at 61.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being as it relates to the mid-back is causally related in part to the accidental injury of October 9, 2012 up to January 30, 2013.

The Arbitrator finds Petitioner's condition of ill-being as it relates to the mid-back after January 30, 2013 is not causally related to the accidental injury of October 9, 2012. The Arbitrator also finds Petitioner has not proven by a preponderance of the evidence that her

condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow are not relates to the accidental injury of October 9, 2012. As such, all other issues as it relates to these body parts are moot.

Issue J: *Medical bills*

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and are determined to be required to diagnose, relieve or cure the effect of a Petitioner's injury. The Petitioner has the burden of providing that the medical services were necessary, and the expenses incurred were reasonable. ***City of Chicago v. Illinois Workers' Compensation Commission, 409 Ill. App. 3d 258, 267 (1st Dist., 2011).*** In determining the reasonableness and necessity of medical treatment, the Commission also considers whether the records demonstrate subjective or objective improvement or whether the treatment undertaken failed to provide a benefit. ***Hugo Alvarez v AMI Bearings, 16 IWCC 0408***.

Petitioner in this case has presented unpaid medical bills from Soma Rehab totaling $2,563.65 (PX 11); Gray Medical totaling $29,395.48 (PX 12); La Grange Memorial Hospital totaling $2,179.41 (PX 13), IWP for $3,391.98 (PX 14); Rx Development totaling $6,052.02 (PX 15); Rehab Dynamix totaling $31,593.47 (PX 16); Preferred Open MRI totaling $8,520.00 (PX 17); Accredited Ambulatory Care totaling $103,146.02 (PX 18); Chicago Pain and Orthopedic Institute totaling $33,608.32 (PX 19); Dr. Ignas Labanauskas totaling $12,950.00 (PX 21); Prescription Partners totaling $6,129.01 (PX 22); Essential Testing totaling $311.28 (PX 23); Metropolitan Advanced Radiological totaling $944.92 (PX 24); and Walgreens Out-of-Pocket Expenses totaling $84.23 (PX 26). *See also* AX 2.

As discussed above, Petitioner's current condition of ill-being as it relates to the mid-back is causally related in part through January 30, 2013. The Arbitrator agrees a maximum of 3-4 weeks of physical therapy would have been appropriate to treat Petitioner's condition. The Arbitrator notes Respondent paid $11,019.89 in medical expenses through April 2013. RX 7.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, as well as her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds Respondent has paid all reasonable and necessary medical treatment pursuant to Section 8(a) and 8.2 of the Act. The remaining issues of Respondent's liability of outstanding Section 8 medical benefits are moot. Accordingly, benefits are denied. Irrespective of any causation opinion, the Arbitrator further denies payment of any medical bills not presented at trial.

The Arbitrator also highlights for further discussion Petitioner's Exhibits 11, 13, 23 and 25, medical bill statements from Soma Rehab, La Grange Hospital, Walgreens and Essential Testing.

The Arbitrator notes Petitioner did not present any medical evidence aside from medical statements to support treatment undertaken at Soma Rehab or La Grange Memorial Hospital. In addition to the Arbitrator's findings regarding causation, the Arbitrator denies medical charges from Soma Rehab or La Grange Memorial as no medical record evidence was presented at trial to support this medical treatment. PX 11 and13.

With respect to Petitioner's Exhibit 23, medical bills from Essential Testing. The Arbitrator notes a description of charges indicates "quantitative" and "qualitative" procedures. The Arbitrator is unable to determine what the charges refer to. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Essential Testing as no medical record evidence was presented at trial to support medical treatment from Essential Testing.

With respect to Petitioner's Exhibit 25 prescription refills from Walgreens, the Arbitrator notes medications were dispensed to treat bacterial infections. The Arbitrator cannot reason the medications were prescribed to treat Petitioner's questionable low back, neck or bilateral shoulder pain complaints. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Walgreens as no medical record evidence was presented at trial to support the medications were prescribed to treat any of Petitioner's claimed injuries.

Issue K: *TTD*

Petitioner argues TTD benefits are owed from October 10, 2012 through December 31, 2014 and September 1, 2015 through January 29, 2019. The Arbitrator notes Respondent paid TTD benefits from October 10, 2012 to December 18, 2012. Respondent also paid TTD benefits from March 20, 2013 to May 14, 2013 totaling $3,960.00. RX 7. The Arbitrator notes TTD benefits were suspended in December 2012 after Petitioner failed to attend an IME with Dr. Zelby. RX 10.

While a job log was presented at trial, the Arbitrator notes Petitioner sought employment on five separate occasions between July 23, 2014 and August 24, 2014. PX 26. At trial, she testified she was hired by two employers, but she voluntarily quit. She also testified

she applied with the State of Illinois and was accepted to work as a caregiver for her adult son. Petitioner worked in this position for nine months and did not seek any other employment during this time. She performed this task on her own. The Arbitrator cannot reason Petitioner put in effort into finding employment. As discussed above, Petitioner testified she was required to lift boxes weighing 30-35 pounds while employed with Staffmark. She was assisted by co-workers if she was required to lift heavier items. The Arbitrator reasonably infers Petitioner's adult son weighed more than 30-35 pounds and was capable of returning to 100% of her prior job demands.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, and her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds all remaining issues of Respondent's liability of TTD benefits moot. Accordingly, further TTD benefits are denied.

Issue L: *Nature and extent of injury*

In light of the Arbitrator's determination regarding Petitioner's credibility and based on the totality of evidence entered at hearing, the Arbitrator finds there is some residual pain of back pain, only, that is part of permanent disability. The Arbitrator finds Petitioner has not provided evidence of a left shoulder, right shoulder, neck, low back or right elbow injury related to the October 9, 2012 work incident.

In determining permanency, the Arbitrator considers multiple factors. The mere existence of testimony does not require its acceptance. ***Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983).*** To argue to the contrary would require that an award be entered or affirmed whenever Petitioner testified to an injury no matter how much testimony might be contradicted by the evidence, or how evident it might be that a story is fabricated afterthought. ***U.S Steel v. Industrial Commission, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).***

First, under subsection (i) of Section 8.1b(b), an impairment rating considers loss of range of motion, loss of strength, measured atrophy of tissue mass consistent with the injury, and any other measures that establish the nature and extent of the impairment. No impairment rating was assigned as it relates to the mid-back. There is no impact on the permanency based upon this factor.

As it relates to the left shoulder, Dr. Arbindi opined Petitioner's condition off ill-being was not causally related to the October 9, 2012 work incident. Regardless of his causation opinion, Dr. Aribindi provided an impairment rating as Petitioner had reached MMI. RX #3. Based on AMA guides to the Evaluation of Permanent Impairment 6th Edition, given a resolved rotator cuff tear with no significant objective findings status-post surgical intervention, a final impairment of 0% whole person impairment was given. Petitioner corroborated fully resolved left shoulder symptoms in September 2016 when she presented to Dr. Labanauskas. The Arbitrator finds the opinions of Dr. Aribindi credible and agrees Petitioner's left shoulder condition is not causally related to the October 9, 2012 work incident.

Second, with regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, Petitioner testified she worked in quality control for Respondent since August 2012. Her job required her to check orders, places boxes in carts and then onto a desk. Petitioner lifted no more than 30-35 pounds on her own. Petitioner was released to return to work at 100% of her job demands by IME experts, Dr. Aribindi and Dr. Zelby. RX #2-5. Petitioner testified she found employment with two companies, but voluntarily left after 1-2 days because she was unable to perform her work. However, she was able to work as a caregiver for her adult son for a period of nine months. Her position was approved by the State of Illinois. Petitioner's ability to work as a caregiver with approval by the State of Illinois lowers any impact on the permanency based upon this factor.

Third, under subsection (iii) of Section 8.1b(b), Petitioner was 56 on the date of accident. Petitioner complained of pain throughout her body and reported to her providers that she had not worked since 2012. As discussed above, Petitioner was fully capable of finding employment during July-August of 2014 when she was hired by two companies. Petitioner was also capable of working as a caregiver for nine months in 2015. While Petitioner obtained the position to care for her son, the caregiver position allows for greater future earning potential for other employers. This again lowers any impact on the permanency based upon factor (iii).

Fourth, under subsection (iv) of Section 8.1b(b), evidence regarding any impact to future earning capacity, Petitioner presented wages earned from January 2015 to September 2015 while working as a caregiver for the State of Illinois. PX 27. Petitioner was earning almost identical pay while employed by Staffmark. Petitioner's capability to work was corroborated by IME experts Dr. Aribindi and Dr. Zelby. Petitioner was and is capable of returning to 100% of her job demands. This again lower any impact on the permanency based upon this factor.

Fifth, with regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the medical records, Petitioner has continued with pain complaints throughout her entire back and body. However, initial medical records, incident reports and an Application for Adjustment of Claim indicate mid-back pain, only with a contusion diagnosis. Petitioner

testified to pain in her back and did not claim any other pain until directed by her attorney. Further, chiropractic medical records indicate reports of improvement and negative sensory deficits despite undergoing various injections, medial branch blocks and ablations. Dr. Aribindi and Dr. Zelby also opined Petitioner's back condition had resolved. RX 2-5. Petitioner did not seek any medical care from 2015 to 2016 when she returned complaining of severe right shoulder pain. This factor is given greater weight.

Although one of many factors may not be the sole determinant of disability, the Arbitrator notes inconsistent statements and misrepresentations of material facts to Petitioner's various medical providers and at trial. At the time of hearing, Petitioner testified to pain in her back. She did not recall any shoulder pain until directed by her attorney. Petitioner also affirmed signing an Employee Incident Statement and Application for Adjustment of Claim, though she later denied understanding the contents of the documents. The medical records from MacNeal Hospital also clearly indicate Petitioner specifically denied a cart hit her shoulders. Petitioner later disagreed with the history she provided to the hospital. She testified she was capable of returning to work in 2014 and 2015.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole at a PPD rate of $220.00 pursuant to Section 8(d)2 of the Act.

Issue M: *Penalties and attorney's fees*

As noted above, the Arbitrator has found Petitioner's current condition of ill-being as it relates to the mid-back after January 2013 is not causally related to the work incident of October 9, 2012. The Arbitrator has also found Petitioner's condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow is not causally related to the work accident of October 9, 2012. As such, further benefits are denied. As will be discussed below, Penalties and fees are also denied as provided in Section 16 of the Act; Section 19(k) of the Act; and Section 19(l) of the Act.

There is adequate evidence to validate Respondent relied upon Petitioner's own reporting of initial mid-back pain only in her Application for Adjustment of Claim, Employee Incident Report and initial medical records from MacNeal Hospital to deny payment of medical care and TTD benefits after the respective IMEs of Dr. Aribindi and Dr. Zelby in March 2013 and May 2013. Further, while Respondent did suspend TTD benefits on December 12, 2012, the Arbitrator notes TTD benefits were suspended after Petitioner failed to attend a scheduled IME

with Dr. Zelby in December 2012. Medical records into evidence support Petitioner reported her IME was being rescheduled. The Arbitrator notes TTD benefits were reinstated on March 20, 2013, when Petitioner attended the first rescheduled IME. RX #7. The language of the Act confirms a failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, ***Avon Products, Inc. v. Industrial Commission, 82 Ill.2d 302, 412 N.E.2d 470 (1980).***

Additionally, the Arbitrator notes Petitioner presented various medical bills from Soma Rehab, LaGrange Memorial Hospital, Essential Testing and Walgreens for treatment that was not presented into the record. The Arbitrator cannot reason penalties are warranted when the Arbitrator is unable to ascertain the type of treatment offered during any of the visits alleged by the providers. The Arbitrator further notes various medical bills presented at trial were addressed to Petitioner, directly. There is no indication the medical bills were issued to Respondent. As discussed above, Respondent paid $11,019.89 in medical bills to various providers through April 1, 2013.

Where Respondent's actions are consistent with the Act, Respondent's nonpayment, underpayment, or delayed payment cannot be deemed vexatious or without just cause, and Section 19(k) and 19(l) penalties must be denied. RX 9. Where Respondent has acted in accordance with the Act, it also should not be held liable for Petitioner's attorney's fees in his effort to establish otherwise, and Section 16 fees also must be denied. RX 9.

Issue N: *Respondent's credit*

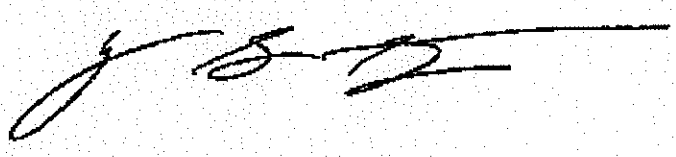
As noted above, Respondent paid $3,960.00 in TTD benefits and $11,019.89 in medical expenses. AX 1, AX 3, and RX 7. Based upon the opinions of the arbitrator regarding causal connection, the Arbitrator finds Respondent shall have a credit for all amounts paid for TTD to or on behalf of Petitioner in the amount of $3,960.00. Respondent shall also have a credit for all amounts paid towards medical treatment in the amount of $11,019.89.

Issue O: *Former attorney's fee petition*

The parties stipulated a petition for attorney's fees by a former attorney for the Petitioner was pending at the time of trial and the Petitioner's current attorney "has notified

the former attorney of the date of this hearing." AX 1 and Tx. at 7. The IWCC case file for this matter contains a September 24, 2014 order from Arbitrator Kane continuing The Vrdolyak Law Group, LLC's Petition for Fees to the disposition of this case.

However, the Petition for Fees covered by Arbitrator Kane's order does not itemize any time spent by The Vrdolyak Law Group in the prosecution of this claim. This Petition also does not list any incurred expenses and/or costs by The Vrdolyak Law Group during its representation of the Petitioner. Furthermore, no testimony or documentary evidence was entered into evidence during the January 29, 2019 hearing to support the Petition for Fees. As such, the Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.



Signature of Arbitrator

March 13, 2019
Date

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF LAKE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN DELGADO,

Petitioner,

vs.

NO: 17 WC 23580

21IWCC0161

PNR PAINTING PLUS, INC., and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, and workers' compensation insurance coverage, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.67 per week for a period of 60 2/7 weeks, representing July 16, 2017 through September 10, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $456.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 25% loss of use of the person as a whole.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General. This award is hereby entered against the IWBF to the extent permitted

21IWCC0161

and allowed under §4(d) of the Act. Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF. The award or findings in this matter in no way limit or modify the Respondent-Employer's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Stephen Mathis

mck

O: 3/3/21

Thomas J. Tyrrell

43

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JUAN
Employee/Petitioner

Case# **17WC023580**

PNR PAINTING PLUS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0161

On 9/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1361 BARRY STEWART SILVER
302 SAUNDERS RD
SUITE 200
RIVERWOODS, IL 60015

0000 PNR PAINTING PLUS, INC
22850 W ILLINOIS ROUTE 173
ANTIOCH, IL 60002

0143 ASSISTANT ATTORNEY GENERAL
KRISTIN LEASIA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Juan Delgado
Employee/Petitioner

Case # **17** WC **023580**

v.

PNR Painting Plus, Inc.; Illinois State Treasurer as *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **July 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Insurance**

FINDINGS

On **July 15, 2017**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent-Employer.
On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
Timely notice of this accident ***was*** given to Respondent-Employer.
Petitioner's current condition of ill-being ***is*** causally related to the accident.
In the year preceding the injury, Petitioner earned **$39,520.00**; the average weekly wage was **$760.00**.
On the date of accident, Petitioner was **30** years of age, ***single*** with **1** dependent children.
Respondent-Employer shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.
Respondent-Employer is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent-Employer shall pay Petitioner Temporary Total Disability benefits of $506.67/week for 60-2/7 weeks, because Petitioner remained off work due to his injuries during the period from July 16, 2017 through September 10, 2018.

Respondent-Employer shall pay Petitioner permanent partial disability benefits of $456.00/week for 125 weeks, because the injuries sustained caused the Petitioner 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

Injured Workers' Benefit Fund

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General's Office. This finding is hereby entered as to the IWBF to the extent permitted and allowed under §4(d) of the Act. No party shall seek or have a right to any recovery from the IWBF. The award or findings in this matter in no way limit or modify the Employer-Respondent's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn M. Doherty

9/23/19
Date

Signature of Arbitrator

SEP 25 2019

FINDINGS OF FACT

An Application for Adjustment of Claim was filed by Petitioner, Juan Delgado, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, PNR Painting Plus, Inc. This action sought further relief from the Illinois Workers' Benefit Fund (IWBF) because Respondent-Employer allegedly did not maintain workers' compensation insurance. A hearing was held on July 29, 2019 in Waukegan, Illinois. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio custodian* of the IWBF, and participated in the proceeding. No appearance was made by the Respondent-Employer at trial, despite proper notice.

Petitioner testified that his name is Juan Jose Delgado. In July 2017, he was 30 years old with one dependent minor child, though he currently has two minor dependent children. In May 2017, Petitioner saw an ad on Facebook for a painter, posted by PNR Painting Plus, Inc. ("Respondent-Employer"). He responded to the ad, and made arrangements to meet Rick Jones, owner of Respondent-Employer. Upon meeting Mr. Jones, Petitioner was hired as a house painter. He completed his first job for Respondent-Employer in May 2017 in Antioch, Illinois.

While working for Respondent-Employer, Petitioner made $20.00 per hour, and worked 40 hours per week. Petitioner placed into the record a copy of a paycheck, written from Respondent-Employer's business account, paying $760.00 for one week of work in June 2017 (Petitioner's Exhibit "Pet. Ex." 1). The reason the check did not reflect the full $800.00 he would be owed for a week of work is that some of the money was held over for the next paycheck.

As a painter Petitioner tracked the time he worked. He marked down the hours worked on a timesheet, which he was required to complete before leaving a specific job. Petitioner's Exhibit 2 reflects the time Petitioner clocked for the pay period ending on June 29, 2017, and shows that Petitioner worked 40 hours during that pay period. (Pet. Ex. 2).

Petitioner received his job assignments via telephone calls from Rick Jones. Jones would provide instructions for Petitioner to report to Respondent-Employer's headquarters, which were located at Jones's home in Antioch, Illinois. Once at Respondent-Employer's office, Jones informed Petitioner regarding the day's job assignment, including where Petitioner was to report and what supplies were needed. Jones transported Petitioner and anyone else working the assignment to the job site in a company van. Jones also provided the supplies and equipment needed for an assignment, including the ladders.

In June 2017, Petitioner received notice that he would be placed on a crew to paint a house in Lake Geneva, Wisconsin. Prior to beginning the job, Petitioner went with Jones to look at the site. Petitioner took photographs of the home to be painted. (Pet. Exs. 6-7). One of the photographs shows the type of extension ladder used at the job site. (Pet. Ex. 6). Petitioner took these photos on his personal cell phone about a week prior to the accident. At any job, there was a daily exchange of photographs between himself and Jones to report progress on the assignment and receive additional instructions regarding what still needed to be completed.

On July 15, 2017, Petitioner was working at the assignment in Lake Geneva with a crew of four people. He was painting a "peak" section of the home – a high point on the building requiring a ladder to access. He was standing on an extension ladder by himself, although one of his coworkers was at the bottom of the ladder holding it for stability. Around 4:00pm that evening, Petitioner was working to finish a few last spots needing more paint on the peak. He climbed the ladder to the peak; about two to three minutes later, while he was painting, the ladder gave way. Petitioner does not know if his spotter had abandoned his post and was no longer spotting at the time of the accident, but essentially the ladder began sliding down with Petitioner still on it. Petitioner fell, hitting his head and sustaining an open fracture to his right ankle. At the time that the accident occurred, Jones was at the job site. An ambulance was called. The paramedics secured Petitioner, provided him with medication and first aid treatment, and transported Petitioner to Mercy Hospital in Janesville, Wisconsin.

Upon arrival at the hospital, Petitioner's bone was exposed out of his ankle and skin, and the foot was turned 360 degrees. Petitioner did lose consciousness for a period of time while he was first being treated. They diagnosed Petitioner with a dislocated fracture of the right ankle, and fractures to the 3rd through 5th metatarsals of the right foot. Petitioner underwent ankle surgery. He was ultimately released home after five days.

Following his release from Mercy Hospital, Petitioner followed up with his primary care physician, Dr. Bains. Dr. Bains referred Petitioner to an orthopedic surgeon at Illinois Bone and Joint Institute, Dr. Weatherford. Dr. Weatherford determined that Petitioner needed further surgery to his right ankle, which was undertaken at St. Francis hospital in Evanston, Illinois. Petitioner was placed on non weightbearing restrictions for his right foot, which remained in effect for eight weeks. While recovering at home from surgery, Petitioner had to convert the first floor of his home into a bedroom. He used a knee scooter or crawled to get around.

Petitioner followed up with Dr. Weatherford for several months. He began physical therapy three weeks after the surgery. Physical therapy lasted several months, and took place in Schaumberg, Illinois, about 60 miles from Petitioner's home. Dr. Weatherford released Petitioner from care and back to work with a 10-pound carrying restriction and no standing for more than five minutes. Petitioner must be able to lift or elevate his leg at work and is not to engage in excessive climbing.

Petitioner is no longer under Dr. Weatherford's care. Dr. Weatherford referred Petitioner to a rheumatologist, Dr. Morris, due to concerns over early-onset arthritis developing in Petitioner's right ankle.

Prior to the accident, Petitioner worked as a professional painter for 15 years. Due to his permanent restrictions, Petitioner is unable to return to work in that capacity. Petitioner now works for another company, Epsco Industries, 40 hours per week and earns $15.00 per hour. Petitioner submitted several exhibits, including tax returns and Year-to-Date earnings statements from Epsco, confirming same. (Pet. Ex. 3-5). His work at Epsco is sedentary in nature.

Petitioner still feels pain in his foot and ankle from the moment he wakes up in the morning, and when completing everyday tasks. How long he can stand in a day depends on the amount of pain

he experiences. He uses a knee scooter for long distances, and also has a cane. He can drive, but has difficulty doing so. He feels pain with breaking, and cannot drive more than 10 to 15 minutes without having to stop. He cannot drive long distances. Petitioner experiences pain during most of his day-to-day activities including taking his kids to the park, grocery shopping, cooking, and picking up his kids at daycare. Petitioner testified he feels his whole life has "done a total turnaround" since his fall.

On cross exam, Petitioner testified that Jones was the co-owner of Respondent-Employer, and that Petitioner received his paychecks from Jones. When Jones hired Petitioner, he did not give Petitioner an employment contract to sign. The van used to transport crew members to job sites was a company van that had the company's name painted on the side. Petitioner clarified that the photo he submitted showing an extension ladder (Pet. Ex. 6) did not depict the actual spot where he fell, but rather the front door of the same property, and was taken a week prior to the fall. Petitioner further clarified that he called the ambulance following the fall after speaking to Jones about the accident. Petitioner testified that Mr. Jones refused to call an ambulance.

Petitioner reported to Mercy Janesville Hospital in Janesville, Wisconsin, on July 15, 2017. (Pet. Ex. 10). He reported that he fell from a ladder while working on a roof, and hit his head. Petitioner presented with an open fracture with displaced bones sticking out of his right lower extremity after a 15-foot fall. (Pet. Ex. 10). X-rays of his right ankle revealed an open subtalar fracture dislocation with medial dislocation of the right foot. The x-rays also showed a fracture of the shaft of the 5th metatarsal. X-rays taken of the right foot as a whole displayed a stable alignment with a complex fracture. (Pet. Ex. 10). CT scans taken of Petitioner's head, lumbar spine, cervical spine, and chest/abdomen/pelvis area were unremarkable and showed no signs of acute trauma. A CT scan of Petitioner's right ankle revealed a complex open fracture of the hindfoot, midfoot, and proximal forefoot, as well as an interval reduction of the previously-seen subtalar joint dislocation. (Pet. Ex. 10). Petitioner underwent laceration repair with sutures. The fracture was reduced and splinted. (Pet. Ex. 10). On July 18, 2017, Petitioner underwent irrigation of the open wound, incisional and excisional debridement of the wound with wound repair at both the ankle and subtalar region. (Pet. Ex. 10). Petitioner was discharged from Mercy Hospital on July 19, 2017 with crutches and prescriptions for ibuprofen, oxycodone, and cephalexin. He was placed on non weightbearing status along with crutches and a walker. (Pet. Ex. 10).

Petitioner saw his primary care physician, Dr. Rushin Bains, on July 20, 2017. (Pet. Ex. 11). Dr. Bains diagnosed degenerative joint disease of the ankle and foot, namely primary osteoarthritis to the right ankle and foot. (Pet. Ex. 11). He also noted the unspecified fracture to the right lower leg. Dr. Bains noted good sensation in the right foot. He opined that Petitioner needed a referral to an orthopedic surgeon, which was given. (Pet. Ex. 11).

On July 23, 2017, Petitioner presented to Northshore University Health System/Highland Park Hospital with an open nondisplaced fracture of the fourth metatarsal bone of the right foot, which displayed routine healing. (Pet. Ex. 12). Dr. Stacey Becker attended to Petitioner. X-rays of his right foot were taken, which confirmed the comminuted fracture of the 5th metatarsal, the nondisplaced fracture of the 4th metatarsal, and a suspected avulsion fracture of the cuboid. (Pet. Ex. 12). He presented for evaluation of the injury, as he reported that the posterior mold he was

given from his stay at Mercy Hospital was digging into his leg. (Pet. Ex. 12). A shorter posterior mold (splint) was applied and Petitioner was discharged home with antibiotics. (Pet. Ex. 12).

Petitioner first saw Dr. Brian Weatherford, an orthopedist at Illinois Bone and Joint Institute, on July 26, 2017. (Pet. Ex. 13). Dr. Weatherford noted with concern the presence of active drainage at the wound site and a lack of healing. He placed Petitioner in a compression wrap and a Cam boot. (Pet. Ex. 13).

Petitioner followed up with Dr. Weatherford on July 28, 2017. (Pet. Ex. 13). Dr. Weatherford confirmed a diagnosis of a right-side type 3 open subtalar dislocation with delayed wound healing and continued drainage, an intraarticular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. Dr. Weatherford opined that Petitioner should proceed to surgery to repeat debridement. (Pet. Ex. 13).

Dr. Weatherford performed repeat surgery on Petitioner on July 31, 2017. The surgery occurred at St. Francis Hospital in Evanston, Illinois. (Pet. Ex. 14). Petitioner's pre-and-post-operative diagnosis was right open subtalar dislocation, open wound with delayed healing, cuboid fracture, displaced intra-articular 5th metatarsal fracture, and equinus contracture. (Pet. Ex. 14). Petitioner underwent a right gastrocnemius recession; irrigation and debridement associated with an open fracture dislocation including skin and subcutaneous tissue, muscle, and fascia; open reduction internal fixation of the right cuboid; open reduction internal fixation of the right 5th metatarsal; and application of negative pressure wound therapy. (Pet. Ex. 14). Synthes implants including two 2mm plates with screws were used. Petitioner was placed on non weightbearing status for his right lower extremity for eight weeks, and was given compression wrapping. (Pet. Ex. 14). He was discharged on August 2, 2017 with a prescription for Norco. (Pet. Ex. 14).

Following surgery, Petitioner followed up with Dr. Weatherford on August 2, 2017; August 7, 2017; August 15, 2017; August 22, 2017; September 5, 2017; September 26, 2017; November 17, 2017; March 2, 2018; and May 5, 2018. (Pet. Ex. 13). At the August 22 appointment, Dr. Weatherford recommended that Petitioner begin physical therapy and gave him a referral. (Pet. Ex. 14). Petitioner's records indicate that he underwent physical therapy at Physical Therapy-Team Rehab under the direction of Kristin Dryden. (Pet. Ex. 16). He attended physical therapy approximately two times per week from September 27, 2017 through May 7, 2018. (Pet. Ex. 16).

At the November 17, 2017 appointment, Dr. Weatherford opined that Petitioner would likely develop activity limitations secondary to the severe nature of his injury; in particular, Dr. Weatherford stated that Petitioner would likely form subtalar arthritis due to the injury. (Pet. Ex. 13). By December 7, 2017, Petitioner could only walk for 2 hours and was unable to sit without swelling. (PX16, 12/7/17, p.2-3). A new long-term goal of improving his ability to squat and kneel to permit child care was identified but unmet at that time. By the end of January 2018, Petitioner was unable to stand or walk for more than 3-4 hours for job duties, unable to fully squat to reach and lift painting supplies, unable to travel stairs at home reciprocally or climb ladders at work, and unable to fully assist with cooking and cleaning tasks at home. (PX16, 1/29/18, p.2-3). Petitioner was still experiencing pain levels between 6 and 8 out of 10, which were caused by joint and tissue hypomobility, lower extremity weakness and decreased dynamic balance. To increase function and reduce pain, Petitioner's plan of care included manual therapy,

therapeutic exercise, neuromuscular reeducation and therapeutic modalities. Petitioner's newest round of therapy would be three times weekly for 6 weeks to yield improvements.

One month later, on February 26, 2018, Petitioner had completed 8 therapy sessions. (PX16, 2/26/18, p.1-3). His pain levels had improved to a range of 2-6/10 and had partially met the goals of squatting and kneeling and increasing standing/ambulating to unlimited time periods to permit work activities. Deficits from the functional analysis in January remained.

At the March 2 appointment, Dr. Weatherford noted Petitioner was weightbearing as tolerated in a standard shoe and continuing with physical therapy 3x/weekly. He had intermittent pain particularly along the plantar aspect of the foot which was relieved with anti-inflammatories. Petitioner was not yet able to return to his heavy labor job. Petitioner's gait still demonstrated a slight external rotation and shortened stride length on the right hand side. The slight dysesthesias in the sural nerve distribution remained as did the diminished range of motion of the right ankle though it had improved markedly since the November visit. The peroneal tendon strength also improved though the focal tenderness over the plantar fascia remained. X-rays revealed appropriate alignment on all views. Dr. Weatherford noted that Petitioner continued to do well and stated that Petitioner could make office visits as needed. (Pet. Ex. 13).

On April 11, 2018, Petitioner underwent a reevaluation at Team Rehabilitation which noted a 60-70% improvement at that time. (PX 16, 4/11/18, p.1). Petitioner noticed gains in standing, ambulation tolerances, ability to turn directions and flexibility in his foot and ankle. However, he remained hypomobile and lacked the eccentric lower extremity strength / endurance needed to perform full work duties and felt full squatting, descending stairs and prolonged standing were the most challenging. Pain levels had not improved, and Petitioner reported prolonged walking and standing on vacation exacerbated his pain levels. Dr .Weatherford ordered another 4 weeks of twice weekly physical therapy. (PX 16, 4/11/18, p.3).

By the re-evaluation on May 7, 2018, Petitioner noticed less frequent pain and was able to squat to reach the floor with minimal difficulty but when pain appeared, it completely limited his ability to stand or walk. (PX 16, 5/7/18, p.1). Most challenging was using stairs while carrying weighted objects and prolonged standing. Petitioner was relatively pleased with his overall improvement and gains in strength and range of motion, though he stated that if the pain lessened, he would be able to do a lot more on his feet. Progress towards long term goals and current deficits were the same as the previous month's evaluation. (PX 16, 5/7/18, p.2). Dr. Weatherford again recommended another month of twice weekly physical therapy. (PX 16, 5/7/18, p.3).

On May 18, Dr. Weatherford provided Petitioner with a referral to a rheumatologist in order to explore the potential for a long-term prescription for THC medication. (Pet. Ex. 13). At this appointment, Dr. Weatherford also allowed Petitioner to return to work with appropriate restrictions and limitations. (Pet. Ex. 13). In his records, Dr. Weatherford stated, "...He was also given a repeat referral to physical therapy today, which will help with assisting him with day to day walking. He is allowed to return to work from my standpoint with appropriate restrictions or limitations. I discussed with him that I would expect lifelong limitations secondary to the severity of his injury. Further surgery may even be necessary. I do suspect he will develop

progressive subtalar arthrosis. ... I would be happy to see him in the office on an as-needed basis." PX 13, p. 41.

Petitioner next treated for this injury on July 9, 2018, with Dr. Bains. (Pet. Ex. 11). Dr. Bains reported that post-surgery, Petitioner was still experiencing pain and discomfort, and had been participating in physical therapy. (Pet. Ex. 11). He gave Petitioner one final prescription for Norco, and suggested the possibility of treatment with medical THC under the care of a rheumatologist. (Pet. Ex. 11).

Petitioner followed up at the rheumatology department at Northshore University Health in Evanston, Illinois on August 3, 2018. (Pet. Ex. 15). At this time, Petitioner was still using the knee scooter, and reported having been participating in physical therapy through mid-June. (Pet. Ex. 15). He reported experiencing burning sensations in his foot and big toe that shot up his leg and into his back. Since the surgery, his right foot would turn bright red and swell, with a burning hot sensation. He reported that the pain became worse with weightbearing, and that it was sometimes so painful that he could not walk. He also reported some swelling and pain in his left foot due to having to use the scooter. (Pet. Ex. 15). An EMG was ordered to evaluate Petitioner's condition and check his A1c levels. (Pet. Ex. 15). He was given a new physical therapy referral and prescriptions for gabapentin and Naprosyn. (Pet. Ex. 15).

Petitioner followed up with rheumatology on September 6, 2018. (Pet. Ex. 15). He reported experiencing warmth, swelling, and a "weird" sensation in his right foot triggered by activity. (Pet. Ex. 15). He stated that the prescribed medications were not helping with the pain. He stated that he did not want to do the EMG, and had been performing self-trials with medical marijuana. (Pet. Ex. 15). The treating physician opined that Petitioner could have Complex Regional Pain Syndrome (CPRS), and indicated that they would refill the gabapentin. (Pet. Ex. 15). Petitioner was also certified as treating for a qualifying condition for medical THC. (Pet. Ex. 15)

On September 10, 2018, Petitioner began working for Ebsco Industries as a sales representative for Luxor furniture in the education sector. Petitioner testified this position is a phone-bank desk job where he processes incoming sales orders, makes cold calls and works a 40-hour week earning $15/hourly. (PX4B, PX5).

Petitioner's final appointment at rheumatology occurred on November 29, 2018. (Pet. Ex. 15). At this time, Petitioner was still taking gabapentin and naproxen. He reported that he had yet to send in the paperwork to qualify for medical THC treatments. (Pet. Ex. 15). He reported experiencing baseline pain in his right foot, but that "really bad" pain was not as frequent but was still debilitating when it occurs. He reported increased mobility in his right foot with his new job and that he was exercising at his stand up desk. He reported that his overall pain was better and that he did not attend the physical therapy but was doing his at home exercises. (Pet. Ex. 15). He reported wearing a compression sock on his right foot but that he felt as if the sock was cutting off his circulation. Dr. Morris renewed the opinion that Petitioner could be experiencing CPRS, and renewed his certification for medical THC as gabapentin did not help.

On December 17, 2018, Petitioner returned to Dr. Bains for follow up and medication refill. He reported continued ankle pain (PX11, 8-9). He told Dr. Bains that Dr. Morris recommended a

medical marijuana program, but was hoping for a refill on Norco prescription in case there was a delay in authorization. (PX11, 8). Dr. Bains informed Petitioner that would be the final prescription issued as he did not prescribe them chronically. (PX11, 9).

On July 15, 2019, Petitioner returned to Dr. Bains for follow up. Dr. Bains ordered Petitioner to resume physical therapy with Team Rehabilitation in Libertyville or another in-network facility. (PX11, 10-11).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent-Employer operating and subject to the Illinois Workers' Compensation Act?

Petitioner testified that Respondent-Employer, PNR Painting Plus, Inc., engaged in the work of residential home painting. As part of this operation, employees, including Petitioner, regularly used extension ladders and worked on the "peaks" of homes. The Arbitrator finds these conditions sufficient to subject Respondent-Employer to the automatic coverage provisions of Section 3 of the Illinois Workers' Compensation Act.

B. Was there an employer-employee relationship?

Petitioner testified that he met Rick Jones, owner of Respondent-Employer, in response to an employment ad placed through Facebook. After this meeting, Jones hired Petitioner as a painter. Jones assigned job sites via telephone and directed Petitioner where to report and which supplies to use. Jones would transport Petitioner and other crew members to job sites in a van marked with the company's name. Jones provided all the supplies and equipment needed to complete an assignment. Petitioner was required to complete and submit timesheets upon leaving a job site. Petitioner received his pay via checks that were written from Respondent-Employer's business account. PX 1, PX 2. The Arbitrator finds that the above conditions sufficiently establish that an employee-employer relationship existed between Petitioner and Respondent-Employer.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent-Employer?

Petitioner testified that on July 15, 2017, he was working at a job site in Lake Geneva, Wisconsin, that had been assigned to him by Rick Jones. Petitioner had climbed up on a ladder in order to finish painting spots on the home's "peak." A coworker was acting as a spotter. While Petitioner was on the ladder, it slid down, causing Petitioner to fall. Petitioner hit his head on the ground and sustained fractures to his right foot and ankle. Medical records submitted by Petitioner corroborate this mechanism of injury. The Arbitrator therefore finds that on July 15, 2017, Petitioner sustained an accident that arose out of and occurred in the course of Petitioner's employment with Respondent-Employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 15, 2017. Petitioner's testimony is supported by medical records and there is no evidence to the contrary. Thus, the Arbitrator finds the accident occurred on July 15, 2017.

E. Was timely notice of the accident given to Respondent-Employer?

Petitioner stated that Rick Jones was present at the job site at the time of the July 15, 2017 accident. Petitioner testified that after the fall, he asked Jones to call an ambulance, to which Jones refused. Petitioner called an ambulance, and was transported to the hospital from the job site. As such, the Arbitrator finds that Respondent-Employer had timely notice of the accident.

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he fell from a ladder while working to paint a house. The fall caused Petitioner to sustain a right-side type 3 open subtalar dislocation, an intra-articular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. There is no evidence that Petitioner's right foot or ankle were fractured prior to the fall. Petitioner's medical care was immediate and continuous. The Arbitrator finds that Petitioner's current condition of ill-being is casually related to the July 15, 2017 accident.

G. What Were Petitioner's Earnings?

Petitioner testified that while employed with Respondent-Employer, he earned $20.00 per hour for 40 hours of work during a week. In support thereof, Petitioner tendered into evidence a copy of a paycheck issued to him by Respondent-Employer, showing a week's pay of $760.00 (Pet. Ex. 1). Petitioner explained that a portion of his weekly pay would be held over to the next paycheck/pay period. The Arbitrator therefore finds that Petitioner's average weekly pay while employed with Respondent-Employer was $760.00.

H. What Was Petitioner's Age at the Time of Accident?

Petitioner testified that he was born on August 12, 1986. Medical records submitted by Petitioner corroborate this testimony. As such, the Arbitrator finds that on July 15, 2017, Petitioner was 30 years old.

I. What Was Petitioner's Marital Status at the Time of Accident?

Petitioner testified that at the time of the accident, he was not married. Petitioner's testimony remains unrebutted, and is supported by information contained in Petitioner's medical records. As such, the Arbitrator finds that on July 15, 2017, Petitioner's marital status was "single." Petitioner has one dependent. ARB EX 1.

J. Were Medical Services Received by Petitioner Reasonable and Necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical care received by Petitioner following this injury was reasonable, necessary and causally related to the injury sustained as a result of the work accident on July 15, 2017. The Arbitrator notes that Petitioner is not requesting an award of any medical expenses, paid or unpaid. ARB EX 1. Accordingly, no finding that Respondent shall pay for or reimburse for paid medical expenses is made by the Arbitrator. To the extent Petitioner requests a finding of a specific prospective medical treatment, the Arbitrator notes that no such finding was requested by Petitioner on the stipulation sheet and the nature and extent of Petitioner's injuries was placed at issue at trial. Thus, no specific award of prospective medical is made under Section 8(a).

K. Temporary Total Disability

Following the accident on July 16, 2017, Petitioner was placed off work and in a non weightbearing status for eight weeks. Throughout his treatment for the injury, Petitioner remained off work. His work restrictions are permanent. On September 10, 2018, Petitioner returned to work for Epsco industries in a sedentary capacity within his work restrictions. Therefore, the Arbitrator finds that Petitioner is entitled to 60-2/7 weeks of Temporary Total Disability at the applicable rate of $506.67 per week.

L. What Is the Nature and Extent of Petitioner's Injury?

Pursuant to Section 8.1(b) of the Illinois Workers' Compensation Act, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b). The criteria to be considered include: (i) the reported level of impairment pursuant to the physician's findings per the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Regarding criterion (i), no AMA Impairment Rating was rendered, and therefore, this factor is given no weight in determining the nature and extent of Petitioner's disability.

Regarding criterion (ii), Petitioner testified that he was a professional house painter at the time of the accident. Petitioner testified that he had operated in this occupation for 15 years prior to the date of accident. Petitioner is not able to return to this profession due to his physical disabilities resulting from the work related accident. The Arbitrator gives this factor great weight.

Regarding criterion (iii), Petitioner was 30 years old at the time of the injury. The Arbitrator gives this factor great weight given that Petitioner has many years left in the work force to contend with his injury which limits his abilities in certain physical labor work fields.

Regarding criterion (iv), Petitioner testified that following the accident, he was unable to return to work as a painter due to the permanent restrictions placed on him by his treating physician. Petitioner testified that he was able to successfully secure work in sales at Epsco Industries beginning about September 2018. Petitioner works in a sedentary capacity, and earns $15.00 per hour. In support thereof, Petitioner submitted 2017 and 2018 tax returns (Pet. Exs. 3-4), as well as 2019 Year-to-Date earnings (Pet. Ex. 5). There is no additional evidence to indicate the range or type of job pay available to Petitioner to evaluate Petitioner's future earning capacity. However, based on his current job in a different work arena and the demonstrated decrease in pay, the Arbitrator gives this factor great weight.

Regarding criterion (v), Petitioner testified that he still feels pain in his foot and ankle when he wakes up in the morning and when completing everyday tasks. Post-surgical follow up visits and x-rays revealed Petitioner was healing and his internal fixation was well-aligned. (PX13). Nevertheless, his pain, stiffness and deficits persisted. (PX13, PX16). On May 18, 2018, ten months after the injury and eight months after surgery, Dr. Weatherford released Petitioner from his care, and told him he could return to work with permanent restrictions. (PX13, 40-42). Petitioner testified that orthopedically, there was nothing more that could be done for him at that time. (PX11, 7). Dr. Weatherford believed Petitioner would eventually develop subtalar arthrosis given the shear nature of the injury and the intraoperative damages noted to the subtalar joint, particularly the posterior facet of the calcaneus. He warned Petitioner might need subtalar joint injection under fluoroscopy in the future. (PX13, 37).

Petitioner testified he was told not to carry anything over 10 pounds, no standing for more than 5 minutes, no climbing ladders or stairs and to elevate his leg at work. Petitioner testified that based on these restrictions, he was unable to return to painting, which had been his profession for 15 years. Petitioner found a sedentary job within his restrictions. The Arbitrator notes that Petitioner request an award under Section 8(d)(2) of the Act and is not requesting an award under Section 8(d)(1) for wage differential.

Petitioner testified as to the daily pain and stiffness he still experiences, now over two years after his injury. He testified that he cannot drive more than 10-15 minutes, struggles to perform daily tasks including playing with his children and regular household chores. Petitioner requires the use of a scooter or cane for walking longer distances. The Arbitrator gives this factor great weight.

Upon consideration of all factors as noted above, the Arbitrator finds that Petitioner has sustained a loss of his trade as a painter based on and in addition to his severe and permanent injury to his right foot and ankle. Accordingly, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

M. Other: Insurance and Liability of the IWBF

The Arbitrator finds that the evidence submitted by Petitioner is sufficient to establish that Respondent-Employer did not maintain active workers' compensation insurance on July 15, 2017. Petitioner submitted a "Request for Information on Employer's Insurance Coverage," (Pet.

Ex. 18), which Petitioner's counsel stated he received from the Illinois Workers' Compensation Commission. The exhibit contains a hand written notation dated 2/6/18 stating "no insurance coverage found on NCCI database." While noting that the NCCI search may have been conducted under the incorrect name of "PN Painting Plus," the search was also performed using the correct address of P N R Painting Plus which was the same address listed on the paycheck given to Petitioner admitted as PX 1. The search using the correct address also revealed no insurance for a business at the address. The Arbitrator's findings are not dissuaded by the disclaimer placed on the address search option, presumably by NCCI. Taken as a whole, the Arbitrator finds these records provide a sufficient basis on which to find the Respondent failed to maintain the appropriate Workers' Compensation insurance.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES GOMEZ,

Petitioner,

vs. NO: 18 WC 32003

ADVANCED DISPOSAL SERVICES,

Respondent.

21IWCC0162

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of causation, prospective medical, and temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification below.

The Arbitrator incorrectly stated that the first mention of Petitioner's shoulder pain was three days after the accident on October 19, 2018. The Arbitrator noted that the record states only "pain in unspecified shoulder." *Arbitration Decision* at p. 6. The Commission's review of the record shows that the note referenced by the Arbitrator appears in records for an office visit on November 1, 2018, which is more than two weeks after the accident at bar. PX5 at 20-24.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8(a) of the Act with credit to be given for any payment made directly by respondent or pursuant to §8(j) of the Act. All medical expenses incurred, or to be incurred, after February 28, 2019 are denied.

21IWCC0162

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of $1,062.37 per week for 21-2/7 weeks, for the period from October 17, 2018 through March 14, 2019 per the stipulation, and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 3.3.21

43

Stephen Mathis

Thomas J. Tyrrell

21IWCC0162

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 11, 2021, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GOMEZ, JAMES
Employee/Petitioner

Case# **18WC032003**

ADVANCED DISPOSAL SERVICES
Employer/Respondent

21IWCC0162

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5094 SKLARE LAW GROUP LYD
MICHAEL R TRYBALSKI
20 N CLARK ST SUITE 1450
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

21IWCC0162

21IWCC0162

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

James Gomez
Employee/Petitioner

v.

Advanced Disposal Services
Employer/Respondent

Case # **18** WC **32003**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of Wheaton on **December 18, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident **October 16, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$82,880.20;** the average weekly wage was **$1,593.35.**

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$22,754.76** for TTD, **$0** for TPD, $**0** for maintenance, and **$4,069.35** (PPD Advanced) for other benefits, for a total credit of **$26,824.11**

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act. All medical expense incurred, or to be incurred, after February 28, 2019 is denied.

Temporary Total Disability

Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of **$1,062.37 per week for 21-2/7weeks**, for the period from **October 17, 2018 to March 14, 2019** per the stipulation.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Christine M Ory

Signature of Arbitrator

January 26, 2020

Date

IC ArbDec19(b) p. 2

JAN 28 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Gomez	)	
Petitioner,	)	21 IWCC0162
vs.	)	**No. 18 WC 32003**
Advanced Disposal Services	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Geneva on December 18, 2019. The parties agree that on October 16, 2018, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent. They agree that in the year predating the accident, petitioner earned $82,880.20 and his average weekly wage calculated pursuant to §10, was $1,593.35.

At issue in this hearing is:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills
3. Whether petitioner is entitled to payment for prospective medical treatment.
4. Whether petitioner is due temporary total disability

FINDINGS OF FACT

Petitioner testified that he had worked for respondent for 5 years as a rolloff driver. He started work at 4:00 AM on October 16, 2018. While on his route later that day at about 2:45 PM, his truck was pulled over to the side of the road, and he was outside of it tarping a rolloff container when he was struck by the passenger-side mirror of a passing vehicle.

Petitioner testified that the mirror hit his left shoulder blade and spun him around. The driver pulled over and petitioner went up to talk with him, then petitioner called his supervisor and reported the incident.

Paramedics were dispatched to the scene, and the history they took from petitioner was that he was in the process of securing his load "when he felt a side mirror of a vehicle hit him in his back." Petitioner confirmed that he was ambulatory the entire time and did not fall down. He also reported that the vehicle tire grazed his boot, but did not run over his foot. "Crew noted no redness, bruising, or swelling to the pt's back or foot." (PX1, p.6).

Petitioner was transported to Alexian Brothers Hospital and was seen in the emergency room. There, petitioner reported that a vehicle going 10 to 15 miles per hour struck his left side and ran "over the edge of his left foot slightly." He was wearing steel toed boots and denied pain and swelling to the toes or the foot. He did complain of pain radiating to the neck and left lateral ribs on a level of 8/10 associated with a slight headache. He confirmed that he did not fall from the occurrence. (PX3, p.13).

The physical examination showed diffuse tenderness to palpation in the neck with no vertebral tenderness, normal range of motion and no bruising or swelling. He had mild diffuse thoracic and lumbar vertebral pain, likewise with no edema or hematoma. His extremities all had normal range of motion with no swelling, open wounds or bruising. (PX3, p.14)

X-rays were taken of the ribs and all levels of the spine, but not the shoulder or the foot. The rib x-rays showed no fractures or deformities. Findings in the cervical, thoracic and lumbar spine studies showed no evidence of acute fracture or malalignment, along with "interval progression of arthritic changes since previous x-rays" at all three levels, with the cervical spine studies specifically noting "multilevel arthritic changes." (PX3, pp.15, 27-30).

Petitioner was discharged in stable condition, with noted improvement in his pain complaints. The "Impression and Plan" section upon discharge actually only noted "Acute pain of the left foot," though petitioner was also provided education materials on back pain. He was provided pain medications and instructed to follow up with Dr. Scholl in two days (PX3, p.16).

According to Petitioner's Exhibit 5, records from Alexian Brothers Medical Group, petitioner reported being hit by a car mirror on the left side "a few days ago." His emergency room visit was recorded, as were his current complaints of headaches, neck pain and pain in his left foot. The physical examination noted that petitioner was ambulating with a mild limp from discomfort on his left hip, he had left side of paraspinal muscle tightness in his back and pain with external rotation of the left hip and on palpation of the joint. No specific examination of the upper extremities is noted, and the cervical spine showed normal flexion and extension, but with spasms on the left side of the posterior cervical region.

The assessment included cervicalgia, pain in the left hip for which an MRI was ordered and pain in the left foot, which was to continue to be monitored. There is also an indication of "pain in unspecified shoulder." (PX 5, p. 25). The MRI of the left hip was performed on November 16, 2018, and showed no obvious tear of the acetabular labrum, no evidence of joint effusion or avascular necrosis of the femoral head. All hip muscles appeared normal and the joint spaces were maintained bilaterally. (PX 5, p.29).

There is then record of a November 1 visit and a history that petitioner reported no improvement since his work accident. Petitioner had undergone two physical therapy sessions at that point, which only helped him temporarily. His primary complaint again was left hip pain, which he felt was aggravated during therapy. He also reported left upper back and neck pain with no numbness or tingling in the left arm, and he was able to move all of his extremities. (PX 5, p.24).

By November 15, 2018, petitioner had improvement in his headaches but no significant improvement in neck pain or hip pain despite additional therapy sessions. The summary of the work accident again notes only that petitioner was "hit by a car mirror on the left side." The physical examination findings with regard to the neck, left hip and cervical spine were all similar to the November 1 visit, once again with no indication of any specific examination on either shoulder. The assessment following this visit is only of neck pain and left hip pain. (PX 5, pp. 17-21).

At his follow-up visit on November 27, petitioner brought in the CD of the hip MRI, and noted that he was told that there was nothing wrong in the hip, though he still complained of pain. He also complained of a knot in his neck. The assessment again included only neck pain and left hip joint pain. Dr. Scholl referred petitioner to Dr. Odell due to petitioner's lack of subjective improvement. (PX 5, pp.13–17).

Petitioner was last seen by Dr. Scholl on January 22, 2019 for what appears to be a general checkup. His only subjective complaint on this date was "back pain." The examination of the neck showed full range of motion, the musculoskeletal examination was negative as to motor strength, tone, joints, bones and muscles, and normal movement was noted of all extremities. Petitioner had a normal gait and his pulses were normal as well. The assessment at this time was an examination without abnormal findings, along with uncontrolled type II diabetes, which had been noted on petitioner's prior medical history. He was scheduled for a follow-up examination in three months. (PX 5, p.13).

According to the records of Midwest Sports Medicine, Dr. Odell first saw petitioner on December 11, 2018. (PX 11, p.7). Petitioner's history at that time was that he was standing outside next to his work truck when he was hit by the mirror of the car, "which spun him and he then hit the quarter panel of the car. He states his left foot was run over by the car," though petitioner confirmed that he was wearing steel toed shoes. Petitioner complained of pain in his left hip, left shoulder and cervical spine. Following his examination and review of the diagnostic studies, Dr. Odell's impression was left hip pain, exacerbation of cervical spondylosis, C4–C7 disc herniations and left shoulder pain and biceps tendon injury. (PX 11, pp.12–15).

Dr. Odell saw petitioner on three more occasions through February 12, 2019, and petitioner's complaints, examination findings and assessments were essentially the same. He ordered MRIs of the left shoulder and the lumbar spine, and kept him off of work (PX 11, pp.26-55).

At that point, respondent scheduled an IME with Dr. Michael Lewis at Illinois Bone & Joint. According to his history to Dr. Lewis, petitioner was outside of his truck on October 16, 2018 when a passenger mirror hit him on his left shoulder while the car was moving. This is the first indication of the vehicle mirror striking petitioner's shoulder, as opposed to his left side or the left side of his back. The impact resulted in a twisting motion to his lower back and the car running over his left foot.

Petitioner reported no pain in the foot, but did have pain in the low back area with radiation into the left thigh. He also complained of pain in the posterior cervical spine with radiation to the left shoulder. Petitioner noted a prior injury to his low back in 2008, for which he had received an injection into his sacroiliac joint.

Examination showed petitioner walking with a normal gait, and normal range of motion of the cervical spine. Range of motion of the shoulders was equal bilaterally as was strength, sensation and reflexes. Examination of the left shoulder was negative for apprehension and impingement signs.

The examination of the lumbar spine showed no spasm in the paravertebral muscles with equal range of motion bilaterally, and normal muscle strength sensation and reflexes in the lower extremities bilaterally. (RX 2, pp.1-2).

Dr. Lewis reviewed the ER records, the October 19, 2018 examination note as well as the MRIs of the left hip, cervical spine, left shoulder and lumbar spine. He also had the off work notes from Dr. Odell and petitioner's physical therapy records.

Following his examination of petitioner and review of the records, Dr. Lewis concluded that there was no objective evidence of orthopedic pathology in regard to the left foot, left hip, cervical spine, lumbar spine or left shoulder. This was confirmed by his review of the diagnostic studies, including all of the MRI films. He specifically stated that there was no evidence of acute pathology on any of those studies, nor objective evidence of orthopedic pathology from his

examination. Therefore, he found that petitioner did not sustain even an aggravation of any underlying conditions.

He did state that the treatment rendered to date, including that by Dr. Odell had been appropriate and causally related to the conditions from the work accident, but that no further treatment was necessary. He felt that petitioner could resume working with no restrictions. (RX 2, pp.3-5).

Petitioner returned to Dr. Odell on March 12, 2019 and according to his work restriction form of that date, the list of diagnoses now takes up nine lines, ranges from the cervical to the lumbar spine and includes the left shoulder and left hip conditions. He was already contemplating surgery to address petitioner's left shoulder complaints, but referred him to Dr. DiGianfilippo for exploration of possible cervical spine surgery. (PX 11, pp.57-60).

Petitioner saw Dr. DiGianfilippo on April 3, 2019. Petitioner's history is recorded almost simultaneously as "he was hit on the left side of his hip" and "He was hit with car mirror behind left shoulder blade." He complained of pain on the left side of his neck and shoulder, but noted that the knot in his neck had improved. "He apparently also developed a rotator cuff tear, along with tingling down his left arm to his last two fingers." (PX 13, p. 9).

Following physical examination findings that are alternately noted as "no neck pain or swelling in the extremities" followed almost immediately by "neck pain, back pain, arm pain, and leg pain," along with buttock and groin pain radiating down the left leg to the knee, the assessment is "significant cervical spinal canal stenosis with spinal cord compression" along with indications of a spinal cord injury and low back pain with mild L4–5 stenosis. He also includes cervicalgia and headache in his diagnoses. (PX 13, p.10).

His proposed treatment was a C3–C6 decompressive laminectomy due to what he deemed a tight canal and cord compression with possible spinal cord injury. Dr. DiGianfilippo was told that the IME doctor had suggested petitioner could go back to work, but he disagreed with that (PX 13, p.11).

Four weeks later, on May 2, 2019, Dr. DiGianfilippo performed a decompressive laminectomy from C3 to C6. He was seen on two occasions through May 22, at which time he was still authorized off of work. (PX 13, pp.12–15). There is no indication petitioner has returned to Dr. DiGianfilippo since May.

Petitioner has continued to follow-up with Dr. Odell, however. Through his visit on August 6, 2019, Dr. Odell took petitioner off of work and charted his complaints regarding his left hip and his left shoulder. The examination noted tenderness to palpation over the subacromial area of the left shoulder, but range of motion to 150°. Positive impingement signs were also noted. The examination of the left hip revealed mild trochanteric tenderness. (PX 11. Pp.82-101).

The assessment and plan were a left shoulder partial thickness rotator cuff tear and biceps tendinitis versus partial tear and impingement, along with left leg lumbar radiculopathy and "disc bulges/herniations" from L2 through S1. Petitioner was released to light duty as of August 12, 2019 with a 20-pound lifting restriction. It was noted that he would continue following up with Dr. DiGianfilippo (PX 11, pp.98-99), though there are no further records from that physician in evidence.

Based on the ongoing complaints and treatment petitioner was undergoing, and particularly after the cervical spine surgery, respondent forwarded petitioner's updated records to Dr. Lewis for an addendum opinion. Specifically, the initial paramedic and emergency room records were provided, along with additional notes of examination from Dr. Scholl, Dr. Odell and Dr. DiGianfilippo, including his operative report of May 5, 2019.

Following his review of these additional records, Dr. Lewis stated in an August 31, 2019 report that while petitioner may have had continued subjective complaints, there was no objective evidence of orthopedic pathology as of the IME on February 28, 2019. Therefore, his opinions as to the need for treatment after that date, the diagnosis of strains and contusions that had resolved, and petitioner's ability to work after that date were unchanged. He acknowledged that petitioner may have made subjective complaints to the other doctors that he did not make during his IME, but this did not impact his opinion with regard to Petitioner's objective physical condition, either as of February, 2019, or thereafter. (RX 3, pp.1-2).

Consistent with this opinion, and despite the most recent diagnosis of multiple herniated lumbar discs by Dr. Odell, a repeat MRI of the lumbar spine dated August 12, 2019 revealed diffuse disc bulges, not herniations, with no resulting spinal stenosis at L2-3, L3-4 and L4-5, and specifically "no disc herniation or spinal stenosis" at L5-S1. The report further notes normal alignment of the lumbar spine without evidence of subluxation, and normal vertebral body heights and disc spaces. (PX 11, pp.102–103).

Petitioner returned to Dr. Odell on September 5, 2019 and the listed diagnoses were now left bicipital tendinitis, osteoarthritis of the left shoulder, and muscle and tendon strains in the rotator cuff of the left shoulder, along with pain in the left hip. These were essentially maintained following his October 5, 2019 visit, at which time, petitioner agreed to proceed with a left shoulder arthroscopy with subacromial decompression, rotator cuff repair, open distal clavicle excision and open biceps tenodesis.

That surgery took place on November 6, 2019, and the postoperative diagnoses were right [sic] shoulder traumatic partial thickness rotator cuff tear, partial-thickness long head biceps tendon rupture, impingement syndrome, anterior superior labral tear and AC joint osteoarthritis. (PX 11, pp.141–143). He followed up on a couple of occasions through November 19, 2019, which was the last examination before trial. Petitioner was authorized off of work and was undergoing therapy at the time.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The petitioner bears the burden of proving every element of his claim by a preponderance of the evidence. Arbuckle v. Industrial Commission, 32 Ill.2d 581 (1965). The arbitrator is asked herein to determine whether petitioner met his burden of proving by a preponderance of the credible evidence that he required treatment from the effects of the October, 16, 2018 work injury following the February, 28, 2019 examination with Dr. Lewis, whether he was unable to return to work without restrictions after that date and at the time of trial, and whether the two surgeries that followed were in fact medically necessary and causally related to the injuries from the October 16, 2018 work accident.

Shoulder surgery

The arbitrator addresses the shoulder surgery first, as this was most recent in time, and the issue of causal connection, or lack thereof, is perhaps more obvious. The extensively recorded summary of the accident histories above that petitioner provided to the paramedics, to the emergency room and to Dr. Scholl early on in the case, and even to Dr. Odell and Dr. DiGianfilippo, establish by overwhelming evidence that the passenger side mirror of the vehicle

that struck petitioner did not strike him in the left shoulder, contrary to his trial testimony. Every history petitioner provided until his IME with Dr. Lewis and his trial testimony referenced only being struck in the back or on the left side of the back. The history to Dr. DiGianfilippo actually records being struck both in the hip and the shoulder.

Corroboration of the absence of a direct impact on petitioner's left shoulder in the accident is further found by the fact that x-rays were done of every area of the body that petitioner reported being injured in the accident, and every area of concern to the emergency room doctors, yet no x-rays were taken of either shoulder.

Likewise, there are no directed examinations of the left shoulder, and to the extent that there is reference to musculoskeletal examinations of petitioner's extremities at all in the early records, no positive objective findings are recorded. There is thus no contemporaneous, objective evidence that petitioner was struck in the left shoulder blade at the time of the accident, or that he in any other way injured his left shoulder in the accident.

Although the first reference to shoulder pain appears three days later at petitioner's follow-up examination on October 19, 2018, that record is devoid of any complaints of pain or injury to either shoulder, or evidence of examination to the upper extremities. In addition, the assessment does not specify which shoulder is involved as it literally states, "pain in unspecified shoulder." (PX 5, p.25).

The focus of petitioner's complaints, examination, findings and treatment thereafter were to the cervical spine on the left side and the left hip. By January 22, 2019, petitioner's only subjective complaints were unspecified back pain, he had full range of motion in the neck, and the musculoskeletal examination was negative. (PX 5, p.13).

The MRI of the left shoulder revealed tendinopathy with a partial-thickness articulating undersurface tear, along with hypertrophic spurring and possibly some mild impingement (RX 2, p.3). None of petitioner's treating doctors have indicated that any of these findings were either acute or represented an aggravation of the underlying findings by the work accident.

Neither Dr. Odell nor Dr. DiGianfilippo have explained or implied in their records how a rotator cuff tear arose from the described accident of petitioner being struck in the back by the rearview mirror of a vehicle passing him at about 10 miles an hour. Dr. Lewis specifically found no evidence of any acute pathology on the shoulder MRI, or any of the other MRIs. (RX 3, p.4).

As a result, the Arbitrator adopts the opinion of Dr. Lewis in his February 28, 2019 report (RX 2), as amplified in his August 31, 2019 report (RX 3), that petitioner was not in need of any further treatment to any body part, much less the left shoulder, after that date as the more credible medical opinion on this issue.

Thus, whether petitioner actually needed the shoulder surgery that Dr. Odell performed on November 6, 2019 or not, the record is devoid of credible, objective evidence that the need for that procedure had anything to do with the October 16, 2018 work injury.

Based on the above, the arbitrator finds that petitioner failed to prove that his medical treatment after February 28, 2019, his lost time beginning with the November 6, 2019 left shoulder surgery, the medical bills for the surgery itself, any prospective treatment, as well as any disability that may later be found to result from the left shoulder surgery, were causally related to or necessitated by the October 16, 2018 work injury.

Cervical spine surgery

The issue of causal connection between the cervical surgery petitioner underwent and the work accident is less obvious than with regard to causal connection between the shoulder surgery and the work accident. As it remains petitioner's burden to prove by a preponderance of the credible

evidence, however, that the cervical spine surgery was causally related to the work accident, the arbitrator finds that petitioner likewise failed to meet his burden of proof on this issue.

Once again, the diagnostic studies, specifically the cervical spine MRI and x-rays, along with petitioner's initial presentation to the paramedics, emergency room and Dr. Scholl all point to a soft tissue contusion/strain injury, and point away from a traumatic injury or aggravation of an underlying condition necessitating surgery.

Although petitioner did have neck and cervical spine complaints, and diagnostic studies were undertaken of the neck and cervical spine (unlike with regard to the left shoulder) in the emergency room, it is significant that the x-ray findings of all three areas of petitioner's spine all noted merely "interval progression of arthritic changes since previous x-rays," with the additional, and significant, detail in the report of the cervical spine x-rays noting "*multilevel* arthritic changes." (PX 3, pp. 27–30).

The arbitrator thus finds that the objective evidence from the diagnostic studies as well as the examination findings in the emergency room and by Dr. Scholl thereafter fail to support any reasonable conclusion that petitioner was a) actually in need of multilevel repairs in his cervical spine or b) that such a procedure, even if medically necessary, was at all causally related to the October 16, 2018 work accident.

Dr. Lewis' reports substantiate this finding, (RX 2,3) and are more credible on the issue than Dr. Odell or the one visit and quick surgery performed by Dr. DiGianfilippo.

In further support of the arbitrator's decision that petitioner failed to meet his burden of proving that the cervical spine surgery was causally related to the work accident, petitioner testified at trial of ongoing stabbing pain from his neck into his left arm, despite the fact that both his neck and his shoulder have undergone surgical procedures, allegedly to alleviate his symptoms. The fact that petitioner has not had any resolution of his symptoms now after two surgeries supports the opinion of Dr. Lewis that petitioner was actually not in need of any further treatment to any body part as of February 28, 2019.

While a surgical result is not always a reliable indicator of medical necessity or causal connection, both surgeries were clearly fueled by petitioner's subjective complaints rather than the objective diagnostic and examination findings. The fact that Dr. Odell references four levels of *herniated* discs in petitioner's lumbar spine as late as August, 2019 (PX 11, pp.98-99), and only backtracks from that diagnosis after yet a second lumbar MRI fails to substantiate this, provides a further basis for the Arbitrator to find his opinions, and those of Dr. DiGianfilippo, less credible on this issue than Dr. Lewis'.

Lastly, the arbitrator notes that a history of being struck by a moving vehicle as a pedestrian, the history relied upon by Drs. Odell and DiGianfilippo, suggests that significant injuries can result. There is no doubt that while working on the side of his truck in the road on October 16, 2018, petitioner was struck by the rearview mirror of a vehicle going about 10 miles per hour or so. The potential severity of that impact, however, is diminished in this case by the factual evidence that petitioner was not knocked down, and walked on his own power over to the offending car, which had pulled over to the side of the road, to advise the driver.

Petitioner then called his supervisor, and when the paramedics showed up, they noted that petitioner was ambulatory the entire time, and their initial examination showed no redness, bruising or swelling to the petitioner's back and foot (PX 1, p.6).

This, of course, does not impact the compensability of the claim, but does confirm the relatively minor nature of the impact on petitioner's body. The resulting absence of findings in the

emergency room records and the initial visits to Dr. Scholl of any swelling in any of the body areas petitioner complained of lends further credence to this conclusion.

In short, petitioner was injured in a work-related accident on October 16, 2018, but fortunately for him, the nature of the resulting injuries was essentially strains that took a couple of months of follow-up visits and physical therapy to resolve. Thereafter, petitioner's subjective complaints led to his ongoing treatment, and eventually surgeries, performed by Dr. Odell and Dr. DiGianfilippo, but the objective evidence and credible opinions in the record do not establish that any of that was causally related to injuries sustained on October 16, 2018.

For the foregoing reasons, the arbitrator finds that petitioner failed to prove that respondent is liable for the costs of the petitioner's cervical spine surgery and its follow-up since July 6, 2019, failed to prove that petitioner was both in need of medical treatment and incapable of working after February 28, 2019, and has failed to prove that any disability that is found to be related to the cervical spine surgery is causally related to the work injury.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator determined petitioner's extensive treatment after February 28, 2019 was not causally related to the work accident of October 16, 2018. Furthermore, based upon the lack of objective findings, the Arbitrator finds all treatment after February 28, 2019 was not reasonable or necessary as required in §8 of the Act and denies petitioner's claim for all medical treatment incurred after February 28, 2019

Specifically, the Arbitrator awards payment to Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act.

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

As the Arbitrator determined no further treatment was causally related, or reasonable and necessary, after February 28, 2019, the Arbitrator denies the claim for prospective medical treatment.

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner was temporarily totally disabled from October 17, 2018 only to March 14, 2019 as stipulated by respondent, based upon the opinion of Dr. Michael Lewis. Petitioner is awarded TTD from October 17, 2018 to March 14, 2019, which is 21-2/7 weeks at the rate of $1,062.57 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICKI MITCHANER,

Petitioner,

vs. NO: 11 WC 5574

SYNGENTA SEEDS, INC,

Respondent.

21IWCC0163

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident, notice, causal connection, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the correction and clarification noted below.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $439.80 per week for a period of 200 1/7 weeks, representing August 19, 2010 through Juy 1, 2013 and August 11, 2015 through July 28, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the amount of $439.80 per week for a period of 75 6/7 weeks, representing April 3, 2017 through June 30, 2018 and April 15, 2019 through June 30, 2019, as provided in §8(a) of the Act

21IWCC0163

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the vocational service expenses of Bob Hammond, CRC, in the amount of $7,649.73, pursuant to section 8(a) of the Act. PX18.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $466.13 per week for life, representing the minimal permanent total disability rate for Petitioner's date of accident, commencing on July 16, 2019, as provided in §8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses pursuant to the fee schedule, relating to the treatment Petitioner underwent for bilateral carpal tunnel syndrome. Respondent is not liable for medical expenses for treatment of Petitioner's left cubital tunnel syndrome.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Commencing on the second July 15th after the entry of the Arbitrators award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 2.16.21

43

Stephen J. Mathis

Stephen Mathis

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MITCHANER, VICKI
Employee/Petitioner

Case# **11WC005574**

SYNGENTA SEEDS INC
Employer/Respondent

21IWCC0163

On 12/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0874 FREDERICK & HAGLE
JEFFREY D FREDERICK
129 W MAIN ST
URBANA, IL 61801

0000 RUSIN & MACIOROWSKI LTD
TERRY SCHROEDER
2506 GALEN D SUITE 102
CHAMPAIGN, IL 61821-7047

21IWCC0163

STATE OF ILLINOIS)
)SS.
COUNTY OF **CHAMPAIGN**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [x] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VICKI MITCHANER
Employee/Petitioner

v.

SYNGENTA SEEDS, INC.
Employer/Respondent

Case # **11** WC **5574**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, former Arbitrator of the Commission, in the city of **Urbana**, on **July 16, 2019**. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the case to Arbitrator Mason for the purpose of reviewing the transcript and exhibits and issuing a decision. The parties agreed to proceed in this fashion. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. xx Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. xx Was timely notice of the accident given to Respondent?
F. x Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. xx Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. x What temporary benefits are in dispute?
   [ ] TPD x Maintenance xTTD
L. x What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **June 14, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to her current post-operative bilateral carpal tunnel syndrome condition of ill-being but did not establish causation as to her claimed left cubital tunnel syndrome.

In the year preceding the injury, Petitioner earned $**57,078.44**; the average weekly wage was $**659.70**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**10,920.21** under Section 8(j) of the Act for payments made under Respondent's short-term disability policy. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against her by reason of having received such payments, pursuant to Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $439.80 PER WEEK DURING TWO INTERVALS, FROM 8/19/10 THROUGH 7/1/13 (THE DATE DR. OAKEY RELEASED PETITIONER TO FULL DUTY) AND FROM AUGUST 11, 2015 (THE DATE OF THE RIGHT CARPAL TUNNEL RELEASE) THROUGH 7/28/16, AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $439.80 PER WEEK FROM 4/3/17 (THE DATE OF PETITIONER'S FIRST RECORDED JOB CONTACT, PX 20) THROUGH 6/30/18 AND FROM 4/15/19 THROUGH 6/30/19, AS PROVIDED IN SECTION 8(A) OF THE ACT. IN ADDITION, RESPONDENT SHALL PAY VOCATIONAL EXPENSES OF BOB HAMMOND, CRC, IN THE AMOUNT OF $7,649.73, PURSUANT TO SECTION 8(A) OF THE ACT. PX 18.

RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $466.13 PER WEEK FOR LIFE, REPRESENTING THE MINIMUM PERMANENT TOTAL DISABILITY RATE IN EFFECT AT THE TIME OF PETITIONER'S INJURY, COMMENCING 7/16/19, AS PROVIDED IN SECTION 8(F) OF THE ACT.

PETITIONER CLAIMS THE MEDICAL EXPENSES ENUMERATED IN PX 21. SOME OF THESE EXPENSES RELATE TO TREATMENT PETITIONER UNDERWENT FOR LEFT CUBITAL TUNNEL SYNDROME. THE ARBITRATOR DID NOT FIND CAUSATION AS TO THIS CONDITION. RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL EXPENSES, PURSUANT TO THE FEE SCHEDULE, RELATING TO THE TREATMENT PETITIONER UNDERWENT FOR HER LEFT AND RIGHT CARPAL TUNNEL SYNDROME.

COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(G) OF THE ACT.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason

Signature of Arbitrator

12/23/19
Date

DEC 23 2019

Vicki Mitchaner v. Syngenta Seeds, Inc.
11 WC 5574

21IWCC0163

Procedural History

Former Arbitrator Hemenway conducted a hearing in this case on July 16, 2019. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the matter to Arbitrator Mason for the purpose of reviewing the transcript, exhibits and proposed findings and issuing a decision. The parties agreed to proceed in this manner.

Summary of Disputed Issues

Petitioner, a longtime "supply tech" who worked in Respondent's lab, claims left carpal tunnel syndrome manifesting on August 18, 2010 secondary to repetitive trauma. She also claims left cubital tunnel syndrome, secondary to the left carpal tunnel surgery, and right carpal tunnel syndrome secondary to overuse. [At the beginning of the hearing, Petitioner amended her Application to clarify she is not alleging injuries to her neck, back or shoulder. T. 7.]

The disputed issues include accident, notice, causal connection, medical expenses, temporary total disability from August 19, 2010 through July 28, 2016, maintenance from March 13, 2017 through the hearing of July 16, 2019 and nature and extent. The parties agree that Respondent paid $10,920.21 in non-occupational benefits. They also agree that, as of the hearing, Petitioner would be earning $22.95 per hour if she still worked for Respondent. Arb Exh 1. T. 5.

Arbitrator's Findings of Fact

Petitioner testified she was born on August 26, 1954. She is right-handed. She graduated from high school in 1972. She did not attend college. Her first job out of high school was for a maid service. She then worked as a stock clerk for Colwell Systems and in the office at United Waste Systems. T. 21-22.

Petitioner testified she began working as a supply tech for Respondent in 1990. She was 37 years old at that time. She continued to work as a supply tech, on a full-time basis, through August 18, 2010. She typically worked overtime from September through January. She testified that overtime was required. Her employment at Respondent ended in February 2011. At that point, her hourly rate was $15.57. T. 22-23.

Petitioner identified PX 16 as a description of the various tasks she performed as a supply tech. She created PX 16 and provided it to Dr. Fletcher. She provided a verbal, less complete description to Dr. Kohlmann, an examining physician she saw at Respondent's direction. She testified she made an unsuccessful attempt to provide Dr. Kohlmann with a more complete description. T. 26-28.

Petitioner testified that Respondent operates a soybean production plant. Respondent contracted with soybean growers. After a harvest, the growers brought their seeds to the plant. She worked in Respondent's lab, performing quality assurance testing on these seeds.

Petitioner testified she initially tested "bin samples." Co-workers placed these samples on a pallet outside the lab. The samples were in white bags. Each bag weighed 5 pounds. Petitioner testified she would carry 5 or 6 bags at a time into the lab. She untied the bags, poured the seeds into trays, performed a two-minute visual inspection and then poured the seeds into metal pans. The pans were 11 x 20 inches in size. Each pan had a hole in the end. She then had to pour the seeds back into the bags. She testified she put her hands over the end of the hole to avoid spillage. She estimated she tied and untied each bag 4 to 6 times during the testing process.

Petitioner also described the "purity checks" she performed. She had to ensure that the seeds were all the same variety. T. 33. She would place a seed on a rough wooden board that was 20 x 20 in size. The surface of the board was carpeted so that the seeds would not roll too quickly. She poured seeds onto this surface and inspected them, using a magnifying glass that lit up. She testified she rested her wrists at an angle on the wooden part of the board as she pulled the magnifying glass down and inspected the seeds. She then used a pencil to roll 500 seeds slowly, while checking their size, shape and coat. She held the pencil in her right hand. She used her index finger and thumb to remove any seeds that seemed questionable. Some seeds were pea-sized while others were smaller. T. 36-37. It took her 10 to 15 minutes to inspect 500 seeds. She rested her wrists against the wooden board during this time period. T. 38.

Petitioner also described a process known as "rag dolls." She started this process by retrieving a 50-pound box of paper from a warehouse, carrying it 200 feet to the lab and using a utility knife to cut it open. The box contained 2000 sheets of paper. She used both hands to remove about three inches of paper at a time. She placed the paper on a baker's sheet and then wet the paper, using water from a plastic container. She then used both hands to flip the paper over and wet the other side. The paper swelled as she wet it. She placed the wet paper into storage containers that had snap-close lids. If the sample was classified as a "round up," she used "round up" solution, rather than water, to wet it down. She made this solution. She then took a sheet of wet paper and folded it halfway down. She then poured seeds into a 10-inch triangular plastic pan and, from there, into a "planting board" that was about 4 x 22 inches in size. She held the "planting board" in both hands and rolled it around until the seeds filled 50 holes. She then poured off the excess seeds into the pan. She then set the "planting board" onto a wet piece of paper and released the seeds, using her thumb. She then used both hands to flip the folded half sheet of paper up onto the seeds. She then used her fingers and thumbs to roll the paper from left end to right end until she "had that rag doll rolled." T. 41. Once it was rolled, she folded it into two, put a rubber band around it and put it into a wired bucket that had holes in it. Her goal was to plant 400 seeds. She repeated the process eight times, put plastic over the bucket and affixed it with a rubber band. In the busiest part of the year, she

might do "300 a day in rag dolls." T. 42. During "bin sampling", she might stand there for five hours in a row, "just doing rag dolls." T. 43.

Petitioner identified PX 22 as a photograph of a gallon jug that co-workers would bring to her. The jugs were referred to as "truck samples." They would be filled with five pounds of seed. There would be a ticket at the top, identifying the grower. She would hold the lid with her left hand and try to twist the lid off, using her right hand. She would alternate if she was not able to untwist the lid on the first try. The lid was 4 inches in diameter. The jug was made of plastic but was sometimes slick due to being covered with bean dust. T. 45. After she removed the lid, she would write out an envelope, using the information from the ticket. She would then grasp the lip of the jug, using her left hand, use both hands to lift the jug to the height of her head and pour the contents into a copper divider. She then put the lid back on the jug and threw the jug into a box. She would have to unscrew and screw jug lids between 20 and 50 times per shift, depending on the number of truckloads that arrived. T. 48.

Petitioner then described the screening process. She handled three types of screens: 12 slotted, 11 ½ slotted and 11. After she poured the seeds into the copper divider, they went down into two brass pans. The pans had 4-inch handles at the top. She would pour 250 grams out of one, using her right hand, and 250 grams out of the other, using her left hand. She poured the seeds onto screens and then started shaking down the seed. She had to use her thumbs and forefingers to pick out all foreign material, including pods, bugs and mice, "whatever the grower picked up in the seed." She used both hands to rub over the screens to get any spilt seeds to fall down through the screens. The screening process could take between 10 and 30 minutes, depending on how dirty the seeds were. T. 51.

Petitioner explained that she did not work one seed sample through all of the stages because it "wasn't productive." Instead, she would take a stack and do the two-minute check, take a stack and do the test weights, take a stack and do the testing and then do the planting and screening. She would never have been able to keep up the pace if she had taken one sample and run it through. T. 52-53.

Petitioner testified that, in May or June, she also performed tasks in locations other than the lab. Out in the field, she would take a post and put a sign on it, indicating the variety of seed that was planted in that area. She would then take a two-handled post hole driver and "slam that down over the top of the post to drive the post into the ground." T. 54. She placed one hand on each handle. She had to slam three or four times to drive the post down. She also put out plastic signs. This involved placing plastic rivets and clips in the signs. In the warehouse, she and a co-worker would sort through old pallets that were stacked 100 feet long. She would be on one side and her co-worker on the other. Together, they would flip each pallet to see whether it needed to be repaired. If they encountered a pallet that needed to be worked on, they would throw it off to the side. T. 56. The "good" pallets had to be "slip sheeted." This involved grabbing stacks of cardboard and using a heavy stapler to "slap" the cardboard onto the pallet. Petitioner testified she had to "slap" pretty hard to get the staple to go through the pallets because the pallets were made of oak or other hard material. T. 56-57.

She used a crowbar to "bust up" the broken boards on pallets that required repair. She then used a pry bar to "pop" the broken boards off so that new boards could be put on. A pneumatic tool was used to affix the new boards but she did not use this tool. T. 57. She also used a push broom in the warehouse to clean the area where the pallets were sorted. This area was 100 x 100 feet in size. She also used a "scoop shovel" while cleaning up. She would put the debris into a wheelbarrow, maneuver the wheelbarrow out to the dumpster and pour the contents into the dumpster. T. 58-59.

Petitioner testified she sometimes worked with sand during the "rag doll" process. If she planted "rag dolls" and they did not meet the germ requirements, she had to replant on sand. Co-workers would bring in sand, using wheelbarrows. She had a bucket that held 50 pounds of sand. The sand could be wet or dry. She used her right hand to scoop the sand from the wheelbarrow into the bucket. She used her left arm to "hoist" the bucket and carry it to her work station. She would typically fill the bucket about ¾ full so that it weighed between 30 and 40 pounds. Once she got the bucket to her work station, she pushed it onto the counter. She would take 600 milliliters of water from her water container and pour that onto special "Kinpack" paper that resembled the lining of a plastic diaper. She then used her hands to flatten the paper. She then poured seed into a pan and then onto a planting board. She would roll it around until she got 100 seed in the holes. She would then pour off the excess and lay that down on each corner of the Kinpack paper. She would release the spring load, press it down and pour sand over the seeds, using the scoop, until the seeds were covered. She then used her hands to "smooth that out" and carried it over to the germ room. She would slide the planted board into racks in that room. T. 60-62.

Petitioner testified that each task she performed throughout each shift required her to use her hands. T. 62.

Petitioner denied performing any hand-intensive activities outside of work. She does not knit. T. 63-64. She does not have any problems with her thyroid. She is 5 feet, 9 inches tall. T. 64.

Petitioner denied having any problems with either of her hands before she started working at Respondent. She first noticed problems with her hands in the spring of 2010. She noticed problems with grip and strength. She also noticed that her hands would shake when she lifted things. She began dropping objects. T. 65.

Petitioner testified she had experienced problems with her neck for several years before the spring of 2010. T. 65.

Petitioner testified she first saw a doctor for left hand and wrist problems on June 14, 2010. She went to the office of her primary care physician and saw that physician's assistant, Bill Kilpatrick. She informed Kilpatrick that she was experiencing pain, tingling and numbness in her left hand. She also told Kilpatrick that she had noticed a knot on the top of her wrist. T. 66.

She discussed her job duties with Kilpatrick. He provided her with a cock-up splint for her left hand and wrist.

Records in PX 1 and RX 5 reflect that Petitioner saw William Kilpatrick, a nurse practitioner, at Christie Clinic on June 14, 2010. Kilpatrick noted a complaint of left wrist and hand pain that had worsened over the previous three days. He also noted a knot on the posterior aspect of Petitioner's left hand near the wrist. Petitioner denied having anything similar in the past. Petitioner reported being "busier at work" and doing "a lot of repetitive movement with her arms and hands on a daily basis." She also reported taking one Aleve daily for ongoing neck discomfort. She denied any specific injury but reported doing a lot of lifting throughout the day. Kilpatrick described her as right-handed.

In addition to the knot, Kilpatrick noted mildly positive Tinel's and Phalen's testing to the left wrist. His impression was: 1) ganglion cyst; 2) wrist strain; and 3) early carpal tunnel syndrome. He placed Petitioner in a left wrist cock-up splint. He recommended that Petitioner take Aleve twice daily for four to five days. He directed Petitioner to return in two to three weeks if she did not improve. RX 5, p. 24/113.

Petitioner testified that, as of her visit to Kilpatrick, she understood that she had left carpal tunnel syndrome that was due to her repetitive work duties. T. 68. She returned to work the same day she saw Kilpatrick. T. 68. She was wearing the splint. The splint was visible. It was dark blue with white trim. She went to the office of Kevin Kaiser, the plant manager, and spoke with Kaiser that day. [She identified Kaiser in the hearing room. T. 69-70.] Kaiser was her supervisor. From where she was standing, the splint was within Kaiser's view. Kaiser asked her what the splint was for. She told him she was having issues with her hand. She also told him she had just come from the doctor's office, where she had learned she had carpal tunnel syndrome. Kaiser then asked her whether she had any work restrictions. She said "not at this time." Kaiser replied, "okay, keep me posted." T. 70-71. During this same conversation, she told Kaiser that she understood the carpal tunnel syndrome was related to her job duties. T. 71.

Petitioner testified she performed full duty at Respondent during the following two weeks and then returned to Kilpatrick. She wore the splint during this time. When she saw Kilpatrick, he sent her to Dr. Freeman, an orthopedic surgeon affiliated with Christie Clinic. T. 71-72.

Records in PX 1 reflect that Petitioner saw David Freeman, PA-C, a certified physician's assistant affiliated with the Christie Clinic, on July 2, 2010. Freeman noted that Petitioner complained of dull, achy left wrist pain of several months' duration that increased with usage of "overuse while at work." He also noted that Petitioner complained of numbness and tingling in all of her fingers, worse on the left. On left wrist examination, he noted a palpable cyst to the dorsal aspect, positive Phalen's testing, negative Tinel's testing, 5-/5 strength and some thenar eminence atrophy. He obtained left wrist X-rays which showed no bony abnormalities. He

diagnosed a left wrist dorsal ganglion cyst and bilateral carpal tunnel syndrome. He referred Petitioner to Dr. Thatcher for bilateral upper extremity EMG/NCV testing. PX 1, pp. 7-8.

Dr. Thatcher performed the prescribed EMG/NCV testing on July 14, 2010. He found the results to be consistent with mild to moderate left carpal tunnel syndrome and mild bilateral cervical radiculopathy. He found no evidence of right carpal tunnel syndrome or ulnar neuropathy. PX 1, pp. 9-11.

Petitioner testified she returned to Dr. Freeman on July 21, 2010. The doctor referred her to Dr. Love, a surgeon. T. 72-73. PX 1, p. 12.

Petitioner testified she went to work the following day, July 22, 2010, and spoke with Kevin Kaiser in his office. Two of her co-workers, Tom Condron and Mike Thomas, were present when she spoke with Kaiser. She told Kaiser that her doctor had referred her to a surgeon and so "more than likely [she] was going to be having a carpal tunnel release." Kaiser then asked her whether she was going to file this under workers' compensation. She told him no, that she was going to file it under her own insurance and take short-term disability. He asked whether she was sure about this. She replied yes. He then said, "well, let me know when you find out the date of the surgery so I can start the paperwork." T. 74.

Petitioner testified she told Kaiser she was going to use her health insurance rather than workers' compensation based on interaction she had had with her previous supervisor, Lou Rhodes, around 1996, in connection with a work-related injury involving her right shoulder. She had gone to Rhodes after seeing her doctor and had told him her doctor had prescribed medication. While she was in Rhodes' office, he called her doctor and asked whether Petitioner could take Ibuprofen instead of prescription medication so he could avoid having to file a recordable accident. T. 75. Based on Rhodes' reaction, she knew how Respondent was about work accidents so she concluded it would be easier to use her health insurance to cover the carpal tunnel surgery and file for short-term disability. T. 76. It was her understanding that the carpal tunnel surgery took only 15 to 20 minutes to perform, that she would need some physical therapy afterward and that she would be back to work within two to three weeks, in time for Respondent's busy season. T. 76.

Petitioner testified that, when she spoke with Kaiser on July 22, 2010, she again told him that her work duties had caused the carpal tunnel. T. 76-77.

Petitioner first saw Dr. Love on August 3, 2010. The doctor described Petitioner as a "55-year-old right-handed woman who has worked for 20 years doing repetitive work with her hands." She noted that Petitioner worked as a lab technician at a seed company. She noted complaints of left hand numbness and tingling, along with pain that increased with lifting, gripping, grasping and twisting. After examining Petitioner and reviewing the X-rays and EMG/NCV results, Dr. Love diagnosed left carpal tunnel syndrome and "double crush" syndrome. She recommended a left carpal tunnel release but cautioned Petitioner that the results would be "tempered by her double crush with the cervical radiculopathy." PX 1, p. 13.

Petitioner testified she underwent carpal tunnel surgery with Dr. Love. [This surgery took place on August 19, 2010. PX 1, pp. 21-22. RX 5, pp. 102-103, 113.] She described the results as "horrible." Her left hand ended up being much worse than it was before the surgery. Her hand was totally numb and the pain was worse. [At the first post-operative visit, Dr. Love noted that Petitioner complained of significant numbness and an inability to grip. PX 1, p. 23.] The pain went up her entire arm and she was not able to use her hand because it was so swollen. At Dr. Love's direction, she underwent physical therapy at Champion Fitness following the surgery. [The therapy records reflect consistent left hand and left elbow complaints that worsened with various household activities. PX 2. RX 5, pp. 75-77, 113.] Petitioner testified that the therapy "helped somewhat" but she was still experiencing excruciating pain. The therapists used ultrasound but this sent pain shooting up her arm. She said "something is not right" and the therapists agreed. T. 78. She returned to her primary care physician and he referred her to Dr. Lee at Bonutti Clinic. Dr. Lee prescribed a Medrol Dosepak to try to reduce the swelling. He felt some of her problems could be neck-related so he sent her for a cervical spine MRI and X-rays that day. T. 78-79.

Dr. Lee's note of November 15, 2010 reflects that Petitioner underwent a left open carpal tunnel release by Dr. Love on August 19, 2010 and described her symptoms as dramatically worsening after this surgery. Dr. Lee noted that Petitioner complained of constant numbness in the index finger, partial numbness in the middle finger, swelling of the hand, difficulty gripping and grasping and worse symptoms at night. Petitioner reported being unable to perform her job as a seed lab technician because she could not feel her fingertips. Dr. Lee reviewed the EMG. On examination, he noted a standard, well-healed incision at the base of the palm and no thenar atrophy. He found Petitioner's symptoms to be "compatible with cervical pathology." He also felt Petitioner could have a double crush injury syndrome. He prescribed cervical spine X-rays and a cervical spine MRI. He prescribed a Medrol Dosepak. RX 5, pp. 91-92/113.

On February 16, 2011, Petitioner filed an Application for Adjustment of Claim alleging repetitive trauma injuries and an accident date of June 14, 2010. Arb Exh 2.

Petitioner testified she later sought another opinion from Dr. Li at Safeworks. Dr. Li's office was closer to her home. It was his belief that Dr. Love did not release the median nerve far enough. At his direction, Dr. Thatcher performed EMG/NCV testing of the left upper extremity on June 30, 2011. This testing revealed mild to moderate left carpal tunnel syndrome. PX 1, pp. 36-37. Following this testing, Dr. Li recommended a release and revision. He performed revision surgery on July 29, 2011. Petitioner testified this surgery helped in the sense that her hand numbness lessened but she was still experiencing tingling and pain shooting up her arm. T. 79. She was still unable to use her left hand. Dr. Li referred her to Dr. Atwater. He concluded her symptoms were neck-related so he prescribed neck treatment. She ended up undergoing a cervical fusion at C4-C5 and C6-C7. This surgery did not alleviate her left hand or arm problems. Repeat EMG/NCV testing performed on October 16, 2012 showed mild left carpal tunnel syndrome, moderate right carpal tunnel syndrome and mild left cubital tunnel syndrome. Dr. Thatcher described these conditions as having progressed since January

2012. PX 1, pp. 41-43. Dr. Atwater was concerned. He referred her to Dr. Oakey, who recommended a carpal tunnel release with a "fat flap revision." Dr. Oakey explained he was going to remove fat from her hand and wrap it around the median nerve so that the nerve would not collapse again. He performed this surgery along with an ulnar nerve transposition. T. 81.

Records in PX 6 reflect that, on November 5, 2012, following repeat EMG/NCV testing performed by Dr. Thatcher, Dr. Oakey noted that Petitioner's left carpal tunnel syndrome had "actually progressed" since her last surgery and that Petitioner also had left cubital syndrome and right carpal tunnel syndrome. He discussed the possibility of revision surgery and injected the left carpal tunnel. PX 6, pp. 46-47. On December 17, 2012, he noted that the injection provided no relief. He again discussed revision surgery, noting that the results were "unpredictable." PX 6, p. 45. He performed a left subcutaneous ulnar nerve transposition and left revision carpal tunnel release with hypothenar fat pad flap on February 12, 2013. At the first post-operative visit, on February 25, 2013, he provided Petitioner with a "boomerang" splint for her left elbow. He prescribed a cock-up splint for the left wrist. He directed Petitioner to return in one month. On April 3, 2013, he described Petitioner as doing well. He removed the braces and indicated Petitioner was "still" subject to a 10-pound lifting restriction. PX 6, p. 40.

Petitioner testified she felt "much better" after Dr. Oakey operated on her. The surgery relieved the shooting pain in her arm. The pain, numbness and tingling in her hand also improved. She still had issues but they were not as severe as prior to the surgery.

Petitioner testified that, as of Dr. Oakey's surgery, she started experiencing right carpal tunnel symptoms which she attributed to overusing her left hand. She underwent additional EMG/NCV testing which confirmed she had right carpal tunnel syndrome. [Dr. Trudeau performed EMG/NCV testing on May 28, 2015, following Dr. Fletcher's evaluation. He found the results to be indicative of severe median neuropathy at the right wrist, moderately severe median neuropathy at the left wrist, moderately severe ulnar neuropathy at the left elbow and mild left C5 radiculopathy. PX 6, pp. 21-30.]

On July 1, 2013, Dr. Oakey noted that Petitioner's left-sided complaints were continuing to improve but that she had a "small amount of loss of her left thenar muscle." He also noted that Petitioner reported experiencing burning pain in both hands with tasks requiring dexterity. He indicated that Petitioner would "ultimately require" a right carpal tunnel release but that she wanted to defer this due to her husband's upcoming surgery. He released Petitioner to full duty "at this point with the understanding that we will be doing a carpal tunnel surgery which will take her out of work activities in the fall." He directed Petitioner to return in two months. PX 6, p. 19.

On September 4, 2013, Petitioner returned to Dr. Oakey and reported increased pain in both hands secondary to placing TED hose on her husband's leg after his knee replacement. The doctor described the right-sided symptoms as "stable," noting "good APB strength. He

indicated that Petitioner planned to contact him when she wanted to proceed with the right carpal tunnel release. PX 6, pp. 15-17.

At Respondent's request, Dr. Kohlmann, an orthopedic surgeon, examined Petitioner on March 6, 2014. See further below.

Dr. Fletcher, an occupational medicine physician, evaluated Petitioner on April 16, 2015, at the request of Petitioner's attorney. See further below.

Petitioner returned to Dr. Oakey on July 15, 2015. The doctor noted ongoing bilateral symptoms. On re-examination, he noted 4/5 right thumb abduction and 4/5 left thumb opposition. He discussed right carpal tunnel surgery with Petitioner. PX 6, pp. 14-15.

Dr. Oakey performed a right carpal tunnel release on August 11, 2015. PX 6, pp. 7-8. On August 26, 2015, he described Petitioner as "thrilled" with the results of this surgery and "doing well with ROM exercises." He imposed a 10-pound lifting restriction. PX 6, pp. 11-13.

On September 28, 2015, Dr. Oakey noted that Petitioner was still experiencing "some sporadic issues in the small and ring fingers" following the right-sided release. He indicated it was "unclear" whether this was coming from a "more proximal etiology." He noted that Petitioner planned to pursue more care for her neck and would return to him as needed. PX 6, pp. 6-7.

Petitioner testified that, in July 2016, she came to understand that she had reached maximum medical improvement. At no point thereafter did Respondent offer her work. She requested vocational rehabilitation services but Respondent did not offer them to her. T. 85.

Dr. Fletcher testified by way of evidence deposition on November 18, 2016. PX 24. Dr. Fletcher identified Fletcher Dep Exh 1 as an accurate copy of his CV. He testified he is board certified in occupational and preventive medicine. Occupational medicine involves performing ergonomic assessments and making determinations as to factors causing or contributing to injuries and illnesses in the workplace. PX 24, p. 6. It also involves making determinations about individuals' capacity to work. PX 24, p. 7.

Dr. Fletcher testified he performs jobsite analyses to determine the frequency of a task, forcefulness, posture, exposure to vibration and awkwardness of positions. PX 24, p. 8.

Dr. Fletcher testified that Governor Rauner appointed him to the Commission's Medical Fee Advisory Board in January 2016. The board advises the Chairman about medical fees and access to care issues. PX 24, pp. 8-9.

Dr. Fletcher opined that Petitioner's claims involves a cumulative rather than acute injury. Before he first examined Petitioner, in April 2015, he reviewed voluminous medical records dating back to the early 2000s. He also reviewed Dr. Kohlmann's report and job

descriptions provided by both Petitioner and Respondent. He knows Dr. Kohlmann very well. Dr. Kohlmann is a surgeon, not an occupational medicine specialist. PX 24, pp. 10-11. Dr. Kohlmann is an "older mode" orthopedic surgeon who performed spine and extremity surgery. PX 24, p. 12.

Dr. Fletcher testified he disagrees with Dr. Kohlmann's report. He sees this claim as presenting a unique situation in that he "had a claimant who provided [him] a significant rebuttal to" Dr. Kohlmann's report.

Dr. Fletcher testified he first saw Petitioner on April 16, 2015. Petitioner is the spouse of one of his patients. He took care of Petitioner's husband for a long time. He saw Petitioner a second time on July 28, 2016. PX 24, pp. 13-14.

Dr. Fletcher identified Fletcher Dep Exh 4 as the job description Petitioner wrote. He has encountered only a few other individuals who have provided similarly detailed job descriptions. The description allowed him to have a better understanding of the tasks Petitioner performed. PX 24, p. 15. Petitioner performed her job for 20 years. In his opinion, her description provided a better sense of clarity than Respondent's "generic" description. Petitioner also provided some photographs. These photographs show a "poor ergonomic setup." The photographs of the task involving a magnifying glass also showed "sustained volar pressure on the wrist," which is a factor identified by the National Institute of Occupational Safety and Health [NIOSH] as a risk factor for developing carpal tunnel syndrome. PX 24, p. 17.

Dr. Fletcher testified that Petitioner did not originally allege right carpal tunnel syndrome. She underwent three left carpal tunnel procedures plus left cubital tunnel surgery and later, in 2015, underwent right carpal tunnel surgery by Dr. Oakey. Dr. Fletcher opined that the right carpal tunnel syndrome was a "complication of the treatment [Petitioner] underwent for her left hand." He has probably seen easily 5,000 cases of carpal tunnel syndrome in his career. With respect to her left hand, Petitioner had one of the worst surgical results he has ever seen. PX 24, p. 19. Petitioner's left hand was "basically butchered." He has photographs showing the scarring in that hand. Petitioner also has "horrible thenar atrophy present." Because she obtained such a poor surgical result, she started overusing her right arm. That is the basis of his causation opinion vis-à-vis the right carpal tunnel syndrome. PX 24, p. 19. It is not unusual for a person to start out with unilateral carpal tunnel syndrome and develop bilateral carpal tunnel syndrome secondary to overuse. PX 24, p. 20. The right carpal tunnel syndrome causally relates back to the June 14, 2010 accident because it is a complication of Petitioner's treatment. PX 24, p. 20. Fletcher Dep Exh 5 is a photograph he took of Petitioner's hands at the time of her initial examination. The photograph shows that Petitioner "has no thenar muscle eminence whatsoever." It also shows extensive scarring in the left lower wrist. Petitioner also has thenar atrophy in her right wrist but it is less severe. PX 24, pp. 20-21.

Dr. Fletcher opined that there is a causal relationship between the job duties Petitioner performed for 20 years and the development of her left carpal tunnel syndrome. The subsequent complications caused her to develop right carpal tunnel syndrome. Petitioner had

"no independent risk factor" for the development of carpal tunnel syndrome. Petitioner does not pursue hobbies that could have contributed. Nor is she diabetic. She does not have thyroid problems, does not smoke and is not obese. PX 24, p. 22. The only physical factor that lowered her threshold for developing left carpal tunnel syndrome was the fact that she had some proximal nerve compression in her neck. That is called "double crush syndrome." Petitioner had this prior to June 2010 but it was not recognized until she saw Dr. Lee. Eventually, Dr. Atwater performed a two-level cervical fusion in 2012. PX 24, pp. 21-22.

Dr. Fletcher did not find a causal relationship between Petitioner's repetitive work duties and her cervical spine condition. He views the cervical spine condition as degenerative. PX 24, p. 23.

Dr. Fletcher distinguished the jobsite analysis performed by Dr. Kohlmann from the kind of analysis he would perform as a board certified occupational medicine physician. In his view, it is critical to have the claimant present at the time of the analysis to determine factors unique to that person, such as height and wrist ratios. There is no evidence as to how much time Dr. Kohlmann spent at Respondent's facility. Nor is there evidence that he used tools Dr. Fletcher would typically use, such as strain gauges. PX 24, p. 24. Dr. Fletcher testified he is not sure whether Dr. Kohlmann, an orthopedic surgeon, is qualified to perform a jobsite analysis. During his career, he has seen orthopedic surgeons perform such analyses on only one or two occasions. PX 24, p. 24.

Dr. Fletcher testified he performs work for insurance carriers and defense firms. He also sees patients. Both sides call him to testify. He tries to be truthful. PX 24, p. 25. Respondent's firm has retained him in the past. PX 24, p. 25.

Dr. Fletcher did not find a clear causal relationship between Petitioner's repetitive work duties and her left cubital tunnel syndrome. The tasks Petitioner performed are not the typical tasks associated with cubital tunnel. PX 24, p. 27. If a person's wrist usage is limited, that could potentially put additional pressure on the rest of the arm. PX 24, p. 28. That Petitioner's cubital tunnel could have been a byproduct of the bad results she obtained from her first two carpal tunnel releases is a "reasonable theory." PX 24, p. 28. It is "probably" more than 50% likely that the poor surgical result caused the cubital tunnel. PX 24, p. 29.

Dr. Fletcher testified that, in late 1989, NIOSH came out with a list of factors playing into the development of carpal tunnel: forcefulness, pressure on the volar surface of the wrist, awkward positioning and vibration. "You don't necessarily have to have forcefulness if you have the other factors present." PX 24, p. 30. Petitioner's tasks were not only repetitive. They also involved "very abnormal awkward hand postures with radial and ulnar deviations" and "pressure on the volar surface of the wrist." PX 24, p. 30. Petitioner's work involved very fine detail, using a magnifying glass to look at seeds. This involved pressure on the volar surface of the wrist. He is relying on Petitioner's account of her job since he did not have an opportunity to visit Respondent's facility. PX 24, p. 31. Petitioner rebutted Dr. Kohlmann. Dr. Fletcher

testified he does not believe Dr. Kohlmann addressed all of the important risk factors. PX 24, pp. 31-32.

Dr. Fletcher opined that all of Petitioner's upper extremity surgeries are causally related to her injury of June 14, 2010. He further opined that the surgeries, therapy and EMG studies were reasonable and necessary. PX 24, pp. 32-33. Petitioner has not worked since the injury. Dr. Fletcher opined that Petitioner was disabled from work due to the severity of her condition up until the time he examined her. At that time, she still had impairment with respect to activities of daily life. Petitioner's Quick Dash score improved between April 2015 and July 2016, due to her right carpal tunnel release, but she still had atrophy and pain as of July 2016. PX 24, p. 34. Petitioner's hand dexterity is "very, very poor." She could not resume the kind of fine, intricate work she performed at Respondent. PX 24, p. 34. In his opinion, Petitioner is permanently and totally disabled. PX 24, p. 36.

Dr. Fletcher testified he has seen employees of Respondent but has never been in Respondent's facility. Respondent has sent employees to him. PX 24, p. 37.

Under cross-examination, Dr. Fletcher testified he is not an orthopedic surgeon, neurologist or neurosurgeon. He frequently refers patients to orthopedic surgeons. PX 24, pp. 38-39. He uses orthopedic surgeons who are tenants and he uses outside doctors as well. PX 24, p. 39.

Dr. Fletcher acknowledged that a note dated October 31, 2000 identifies Petitioner's employer as Norvat Seeds, not Respondent. PX 24, p. 40.

Dr. Fletcher testified he was not asked to address causation vis-à-vis the lumbar spine. Petitioner has degenerative disc disease at the cervical and lumbar levels. PX 24, p. 41. Aging and other factors, including microrepetitive trauma, excessive standing, vibratory exposure, smoking and trauma can contribute to degenerative disc disease. PX 24, p. 42.

Dr. Fletcher acknowledged that Petitioner is invested in her claim and is trying to present her side of the story. He is operating on the assumption she is being truthful. Dr. Kohlmann described her as reliable. PX 24, p. 43. If Petitioner misrepresented her job duties, that could affect his opinions. PX 24, p. 43.

Dr. Fletcher testified that early records from Dr. Love show Petitioner had a ganglion cyst in her wrist. Such cysts can develop spontaneously. They are potentially related to repetitive trauma but there is no good hard epidemiological evidence of that. PX 24, pp. 43-44. There is no relationship between Petitioner's ganglion cyst and her carpal tunnel syndrome. PX 24, p. 44. A ganglion cyst in the volar aspect could potentially cause compression but Petitioner's cyst was more in the dorsal area. PX 24, p. 44. Ganglion cysts can cause pain and swelling. The symptoms wax and wane. PX 24, p. 45.

Dr. Fletcher reiterated that Petitioner has no systemic risk factors for carpal tunnel, such as diabetes, smoking, thyroid issues or rheumatoid arthritis. She is female but gender is not as strong a risk factor as smoking, diabetes or thyroid problems. PX 24, pp. 45-46. Petitioner, like all people, uses her hands outside of work but her job involved unusual tasks, such as looking at and manipulating thousands of seeds. In terms of outside activities, Petitioner cared for her husband and a brother-in-law who had a stroke. He is unaware of Petitioner pursuing any hobbies such as knitting. Petitioner's husband had three surgeries while he was under Dr. Fletcher's care so Petitioner had to take him to the doctor. Petitioner's husband was never in a wheelchair. He was ambulatory but he could not drive. PX 24, pp. 47-48. Petitioner is actually older than most people who develop carpal tunnel. PX 24, p. 48. Petitioner had neck and back issues dating back to 2000. Petitioner's longstanding proximal nerve compression made her more susceptible to developing problems secondary to her work activities. Petitioner's non-work activities would not necessarily have had the same kind of impact, unless she was performing forceful or repetitive non-work activities. PX 24, p. 49. If Petitioner developed carpal tunnel as a homemaker, he would have asked her about her specific home activities. PX 24, p. 50. He asked Petitioner about these activities. PX 24, p. 50. He does not believe that those activities had any bearing on the development of her carpal tunnel. PX 24, p. 51.

Dr. Fletcher testified that the AMA Guides, Sixth Edition, are part of Illinois law since 2011. He considers the Guides authoritative. He used to give seminars on impairment ratings. He did this for the Illinois State Medical Society. After a couple of years, most people had learned what they needed to know. There wasn't much demand after that point. PX 24, p. 52. He performs about 40 to 50 impairment ratings per years. PX 24, p. 52.

Dr. Fletcher testified that some of the orthopedic surgeons who treated Petitioner felt there was a connection between her cervical spine issues and her left arm issues. PX 24, pp. 54-55.

Dr. Kohlmann testified by way of evidence deposition on January 27, 2017. Dr. Kohlmann testified he is a board certified orthopedic surgeon. He has been in practice since 1992. RX 8, p. 5. He is a general orthopedist. RX 8, p. 5. He has treated patients who have carpal tunnel syndrome. He has performed many carpal tunnel surgeries. An open carpal tunnel release involves making an incision at the base of the palm and releasing the transverse carpal and volar retinacular ligaments. He prefers to perform open releases but could perform an arthroscopic release. RX 8, p. 7. Some people have large carpal tunnels and others have small ones. The size is an "anatomical variation." RX 8, p. 8. Most commonly, people need releases because they develop flexor tenosynovitis. Carpal tunnel syndrome can also result from crush injuries or wrist fractures. Females develop carpal tunnel syndrome more frequently than men. RX 8, pp. 9-10. Some work activities would predictably result in carpal tunnel syndrome. Such activities would include using a screwdriver all day or repeatedly pinching hard with your thumb and index finger or thumb and middle finger. RX 8, p. 10. Use of vibratory tools could also cause the syndrome. Typing all day is repetitious but is not considered a cause. RX 8, p. 11.

Dr. Kohlmann testified he examined Petitioner on March 6, 2014, at Respondent's request. He needed to refer to his report (Kohlmann Dep Exh 2) while testifying. RX 8, pp. 11-12. Petitioner told him she worked for Respondent for 20 years and began having problems with numbness in her left thumb, index finger and middle finger sometime in 2010. Petitioner also told him that, after she underwent a left carpal tunnel release by Dr. Love, she woke up with terrible hand pain and numbness. Her symptoms did not resolve with physical therapy. RX 8, p. 11. She was off work so long she lost her job. Dr. Li ordered additional testing and then performed a repeat release but only some of her symptoms improved. Petitioner related she then underwent a cervical spine work-up and injections that "did not agree with her." RX 8, p. 14. After Dr. Atwater performed a two-level cervical spine fusion, her neck and radiating shoulder/trapezius pain improved but she continued to have pain in her arm, wrist and hand. She then saw Dr. Oakey, who performed an anterior subcutaneous ulnar nerve transposition and a revision left carpal tunnel release. RX 8, p. 14. Dr. Kohlmann testified that Petitioner remained symptomatic as of his examination. Petitioner told him she was still experiencing occasional left hand numbness, decreased bilateral hand grip strength, dizziness when looking up, loss of muscle mass in her forearm and weakness in both hands, to the point where she is unable to peel potatoes without experiencing bad pain and numbness in her right hand. She had been told she needed a right carpal tunnel release but was unsure whether she wanted to undergo that surgery. She also complained of longstanding low back pain and migraine headaches. RX 8, p. 15. She attributed her upper extremity problems to overuse at work. RX 8, p. 16.

Dr. Kohlmann testified that Petitioner described most but probably not all of the duties she performed at Respondent over the 20 years she worked there. RX 8, p. 17.

Dr. Kohlmann testified that Petitioner is right-handed. He testified that carpal tunnel syndrome usually develops in a person's dominant hand but can develop in the non-dominant hand. RX 8, p. 18. To him, it seems as if the dominant hand should be affected first. RX 8, pp. 18-19. Dr. Kohlmann testified that a ganglion cyst is fluid-filled. It can be found in the tendon sheath or the joint. He is not sure exactly why such cysts develop. RX 8, p. 19.

Dr. Kohlmann testified that cervical spine problems can cause symptoms that are similar to those caused by carpal tunnel syndrome. A person who undergoes carpal tunnel surgery could require revision surgery. RX 8, p. 21.

Dr. Kohlmann testified he went to Respondent's facility and saw the area where Petitioner worked. He saw various pieces of equipment and work stations. He was "walked through" the tasks Petitioner performed. He was allowed to perform the same tasks. RX 8, p. 22. He took instructions first. He was only in the lab. He did not go into the warehouse. RX 8, p. 23. In his opinion, the tasks Petitioner performed were "all very low force." He had to use his hands but the tasks did not require strenuous gripping, the use of vibratory tools or any unusual wrist positions. RX 8, p. 24.

Dr. Kohlmann then looked at the photographs that were made an exhibit at the time of Dr. Fletcher's deposition. He performed the function shown in the photograph at the 3:00 position. He did not have any sense that this task put stress on his hands, wrists or arms or required awkward positioning. RX 8, pp. 25-26. At no point during his site visit did he perform any tasks that were conducive to causing or aggravating carpal tunnel syndrome. He would reach the same conclusion even if the tasks were being performed during the busy season. RX 8, p. 27. Respondent did not hire him to perform a complete workplace evaluation. He does not perform such evaluations. RX 8, p. 28.

Dr. Kohlmann opined, to a reasonable degree of orthopedic certainty, that Petitioner's job duties, as he understood them, did not cause or aggravate her carpal tunnel syndrome. RX 8, p. 28.

Under cross-examination, Dr. Kohlmann acknowledged he saw Petitioner only once. Petitioner was never his patient. RX 8, pp. 28-29. He has no reason to dispute that Petitioner has carpal tunnel syndrome. RX 8, p. 29. He is familiar with the term "double crush." The theory goes that a person who has a cervical spine condition may be more likely to also development symptomatic peripheral nerve entrapment. RX 8, p. 30. He knows Dr. Love. She is no longer practicing medicine. RX 8, pp. 30-31. He never performed many independent medical examinations. He performs maybe one per month. RX 8, p. 31. He primarily performs examinations for insurance companies but some claimants' attorneys send examinees to him also. RX 8, p. 31. He has performed other examinations for Respondent's counsel's firm. RX 8, p. 32. He does not have any social relationship with Respondent's counsel or Mark Cosimini, another member of his firm. RX 8, p. 32. He is not friends with any of the owners or stockholders of Respondent. Before his site visit, he never went to Respondent's facility. RX 8, p. 33. He cannot recall when he made the site visit but he thinks it was after he examined Petitioner. RX 8, p. 33. He believes that, when he saw Petitioner, he did not know he would be visiting Respondent's facility. He reviewed records when he saw Petitioner but he does not have his file with him. RX 8, p. 34. He reviewed various X-ray images, an EMG/NCV study performed by Dr. Thatcher, Dr. Love's operative report and cervical spine MRI scans. He does not recall exactly how much time he spent with Petitioner. RX 8, p. 35. He spent time obtaining a history from Petitioner. He tries to write down exactly what the examinee tells him. RX 8, p. 36. He does not know where his notes are. It is possible he scanned the notes into the electronic health record. RX 8, p. 37. He does not know how much he charged for his report. His fee typically ranges from $800 to $2,300. He believes the hospital charges $1,000 per hour for his deposition time. RX 8, p. 38. His orthopedic practice is "very general" so it is "hard to say" how many carpal tunnel surgeries he performed in 2016. "It could be 5%" of the surgeries he performed. RX 8, p. 39. Respondent's counsel was present when he visited Respondent's facility. He cannot recall whether he prepared his examination report before he made this visit. RX 8, p. 39. He cannot recall whether he knew he would be making this visit when he examined Petitioner. RX 8, pp. 40-41. He does not know how much time he spent in total on Petitioner's claim. RX 8, p. 41. When he went to Respondent's facility, he met Respondent's counsel there. RX 8, p. 43. He spent half an hour to an hour at the facility. Petitioner was not present. A female employee was there and she was familiar with Petitioner's job. RX 8, p. 44.

He is not trained in occupational medicine. RX 8, p. 45. He has visited various workplaces, to help make adjustments, depending on what the employee's problem was, but he does not do this for a living unless asked. RX 8, p. 46. In the past, he saw patients at Dr. Fletcher's facility. RX 8, p. 46. He left the issue of work restrictions up to Dr. Fletcher. RX 8, p. 47. Dr. Fletcher is a well-qualified occupational medicine physician. He "knows what he's doing." RX 8, p. 47. He did not take any photographs at Respondent's facility. RX 8, pp. 47-48. The available photographs are still shots. The woman who guided them at Respondent's facility did not take them through every task that is listed in the job description attached to his report. RX 8, p. 48. She showed them some seed-related tasks and activities involving five-gallon jugs that had screw tops. There were "maybe certain parts that [he] didn't do." RX 8, p. 49. He never performed any task for an hour. He did not stay there eight hours or work there fifty weeks out of the year. RX 8, p. 49. He found no causal relationship between Petitioner's job and her carpal tunnel syndrome. He has been wrong at times during his career. RX 8, p. 50. Different physicians can render different opinions in matter such as this. RX 8, p. 50.

On redirect, Dr. Kohlmann testified it is possible he went to Respondent's facility before he examined Petitioner. He has no independent recollection of the timeline. RX 8, p. 51.

Petitioner testified she last worked for Respondent on August 18, 2010. She requested but never received workers' compensation benefits. She did receive short-term disability. Her employment by Respondent ended in February 2011. She had not planned to retire at that point. T. 93. She received a letter informing her that she had been terminated. If a Respondent employee is unable to resume working after receiving 26 weeks of short-term disability, he is officially terminated. T. 87. Since her termination, Respondent has not offered her work. T. 87.

Petitioner testified she has difficulty with intricate activities such as buttoning a button, zipping a zipper and tying shoes. When she takes a blouse off to wash it, she leaves it buttoned so she will not have to button it again. She now buys more leggings and pants that do not have have to be zipped up. She also buys slip-on shoes. She has learned to do things differently. She cannot cut meat or a steak because she lacks strength to put sufficient pressure on her hands to accomplish this. She continues to drive but travels less because gripping the steering wheel causes pain in her hands and wrists. T. 89. If she performs simple tasks such as this she can be up all night due to pain in her hands. She takes Gabapentin for her pain. T. 90. She can talk to someone via cell phone but usually uses the speaker function. She cannot hold a cell phone to her ear for more than two to three minutes because her hand goes numb. T. 90. She still does some gardening but not to the extent she did in the past. Her husband does a lot of the gardening now. T. 90-91. She can use pruners to snip plants with thin stems, such as roses, but lacks sufficient strength to grip the pruners hard enough to cut a plant that has diameter to it. She can pick vegetables but cannot carry a bucket. She cannot carry anything that is dangling from her hands. When she goes grocery shopping, she usually takes her husband or nephew along because she cannot carry bags that hang down from her hands. She can carry a gallon of milk only if she carries it up in her arms. T. 91. If she uses a computer for 10 or 15 minutes, her hands go numb from the typing. T. 92.

Petitioner testified she is currently receiving Social Security disability benefits. Her short-term disability carrier filed a claim on her behalf in October 2011 and Social Security awarded her benefits retroactively, finding that her disability began on August 17, 2010. T. 92.

Petitioner testified she was not present at Respondent when Dr. Kohlmann performed a job analysis. The doctor never observed her performing tasks at Respondent. To her knowledge, she never gave Dr. Kohlmann a complete description of her job duties.

Petitioner testified she continues to experience pain in her palms and wrists, along with numbness and tingling. Her symptoms vary in intensity depending on her activity level. When she performs yard work or cleans her house, she has to stop after 15 or 20 minutes to take a break and rest her hands. If she tries to perform any activity requiring gripping, such as mopping or sweeping, she has to stop because it causes a lot of pain in her hands. T. 94.

Petitioner testified she first met with Bob Hammond, a vocational counselor, in March 2017. Hammond discussed the job search process with her. She understood that she was supposed to contact prospective employers by making calls, visiting businesses and going online. She also understood she was supposed to present a positive outlook. She was supposed to tell employers what she could do with her hands rather than stress what she could not do. She was instructed to give Respondent as a reference and identify Kevin Kaiser as a contact person. T. 96.

Petitioner testified she believes she started looking for work in May 2017. She met with Bob Hammond on five or six occasions, over time, and also talked with him by phone. At one point, Hammond sent his assistant Kelly over to meet with her. She kept detailed records of the job contacts she made. She identified PX 20 as records she created to memorialize her job search between April 3, 2017 and June 24, 2019. T. 97. The records are complete and accurate. T. 97-98. While she was looking for work, she "applied for anything and everything," from clerical jobs to retail jobs to warehouse jobs. She participated in interviews but did not receive any job offers. She was either not qualified to perform the job or the job involved activities beyond her restrictions. T. 98-99.

Under cross-examination, Petitioner testified it would be difficult for someone to understand how complicated her job was if he did not perform it. During bin sampling, she might have to carry groups of small white bags weighing 30 pounds three or four times per day. T. 103. She frequently worked overtime. It was not unusual for her shifts to last 10 or 12 hours. T. 103. During bin sampling, she had to meet a quota each day. The seed handling and rolling involved fine dexterity but not forceful gripping. The seeds are small. T. 104. She had to forcefully grip to twist lids off jugs. T. 104-105. When she put the lids back on, she did not tighten them excessively because she would have to remove them again. T. 106. During a busy period of a month or a month and a half, she had one to two helpers. Otherwise, she worked alone in the lab. T. 106-107. During the period that she had helpers, the helpers performed the same tasks she performed. T. 107. She continued performing the pallet-related activities all

the way up until the time she stopped working for Respondent. T. 107. She has been married for 30 years. She owns a home. She cleans the home and performs all of the other household tasks, including laundry, dishes and vacuuming. She has a vegetable garden in the summer. She sometimes does canning. Her husband, an IDOT employee, was involved in a serious motor vehicle accident in approximately 2013. He had to undergo back surgery and have both knees replaced. T. 111-112. She helped care for him while he was recuperating. During that time, she hired people to perform yardwork because she could not do it all. T. 112. Before she underwent the first carpal tunnel release, she saw Dr. Hemmer at Tuscola Wellness. T. 113. Dr. Hemmer treated her neck and back. T. 114. RX 5. She kept track of all of the job contacts she made. She typed up those contacts each week. T. 115. She talked with Kevin on June 14, after she received the cock-up splint. She does not recall Bobbi being present during this conversation. She told Kevin she was having wrist problems due to her job duties. She worked for Respondent for 20 years and was familiar with Respondent's policies concerning accident reporting. Respondent required an injured employee to report the injury to a supervisor. Paperwork is usually completed but she did not complete any when she reported her injury to Kevin. T. 116. She initially chose not to turn in a claim to workers' compensation. She made this decision based on a prior experience years earlier. She later decided to pursue a workers' compensation claim. T. 117. When she met with Kevin a second time, in July, she again told him her condition was work-related. She did not contact anyone at Respondent at that point to complete paperwork for a workers' compensation claim. She has reviewed Hammond's reports. They are accurate. T. 119. Lou Rhodes, the person with whom she interacted in the past, was Respondent's plant manager. T. 122. Rhodes was not her supervisor as of the day she received the splint from Kilpatrick. T. 123.

On redirect, Petitioner testified the seeds she tested arrived at the lab in one-gallon jugs as well as bags. At the present time, her husband does most of the cooking because she has trouble lifting pots and pans and pouring things out of containers. Her husband also opens most of the jars and helps her seal lids during the canning process. T. 124. She does the dusting and lighter work while her husband helps with vacuuming and mopping. Before June 14, 2010, Respondent had an incentive-based safety program. If an employee did not have any recordable accidents, Respondent would take that employee out for a meal or give him a safety bonus. T. 125. When she made the decision to apply for short-term disability rather than workers' compensation, she feared that her job would be negatively affected if she pursued a workers' compensation claim. T. 129.

Under re-cross, Petitioner testified that, as of June 2010, she was sure her complaints were related to her job duties. Kilpatrick confirmed that belief. She told Kaiser she had a work-related injury but she chose to apply for short-term disability. T. 130-131.

Bob Hammond, a 67-year-old vocational consultant, testified on behalf of Petitioner. He obtained a master's degree in counseling from the University of Illinois. There are two major certifications available in the United States right now: CRC and ABVE. He was a member of the CRC for five years but let that lapse when he became a member of the American Board of

Vocational Experts, or ABVE. You have to undergo testing, obtain references and have a certain number of experiences to be certified as ABVE. T. 133-134.

Hammond testified his business is called Hammond Vocational Consultants. Most of the work he does involves Illinois workers' compensation cases. He has testified on prior occasions. He has been doing this kind of work for 31 years. T. 135. He has given over 300 evidence depositions. T. 136. He is familiar with the Act. T. 136. About 60% of the work he does is for respondents. He has done work for Respondent's law firm in the past. He is very familiar with Respondent's counsel, Terry Schroeder. Schroeder has hired him in the past. T. 137. In connection with his evaluation of Petitioner, he reviewed treatment records along with the depositions of Drs. Fletcher and Kohlmann. He issued four reports. T. 138-139. He met with Petitioner before preparing his initial report of March 27, 2017. After he submitted this report to Petitioner's counsel, Petitioner's counsel asked whether it would benefit Petitioner to look for work. He said yes. Dr. Fletcher opined that Petitioner is unable to return to work in the general labor market due to significant issues with dexterity. T. 142. Dr. Kohlmann, in contrast, did not discuss Petitioner's restrictions or capabilities in his reports or deposition. Dr. Kohlmann did not express the belief that Petitioner could resume her former occupation. T. 143-144.

Hammond testified he expressed some concerns about Dr. Kohlmann's opinions in his initial report. Dr. Kohlmann reached conclusions about Petitioner's job duties without addressing the issue of whether he and Petitioner are the same height and weight. T. 146. If he had only been presented with Dr. Kohlmann's opinions, he would have asked his referral source whether the doctor had reached conclusions about Petitioner's restrictions or whether the doctor was saying Petitioner was not subject to any restrictions. T. 147. Dr. Kohlmann is a general orthopedist while Dr. Fletcher is an occupational medicine specialist. He has interacted with Dr. Fletcher on numerous occasions. Dr. Fletcher has been at many jobsites and has an understanding of occupational requirements. T. 148.

Hammond opined that Petitioner is "severely limited in the ability to use her hands to do fine manipulations." Petitioner can make some gross motor movements but those are also limited because of the articulation of the fingers and wrists. T. 149. Petitioner is considered to be an individual of advanced or retirement age. From a vocational standpoint, she would have few, if any, transferable skills. T. 150. In his first report, he indicated that, if you follow Dr. Fletcher's restrictions and limitations, Petitioner is not employable in the labor market. T. 150.

Hammond testified he communicated with Petitioner a second time and instructed her how to go about performing a job search. He advised Petitioner what to say to prospective employers, in accordance with the Americans with Disabilities Act. He had Petitioner set up an E-mail account that was specific to her job search so he could access it and review her progress. T. 151. At their first meeting, Petitioner told him she was in so much pain she felt she would not be able to work. After further discussion, Petitioner came around to the idea of conducting a job search. T. 152.

Hammond testified he met with Petitioner around seven times. His job developers met with her three times. He also had eleven phone contacts with Petitioner. Between March 13, 2017 and June 2019, Petitioner made just shy of 1800 job contacts. In his long experience, this is only the second time that a person has made over 1500 contacts. T. 153. It is his opinion that Petitioner made a diligent job search. He reached this opinion after accessing Petitioner's E-mail account, talking with employers to make sure they received Petitioner's resume and reviewing the records Petitioner created. Respondent never formulated a vocational rehabilitation plan. T. 155. Nor did Respondent offer her restricted work. T. 155.

Hammond testified he charges $120 per hour. To his knowledge, he is the least expensive vocational counselor in his area. T. 156.

Hammond testified that generally he looks at a year's worth of job contacts, or somewhere between 700 and 900 contacts, before determining that there is no reasonably stable labor market for a particular individual. Petitioner made substantially more than 700 or 900 contacts. T. 157.

Hammond testified he viewed Petitioner as an "entry level person." He felt that telephonic jobs would be best for her because they would require less wrist and hand usage. He anticipated that Petitioner would be able to earn between $8.50 and $9.50 per hour.

Hammond opined that there is no reasonably stable labor market for Petitioner's services. He bases this opinion on the "abnormally" high number of contacts Petitioner made and the fact she applied for jobs even when there was only a remote possibility of being hired. "Nobody would hire her, nobody considered her and nobody brought her back for a second interview." T. 159. He believes Petitioner is totally disabled based on her diligent job search and because she cannot perform any services except those for which no reasonably stable labor market exists. T. 160.

Hammond testified he generated several bills along the way. T. 160-161. The last was in the amount of $4,031.27. T. 161.

Under cross-examination, Hammond testified that insurance carriers take varying views as to what constitutes a diligent job search. He looks to see if the person is spending about 32 hours per week looking for work, applying for a minimum of 15 jobs per week on the Internet and making 3 to 7 in-person contacts and "cold calls" per week. The term "diligent" is subjective. T. 163. Given Petitioner's upper extremity limitations, he would not send her to a construction company to hang siding or a warehouse to load cargo. T. 163-164. He counsels people how to go about looking for work within their restrictions but "sometimes we fall back into the familiar." In Petitioner's case, what was familiar was warehouse work and seed testing. That's what they went after because that is what she knew. Part of that is simply advancing the goal of getting an application in to an employer. T. 164-165. Some of the jobs Petitioner applied for were not physically suitable for her. T. 165. He does not know how many of

Petitioner's job contacts fall into this category. He has reviewed Petitioner's contacts. He has no idea how many follow-up contacts Petitioner made. T. 167.

Hammond testified he has known Dr. Fletcher for over 25 years. Dr. Fletcher is a very frequent participant in workers' compensation litigation. T. 169. He has met Dr. Kohlman once and has read a number of his reports. He is much less familiar with Dr. Kohlmann than Dr. Fletcher. T. 170. Petitioner is relatively tall but he has no idea how tall Dr. Kohlmann is. T. 171. It could be that Petitioner and Dr. Kohlmann are close to the same height. T. 171. He was not present when Dr. Kohlmann went to Respondent's plant and performed activities that he detailed in his report. He (Hammond) has never been in Respondent's plant. T. 171. He is not a physician. He has not performed the job that Petitioner performed. T. 172-173. An orthopedic surgeon who performs carpal tunnel surgery would have knowledge of the force that might be required to cause or aggravate that condition. T. 173. A board certified orthopedic surgeon could gauge whether an activity he performs could cause or aggravate carpal tunnel syndrome. T. 175.

Hammond testified that, in Petitioner's case, he performed about 130 follow-ups with prospective employers. T. 176. In his report of March 21, 2019, he noted that Petitioner had stopped looking for work due to increased pain levels. Based on the information he obtained from Petitioner's E-mail account, Petitioner stopped looking for work for about a year but restarted after he met with her. He would not consider taking a year off to be a diligent job search. T. 177.

On redirect, Hammond testified he looks at the combination of effort and time spent looking for work. He believes Petitioner has no physical capabilities with her hands. Under these circumstances, "you drop off the edge of all occupations unless you have education and a degree that you can follow that up with." T. 178-179. At the time of his initial report, in March 2017, he thought Petitioner was permanently and totally disabled. To make sure of this, he had Petitioner perform a job search. He would not go so far as to say it did not matter that Petitioner, at one point, stopped looking for work. Instead, what he would say is that, during the times Petitioner did look, she performed a diligent job search. Petitioner stopped looking due to pain and difficulty concentrating. T. 180. Between April 2017 and June 2018, Petitioner consistently looked for work each week. After she restarted, she again consistently looked for work. T. 180-181. Throughout his career, he has been aware of only one other person who applied for as many jobs as Petitioner did. T. 181.

Thomas Condron testified on behalf of Petitioner. Condron testified he worked as a tech at Respondent between 2006 and 2016. He worked in the tower, processing seeds and running seeds through machinery. He worked with Petitioner and observed Petitioner doing her job. T. 183-184. He brought samples in to the area where Petitioner worked. T. 185. He is aware that Petitioner began having problems with her hands around 2010. He was present at one conversation during which Petitioner discussed these problems with Kevin Kaiser, Respondent's plant manager. T. 187. He and Mike Thomas were in Kevin's office when Petitioner came in "with her hand in some gadget." At that point, Petitioner began conversing

with Kevin. Condron testified this conversation took place sometime around July 22, 2010. He does not know the exact date. T. 186. Petitioner said she had to have a carpal tunnel operation and she would be off work for a while. Petitioner did "not exactly" say the condition was work-related but he (Condron) "kind of figured she got it somewhere working in the lab." T. 188. Kaiser did not have much to say in response. Petitioner told Kaiser she was going to put it through her insurance rather than the company. Condron testified that, when he heard this, he called Petitioner a bad name. T. 189.

Condron testified that, at that time, Respondent's employees were "very safety conscious." In his department, they talked about safety all the time because they worked around moving machinery. T. 190-191. Respondent would provide a lunch once a quarter if no accidents occurred. If an employee filed a workers' compensation claim, "we would lose our incentive." T. 191. When his department reached five years with no accidents, they received T-shirts. After seven years, they again received T-shirts. The T-shirts commemorated years of safety. T. 192-193.

Condron testified that, when Petitioner said she was going to use her health insurance rather than workers' compensation, he called her an "asshole" right there and walked out of the room. In his opinion, "it should have been a workman's comp claim" but she was willing to forego that. T. 193.

Under cross-examination, Condron acknowledged he is not a doctor. He called Petitioner a bad name because, since she had carpal tunnel, he assumed it must be work-related. T. 194. He was present on only one occasion when Petitioner discussed her condition with Kevin Kaiser. T. 194.

Kevin Kaiser testified on behalf of Respondent. Kaiser testified he is site manager at Respondent in Tuscola. He held the same job in June 2010. He has worked for Respondent for just over 28 years. T. 197. If an employee reports a work injury at Respondent, he brings in his HSE manager, Bobbi Pierce, and begins the investigation process. He also takes it to the corporate level and brings in other regional HSE employees. An accident report is typically completed. T. 197-198.

Kaiser testified he does not recall the conversation that Petitioner testified to. He recalls seeing Petitioner wearing a brace on June 14, 2010. He and Bobbi Pierce talked with Petitioner about that. They are "drilled" to ask questions if an employee shows up at work wearing a brace or other device. T. 199. There are two reasons for that: Respondent does not want to cause the condition to worsen and needs to investigate whether there was an underlying injury. T. 200. He and Bobbi confronted Petitioner about the brace. Petitioner explained that she had been to the doctor. Petitioner showed them a cyst or knot on her hand. They asked Petitioner if she was subject to any restrictions and she said no. They told Petitioner to let them know if that changed. They also discussed the issue of whether the condition was work-related. Petitioner said it was not. "It was what [Petitioner] thought was a cyst." T. 203.

Kaiser testified that, during a subsequent conversation, Petitioner told him she was "going to have an additional surgery" and "additional time off." T. 204. He helped her initiate a claim for short-term disability. He completed the application form and sent it on to corporate. After that, he was "hands off" and "kind of in the dark" because the information obtained from doctors is protected by HIPAA. T. 205.

Kaiser identified RX 2 as a notice from Petitioner's law firm and an attached Application dated February 4, 2011. Kaiser testified that, before he received this document, he had no knowledge of Petitioner pursuing a workers' compensation claim. After he received RX 2, he passed it on to corporate. T. 206.

Under cross-examination, Kaiser acknowledged he does not hear very well. T. 207. He does not recall the exact date of the conversation he had with Petitioner. Respondent asked him about a conversation occurring June 14, 2010. T. 207. He does not know the meaning of the term "repetitive." He has "no clue" when he got up on June 14, 2010 or what he did that day. T. 208. He does not recall anything that occurred on June 14, 2010. T. 209. He likes to think his hearing was better on June 14, 2010. He does not wear hearing aids. He has had his hearing checked and has been told he has "slight hearing loss." T. 209. He did not file an occupational disease claim against Respondent. In June 2010, any accident investigation would have been conducted at the corporate level. T. 210. Bobbi Pierce was in his office when Petitioner came in. Pierce's office is 10 to 15 steps away from his. As of June 4, 2010 [sic], Pierce was Health Safety Environmental [HSE] manager. T. 211. At that time, about 30 individuals worked at Respondent. T. 211. Pierce had no other assigned duties outside managing safety. T. 212. When Petitioner entered his office, he went and got Pierce to show her the device Petitioner was wearing. T. 212. As soon as he saw Petitioner, he said, "let me go get Bobbi." As to whether he conversed with Petitioner outside of Pierce's presence, he "might have [said] hi." He "can't answer that question." T. 213. He immediately went to get Pierce. T. 214. He does not recall having any conversation of substance with Petitioner outside Pierce's presence. T. 215. He typically met with Pierce six times a day. Pierce does not report directly to him. They do not have any social relationship outside of work. T. 216. He has never had a specific protocol relating to repetitive trauma injuries. He thinks of an accident as a specific event such as a fall. T. 218. He would like to think he had a pretty good idea of what a repetitive trauma injury was as of June 2010. T. 218-219.

In an offer of proof, made after Respondent's counsel voiced relevancy and "beyond the scope" objections, Kaiser testified he has undergone training relating to ergonomics in the sense of evaluating work stations to make sure everything is at the proper level. T. 219-220. He did not undergo specialized training concerning notice of a specific trauma versus notice of a repetitive trauma injury. He did not talk to Petitioner before she went to the doctor. T. 223. If a doctor told Petitioner on June 14, 2010 that her carpal tunnel was work-related, he cannot explain why Petitioner did not tell him this. T. 223. The meeting he and Pierce had with Petitioner was brief. It lasted maybe 15 minutes. T. 224. Petitioner continued working up to the point of her left hand surgery. Before June 14, 2010, he had multiple daily interactions with

Petitioner. He was constantly in and out of the lab. T. 224. He does not recall Petitioner telling him that the surgery she was going to have was simple and she would be back to work in a few weeks. T. 225. He did not tell Petitioner she had two options in the sense she could use her health insurance or go through workers' compensation. T. 225. He only vaguely recalls the events of July 22, 2010. T. 226. He did not keep notes of either meeting with Petitioner. When they saw the brace, they asked Petitioner if she had hurt herself. Petitioner told them she did not know how it had happened. T. 227.

Arbitrator's Credibility Assessment

Petitioner's very lengthy tenure with Respondent weighs in her favor, credibility-wise.

The Arbitrator finds credible Petitioner's detailed description of her job duties. The Arbitrator also finds credible Petitioner's testimony as to the extra hours she put in during the busy season and the pace at which she was required to work. It is clear to the Arbitrator that Petitioner's job was not confined to the tasks outlined in Respondent's written description. Even so, that description reflects that the job involved "gripping" and making "precise finger movements" between one and four hours per day. RX 4. The description contains no mention of the rigorous pallet-related activities Petitioner periodically performed outside of the lab.

Respondent's plant manager, Kevin Kaiser, did not take issue with any aspect of Petitioner's testimony concerning her duties or the extra work she performed during the busy season.

Petitioner's notice-related testimony was also detailed and believable. Kevin Kaiser attempted to refute some of that testimony but the Arbitrator found him unconvincing. He initially stated that Respondent's safety director, Bobbi Pierce, was in his office when Petitioner came in, wearing a brace on her hand. He subsequently testified he was alone when Petitioner arrived and that he briefly spoke with her before going to get Pierce. The transcript reflects that Bobbi Pierce was present at the hearing. T. 200, 227. The Arbitrator finds it odd that Respondent did not call her as a witness, given the inconsistencies in Kaiser's testimony.

In his report of March 6, 2014, Respondent's examiner, Dr. Kohlmann, described Petitioner as a "very nice, warm person who was very believable." RX 7, p. 6. Kohlmann Dep Exh 2. In that same report, Dr. Kohlmann indicated he "performed a site visit requested by [Respondent]" and performed several seed-related and quality control tasks. He indicated that Petitioner described other non-seed related tasks, such as painting and handling pallets, to him and that he was already familiar with such tasks since he had performed them elsewhere.

At his 2017 deposition, Dr. Kohlmann was remarkably vague about his involvement in this claim. He could not recall whether he visited Respondent's facility before or after he examined Petitioner. He also had no recollection of the amount of time he spent with Petitioner or on the claim as a whole. He acknowledged he limited his visit to Respondent's lab. He did not perform any of the rigorous tasks Petitioner performed in the warehouse. He was

evasive about his billing. While he is an orthopedic surgeon, he conceded he has a general practice and that only about 5% of the surgeries he performs involve the carpal tunnel. He also acknowledged he does not perform jobsite analyses in the way that Dr. Fletcher does.

Overall, the Arbitrator did not find Dr. Kohlmann persuasive. He did not question Petitioner's diagnoses or treatment yet concluded that she requires no restrictions of any kind. In his report, he described Petitioner as having "very good function" in both hands yet went on to state "she can't make a fist and fully extend all the fingers." RX 7, p. 7.

Arbitrator's Conclusions of Law

Did Petitioner establish repetitive trauma injuries manifesting on June 14, 2010?

The Arbitrator finds that Petitioner developed left carpal tunnel syndrome secondary to repetitive trauma, with this condition manifesting on June 14, 2010. In so finding, the Arbitrator relies in part on Petitioner's credible testimony concerning the manual tasks she performed for Respondent and the time pressure she was under. The Arbitrator recognizes that Petitioner did not perform the same task all day, every day. "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. Edward Hines Precision Components v. Industrial Commission, 356 Ill.App.3d 186, 193-194 (2nd Dist. 2005). In City of Springfield v. IWCC, 388 Ill.App.3d 297, 314 (4th Dist. 2009), the Appellate Court upheld a finding that bilateral carpal tunnel was causally related to the claimant's job where the claimant "routinely twisted wire, used pliers, handled small objects and performed frequent and repetitive hand usage throughout his work shifts." Petitioner testified along similar lines,

Did Petitioner provide Respondent with timely notice?

The statutory language relevant to the issue of notice reads: "Notice of the accident shall be given to the employer as soon as practicable but not later than 45 days after the accident." Notice may be given orally or in writing. No defect or inaccuracy of notice shall bar recovery "unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy."

The notice requirement applies to employees like Petitioner who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident from which notice must be given is the date when the repetitive trauma injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 531 (1987). The statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. The purpose of the notice requirement is to enable the employer to investigate the alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In the instant case, Petitioner alleged a manifestation date of June 14, 2010. This is the date she saw William Kilpatrick, a physician's assistant affiliated with the Christie Clinic. Kilpatrick examined her left wrist, discussed her work duties with her and placed her left wrist in a splint. Petitioner testified that, after she saw Kilpatrick, she understood she had left carpal tunnel syndrome and that this condition stemmed from the duties she performed for Respondent. T. 68. Petitioner further testified that she went to work the same day she saw Kilpatrick, showed her splint to Kevin Kaiser, Respondent's plant manager, advised Kaiser that she had been diagnosed with carpal tunnel syndrome and that this condition was work-related and indicated she was not yet subject to restrictions. Petitioner testified to having a second conversation with Kaiser on July 22, 2010, one day after receiving a referral to a surgeon. Petitioner testified she again told Kaiser her condition was work-related and that she would likely require surgery. Based on interaction she had had with a different plant manager in the past, and because she believed the surgery would not require much recovery time, she told Kaiser she intended to submit her bills to her group carrier and seek short-term disability under workers' compensation.

As indicated above, the Arbitrator finds credible Petitioner's testimony as to her interaction with Kaiser on June 14 and July 22, 2010. Both dates fall within the statutory 45-day notice period. Petitioner's testimony included two compelling details. She indicated that, after she told Kaiser she intended to pursue benefits under group rather than under workers' compensation, he asked her if she was sure, to which she replied "yes." In reviewing the transcript, one can almost hear Kaiser's sigh of relief at that moment. Additionally, it was Kaiser, and not Petitioner, who completed the paperwork. This factor differentiates the claim from White v. IWCC, 4-06-0566WC (4th Dist. 2007). White also involved repetitive trauma injuries, albeit injuries involving the shoulders and back. The claimant in that case stopped working on July 17, 2000, around the time he underwent right shoulder surgery. The following May, he completed a sickness/accident form on which a box was checked stating that his back and upper extremity conditions were not work-related. One year into his sickness and accident benefits, he received a letter from his employer indicating his benefits were running out and his job would be discontinued if he did not resume working. He retired when the benefits ran out. It was not until October 29, 2002, about two weeks after a doctor issued a written opinion linking his conditions to his laborer duties, that he filed an Application for Adjustment of Claim. In this pleading, he alleged an accident or manifestation date of July 17, 2000. The arbitrator found the claim compensable and awarded benefits. The Commission reversed on the grounds that the claimant failed to provide the employer with timely notice. The Appellate Court affirmed this result, noting that the claimant could have alleged a manifestation date of October 15, 2002, under the "flexible standard" espoused by the Supreme Court in Durand v. Industrial Commission, 224 Ill.2d 53 (2006), but failed to do so. The Court also noted that, given the manner in which the claimant completed the sickness/accident forms, the employer had no basis for knowing that an accident existed to investigate. In the instant case, in contrast, Petitioner openly characterized her condition as work-related when providing notice (on the same day she learned of the condition) but indicated her willingness to defer benefits under the Act as she knew Respondent would want her to do. Petitioner ceded control to Respondent in

that she left it to Kaiser to complete the paperwork. Respondent introduced no evidence indicating she ever asserted in writing that her condition was not work-related.

The Arbitrator finds that Petitioner provided Respondent with timely notice of her condition.

Did Petitioner establish causal connection?

As a preliminary matter, the Arbitrator notes that Petitioner is not claiming causation as to her cervical spine condition. Dr. Fletcher described this condition as degenerative in nature.

The Arbitrator finds that Petitioner established causation as to her current post-operative left carpal tunnel syndrome condition of ill-being. In so finding, the Arbitrator relies in part on the histories Petitioner provided to her treating physicians. The Arbitrator also relies on the causation opinions expressed by Dr. Fletcher. As noted above, the Arbitrator found those opinions more persuasive than those expressed by Dr. Kohlmann. Dr. Fletcher had a significantly better understanding of Petitioner's duties. Dr. Kohlmann did visit Respondent's facility, on one occasion, but his recollection of this visit was poor and he readily acknowledged he does not perform jobsite analyses in the way Dr. Fletcher does. The Arbitrator also notes the absence of other intrinsic risk factors. Petitioner is not diabetic or overweight, does not smoke, does not have rheumatoid arthritis and has no thyroid-related problems. Dr. Kohlmann never suggested that some non-work factor was the cause of her condition. The therapy records following the initial left carpal tunnel release reflect that Petitioner experienced increased symptoms when performing various household activities. That such activities might have slowed Petitioner's recovery does not bar her claim. Repetitive work activities need not be the sole causative factor, not even the primary causative factor, so long as they were a causative factor in the resulting condition. A claimant is not required to eliminate all other possible contributing factors. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

That Petitioner's underlying cervical spine condition might have predisposed her to developing carpal tunnel syndrome does not bar her from recovering benefits for that syndrome. In Illinois, it has long been held that an employer takes an employee as it finds her. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

The Arbitrator also finds that Petitioner established causation as to her current post-operative right carpal tunnel syndrome via an overuse theory. In so finding, the Arbitrator relies in part on Petitioner's credible testimony that she began experiencing carpal tunnel symptoms in her right hand around the time she came under Dr. Oakey's care, due to overusing that hand. There is really no dispute in this case that Petitioner obtained a very poor result from her initial left carpal tunnel release. Nor is there is any dispute that she required revision surgery. Her left carpal tunnel syndrome treatment was unusually protracted and she continued to experience symptoms even after Dr. Oakey performed a third procedure. It makes sense to the Arbitrator that she would rely on and overuse her dominant right hand due to her left-sided symptoms.

The Arbitrator further finds that Petitioner did not establish causation as to her claimed left cubital tunnel syndrome. Neither Dr. Thatcher nor Dr. Oakey addressed causation via this condition. On direct examination, Dr. Fletcher initially testified he did not clearly see any causal relationship between Petitioner's job and the left cubital tunnel syndrome. He indicated that the tasks Petitioner performed at Respondent were not those commonly associated with the development of this syndrome. After Petitioner's counsel pressed further, asking him whether the cubital tunnel could be linked with Petitioner's poor outcome from her initial carpal tunnel surgeries, he did not fully commit himself. He simply stated this was a "reasonable theory." The Arbitrator finds that Petitioner did not meet her burden of proof on the issue of causation vis-à-vis the claimed left cubital tunnel syndrome.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the medical expenses detailed in PX 21. These expenses relate to treatment Petitioner received for her left carpal tunnel syndrome, her left cubital tunnel syndrome and her right carpal tunnel syndrome. The Arbitrator has previously found that Petitioner established causation as to her bilateral carpal tunnel syndrome but not as to her left cubital tunnel syndrome. The Arbitrator views the carpal tunnel treatment as reasonable and necessary. Respondent's examiner, Dr. Kohlmann, did not question Petitioner's diagnosis or any aspect of her care. When he examined her, she had not yet had the right-sided release but was contemplating it. He did not suggest it was unnecessary.

The Arbitrator awards the expenses in PX 21 that relate to left and right carpal tunnel syndrome treatment, subject to the fee schedule.

Is Petitioner entitled to temporary total disability? Is Petitioner entitled to maintenance? Is Respondent liable for the cost of the vocational services provided by Bob Hammond?

Petitioner claims she was temporarily totally disabled from August 19, 2010 through July 28, 2016, when she reached maximum medical improvement. PX 24 at 33. The stipulated average weekly wage of $659.70 gives rise to a temporary total disability rate of $439.80.

The Arbitrator finds that Petitioner was temporarily totally disabled during two intervals: from August 19, 2010 through July 1, 2013 (the date Dr. Oakey released her to full duty) and from August 11, 2015 (the date of the right carpal tunnel release) through July 28, 2016. Dr. Oakey's note of July 1, 2013 reflects he was fully aware that Petitioner had ongoing bilateral hand symptoms yet he imposed no restrictions. PX 6, p. 19. Dr. Fletcher found Petitioner to be continuously disabled but it appears he was unaware of Dr. Oakey's release.

Petitioner claims she is entitled to maintenance from March 13, 2017, the date of her first meeting with Bob Hammond, through the hearing of July 16, 2019. The Arbitrator finds that Petitioner was entitled to maintenance during two periods: April 3, 2017 (the date of her first job search contacts, PX 20) through June 30, 2018 and April 15, 2019 through June 30,

2019. The Arbitrator relies on Bob Hammond's reports and testimony, along with Petitioner's very extensive job search records (PX 20), in making this finding. Hammond testified that Petitioner initially resisted the idea of looking for work, due to her pain level, and did not start looking until after he communicated with her a second time. T. 152.

In the Arbitrator's view, Respondent failed on all fronts insofar as the issue of vocational rehabilitation is concerned. Respondent did not even prepare a written vocational assessment, as required by Section 9110.10 of the Rules Governing Practice Before the Commission. In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207 (1st Dist. 2009), the Appellate Court emphasized that such assessments are required "even in circumstances where no plan or program of vocational rehabilitation is necessary." Regardless of its defenses, Respondent had an obligation to assess Petitioner's employability and vocational needs. Nevertheless, the Arbitrator declines to award maintenance between July 2018 and March 2019 based on the concession that Hammond made under cross-examination when asked about Petitioner's inactivity during this period. The Arbitrator recognizes that Respondent paid no weekly benefits under the Act at any point and that an unproductive job search can be discouraging but Hammond agreed that taking time off is not compatible with a diligent search for work.

The Arbitrator finds Respondent liable for Hammond's charges of $7,649.73 (PX 18). See W. B. Olson, Inc. v. IWCC, 2012 IL App (1st) 113129WC, 820 ILCS 305/8(a).

What is the nature and extent of the injury?

Petitioner seeks an award of permanent total disability under Section 8(f) of the Act. There are three ways for a claimant to establish entitlement to benefits under this section: "by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience and condition, no jobs are available to a person in their circumstances." ABB C-E v. Industrial Commission, 316 Ill.App.3d 745, 750 (5th Dist. 2000). The Arbitrator finds that Petitioner established both that she is medically permanently totally disabled and that she falls into the "odd lot" category by virtue of her lengthy but ultimately unsuccessful job search. As for the medical aspect, Dr. Fletcher testified that Petitioner is totally disabled because of her hand condition. He characterized her dexterity as "very, very poor." PX 24, p. 34. Dr. Kohlmann, Respondent's examiner, did not comment directly on the issue of total disability but, in his report, conceded that Petitioner is unable to make a fist or close her fingers completely. RX 7, p. 7. As for the remaining component, Petitioner, via her own testimony and that of Bob Hammond, established she conducted a diligent but unsuccessful job search. During an initial period, Petitioner applied for approximately 1500 jobs. During a second period, prior to the hearing, she applied to 300 additional jobs. PX 20. She persisted in looking despite not receiving benefits or offers to interview. Hammond testified that, in his 31 years of experience, only one other individual had applied to as many jobs as Petitioner did. He also testified that, during the two periods in question, Petitioner diligently looked for work and there was no reasonably stable labor market for her.

Once Petitioner met her burden on the job search aspect, the burden shifted to Respondent to establish that there is a reasonably stable labor market for Petitioner's services and that Petitioner is employable in that market. Respondent offered no vocational evidence of any kind.

The Arbitrator awards permanent total disability benefits under Section 8(f) of the Act at the applicable minimum rate of $466.13 per week, beginning July 16, 2019 and for the duration of Petitioner's life.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID FINK,

Petitioner,

vs.

NOS: 12 WC 003215
12 WC 11480

AC McCARTNEY FARM EQUIPMENT,

Respondent.

ORDER

This matter comes before the Illinois Workers' Compensation Commission for an order to allow Petitioner's attorney to disburse attorney's fees that were held in escrow since the approved Settlement Contract Lump Sum Petition and Order was entered by Commissioner Kathryn A. Doerries on March 11, 2021. At the time Commissioner Doerries approved the Lump Sum Settlement Contract Petition and Order on March 11, 2021, a contemporaneous Order was entered that mandated Petitioner's counsel hold the claimed attorney's fees ($140,000.00) in escrow pending an Order of the Commission for disbursement. Commissioner Doerries allowed Petitioner's counsel leave to provide an itemization of legal work performed. Upon receipt of the documents provided by Petitioner's counsel in support of the Petition for fees in excess of the statutory cap on attorney's fees for settlements pursuant to §16a(B), the matter was heard by Commissioner Kathryn A. Doerries on March 25, 2021, with both parties represented by counsel and with Petitioner present by Webex.

§16a(B) states in pertinent part:

> With respect to any and all proceedings in connection with any initial or original claim under this Act, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or his dependents, whether secured by agreement, order, award or a judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be

> allowed to the attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this Section. However, except as hereinafter provided in this Section, in death cases, total disability cases and partial disability cases, the amount of an attorney's fees shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in this Act unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees. *820 ILCS 305/16a*

In favor of the Petition, Petitioner's attorney submitted multiple documents including an Affidavit signed by Petitioner on March 1, 2021 (Comm'nXA) swearing that he was fully aware that his attorney's law firm, Ridge & Downes, is limited by statute to Attorney's fees of 20% or 364 weeks of compensation, unless a further fee shall be allowed by the Illinois Workers' Compensation Commission. In his Affidavit, Petitioner represented that he was aware of the law firm's Petition for a fee of 35%, or $140,000.00, and that based upon the time, quality of work and advice that they had given him over a period of 11 years, it was his desire that Ridge & Downes be allowed the fee. The work over the 11 years included securing an expert opinion from Vocamotive, Inc., that he was permanently and totally disabled. Petitioner's attorney then brought his case to trial before an Arbitrator on March 1, 2017, which resulted in an award for Petitioner of permanent total disability benefits. On appeal by Respondent, the Commission modified the Decision to an award of 50% loss of use of the man as a whole, or $78,000.00.

Thereafter, Petitioner's counsel sought review of the Commission Decision in the Circuit Court of Winnebago County and on July 16, 2019, was successful in having the Commission Decision reversed. The Petitioner signed an Addendum to Fee Agreement on June 29, 2020, (Comm'nXC) allowing a fee of 25% of the gross amount recovered if an appeal was taken to the Circuit Court and if an appeal was taken to the Appellate Court, then the attorneys' fees shall be 35% of the gross amount received.

Respondent sought review in the Appellate Court, which on October 13, 2020, affirmed the judgment of the Circuit Court setting aside the Decision of the Commission and reinstating the Decision of the Arbitrator finding permanent total disability in favor of Petitioner. After a number of offers had been conveyed and rejected, the Petitioner agreed to settlement of these cases for $400,000.00 plus a Medicare Set-Aside of $76,126.00. (Comm'nXA)

In further support of the Petition, Petitioner's attorney submitted, and Commissioner Doerries reviewed, the Attorney Representation Agreement, (Comm'nXB), the executed addendum to the fee agreement, (Comm'nXC), the case file notes beginning January 20, 2012, to the present, case law, the Circuit Court and Appellate Court briefs filed by the parties, the proceedings throughout the Appellate Court and the results obtained, those being an award of permanent and total disability and a lump sum settlement offer of $400,000.00 plus a Medicare Set-Aside agreement of $76,126.00. (T, 5-6, Comm'nXA)

After recitation of the documents reviewed, the Commissioner addressed the Petitioner and advised she had reviewed his signed Affidavit, and reviewed the substantive points enumerated therein, in pertinent part, that Ridge & Downes is petitioning the Commission for a fee of 35% rather than the statutory 20%, pursuant to the addendum to the Attorney Representation Agreement signed June 29, 2020. When asked if he remained in agreement that for the services rendered, his attorney should be allowed a fee of 35% or $140,000.00, Petitioner responded, "Yes, I do." (T, 6)

Based on the foregoing, the Commission is in agreement with the fee arrangement and disbursement of the attorney's fees held in escrow is allowed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's law firm, Ridge & Downes, is hereby allowed to disburse attorney's fees of $140,000.00 that have been held in escrow since the Settlement Contract Lump Sum Petition and Order pertaining to cases 12 WC 3215 and 12 WC 11480 was approved on March 11, 2021.

DATED: APR 7 - 2021

Kathryn A. Doerries

KAD/bsd
04/06/21
42

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve E. Cluck,

Petitioner,

21IWCC0164

vs. NO: 18 WC 022337

Walgreens Family of Companies,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

21IWCC0164

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CLUCK, STEVE E
Employee/Petitioner

Case# **18WC022337**

21IWCC0164

WALGREENS FAMILY COMPANIES
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4689 HASSAKIS & HASSAKIS PC
JOSHUA A HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

21IWCC0164

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Steve E. Cluck
Employee/Petitioner

v.

Walgreens Family of Companies
Employer/Respondent

Case # 18 WC 022337

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **February 14, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care? – **Total Knee Replacement by Dr. McIntosh**
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, September 21, 2016, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$27,634.34**; the average weekly wage was **$727.22 (38 weeks)**.

On the date of accident, Petitioner was **57** years of age, with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$10,527.31** in TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$10,527.31**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall have credit of $11,220.40 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall authorize and pay for the treatment recommended by Dr. McIntosh.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/22/20
Date

APR 2 - 2020

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

21IWCC0164

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

STEVE E. CLUCK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 22337
	)	
WALGREENS FAMILY OF COMPANIES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 14, 2020. The parties agree that on September 21, 2016, Petitioner was a receiver/checker when he sustained injuries to his left knee which arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection and prospective medical care. All other issues are stipulated by the parties.

MEDICAL HISTORY

Petitioner provided a history of operating a stand-up fork truck when he attempted to exit the equipment and twisted his left knee and felt a "pop." He had an immediate onset of pain. On 9/28/16, Petitioner was examined by Dr. Houle at the Orthopedic Center of Southern Illinois for increased pain with range of motion and weightbearing and swelling. Dr. Houle noted pain at the joint line medially and overlying the left MCL, with a significantly uncomfortable McMurray's test. The initial assessment was a medial meniscus tear. Dr. Houle ordered an MRI, physical therapy, and took Petitioner off work.

The MRI demonstrated a complex tear of the posterior horn of the medical meniscus with a small meniscal flap, as well as a small horizontal tear of the body of the medial meniscus. It also showed a mild sprain to Petitioner's MCL, diffuse chondromalacia of the medial compartment, and moderate chondromalacia of the patella. Petitioner participated in physical therapy from 10/21/16 through 11/10/16 that did not improve his symptoms. On 1/17/17, Dr. Houle performed a resection of Petitioner's medial meniscus tear, chondroplasty of the medial femoral condyle, and chondroplasty of the patellofemoral compartment. Dr. Houle noted an "obvious tear of the posterior horn of the medial meniscus and some areas of grade 2 to 3 chondromalacia of the medial femoral condyle."

On 1/25/17, Petitioner reported 2 out of 10 pain and reported the sharp pain in the medial aspect of his knee was gone. He participated in physical therapy from 2/2/17 through 2/13/17. On 2/24/17, Petitioner reported

0 out of 10 pain, with difficulty going from squatting to standing, and advised Dr. Houle he would like to go back to work. Dr. Houle released Petitioner to return to work the following Monday and prescribed Mobic. Petitioner returned to Dr. Houle on 3/27/17 complaining of 3 out of 10 pain, difficulty descending stairs, and feeling a locking sensation stepping off the fork truck at work. Dr. Houle assessed persistent pain secondary to some degree of osteoarthritis from the time of surgery. On 5/1/17, Dr. Houle administered a cortisone injection which provided some relief.

Petitioner continued to follow up with Dr. Houle complaining of increased pain by the end of his work day. Dr. Houle recommended medications, injections, physical therapy, bracing and potentially knee replacement surgery. On 11/13/17, Petitioner reported severe flareups for which Dr. Houle stated Petitioner may require future cortisone injections.

Petitioner sought a second opinion with Dr. Jeffrey McIntosh on 2/20/18. Petitioner was experiencing sharp pain in the medial joint line and he was walking with an antalgic gait. Dr. McIntosh noted swelling and pain at the extremes of flexion and tenderness in the medial joint line. Dr. McIntosh reviewed an x-ray of Petitioner's left knee taken in 2014 when Petitioner sustained injuries to his *right* knee, with an x-ray taken by Dr. Houle after his 9/21/16 accident. Dr. McIntosh performed left knee x-rays on 2/20/18 which revealed an almost complete loss of joint space. Dr. McIntosh opined Petitioner was suffering from degenerative joint disease which significantly progressed over the last two years as "determined by radiographic evaluation." Dr. McIntosh recommended a total knee replacement.

On 5/21/18, Petitioner presented to Dr. Jason Young for a Section 12 examination at Respondent's request. Petitioner reported he had start up pain and aching in his left knee and that he was still working full duty. Petitioner reported the steroid injections provided temporary relief. Dr. Young noted Petitioner's previous right knee surgery in 2014. Dr. Young noted Petitioner walked with a slight limp favoring the left side, with noted medial and patellofemoral compartment pain of the left knee. Dr. Young stated x-rays were performed the day of the visit of Petitioner's bilateral knees that revealed medial joint space collapse with bone-on-bone arthritic changes. Dr. Young observed moderate patellofemoral arthrosis and superior osteophyte formation of the patella of the left knee and medial joint space collapse of the right knee which was also near bone-on-bone in severity. Dr. Young assessed severe left knee osteoarthritis which he felt clearly preexisted the work incident. Dr. Young opined chondromalacia was not something that occurred acutely, but was something which occurred over many years. He felt the work injury did not accelerate the underlying disease. Dr. Young noted Petitioner's progression was one of a natural variety and there had been no significant acceleration as a result of the meniscus tear. Dr. Young noted arthritic changes in the contralateral knee which were indicative of a genetic component rather than an acute traumatic component. Petitioner's arthritic progression was typical for the type and severity of the arthritis he had. There was no acute cartilage damage or chondral flap which would have been a result of a plant and twist mechanism, but rather a degenerative process when the cartilage was globally thin indicative of normal wear and tear over the course of Petitioner's life. Dr. Young opined the need for a left knee replacement was in no way related to the 9/21/16 work incident.

On 7/24/18, Petitioner complained that his *right* knee was bothering him and Dr. McIntosh aspirated the right knee and injected same with 40 mg. of Kenalog.

Dr. McIntosh authored a narrative on the question of causation. Dr. McIntosh reviewed and compared the radiographs from 2014, 2016, and 2018 related to Petitioner's left knee. He noted that the joint space in 2014 and

2016 were very similar in appearance. However, upon comparison of the 2018 films, Dr. McIntosh noted that, "[i]n comparison views of the right knee and the left knee from February 2018, there is a significant decrease in the joint space in the left knee compared to the right, which is notable." Had the injury and subsequent surgery not contributed to the worsening of his arthritis, Dr. McIntosh would expect the changes in the joint space to be equal, especially if it was a "genetic" predisposition as suggested by Dr. Young. He attributed the progressive change in the left knee to Petitioner's left knee surgery.

TESTIMONY

Petitioner testified he has worked for Respondent for twenty years. On the date of accident, Petitioner dismounted a fork truck and his left knee twisted and popped. He felt immediate pain and reported the accident. Petitioner testified that when he saw Dr. Houle on 2/24/17 he had 0 out of 10 pain with some difficulty squatting. That he returned to work shortly following that visit and his knee pain returned. He has worked full duty since 2/25/17. He treated with Dr. Houle several times after returning to work and received cortisone injections that provided temporary relief. Petitioner testified he has never had symptoms in his left knee prior to the accident. He testified he treated with Dr. Houle prior to this accident for a meniscal surgery on the right knee in 2014. Petitioner testified he did not have any pain in his right knee at the time of arbitration. He further testified that Dr. Jason Young did not take x-rays of his knees at the Section 12 examination as indicated in the report.

Dr. Jeffrey McIntosh testified by way of deposition. Dr. McIntosh maintained that subjectively, chronologically and objectively from comparison radiographic evaluation, Petitioner's deterioration of his left knee following his 9/21/16 incident and 1/17/17 surgery accelerated the deterioration of Petitioner's left knee joint space leading to the need for a total knee replacement. Dr. McIntosh opined that it was his opinion to a reasonable degree of medical certainty that Petitioner's need for total knee replacement is causally related to his work injury and the *sequela* from the subsequent meniscal surgery and chondroplasty. He understood that Petitioner had no problems with his left knee prior to his work accident. In reviewing the comparison studies from 2014 to 2016, Dr. McIntosh noted there was slight worsening of both knees, but they maintained equal space between the medial femoral condyle and the medial tibial plateau.

In comparing the 2016 to 2018 films, Dr. McIntosh noted that the accident accelerated the arthritis in Petitioner's left knee. He stated that there was a "significant difference" in the left knee compared to the right from 2016 and 2018. Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner merely had a genetic predisposition to arthritis as Petitioner's knee progression did not occur at an equal rate, but he developed arthritis at a faster rate in the left. He noted that when you change the anatomy of the knee, you change the weight-bearing of the knee by removing part of the cartilage or if there is damage to the cartilage that lines the bone that has the capacity to accelerate the development of arthritis in the knee. Even though the meniscal resection was undertaken with chondroplasty to improve the immediate symptoms, it put Petitioner at risk to develop arthritic changes which happened at a rapid rate.

Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner was at MMI in February, 2017 in light of Petitioner's continued symptoms after returning to work. He noted that the aspiration of Petitioner's right knee in July, 2018 was secondary to Petitioner ambulating with an antalgic gait. Petitioner ambulating with an antalgic gait was documented in Dr. McIntosh's initial evaluation. Dr. McIntosh explained the torn meniscus was resected and when there is injury to the cartilage there is no real cure for that outside of replacing cartilage. The structural changes in Petitioner's left knee with his injury and repair, in combination with the accelerated rate of progression

in the left knee versus Petitioner's right knee, allowed Dr. McIntosh to opine that the incident and subsequent surgery led to the need for knee replacement surgery.

Dr. Jason Young testified by way of evidence deposition. He testified consistent with his written report. Again, he opined that Petitioner had severe left knee osteoarthritis and the work incident did not accelerate the underlying disease. Dr. Young testified arthritis can be severe in some patients yet they have no pain, and with others arthritic knee pain begins spontaneously meaning arthritis is not always associated with a particular event. He testified a knee surgery does not automatically equate to advancing of arthritic disease and many do just fine following surgery. He testified given the amount of arthritis Petitioner had, the arthritic progression was in the normal course. Dr. Young testified Petitioner reached MMI on 2/27/17 when he was returned to full duty work. He testified further treatment was related to the natural history of his underlying degenerative disease. He testified based on Petitioner's presentation and most recent radiographs, Petitioner was a candidate for a left total knee replacement. He testified he had no knowledge of any prior complaints of the left knee before 9/21/16, but stated it would not be surprising for someone to be functioning completely normal with a really degenerative advanced arthritic knee.

CONCLUSIONS OF LAW

ISSUE (F): Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator concludes that Petitioner's current condition of ill-being with regard to his left knee is causally related to his work accident of September 21, 2016. Petitioner testified credibly and the records support that prior to his accident, Petitioner did not have symptoms or receive treatment for his left knee. Petitioner sustained an acute accident on September 21, 2016 for which he felt immediate pain and symptoms resulting in a meniscal resection and chondroplasty in his left knee.

The opinions of treating physicians Dr. Houle and Dr. McIntosh are more credible than those of Dr. Jason Young. Dr. Houle and McIntosh compared and reviewed the x-rays of Petitioner's left knee from 2014, 2016, and 2018. Dr. McIntosh explained the comparison x-rays objectively show an accelerated collapse of joint space in Petitioner's left knee following his meniscal resection and chondroplasty. He noted a loss of all cushioning in Petitioner's medial joint line, which Dr. Young agreed.

Dr. Young maintained Petitioner's current state of ill-being was merely genetic; however, Dr. Young did not review Petitioner's MRI films, the arthroscopic photos from Dr. Houle's surgery, the comparison x-rays done in 2014 and 2016, or any imaging that predated the date of accident, including records from Petitioner's prior right knee surgery in 2014. Dr. young did not review Dr. McIntosh's narrative report of January, 2019 or Dr. Houle's treatment note dated March 27, 2017 when Petitioner's symptoms returned following surgery. Dr. Young agreed that in light of the fact he had not reviewed the 2014 and 2016 x-rays, he had no opinion about the interval changes demonstrated on those studies.

Further, it was Dr. Young's understanding that Petitioner's left knee was asymptomatic prior to the accident. Dr. Young could not identify, but for the September 21, 2016 incident, when Petitioner's left knee would have become symptomatic and opined it was coincidental that his underlying arthritis had become symptomatic at the time Petitioner sustained his accident. Despite Petitioner being immediately symptomatic following this accident, his meniscal injury, subsequent meniscectomy and chondroplasty, increase in symptoms immediately

upon returning to work, and the temporal relationship of his manifestation of symptoms to his injury, Dr. Young simply believed it was coincidental that his underlying arthritis was symptomatic. Dr. Young could not opine to any degree of medical certainty exactly when, but for the September 21, 2016 event, Petitioner's arthritis would have started causing him pain. In light of the above shortcomings in the foundation of Dr. Young's opinions, the Arbitrator gives little weight to his opinions on causation.

Aside from the direct opinions on the issue of causation by Dr. McIntosh and Dr. Houle, causation may also be shown by a chain of events which demonstrates a previous condition of good health, an accident and a subsequent injury resulting in disability. That scenario may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 69, 63-63 (1982). In the case at hand, Petitioner had no history of pain, treatment, disability or limitation with his left knee up until his twisting incident and subsequent meniscal resection and chondroplasty. Petitioner worked with Respondent for over 20 years. There was no medical opinion, record or testimony that Petitioner ever had difficulty ascending/descending stairs; getting up from a squatted position; standing for durations; stepping down from his forklift; or suffered from daily pain, locking and swelling. The medical records wholly support Petitioner continues to be plagued with difficulty with his left knee, which is well documented upon his return to work following his January 17, 2017 surgery. The records taken as a whole support a clear, well-documented onset of symptoms and a lack of longstanding improvement which began with the September 21, 2016 incident.

ISSUE (K): Is Petitioner entitled to any prospective medical care?

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury, and the credible opinions and/or testimony of Dr. Houle and Dr. McIntosh, the Arbitrator orders Respondent is liable for Petitioner's medical care, including a left total knee replacement as recommended by Dr. McIntosh and Dr. Young. Accordingly, Respondent shall authorize and pay for prospective medical care as recommended by Dr. McIntosh as provided in Sections 8(a) and 8.2 of the Act.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/22/20

DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Giovanni Cruz,

Petitioner,

21IWCC0166

vs.

NO: 19 WC 013786

Schilke Music,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0166

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CRUZ, GIOVANNI
Employee/Petitioner

Case# **19WC013786**

SCHILKE MUSIC
Employer/Respondent

21IWCC0166

On 11/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
ANDREW MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

21IWCC0166

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Giovanni Cruz
Employee/Petitioner
v.
Schilke Music
Employer/Respondent

Case # 19 WC 13786

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2019 and October 9, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **1/25/2019,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned ***$28,633.28***; the average weekly wage was ***$550.64***.

On the date of accident, Petitioner was ***30*** years of age, ***single,*** with ***0*** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of ***$2,065.72*** for TTD, $***N/A*** for TPD, $***N/A*** for maintenance, and ***$1,822.97*** for other benefits, for a total credit of $***3,888.69***.

Respondent is entitled to a credit of $***N/A*** under Section 8(j) of the Act.

ORDER

Because Petitioner did not sustain an accidental injury which arose out of and in the course of his employment with Respondent, and because his current condition of ill-being is not causally-connected to the alleged incident, benefits are denied.

Respondent shall be given a credit of $2,065.72 for TTD, and $1,822.97 for medical benefits that have been paid, for a total credit of $3,888.69.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11-21-19
Date

ICArbDec19(b)

NOV 22 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GIOVANNI CRUZ, Petitioner,	)	
v.	)	19 WC 13786
SCHILKE MUSIC, Respondent.	)	

MEMORANDUM IN SUPPORT OF ARBITRATOR'S DECISION

Statement of Facts

On January 25, 2019, Petitioner, Giovanni Cruz, was an employee of Schilke Music. He makes parts for trumpets (Tr. p. 39). On the alleged incident date, he and an employee named Eric had to move a rack. Mr. Cruz said he had a bad hold on the rack. When he tried to reposition it, he felt a pain in his right wrist and a sort of "pop" feeling. He initially testified this occurred approximately 10:00 a.m. to 12:00 pm (Tr. p. 40). He described the rack as having a cloth wheel and a paper wheel. He said the rack was about 5 feet long. He would not be able to lift it by himself (Tr. p. 41).

When further describing the incident moving the rack, he testified "I felt it, I felt losing my balance. And when I reached – I turned my hand to grab it, that's when I -- all the weight was on my right hand and I felt it, like, a really bad pain and then, like, some kind of, like, pop vibration in my right hand" (Tr. p. 42-43). He did not yell out. The pain was on the outside of his right wrist (Tr. p. 43). When this happened, they let go of the rack and then tried to reposition to get it to move. They eventually got the rack into position. Mr. Cruz said he told Eric about what happened with his wrist but he does not think Eric heard him. He did not tell anyone else with the employer that day what had happened with his wrist. He said he did not report it because he assumed he pulled a muscle. He said this happened on a Friday and he felt maybe over the weekend he would heal and then he could just go back to work on Monday (Tr. p. 44).

Eric Zaragoza testified on behalf of the petitioner. He said that he and Mr. Cruz were moving a cloth dispensary back to its original location. He said the dispensary was 7 feet by 4 feet (Tr. pp. 12-13). Mr. Zaragoza said he was at the back of the dispensary and Mr. Cruz was in the front (Tr. p. 14). Mr. Zaragoza believes they had to move the dispensary maybe 20 feet. He said while they were carrying the dispensary it tilted forward and Mr. Cruz went to catch it. Mr. Zaragoza testified that as this was being done he saw Mr. Cruz tweak his hand or wrist. They set the rack down and eventually moved it back to its original location (Tr. pp. 14-15). Mr. Zaragoza testified that they had moved the rack 17 or 18 feet before setting it down. He said they took probably a 2 or 3 minute break before moving it the last few feet. He testified that they took the break until Mr. Cruz' wrist felt better. They then moved the dispensary the remaining 2 or 3 feet (Tr. pp. 28-29).

Video clip 1 shows the petitioner and Mr. Zaragoza first moving the rack at 6:04 am (Rx. 2). Mr. Cruz was facing and walking forward and Mr. Zaragoza was walking backwards. They slid the rack most of the way and then picked it up in order to not scratch the new floor (Tr. pp. 66-67). While watching clip 1, Mr. Cruz testified that he hurt his wrist at 6:04 am between the 13 and 19 second mark (Tr. p. 69-70). After moving the rack, Mr. Cruz tied his shoe. Mr. Cruz agreed that during the movement of the rack at 6:04 am that he and Mr. Zaragoza did not take a 2 or 3 minute break before completing the task (Tr. pp. 71-72).

Video clip 7 shows them moving the rack back at 11:21 am (Rx. 2). Again, Mr. Cruz was walking forward and Mr. Zaragoza was walking backwards. Mr. Cruz testified that while moving the rack they did not stop to take a 2 or 3 minute break, as described by Mr. Zaragoza. After moving the rack, Mr. Cruz pointed with his right to someone in the finishing room (Tr. pp. 73-75).

Mr. Cruz finished the workday, ending at 2:30 p.m. He was able to perform his duties throughout the remainder of the day as he said he took most of the load on his left hand. He said he struggled the whole day (Tr. p. 44-45).

Mr. Cruz testified he did not go to work on Monday and he called off. He believed he spoke to Chris on the phone, the manager at Schilke (Tr. p. 45). Brian Persaud, the petitioner's direct supervisor, said that Mr. Cruz arrived at work on Monday and said that he hurt his wrist and needed to see a doctor. Mr. Cruz did not say that he injured his wrist at work (Tr. pp. 104-105).

The petitioner first saw Dr. Bednar at Loyola on January 29, 2019. He told him he suffered an injury on the job. He initially told him the injury had occurred three days earlier. Petitioner clarified, saying he told him it happened a few days before. He testified that he told Dr. Bednar that it happened on Friday. According to Mr. Cruz, Dr. Bednar at the time said the date was not important (Tr. p. 45-46).

Dr. Bednar provided him with a wrist splint for his right wrist and gave him a 5-pound lifting restriction. Those restrictions were originally accommodated (Tr. p. 47). Brian Persaud testified that on February 12, Mr. Cruz told him that according to his doctor he needed complete rest. He asked Mr. Persaud if he was going to get paid for his time off-of-work because it was a work-related injury. This was the first time Mr. Persaud was aware that Mr. Cruz was claiming the injury was related to work (Tr. p. 106).

Andrew Naumann is the owner of Schilke Music. He first became aware that Mr. Cruz was claiming a work-related injury when he was notified by Brian Persaud on February 12 (Tr. p. 111-112). As Mr. Naumann was out-of-town at the time, he called the petitioner. The petitioner told him the event took place first thing in the morning on January 25 while moving a rack (Tr. pp. 112-113). Upon returning to town, he spoke with Mr. Cruz again about the

incident. At that time, the petitioner said he did not injure his wrist first thing when the rack was first moved. He injured it when he moved that rack back later in the morning (Tr. p. 114). Mr. Naumann described a surveillance system he has in the facility to observe activities in high traffic areas. He prepared Rx. 2, which is a disc that contains 25 clips of video. The clips show every time Mr. Cruz appeared on any of the cameras on January 25, 2019 (Tr. pp. 114-115).

Petitioner continued to treat with Dr. Bednar on March 5, 2019. Ever since March 6, 2016, he has not worked (Tr. p. 50). He had an MRI of the right wrist taken March 22, 2019. He had follow-up visits with Dr. Bednar on March 26, April 9 and April 30, 2019. Dr. Bednar prescribed surgery for the right wrist (Tr. p. 49).

Petitioner attended a Section 12 examination with Dr. Bryan Neal on September 5, 2019 (Tr. p. 51, Rx. 1).

Petitioner testified he was still having problems with his wrist. He cannot rotate it fully to the left. He said he wears the splint all the time. He still wants to undergo surgery (Tr. p. 55).

ARGUMENT

Findings of Arbitrator

As to Issue C, did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Petitioner did not sustain an accident that arose out of and in the course of his employment.

Petitioner testified that after the accident, he was able to work through the end of his workday because "I took most of the load on my left hand. But I struggled the whole day." (Tr. p. 45) This representation is not supported by his activity shown on surveillance video. In Respondent's Ex. 2, clip 8 (11:50 am), Petitioner is viewed vigorously moving the handle of the pallet jack up and down with two hands. He then continues this movement of the handle with only his right hand. He is then shown pulling the pallet jack with his right hand in this clip, continuing to do so in clips 9, 10, and 11 (11:51 am to 11:53 am) (Rx. 2). In clip 23 (1:56 pm), Petitioner is shown moving buckets and rolling up and carrying a rubber mat. He initially carries the rubber mat with two hands and then walks while carrying the rubber mat at his side with his right hand only (Rx. 2). Petitioner testified that the rubber mat may have weighed 5 pounds (Tr. p. 92). Andrew Naumann testified the mat was 6 foot long by 3 foot wide and it weighed at least 30-35 pounds (Tr. p. 119).

The Arbitrator notes additional activity exhibited by Petitioner after the alleged incident. In clip 12 (12:00 pm), the Petitioner is shown carrying his gloves with his right hand and moving his hands while speaking. In clip 13 (12:01 pm), he is shown gesturing with his hands. In clip 14 (12:49 pm), he is carrying a large roll of hand towels with his right hand. He is shown bending his right hand underneath the roll of towels. In clips 16 and 17 (1:13 pm), he is shown picking up a box with his right hand and breaking down the box using his right hand. In clip 22 (1:46 pm), he is shown cleaning the work area with a rag for 8 minutes and 29 seconds, often using the right

hand. In clip 24, (2:21 pm), he is shown pulling (with assistance) a 55-gallon tank. Clip 25 (2:30 pm) shows him punching out at the end of the day with the right hand (Rx. 2).

Not only do these clips fail to show him mostly taking the load with his left hand, and struggling the whole day, they fail to show any evidence of pain or problems with the right hand whatsoever.

The finding of no accident is based upon other discrepancies as well. At trial, and in discussions with Andrew Naumann, Petitioner wavered in saying whether the accident occurred when the rack was moved first thing in the morning, or when it was moved back between 10:00 a.m. and 12:00 noon. At trial, Petitioner initially testified on direct examination that the incident occurred between 10:00 am and 12 pm (Tr. p. 40). However, on cross-examination, after being shown the video clip of the rack first being moved, he testified he was injured at 6:04 am, somewhere between the 13 and 19 second marks (Tr. p. 65-70). After direct examination, Petitioner met with his attorney. On re-direct examination, he testified he injured his wrist when he was moving it back at 11:21 a.m. (Tr. p. 89).

Mr. Naumann testified that he initially spoke with Petitioner on February 12. During that conversation, Mr. Cruz told him he was hurt when he was moving the rack first thing in the morning (Tr. p. 113). After returning from out-of-town, he met with Mr. Cruz again. At that time, Mr. Cruz told him he had injured his wrist while moving the rack back, and not first thing in the morning (Tr. p. 114).

Another question is raised as to the reporting of the incident. While saying he did not remember being told that he was to immediately report any work injury regardless of how minor, he admitted there was language in the employee handbook about immediately reporting work injuries (Tr. p. 57). Brian Persaud, his direct supervisor, testified that Mr. Cruz had been instructed to immediately report any type of work injury to him (Tr. p. 104). Mr. Cruz

acknowledged at trial that he did not tell his employer that he was hurt at work on the incident date (Tr. p. 57-58). Mr. Persaud testified that he was not told by Mr. Cruz that his wrist injury was work-related until February 12, 2019 (Tr. p. 106).

Brian Persaud testified that on the January 25, 2019 alleged incident date, he observed no behavior on the part of Mr. Cruz to indicate he had injured his wrist. Mr. Cruz said nothing to him about injuring his wrist on that date.

The Arbitrator does not rely upon the testimony of Eric Zaragoza. Mr. Zaragoza said that after seeing Mr. Cruz "tweak" his hand or wrist, that they waited 2 or 3 minutes before completing the move of the cloth dispensary rack (Tr. pp.28-29). This break did not happen, as shown in the video and confirmed by Mr. Cruz (Rx. 2; Tr. pp. 71-75). While testifying he saw the "tweak" in the petitioner's face when it happened (Tr. p. 18). However, he also said that he was looking backwards as they were moving the dispensary and thus could not see where the petitioner's hands were placed on the rack (Tr. p. 28). The Arbitrator further notes that located between Mr. Zaragoza and the petitioner on the rack was a roll of cloth and a roll of paper. These rolls would have made it even more difficult to see the expression of Mr. Cruz described by Mr. Zaragoza.

For the foregoing reasons, the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent.

As to Issue F, Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

Petitioner's current condition of ill-being is not causally related to the alleged incident.

As discussed previously, the Arbitrator does not find Petitioner's testimony to be credible in many areas. The Arbitrator specifically notes the Petitioner's testimony at trial that he made it through the remainder of the workday by taking most of the load with his left hand and that he

had struggled the whole day (Tr. p. 45). This is clearly not the case, based upon the video clips submitted into evidence as Respondent's Exhibit 2.

In addition, the Arbitrator notes the report of Dr. Bryan Neal. Dr. Neal conducted an Independent Medical Examination on September 5, 2019. In addition, he had the opportunity to review the surveillance video (Rx. 2). Based on his review of the video in conjunction with his discussion with Petitioner and his examination, it was his opinion that the Petitioner's right wrist condition was not causally-connected to the alleged work incident. In discussing the video clips, Dr. Neal wrote:

> "No video clip shows the examinee or any individual pictured in any of the video to have either injured his wrist or to look like there is any injury complaint, problem or issue. Clip #1 and clip #7, the only clips where, based upon his history, the injury could have occurred, do not support any injury to the wrist as he described" (Rx. 1 p. 14).

The Arbitrator notes that the treating physician, Dr. Bednar, did not have the benefit of reviewing the surveillance video. As such, Dr. Neal is in a better position to assess the causation issue and the Arbitrator relies upon the opinion of Dr. Neal in this issue. The Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to the alleged work incident.

As to Issue J, were the medical services that were provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services; the Arbitrator finds the following:

As Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and as Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Respondent is not liable for any medical treatment charges incurred by Petitioner.

As to Issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to prospective medical care.

As to Issue L, what temporary benefits are in dispute, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to temporary total disability benefits.

As to Issue N, is Respondent due any credit, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, the Arbitrator awards a credit to Respondent for $2,065.72 for TTD paid and $1,822.97 for medical bills paid for a total credit of $3,888.69.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Demetrius Bell,

Petitioner,

21IWCC0167

vs. NO: 16 WC 019664

RJ Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, other (intoxication) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 17, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

21IWCC0167

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELL, DEMETRIUS
Employee/Petitioner

Case# **16WC019664**

21IWCC0167

RJ TRANSPORTATION
Employer/Respondent

On 1/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

21IWCC0167

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Demitrius Bell
Employee/Petitioner

Case # **16** WC **19664**

v.

R. J. Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 5, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **June 20, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**29,505.32**; the average weekly wage was $**567.41**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**378.27**/week for **10** weeks, commencing **June 21, 2016** through **August 30, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $753.00 to Premier Occupational Health, $6,901.26 to Elmwood Park Same Day Surgery Center, $5,520.66 to Instant Care Equipment Leasing, $1,925.00 to Windy City Anesthesia, $11,135.00 to Athletico Physical Therapy, and $749.06 to Prescription Partners, for a total of $26,983.98, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**340.45**/week for **30** weeks, because the injuries sustained caused the **6**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

January 14, 2019
Date

JAN 17 2019

FACTS:

On June 20, 2016, Petitioner was employed by the Respondent in "Quality Control" and "Replenishment", and he had been so employed for approximately one year. Petitioner testified that, on a daily basis, he was required to pick orders and take them to the correct areas in the warehouse for distribution. Petitioner testified that on June 20, 2016, he arrived at 6:30 a.m. for his regular 7:00 a.m. shift, in good health without any pain complaints. Petitioner testified that he had to pick orders that morning, which required him to maneuver pallets, some of which were empty, some weighing over 500 pounds. Petitioner testified that he needed to move a specific pallet, but was unable to do so without moving another pallet that was placed vertically on top of the pallet that he needed to move. Petitioner testified that the vertical pallet was stuck, and when pulling hard to free the pallet, he injured his low back. Petitioner testified that he immediately felt pain in his low back, with subsequent numbness and tingling in his legs. Petitioner testified that he had never felt such pain.

Petitioner testified that he reported his injury to his supervisor, and was sent to Premier Occupational Health for Medical treatment. In his "Injury Statement" that Petitioner was required to complete when arriving at Premier Occupation Health, Petitioner stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Prior to his physical examination, Petitioner willingly underwent drug and alcohol tests. Petitioner's drug screen was negative. On his alcohol test, Petitioner registered a blood alcohol content ("BAC") of .045 and .041. Petitioner testified that he was made aware of the positive test, that he was surprised of the result because he did not feel intoxicated, and that he would not have worked had he known he had alcohol in his system. Petitioner further testified that he spent the preceding day celebrating Father's Day with his family, and that he had consumed alcohol that evening.

Petitioner was examined by Dr. Gorovits, to whom Petitioner gave an identical accident description. During a physical examination, Petitioner described constant, sharp, and severe pain in his low back. Petitioner underwent an x-ray that revealed 2mm retrolisthesis at L5-S1. Petitioner was prescribed analgesic balm, naproxen, and given a lumbar brace. Dr. Gorovits returned Petitioner to work for a "[r]egular duty trial." Petitioner testified that he returned to work and sat in the breakroom until his employer informed him that he was terminated as a result of the failed alcohol test.

On June 21, 2016, Petitioner sought treatment at Elmwood Park Same Day Surgery Center, in Elmwood Park, Illinois. Petitioner was examined by Dr. Amit Mehta, and stated that he suffered a work injury the previous day. Specifically, Dr. Mehta noted that Petitioner "was pulling a pallet out of the racks which weighed approximately 30# when he felt sharp, 10/10 back pain." It was noted that Petitioner was also suffering from radicular symptoms going down the right leg that were triggered by "pulling the pallet as he was bending over pulling them out of the racks." Dr. Mehta prescribed physical therapy three times per week for four weeks, terocin cream, and disabled Petitioner from work. Dr. Mehta also opined that Petitioner's conditions and symptoms were casually connected to the mechanism of Petitioner's injury at work.

On June 23, 2016, Petitioner presented to Athletico Physical Therapy. In the initial treatment note, it is indicated that Petitioner was experiencing sharp back pain when lifting a pallet at work that radiated into his right toes and into the back of his leg.

On July 5, 2016, Petitioner returned to Elmwood Park following his sessions of physical therapy. Petitioner was experiencing low back and radicular symptoms in the right leg. During the

physical exam, Petitioner had a positive right-sided slump seat test. Petitioner was diagnosed with low back pain, myofascial pain, and lumbar radiculopathy. Petitioner's current pain medications were discontinued, and he was prescribed a trial of Mobic 7.5 mg. In addition, Petitioner was to continue physical therapy and an MRI of the lumbar spine was recommended. Petitioner was disabled from work until his next follow up in two to three weeks.

On July 14, 2016, Petitioner underwent an MRI of the lumbar spine which was reported to demonstrate a right-sided disk herniation measuring approximately 3-4mm at L5-S1 and a 2-mm posterior annular disk bulge which indented the ventral surface of the thecal sac at L4-L5.

On July 26, 2016, Petitioner was examined by Dr. Mehta at Elmwood Park following the MRI and physical therapy. Dr. Mehta reviewed the MRI findings and performed a physical examination of Petitioner, which revealed continued low back pain and radicular symptoms caused by the pathology shown on the MRI. Due to Petitioner's continued symptoms, Dr. Mehta recommended an L5-S1 epidural injection. Petitioner was disabled from work, to continue taking the Mobic as needed, and to follow up to undergo the injection.

On August 2, 2016, Dr. Mehta performed an L5-S1 interlaminar epidural injection under fluoroscopic guidance. Petitioner was prescribed a cold/compression therapy device and accompanying wrap. Petitioner testified that the injection and cold therapy device significantly improved his symptoms.

On August 19, 2016, Petitioner returned to Elmwood Park. Upon examination, it is noted that "since the injection [Petitioner's] symptoms have improved dramatically." It is also noted that Petitioner wanted to transition out of physical therapy as he felt that his home exercise program at that point was adequate, and that he was interested in returning to work. Petitioner's medications were discontinued, he was continued off work, and he was prescribed work conditioning. Petitioner was to follow up in four weeks.

On August 30, 2016, Petitioner returned to Elmwood Park, and was noted to still be doing well following the injection. It was noted that Petitioner wanted to be returned to light-duty work, and he reported that his pain was currently at a 0/10 but occasionally at 4-6/10 with certain activities, such as bending forward and lifting over ten pounds. Petitioner was returned to work with a ten pound restriction, and instructions to begin work conditioning, and to follow up in one month.

On September 8, 2016, Petitioner was examined by Dr. Kern Singh at Midwest Orthopedics at Rush at the request of the Respondent.

On September 21, 2016, Petitioner attended a work conditioning session. Petitioner met one of four job demands. Nonetheless, Petitioner indicated that he was working full-time at a new job, and despite continuing to feel right leg pain from time to time, his current job did not require lifting.

On October 11, 2016, Petitioner followed up at Elmwood Park. Dr. Mehta noted that Petitioner underwent physical therapy and an injection that provided an overall improvement of 60-70% relief. Dr. Mehta noted that Petitioner suffered from occasional soreness, but that his pain was a 0/10 at that time. Dr. Mehta found Petitioner to be at maximum medical improvement and released him from care at full duty.

Petitioner testified that he thought physical therapy and the injection, along with the medication and cold compression machine, helped to relieve his pain and enable him to return back to work. Petitioner further testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. Petitioner testified that he did have a prior back injury in 2012, but that he had no back pain in the period of time before his employment with Respondent and during his employment with Respondent prior to the injury that he sustained on June 20, 2016.

The January 10, 2018 deposition testimony of Dr. Amit Mehta was admitted into the record as Petitioner's Exhibit 6. Dr. Mehta is a board certified Anesthesiologist and Pain Management Specialist who primarily treats patients with spine-related issues. Dr. Mehta testified that, to a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner's complaints were aggravated or caused by the mechanism of injury described. Dr. Mehta testified that he recommended physical therapy because it can help with any type of back injury, and is many times the first step in treating a patient prior to more invasive treatment. Dr. Mehta testified that he prescribed Naproxen and Terocin cream because Naproxin is an anti-inflammatory that can help with pain, and topical creams such as Terocin help to reduce localized back pain without any major side effects.

Dr. Mehta testified that Petitioner's positive right-sided "Slump Test" is indicative of disc and/or nerve irritation. Dr. Mehta testified that the Petitioner's MRI report indicated a right-sided disc protrusion at L5-S1 measuring 3-4 mm and a 2 mm bulge at L4-L5, and he opined that the pathology on the MRI was the cause of Petitioner's physical and subjective complaints. As a result of the disc protrusion causing low back pain and radiculopathy, and the medications and physical therapy providing minimal relief, Dr. Mehta testified that the next step in treatment was an epidural injection for diagnostic and therapeutic purposes. Dr. Mehta testified that the Petitioner's improvement in pain and radicular symptoms indicated that the injection was successful.

On cross examination, Dr. Mehta testified that the Petitioner's positive alcohol test indicating a BAC of .041 would not affect his causation opinion as the Petitioner's clinical history, physical examination, and imaging studies correlated to his subjective complaints, and that alcohol in his system did not change the fact that he had a disc protrusion and radiculopathy. Dr. Mehta further testified that, based upon Petitioner's subjective complaints, objective symptoms, and diagnostic reports, it was his opinion that Petitioner suffered an acute injury that was casually related to the mechanism of injury described by Petitioner.

The February 28, 2018 deposition testimony of Dr. Kern Singh was admitted into the record as Respondent's Exhibit 2. Dr. Singh testified that he examined Petitioner on September 8, 2016 and that Petitioner informed him that he hurt his back while pulling a pallet. Dr. Singh further testified that Petitioner had minimal back pain, no leg pain, and that the last epidural injection provided Petitioner significant relief. Dr. Singh opined that Petitioner was negative for back pain and demonstrated no symptom magnification with negative Waddell's findings. Dr. Singh testified that his impression of the Petitioner's MRI revealed an L5-S1 disc protrusion. Regarding causation, Dr. Singh testified that he felt Petitioner's injury was sustained during "his work-related event. . .".

When asked what treatment he would recommend for someone with an L5-S1 disc protrusion, regardless of whether it was acute or degenerative, Dr. Singh testified that he thought physical therapy, anti-inflammatories, prescription meloxicam, and an MRI would be appropriate and reasonable. Dr. Singh further testified that he recommends epidural steroid injections if a patient has

radiculopathy and nerve root distribution that correlates with an MRI. Furthermore, he testified that one epidural steroid would be a reasonable course of treatment for Petitioner. Finally, Dr. Singh testified that, based upon a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner suffered an injury at work on June 20, 2016.

The March 22, 2018 deposition testimony of Dr. Jerrold Leikin was admitted into the record as Respondent's Exhibit 1. Dr. Leikin is a medical toxicologist and physician who teaches in the field of medical toxicology. He testified that in his specialty of medical toxicology, he has performed retrograde extrapolation in regards to alcohol content a person may have had in their system over a thousand times in the past 30 years. Dr. Leikin testified that he reviewed the breathalyzer test results from the day of the Petitioner's alleged accident, and that he performed a "retrograde extrapolation" of Petitioner's blood alcohol test. Dr. Leikin opined that, due to the Petitioner's blood level that was identified after the accident, the Petitioner was at increased risk from being involved in an accident at work and thus impaired due to alcohol intoxication. Dr. Leikin testified the he determined that Petitioner's blood alcohol level would have likely been between 0.056% and 0.076% at the time of the injury. When questioned further, Dr. Leikin opined that it was very possible for Petitioner's blood alcohol level to be 0.061% at the time of the injury, but could have been lower. At this level, Dr. Leikin testified that a person would be unable to concentrate or multi-task, and have problems judging time, space, and distance. Dr. Leikin opined that the neurological effects of a 0.046% or a 0.056% blood alcohol level could have contributed to Petitioner's injury.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by the preponderance of the evidence that he suffered an injury on June 20, 2016 that arose out of and in the course of his employment for Respondent.

In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Industrial Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). Petitioner must show, through a preponderance of the evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 214 (2003). If an employee's intoxication is the proximate cause of his accidental injury, or the employee was so intoxicated that the intoxication constituted a departure from employment, then no compensation is owed to the employee by the employer. 820 ILCS 305/11 (2011). If, at the time of the injury, the employee's blood alcohol level was 0.08% or above, there is a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the injury. *Id.*

In the instant case, Petitioner's tested blood alcohol levels were 0.041% and 0.045% at the time he was tested. Dr. Jerrold Leikin opined that Petitioner's blood alcohol level was likely around

0.061 at the time of the accident. Because the tested and estimated levels of Petitioner's intoxication are below 0.08%, there is no rebuttable presumption that Petitioner's intoxication was the proximate cause of his injury.

Therefore, the Arbitrator finds that Petitioner was not required to overcome the rebuttable presumption that his intoxication was the proximate cause of his injury, and that such burden is on Respondent. Respondent offered no evidence that Petitioner's intoxication was the proximate cause of his injury. Petitioner testified that he felt no pain in his lumbar spine prior to the injury, gave a consistent history throughout his medical treatment, and was subsequently released from care after undergoing treatment that was reasonable according to both Dr. Mehta and Dr. Singh. Accordingly, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by a preponderance of the evidence that his lumbar spine injury was causally related to the accident at work.

To prove this element, Petitioner must show that his injury was caused by "some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 672 (2003).
The Arbitrator finds it significant that Petitioner was working full duty and testified that he had no prior complaints or treatment to his lumbar spine prior to the accident. Here, Petitioner testified that his job was to essentially pick orders and move product around the warehouse to ensure that the correct product was in the correct location for transport. He testified that he needed to remove a pallet off of a rack that had another pallet stood up vertically on the pallet he needed. When attempting to pull out the vertical pallet, he felt a sharp pain in his back that ultimately developed into numbness and tingling in his legs.

Petitioner was immediately sent to Premier Occupational Health, where he stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Petitioner provided a nearly identical history throughout the rest of his treatment, including the independent medical examination with Dr. Singh. Furthermore, both Dr. Singh and Dr. Mehta opined that Petitioner suffered an injury at work.

Petitioner testified that he did suffer a back injury in 2012, but that he could not remember the last time he had treated for, or suffered pain from, that incident. Petitioner testified that he had worked for Respondent for approximately one year prior to the instant injury, and had no back pain prior to June 20, 2016. The Petitioner testified that he still suffers back pain as a result of the work injury, despite also having "good" days. Petitioner further testified that his back sometimes affects his sleep.

Relying on the above, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the injury that occurred on June 20, 2016.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Petitioner has met his burden of proof by a preponderance of the evidence that the medical services provided were reasonable and necessary.

Petitioner immediately sought treatment for his injury at Premier Occupation Health. Petitioner subsequently sought treatment at Elmwood Park Same Day Surgery Center. He was prescribed physical therapy, which he underwent at Athletico Physical Therapy. Petitioner testified that he felt the physical therapy did help to relieve his symptoms. Furthermore, Dr. Mehta and Dr. Singh testified that physical therapy and non-opioid medications were a reasonable course of treatment. Petitioner also underwent an epidural steroid injection at L5-S1 while under anesthesia, and was provided with a cold/compression device post-injection. Petitioner testified that the injection and cold/compression device helped to relieve his symptoms.

The Arbitrator takes note of the testimony of both Dr. Singh and Dr. Mehta, who both opined that an epidural steroid injection was reasonable in the instant case. In addition, the medical records indicate that Petitioner had significant symptom relief following the injection and returned to work not long afterward.

Regarding payment for reasonable medical treatment, the Arbitrator finds that the medical bills introduced by Petitioner show unpaid charges for medical treatment in the following amounts:

Premier Occupational Health:	$753.00
Elmwood Park Same Day Surgery Center:	$6,901.26
Instant Care Equipment Leasing:	$5,520.66
Windy City Anesthesia:	$1,925.00
Athletico Physical Therapy:	$11,135.00
Prescription Partners:	$749.06

Respondent has not paid all appropriate charges. Therefore, Respondent is ordered to pay the aforementioned medical bills, totaling $26,983.98 pursuant to Section 8(a). The parties stipulated that the Respondent is entitled to credit for any medical bills paid by the Petitioner's group insurance.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he was owed temporary total disability benefits from June 21, 2016 to August 30, 2016, while he was disabled from work.

The Arbitrator recognizes that off work status notes were provided throughout Petitioner's treatment, until he asked to be released back to work.

Therefore, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of $378.27/week for a period of 10 weeks, commencing on June 21, 2016 through August 30, 2016, as provided by Section 8(b) of the Act.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no report of impairment compliant with the provisions of of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a material handler. The Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Arbitrator therefore gives some weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 46 years old at the time of the accident. The Arbitrator considers the Petitioner to be younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less able to recover fully from such an injury. The Arbitrator therefore gives little weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. Because there is no evidence of any impairment to future earnings, the Arbitrator gives no weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Petitioner testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. These complaints are corroborated in the medical records as well as the testimonies of both Dr. Mehta and Dr. Singh. The Petitioner's complaints as supported by the

medical records, evidences some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 6% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSARIO JIMENEZ,

Petitioner,

vs.

21IWCC0168

NO: 18 WC 13761

CHICAGO MARRIOTT OAK BROOK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability benefits, medical expenses, and prospective medical treatment and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the Arbitrator's decision with the following clarification:

On April 12, 2018, Petitioner was working as a banquet server for Respondent. She testified she was working in the VIP room and that she was directed by her supervisor to go to Starbucks to find lids for the coffee cups as there were none in the VIP room or storage. (T. 10) Petitioner went to Starbucks and obtained lids and some cups. Petitioner subsequently realized they were not the correct lids so she grabbed the lids, advised her supervisor that they were not the correct lids, and went to Starbucks for a second time. (T. 11)

On this second trip to Starbucks Petitioner was carrying the cups and lids she was going to return and as she was walking, she tripped. (T. 8) Her leg went to the side, her left knee popped and Petitioner was unable to continue walking. (T. 8-9) After advising her general manager and Human Resources, she was put in a taxi cab to go to the occupational health clinic for an examination. (T. 12-13)

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On April 12, 2018 the same day the accident occurred, Petitioner was examined at Advocate Occupational Health where she was taken off work, diagnosed with a left knee sprain and instructed to follow up with an orthopedic surgeon should problems persist. (Px1) She reported that the incident occurred while she was walking rapidly and felt a pop in her knee. (Px1) Petitioner followed up with orthopedic surgeon, Kevin Tu, M.D., on May 10 2018, at which time he ordered an MRI and placed Petitioner on restricted duty. (Px2) Petitioner described her accident as quickly walking and tripping over the junction between the hard floor and carpet. (Px2) Petitioner underwent an MRI on May 15, 2018 which showed a torn meniscus. (Px3) On May 24, 2018, Petitioner returned to Dr. Tu, at which point he recommended conservative treatment consisting of physical therapy. He continued restrictions. (Px2) Petitioner returned on June 28, 2018, at which point physical therapy was discontinued and surgery was recommended. Restrictions were again continued. Petitioner returned to Dr. Tu on August 9, 2018 and September 20, 2018, and authorization for the recommended surgery was still pending. Petitioner's restrictions remained in place. (Px2)

On cross-examination, Petitioner testified that she was walking very fast at the time she hurt her knee. She wasn't walking or jogging. (T. 18) She was walking fast because of customer's complaints. (T. 23) She didn't fall, but she tripped and then her foot got stuck and she couldn't move. (T. 27) Petitioner did not testify as to any defects in the floor.

The Respondent does not dispute that the evidence establishes that at the time the Petitioner sustained her knee injury she was at work – i.e. in the course of her employment. As the parties do not dispute that Petitioner's knee injury occurred in the course of her employment, the Commission will only address the second element that must be proved to find the case compensable --whether the Petitioner's knee injury arose out of her employment.

The *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (9/24/20) case provides the proper analysis to be applied in this instance. In *McAllister* at ¶60, the court held that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 (1989), stands for the proposition that an injury arises out of a claimant's employment for purposes of the Act if, at the time of injury, the claimant was performing an act that he might reasonably be expected to perform incident to his employment or causally connected to what the claimant must do to fulfill his assigned job duties, even if the act involves an everyday activity.

In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill.2d at 58; *see also The Venture - Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18; *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 204 (2003). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro,* 207 Ill.2d

at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58) *see also Baggett v. Industrial Comm 'n*, 201 Ill.2d 187, 194 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.").

A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987). To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶31; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152115WC, ¶38; *Baldwin v. Illinois Worker 's Compensation Comm'n*, 409 Ill.App.3d 472,478 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105 (2006).

Petitioner's knee injury arose out of her employment because at the time she injured her knee while in the process of retrieving coffee cup lids for customers, she was at work performing an act her employer might reasonably expect her to perform incident to her assigned job duties as a banquet server, and in fact, was directed to perform. Therefore, the knee injury was employment related, as it was caused by retrieving coffee cup lids for the customers in the VIP concierge room — an act that was incident to and causally connected to Petitioner's job duties as a banquet server. *Caterpillar Tractor*, 129 Ill.2d at 58; *Memorial Medical Center v. Industrial Comm 'n*, 72 Ill.2d 275, 280 (1978) (" 'to come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury' " (quoting *County of Cook v. Industrial Comm 'n*, 69 Ill.2d 10, 17 (1977))).

Sisbro and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill.2d at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once she has presented proof that she was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill.2d at 58.

In addition to proving accident, Petitioner met her burden that her current condition of ill-being is causally related to her work injury. Petitioner reported directly to occupational health, wherein she was diagnosed with a "sprain of unspecified collateral ligament of left knee." (Px1) She followed up with orthopedic surgeon Dr. Tu, who ordered an MRI and ultimately diagnosed that she had a torn medial meniscus. (Px2, 5/24/18 visit) On August 9, 2018, Dr. Tu opined that Petitioner's mechanism of injury was consistent with the development of a medial meniscus tear. (Px2) Respondent did not offer any medical opinion to refute this causation opinion.

Based on the finding of accident and causation, the Arbitrator appropriately awarded medical expenses as all were in furtherance of the treatment of Petitioner's knee injury. He also appropriately awarded prospective treatment in the form of left knee arthroscopic surgery and

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attendant care, as well as temporary total disability benefits from the day following the injury through the date of trial.

In addition to the foregoing, the Commission corrects a scrivener's error contained in the Arbitration Decision in the second to last sentence of the second paragraph on page 11. The Commission replaces the word "hear" with the word "heard".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,122.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 022321
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

JIMENEZ, ROSARIO
Employee/Petitioner

Case# **18WC013761**

21IWCC0168

CHICAGO MARRIOTT OAK BROOK
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2512 THE ROMAKER LAW FIRM
JASON BRISKI
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN A RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

21IWCC0168

STATE OF ILLINOIS)
)SS.
COUNTY OF Dupage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rosario Jiminez
Employee/Petitioner

v.

Chicago Marriott Oak Brook
Employer/Respondent

Case # **18** WC **13761**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **April 12, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

On **April 12, 2018**, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On **April 12, 2018**, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent on **April 12, 2018**.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $31,092.88 and the average weekly wage was **$597.94**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

ORDER

Accident

Petitioner was injured in a work related accident on April 12, 2018, while working as assigned for Respondent when she injured her left knee. Based upon Petitioner's consistent and credible testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu, the Arbitrator holds that Petitioner had an accident that arose out of and in the course of the employment by Respondent on April 12, 2018.

Is Petitioner's Current Condition of ill-being causally related to the injury?

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability (TTD) benefits of $398.62 per week for a Petitioner 27 and 5/7th weeks, commencing April 13, 2018 to the date of trial as provided in Section 8(b) of the Act. Total TTD owed is $11,047.35.

Medical Benefits

Petitioner's medical bills were admitted as Petitioner's Exhibits 1,2,3 and 4. The Arbitrator awards the medical bills in Exhibits 1,2,3 and 4. The Respondent shall pay the reasonable and necessary medical services of **$9,974.03** to Petitioner and The Romaker Law Firm as provided in Section 8(a) and 8.2 of the Act.

Prospective Medical Care

Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. Respondent has not provided any rebuttal medical evidence or testimony. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Charles W Watts

Signature of Arbitrator

March 26, 2020
Date

APR 2 - 2020

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PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.
If you prefer, you may submit the front of this application form with the *Proof of Service* on a separate page.

I, **Jason Briski**, an attorney, affirm that I emailed and ☐ delivered ☐ mailed with proper postage in the city of **Chicago** a copy of this form at **5:00pm** on **November 15, 2018** to the Respondent listed on this application and to each additional party, if any, at the address listed below.

TO: Mr. Brian Rudd
Nyhan Bambrick Kinzie and Lowry
20 N. Clark Street, Suite 1000
Chicago, IL 60602
Via E-Mail to bar@nbkllaw.com

Arbitrator Charles Watts
Illinois Workers' Compensation Commission
100 W. Randolph
Chicago, IL 60601
Via E-Mail to charles.watts@illinois.gov

Signature of person completing *Proof of Service*

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosario Jimenez	)	
	)	
Petitioner,	)	
	)	
vs.	)	Nos. 18 WC 13761
	)	
Chicago Marriott Oak Brook	)	
	)	
Respondent.	)	

FINDINGS OF FACT

The parties stipulated that on April 12, 2018, the Respondent, Chicago Marriott Oak Brook, was operating under and subject to the provisions of the Act, and that an employee-employer relationship existed between Respondent and Petitioner. (*See* Request for Hearing Form, Arb. Ex. 1,). The parties also stipulated that Respondent was given notice of the accident within the time limits stated in the Act. (*See* Request for Hearing Form, Arb. Ex. 1,). Additionally, the parties stipulated that Petitioner's average weekly wage to be considered is $597.94. (*See* Request for Hearing Form, Arbitrator's Ex. 1). Further, the parties stipulated that at the time of the injury Petitioner was 61 years old, married, with zero dependent child. (*See* Request for Hearing Form, Arb. Ex. 1). The Request for Hearing Form was entered as Arbitrator's Exhibit #1. (Tr. p 5). Petitioner's list of outstanding medical bills was attached to Arbitrator's Exhibit #1. (Tr. p. 6). The Application for Adjustment of Claim for the case was entered as Arbitrator's Exhibit #2. (Tr. p. 6). An interpreter was used for the hearing named Paula Riordan. (Tr. p. 7).

On October 23, 2018, Petitioner submitted Exhibits #1 through #4 and all Petitioner's Exhibits were admitted into evidence. (Tr. pp. 79-82). Respondent withdrew Exhibits #1, #2 and #3; and submitted Exhibits #4 through #8; however, Respondent's Exhibit #8 was rejected and not admitted into evidence. (Tr. pp. 82-86). Petitioner objected to Exhibit # 6(a) and 6(b) based on lack of foundation; however, the Arbitrator over ruled the objection and allowed the exhibit to be admitted. (Tr. pp. 83-85).

On October 23, 2018, Petitioner testified that she worked at Marriott International in Oak Brook as a banquet server for approximately 14 years. (Tr. pp. 7-8). Petitioner testified that she

injured her left knee on April 12, 2018. (Tr. p. 8). Petitioner testified that the injury occurred when she was walking very fast to Starbucks in the hotel while she was carrying some cups and lids (Tr. p. 8).

Petitioner testified that she as she was walking, carrying the cups and lids, she tripped on a carpet and her leg went to the side and she heard a popping sound. (Tr. pp. 8-9). Petitioner testified that she felt a sharp pain and was not able to walk anymore. (Tr. p. 9). Petitioner testified that she tried to take two steps but she could not move. (Tr. p. 9). Petitioner testified that the carpet she tripped on was a mat to clean feet at the entrance of the hotel. (Tr. p. 9).

Petitioner testified that she was going to Starbucks to return the cups and lids because they did not match the cups in the VIP room. (Tr. p. 10). Petitioner testified that the Starbucks was within the Marriott Oak Brook Hotel. (Tr. p. 10). Petitioner testified that she was working in the concierge room for people that have a key that are VIP to go into. (Tr. p. 10).

Petitioner testified that she went to the storage room looking for lids but could not find any and she had to go to other departments to get lids for the cups (Tr. p. 10). Petitioner testified that her supervisor Megan told her to go to Starbucks. (Tr. p. 10). Petitioner testified that she went to Starbucks and got some lids and cups but did not realize that the lids did not fit until customers started complaining about it. (Tr. p. 10). Petitioner testified that she spoke to her supervisor Megan again. (Tr. p. 11) Petitioner testified that Megan directed her to go back to Starbucks. (Tr. pp. 11-12). Petitioner testified that it was her second trip going back to Starbucks when she tripped and injured herself. (Tr. p. 12).

Petitioner testified that after she tripped she could not walk so she was looking around to see who could come and help her. (Tr. p. 12). Petitioner testified that she did not fall down and the clients at Table 15 saw her trip and asked if she was ok. (Tr. p. 12). Petitioner testified that she reported the accident and they took her to tell the general manager, Christina Duncan. (Tr. p. 12). Petitioner testified that HR was called and she spoke to Diana and was told they would write an accident report and she could go to the hospital. (Tr. p. 13). Petitioner testified that she was sent in a taxi for medical treatment. (Tr. pp. 13-14).

Petitioner testified that she was seen at Advocate Occupational Health on the same day that she hurt her knee. (Tr. p. 14). Petitioner testified that the occupational clinic kept her off work and told her to follow up with an orthopedic surgeon. (Tr. p. 14). Petitioner testified that she sought care from Dr. Tu, an orthopedic surgeon, on May 10, 2018. (Tr. p. 14). Petitioner

testified that Dr. Tu ordered an MRI of her left knee, which was performed on May 15, 2018. (Tr. pp. 15). Petitioner testified that Dr. Tu gave her work restrictions and she sent the restrictions to Respondent, however, Respondent did not offer her light-duty work. (Tr. p. 15). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and she began physical therapy. (Tr. p. 15). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. p. 16).

Petitioner testified that when she saw Dr. Tu at the end of June 2018, he recommended surgery for her left knee. (Tr. p. 16). Petitioner testified that she has continued to treat with Dr. Tu, but she has not been able to have surgery for her left knee because it has not been authorized by Workers' Compensation insurance. (Tr. p. 16). Petitioner testified that she has not received any Workers' Compensation disability pay. (Tr. pp. 16-17). Petitioner testified that she wants the surgery so she can go back to work (Tr. p. 17).

On cross-examination, Petitioner testified that she was claiming an accident dated April 12, 2018, and she began her shift at six o'clock in the morning. (Tr. pp. 17-18). Petitioner testified that she was working in the restaurant area near the Starbucks and she received customer complaints that coffee lids need to be restocked. (Tr. p. 18). Petitioner testified that she was walking fast, but she was not running or jogging. (Tr. p. 19). Petitioner testified that she went to Advocate Occupational Health and spoke to Dr. Piotrowski. (Tr. p. 19). Petitioner testified that she told Dr. Piotrowski that she was walking rapidly on carpet at work and felt a pop in her left knee. (Tr. p. 19). Petitioner was asked by Respondent's counsel if she tripped on a carpet or a mat and Petitioner testified that it was a mat but she was not sure what it was called. (Tr. pp. 19-20). The interpreter explained on the record that the Spanish word Petitioner was using, "Alfombra", can be a mat or a carpet used for either. (Tr. p. 20).

On cross-examination, Petitioner testified that x-rays of her left knee were taken and she did not break any bones or have any fractures. (Tr. p. 20). Petitioner testified that she was initially diagnosed with a left knee sprain. (Tr. p. 20). Petitioner testified that she sought treatment with Dr. Tu for the first time on May 10, 2018. (Tr.21-22). Petitioner testified that she gave Dr. Tu a description of her accident and told him that she was walking quickly between the floor and the carpet when she tripped over a junction between the carpet and the hard floor. (Tr. p. 21). Petitioner testified that she told her treating doctors that she tripped when she crossed from the floor to the carpet. (Tr. p. 22).

On cross-examination petitioner testified that she had a conversation with Respondent that was recorded. (Tr. p. 23). Petitioner testified that she told Respondent that customers were complaining about coffee lids and she was walking fast because of the customer complaints. (Tr. p. 23). Petitioner testified that her foot got stuck and she could not move anymore. (Tr. p. 23). Petitioner testified that she did not remember what she told respondent and she answered what Respondent asked her while she was in a lot of pain. (Tr. p. 26). Petitioner testified that she did not say that her foot simply got stuck and when she tripped it did get stuck. (Tr. p. 27).

On cross-examination Petitioner testified that her accident took place about 10 to 15 feet from the outside of the Starbucks. (Tr. p. 27). Petitioner testified that the hostess stand and computer were near where her accident occurred and she held on to it. (Tr. pp. 27-28). Petitioner testified that the hostess stand and computer were at the entrance door and by the door going to Starbucks. (Tr. p. 28). Petitioner testified that she did not know the distance from where the accident occurred to the hotel entrance door and restaurant Table 15 was ten to fifteen feet away. (Tr. p. 29).

On cross-examination Petitioner testified that she spoke with the general manager Christina, immediately after she was hurt, who called HR and then Cathy and Megan arrived. (Tr. p. 29). Petitioner testified that she told the HR person, Diane Wnek that she tripped on a mat near the exit door. (Tr. p. 29). Petitioner testified that when she hurt her knee she stumbled but did not fall to the ground. (Tr. p. 29).

On cross-examination Petitioner said she did not remember that well if the photograph marked Respondent's Exhibit 5E showed the floor by Table 15, but it appeared so. (Tr. p. 31). Petitioner said she walked on the floor many times and it was the floor that went to the hostess stand. (Tr. p. 32). Petitioner testified that she did not know if the carpet started after the wooden dividing wall and she did not know if the floor tiles were broken. (Tr. p. 33).

On redirect examination, Petitioner testified that there was carpeting on top of the tile floor and that was away from the area of the floor shown in Respondent's Exhibit 5E. (Tr. p. 34). Petitioner further testified that that the carpeting is what she tripped on. (Tr. p. 34). Petitioner testified again that she tripped on the carpeting after re-cross and re-direct examination. (Tr. p. 36).

The Market Director for Human Resources, Diane Wnek testified for the Respondent. (Tr. p. 38). Ms. Wnek testified that she oversees recruiting, talent management, performance

development, associate issues, disciplinary actions, terminations, hiring, Workers Comp, and other human resources situations. (Tr. p. 38).

Ms. Wnek testified that she has interacted with the Petitioner. (Tr. p. 38). Ms. Wnek testified that on April 12, 2018, she was working at the Chicago Marriott Oak Brook location and received a call at about 8:00 am from the general manager regarding an associate injury. (Tr. p. 39). Ms. Wnek testified that she spoke to Petitioner in the hallway behind the restaurant concierge lounge and Petitioner was sitting on a chair with ice on her knee. (Tr. p. 39). Ms. Wnek testified that Petitioner, general manager, Kristin Duncan and herself were present for the conversation. (Tr. p. 40).

Ms. Wnek testified that Petitioner told her it was very busy that morning, she was rushing around to get lids for to-go coffee cups for guests, and that while she was walking through the restaurant her knee gave out and began hurting her, and that she had made it as far as the mat where she could not continue any farther and that was where she stayed until she got assistance to move from that spot. (Tr. p. 40).

Ms. Wnek testified that her conversation with Petitioner was in English without an interpreter and she was able to communicate with the Petitioner in English. (Tr. p. 41). Ms. Wnek testified that it was her impression that Petitioner was capable of understanding and communicating in English. (Tr. p. 41). Ms. Wnek testified that Petitioner told her she was walking through the front portion of the restaurant which would have been on tile floor that goes past the hostess stand towards Starbucks when she hurt her knee. (Tr. p. 42). Ms. Wnek testified this is near an exit door that leads to the outside just outside the Starbucks entrance. (Tr. p. 42). Ms. Wnek testified that the exit door would be probably ten to fifteen feet away from where Petitioner said she hurt her knee. Ms. Wnek testified there is not carpeting or a mat in that area. (Tr. p. 42).

Ms. Wnek testified that there are walk off mats used at the hotel at the exits particularly during the winter months. (Tr. p. 43). Ms. Wnek testified the walk off mats are flat and they take moisture off guest's shoes as they come in and out the door. (Tr. p. 43). Ms. Wnek testified there is not any transition or junction between the tile and carpet in the area where she understood that Petitioner was walking. (Tr. p. 43). Ms. Wnek testified that the area where Petitioner hurt her knee was open to the public. (Tr. p. 43).

Ms. Wnek testified that the hotel has security cameras and as an HR representative she has access to the surveillance video. (Tr. pp. 43-44). Ms. Wnek testified that she reviewed the surveillance footage dated April 12, 2018, and saw Petitioner walking to the Starbucks, then she stops and catches herself and then continues walking to the Starbucks entrance where the mat was. (Tr. p. 44). Ms. Wnek testified that based on what she saw in the video the floor where Petitioner stumbled was tile. (Tr. p. 44). Ms. Wnek testified that there were not any mats in the area. (Tr. p. 45). Ms. Wnek testified that the camera was pointed down in the Starbucks and you can see the servers through the window. (Tr. p. 47). Ms. Wnek testified that Petitioner was seen stumbling through the window. (Tr. p. 49). Ms. Wnek testified that Petitioner caught herself in the video and then goes to the mat and stayed there. (Tr. p. 49). Ms. Wnek testified that she thought she saw Petitioner leaning on the door and her co-worker took her to the back. (Tr. p. 49). Ms. Wnek testified that the co-worker that helped Petitioner was named Marco. (Tr. p. 50).

Ms. Wnek then testified that the photograph marked Exhibits 5A showed the tile floor next to Table 15 along with Table 15, as it looked on April 12, 2018. (Tr. p. 54). Ms. Wnek testified that she took the photograph marked Exhibits 5A-5F after Petitioner was hurt. (Tr. p. 55). Ms. Wnek testified that photograph 5B was an accurate representation of the floor on the date of the accident. (Tr. pp. 55-56). Ms. Wnek testified that photograph 5C was the tile floor by the hostess stand on the date of the accident and photograph 5D was a photograph of the floor next to the hostess stand and towards the Starbucks. (Tr. p. 56). Ms. Wnek testified that photographs 5E and 5F show the floor by Table 15 on the date of the accident. (Tr. p. 57).

Ms. Wnek testified that a supervisor's accident report related to Petitioner's knee injury was drafted by Megan Orr, Petitioner's supervisor. (Tr. p. 58). Ms. Wnek said the only inaccuracy in the report is that it says Rosario (Petitioner) was seen by Megan talking to Marco immediately prior to her fall and fall is erroneous because Petitioner never said she fell but stumbled. (Tr. pp. 58-59).

On cross-examination, Ms. Wnek testified that she was responsible for performance management or performance appraisals employees. (Tr. p. 60). Ms. Wnek testified that safety is not part of the performance management system, but Marriott tracks safety incidents. (Tr. p. 61). Ms. Wnek testified that all the Marriott properties are measured against each other for safety incidents, lost time and restricted duty statistics. (Tr. p. 61). Ms. Wnek testified that five OSHA

recordable injuries have occurred at the Marriot Oak Brook in 2018. (Tr. p. 62). Ms. Wnek denied that high levels in the organization would ask about injuries if the properties she was responsible for started to have more OSHA reportables than the other properties. (Tr. p. 63).

On cross-examination, Ms. Wnek testified that she would normally use a translator for meetings with Petitioner and her co-workers if it was needed. (Tr. p. 64). Ms. Wnek testified that she did not speak Spanish, however, she felt that Petitioner was able to respond accurately to her questions about the accident. (Tr. p. 64). Ms. Wnek testified that Petitioner said she was very busy rushing to get lids. (Tr. pp. 64-65).

On cross-examination, Ms. Wnek testified there is not a camera by the entrance door to the hotel and the camera in Starbucks is the only camera in that area. (Tr. p. 65). Ms. Wnek testified that the exit door for the hotel is on the edge of the video frame. (Tr. p. 66). Ms. Wnek testified that a runner mat was located at the doorway. (Tr. p. 67)

On cross examination, Ms. Wnek testified that she did not recall if she took the pictures on the day of the accident or the next day, or a couple days later. (Tr. p. 69). Ms. Wnek testified that she did not take a picture of the pathway to the Starbucks because the Petitioner did not say the accident occurred in the Starbucks. (Tr. p. 69). However, Ms. Wnek testified that Petitioner did say she was walking towards the Starbucks. (Tr. p. 69). Nevertheless, Ms. Wnek testified that she did not take any pictures in the direction of the Starbucks. (Tr. p. 70). Ms. Wnek testified that the mats at the entrance doors are used during the wet months of the year; but she did not have knowledge of who maintains the mats or if they are changed periodically. (Tr. p. 70). Ms. Wnek testified that it is possible for the mats to move. (Tr. p. 70).

On cross-examination, Ms. Wnek testified that she did not talk to the customers at Table 15 that saw Petitioner injure herself. (Tr. p. 70). Ms. Wnek testified that she did not know why Megan Orr, Petitioner's Supervisor that completed the accident report was not present for the arbitration hearing, yet Ms. Orr still works for Marriott. (Tr. p. 71).

Ms. Wnek testified that she did not know why the question on page 2 of the accident report asking, "Was the person carrying anything when injured?" was not marked. (Tr. p. 72). However, Ms. Wnek testified that Petitioner told her that she was carrying lids. (Tr. p. 72). Ms. Wnek testified that she did not know why the accident report says that Petitioner was talking to Marco prior to her fall as an "unsafe work practice", although she previous testified that was incorrect. (Tr. p. 72). Further, Ms. Wnek testified that Petitioner was not talking to Marco in the

video shown. (Tr. p. 72). Ms. Wnek testified that the supervisor's accident report was marked yes for the question, "Did a time constraint, hurrying to complete a task, contribute to the injury?" (Tr. p . 73).

On cross-examination, Ms. Wnek testified that the accident report was marked yes for the question, "Did an unsafe work practice contribute to this injury?" (Tr. p. 73). Ms. Wnek testified that it was important to capture the information for the supervisor's accident report as part of the investigation to see if there was anything out of the ordinary or something that could be prevented. (Tr. p. 73). Ms. Wnek testified that if employees engaged in hurrying to complete something, it could increase the risk of an injury occurring. (Tr. p. 74).

On re-direct, Ms. Wnek testified that she took the photographs for Respondent's Exhibits 5A-5F after she spoke to the Petitioner to show there were no defects or an unsafe condition in the area. (Tr. p. 75). Ms. Wnek testified that the mats were in the proper location. (Tr. p. 75). Ms. Wnek testified that it was recommend that Petitioner practice safe walking, but she did not know what training took place besides that listed for 2017. (Tr. p. 76).

Ms. Wnek testified that it did not appear in the video that Petitioner was working or moving in a hurried manner. (Tr. p. 78). However, on cross-examination Ms. Wnek was asked how she could tell that it didn't appear that Petitioner was hurry although she was looking through a window on the video for a brief amount of time and Ms. Wnek testified that it was her interpretation that Petitioner was walking normally. (Tr. p. 78). Ms. Wnek testified that if there were not proper lids in the VIP rooms, it was an issue that needed to be corrected quickly. (Tr. p. 78-79).

Medical Treatment

Petitioner testified that she was sent by Respondent in a taxi to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI

performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2 at 5/24/18) Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

ISSUES

Based upon the Stipulation Sheet signed by the Parties, as amended, the matters in dispute are as follows:

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
(F) Is Petitioner's current condition of ill-being causally related to the injury?
(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
(K) Is Petitioner entitled to any Prospective Medical Care?
(L) What temporary benefits are in dispute? TTD

(*See* Arbitrator's Exhibit 1, Request for Hearing form).

Regarding Issue (C)

Regarding the issue "Did an Accident Occur that Arose Out of and in the Course of the Employment by Respondent," Petitioner testified that she injured her left knee during the scope of her employment on April 12, 2018, the Arbitrator finds the following:

A. Petitioner's Testimony Was Consistent and Credible Proving That Her Employment Exposed Her To A Risk Greater Than The General Public

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The requirement under the Workers' Compensation Act that a compensable injury arise out of the employment concerns the origin or cause of the claimant's injury. Adcock vs. IWCC, 2015 Ill. App.2nd 130884WC citing Parro v. Industrial Comm'n, 167 Ill.2d 385, 393, 212 Ill.Dec. 537, 657 N.E.2d 882 (1995). Whether an injury arose out of and in the course of a claimant's employment is a question of fact to be resolved by the Workers' Compensation Commission. Adcock vs. IWCC, 2015 Ill. App.2nd

130884WC citing Illinois Institute of Technology Research Institute v. Industrial Comm'n, *314 Ill.App.3d 149, 164, 247 Ill.Dec. 22, 731 N.E.2d 795 (2000).*

For an injury to arise "out of" the employment, the injury must have occurred from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of the employment if, at the time of the incident or accident, the employee was performing acts he or she was instructed to perform by his or her employer, acts he or she had a common law or statutory duty to perform, or acts the employee might reasonably be expected to perform incident to his or her assigned duties. O'Fallon School Dist. No. 90 v. Industrial Commission, *313 Ill.App.3d 413729 N.E.2d 523246 Ill.Dec. 150 (2000).* In O'Fallon, Petitioner was a school hall guard and injured her back when she quickly twisted and turned to stop a student that ran past her. Id. Compensation was denied under the theory of common risk, but the Commission reversed its decision following a Circuit Court mandate. Id. The appellate court affirmed stating that the Petitioner was subject to enhanced risk inherent in her duties. Id.

In Nascote Indutries, compensation was awarded due to frequency of usage although there was no "defect." In that case, Petitioner was required to pick up bumpers, walk to her work station and step up onto a rack. Petitioner stepped down from the rack and her foot turned causing a fractured metatarsal. The court affirmed compensation because Petitioner's foot injury "arose out of the course of employment" based on increased risk to foot, despite employer's claim that there was nothing unusual about the premises which contributed to the injury, where claimant stepped on to floor off part of a machine or platform that she was required to load as part of her job duties, claimant's work was fast-paced and involved quick turnaround rate, and claimant had to keep pace with parts press. Nascote Industries v. Industrial Commission *353 Ill.App.3d 1056, 820 N.E.2d 531, 289 Ill.Dec. 755 (2004).*

The court addressed an unexplained fall down stairs that occurred while Petitioner was moving hastily for her job in William G. Ceas and Company v. Industrial Commission, *261 Ill. App. 3d 630, 199 Ill. Dec. 198, 633 N.E. 2nd 994 (1994).* The Commission found the claim compensable due to Petitioner's hurried departure to deposit packages at her supervisor's request. Id. However, the appellate court then reversed, but after a rehearing was allowed, the court reversed the earlier decision and opined that the employer's last minute assignment caused

her to descend the stairs in a hastily manner and therefore the risk of injury was increased as a result of her work duties. Id.

Additionally, Petitioner has the burden of proving, by a preponderance of the evidence, all the elements of her claim. O'Dette v. Industrial Commission, *79Ill. 2d 249, 253.* Preponderance is evidence which is of greater weight or more convincing that the evidence offered in opposition to it, evidence which as a whole shows the fact to be proved as more probable than not. Houck v. Nationwide Rail Service, *No. 11 I.W.C.C. 0249*, citing Kordrey Jones v. J. Rubin Co, *98 IL W.C. 7779.* Factors to consider in determining whether a Petitioner has sufficiently carried the burden is credibility. Id.

In the case before the Arbitrator, Petitioner was credible and consistent. Petitioner testified that on April 12, 2018, she was hurrying to Starbucks while carrying cups and lids, when she tripped on carpeting and twisted her left knee causing injury. (Tr. pp. 8-12). Petitioner testified that the carpet was a mat located at the entrances of the hotel. (Tr. p. 9). Petitioner testified that she was hurrying because the lids did not fit the cups for customers in the VIP room. (Tr. pp. 8-12). Petitioner testified that she had received customer complaints about the coffee lids. (Tr. p. 18). Petitioner testified that she when she tripped her leg went to the side , she hear a popping sound and she felt immediate pain and could not walk. (Tr. pp. 8-9). Further, Petitioner testified that the carpeting she was referring to was a mat used by the hotel entrances. (Tr. p. 9).

The Medical records show that Petitioner consistently gave the same mechanism for her accident and injury which was that she tripped on carpet. Petitioner gave the same history of accident to Respondent's Occupational Clinic and Dr. Tu. (PX1 and PX2) The Occupational Clinic records report the description of the accident as "walking rapidly on carpet at work when I felt a pop in my knee," and the work status form states, "severe left knee pain after tripping at work no fall reported." (PX1). The history in Dr. Tu's notes stated, "she was walking quickly in between the floor and she tripped over the junction on the hard floor and the carpet." (PX2). Respondent questioned Petitioner about the differences between the descriptions. Although the records have slight differences, the medical records were not prepared in anticipation of litigation and the differences are negligible. Both histories state that Petitioner was walking rapidly or quickly when she tripped.

In addition to Petitioner's testimony and treatment records, Respondent's Exhibit 4, the supervisor's accident report documented that Petitioner was walking in a hurried manner causing an unsafe work practice as testified to by Respondent's witness, Ms. Wnek. (Tr. pp. 72-73, RX4). Further, the report listed suggested training for Petitioner to prevent future accidents and safety concerns. (Tr. pp. 73-74, RX4). Respondent's witness acknowledged that employees that work in a hurried manner are more likely to suffer injuries. (Tr. pp. 73-74).

Respondent's witness, Ms. Wnek, was simply not credible when testifying about Petitioner's accident. First, Ms. Wnek did not witness the accident and only spoke to Petitioner following the injury occurred. (Tr. pp. 13,39). Additionally, Ms. Wnek testified that she does not speak Spanish and did not use a translator when she spoke to Petitioner about the accident (Tr. pp. 63-64). However, Ms. Wnek testified that she would use translators for important employee meeting with Petitioner and her co-workers. (Tr. pp. 63-64). Apparently Ms. Wnek did not feel that an accident investigation was important enough to have a translator for her discussion with Petitioner.

Further, Ms. Wnek testified that she did not take pictures of the walkway leading to the Starbucks submitted as Respondent's Exhibit 5, because it was not her understanding of where the Petitioner tripped. (Tr. pp. 69-70). This is not credible since the records from Respondent's Occupational Clinic list the description as walking rapidly on carpeting and Ms Wnek was listed as a company contact. Therefore, Ms. Wnek would have reviewed the Occupational Clinic records as part of the accident investigation. As the site HR Director, Ms. Wnek would have been aware after Petitioner's treatment at the Occupational Clinic on April 12, 2018, that Petitioner tripped on carpeting. However, Ms. Wnek choose to take photographs that were limited in scope, without providing a picture of the run off mat that she testified was at the entrance of the hotel. Further, Ms. Wnek could not accurately testify as to when she took the photographs, only that they might have been taken the day of, or the day after, or within a few days. (Tr. p. 69).

Additionally, Ms. Wnek's testimony regarding the surveillance video was not credible. The view was a downward angle inside Starbucks and Petitioner was only visible through a small window. On cross-examination, Ms. Wnek testified that based on her interpretation of the video, the Petitioner did not appear to be hurrying although Petitioner was only visible for a few seconds. (Tr. p. 78). The surveillance video provided a limited and brief view of the Petitioner.

In fact, the surveillance video does not even show the actual floor at the moment the Petitioner is seen tripping. (PX7). Therefore, it is impossible from the surveillance video to see whether there was a mat at the point where Petitioner tripped. (PX7).

Much of Respondent's argument against finding accident is that Petitioner gave conflicting statements about the nature of her tripping incident. Respondent is correct that all of the various accounts do not perfectly align in terms of words chosen, descriptions used, or exact location where Petitioner tripped. The Arbitrator finds, however, that this is an exercise in splitting hairs and will not let the perfect defeat what amounts to good evidence in Petitioner's favor. Petitioner claimed she was in a hurry and tripped in such a manner that she hurt her knee while going to fetch lids as part of her job. She reported the incident, was treated near in time to the injury and was in fact hurt. The vast majority of all evidence in the record aligns with Petitioner's account of what happened.

Petitioner's testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu where consistent and credible. Similar to the O'Fallon, Nascote Indutries and William G. Ceas cases discussed above, Petitioner was engaged in activity on behalf of the employer that increased her risk of injury beyond the risk to the general public. In this case, Petitioner was working in a hurried manner carrying cups and lids as was testified to by Petitioner and Respondent's witness. Moreover, Petitioner was engaged in activities directed by her supervisor. Further, Petitioner accident was documented in the Respondent's supervisor report as the result of working in a hurried manner.

Based upon all of the above, the Arbitrator finds that the Petitioner suffered a left knee injury that arose out of and in the course of her employment, as a result of the work related accident of April 12, 2018.

B. Respondent's Exhibits 6(a) and 6(b) Were Properly Admitted as Evidence By the Arbitrator As an Admission by a Party Opponent

Under the Illinois rules of evidence, proper foundation must be laid to show authentication and identification for audio recordings to be admitted as evidence. Geary & Graham's Handbook of Illinois Evidence 9th Edition. Sound recordings of voices are authenticated if a proper foundation is laid, including the identification of the speakers. Id. Further, a transcript of the sound recording may be admitted in evidence if a sufficient

foundation is presented establishing the accuracy of the transcript and the identity of the speakers. Id. Communications by telephone do not authenticate themselves; the person speaking must be identified. Id.

Relevant and material audio recordings are admissible "if a proper foundation has been laid to assure the authenticity and reliability of the recording." People v. Viramontes, *410 Ill.Dec. 221, 69 N.E.3d 446 (2017)* citing, People v. Aliwoli, *238 Ill.App.3d 602, 623, 179 Ill.Dec. 515, 606 N.E.2d 347 (1992).* A sufficient foundation is laid when "a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." Id. citing In re C.H., *398 Ill.App.3d 603, 607, 339 Ill.Dec. 139, 925 N.E.2d 1260 (2010).*

In a recent case before the commission concerning proper foundation, Dinaz Ravji v. United Airlines, Inc., *No. 05 W.C. 54051, No. 12 I.W.C.C. 0094, (2012)* the Illinois Workers Compensation Commission ruled that the Arbitrator was in error to admit still photographs from surveillance video introduced as exhibits by Respondent. In Ravji v. United Airlines, Respondent argued that the foundation was laid when Petitioner identified herself in the video; however, the commission disagreed citing People v. Flores 406 Ill.App.3d 566, 941 N.E.2d 375 (2010).

The court in Flores found that the trial court improperly admitted a video. The court opined that witness testimony was sufficient foundation for admission of the videotape for use as *demonstrative* evidence, and the court cited M. Graham, Geary & Graham's Handbook of Illinois Evidence as follows: "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time [.]" [citation omitted] Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. However, the Flores court noted that foundation for admitting the tape to be used as *substantive* evidence, however, required "something more rigorous than the witnesses' testimony that the video in evidence truly and accurately depicted that which it purported to depict." 406 Ill.App.3d at 576, 941 N.E.2d at 384. The court indicated that, "visual recordings, when treated substantively, are real evidence requiring a proper foundation, including evidence that the proposed exhibit is substantially unaltered." Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. The witness testified

that the copy he produced was altered because he omitted portions from the original tape. The court held that the trial court abused its discretion when it considered the tape as substantive evidence, and stated that "an adequate foundation must show that the original has been preserved without change, addition, or deletion and that, if a copy is introduced into evidence, there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." Flores, 406 Ill.App.3d at 577, 941 N.E.2d at 385.

In the present matter before the arbitrator, Respondent's Exhibits 6(a) and 6(b) are a recorded audio statement with a translator and a transcript. At the hearing on October 23, 2018, Respondent did not lay a proper foundation to admit the recorded statement, translation and transcript. Respondent did not provide a witness to testify to the authenticity and accuracy of the recorded statement. The speakers on the recorded statement were not identified. Respondent did not provide a witness to testify about the accuracy of the Spanish to English translation of the recorded statement or the transcript. Further, because Respondent did not have a witness, Petitioner was not afforded the opportunity to cross-examine the individuals responsible for creating the recorded statement. Additionally, Petitioner could not cross-examine the translator with respect to his or her qualifications.

Respondent argued at Arbitration that Petitioner testified that she gave a statement and therefore it was an admission by a party opponent. (Tr. p. 24) Further, Respondent's counsel argued at Arbitration that Petitioner admitted it was her on the recorded statement. (Tr. p. 84) The Arbitrator finds this admission by a party opponent sufficient to admit the recorded statement into evidence despite the lack of foundation testimony that was outlined in the discussion above.

Based upon all of the above, the Arbitrator finds that Respondent's Exhibits 6(a) and 6(b) were properly admitted at Arbitration and should not be stricken from the record.

Regarding Issue (F)

Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial

Comm'n,207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The "arising out of" component for obtaining compensation under the Workers' Compensation Act is primarily concerned with causal connection; to satisfy that requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.(Id.) Claimant need only prove some act or phase of his employment was a causative factor in the ensuing injury to recover benefits under the Act. He need not prove it was the sole causative factor, nor even that it was the principal causative factor of his injury. Republic Steel Corp. v. Industrial Comm'n, *et al.*, 26 Ill.2d at 45, 185 N.E.2d at 884 (1962).

Petitioner testified that on April 12, 2018, she was hurrying to the Starbucks in Respondent's hotel to get cups and lids for guests when she tripped on mat causing injury to her left knee. (Tr. p. 8). Petitioner testified that when she tripped, her left leg went to the side and she heard a pop followed by immediate pain. (Tr. pp. 8-9).

Petitioner testified that Respondent sent her by taxi to Advocate Occupational Health on the same day of the accident. (Tr. pp. 13-14). The records indicate that Petitioner was walking rapidly on carpet when she tripped injuring her left knee. (PX1). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18). Petitioner testified that she has not been able to have the surgery because the insurance did not authorize it. (Tr. pp. 16-17).

Respondent offered no rebuttal testimony or medical evidence regarding Petitioner's need for left knee surgery as recommended by Dr. Tu.

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury. This is supported by the medical records and opinions of Petitioner's testimony at trial, the treaters at Advocate Occupational Health and Dr. Tu.

Regarding Issue J:

Were the Medical Services Reasonable and Necessary, The arbitrator holds the following:

For all the reasons stated above, Petitioner suffered a work related injuries on April 12, 2018. As a result of those injuries, Petitioner has the following unpaid medical bills:

Provider	Dates of Service	Balance
Advocate Occupational Health	4/12/2018	$387.00
Dr. Kevin Tu	5/10/2018 to 9/20/2018	$1,820.00
Premier Imaging & Open MRI	5/15/2018	$1,626.03
Total Rehab	5/29/2018 to 6/29/2018	$6,141.00
	Total outstanding:	**$9,974.03**

Petitioner had admitted medical bills from Advocated Occupational Health (PX1) that had a balance of $387.00, Dr. Kevin Tu (PX2) with a balance of $1,820.00, Premier Imaging and Open MRI (PX3) with a balance of $1,626.03, and Total Rehab (PX4) with a balance of $6,141.00. Petitioner's treatment at Advocate Occupational Health was at the direction of and authorized by Respondent. (PX1) Respondent's clinic directed petitioner to follow up with an orthopedic doctor, which is Dr. Tu. (PX1) The MRI for her left knee was ordered, by Dr. Tu, Petitioner's treating physician. (PX2) The physical therapy at total rehab was recommended by Dr. Tu. (PX4).

In sections C and F above, the Arbitrator found that Petitioner did suffer a work related injury and her condition of ill being is causally connected to that injury. Respondent did not produce any medical opinions or testimony. Therefore, based upon the totality of the evidence, including medical opinions, and witness testimony, the Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injury

and the Arbitrator awards the $9,974.03 of the medical bills listed above, as provided in Sections 8(a) and 8.2 of the Act.

Regarding Issue K:

Is Petitioner entitled to any Prospective Medical Care?

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for. Plantation Manufacturing Co. v. Industrial Comm'n, 294 Ill.App.3d 705, 710, 229 Ill.Dec. 77, 691 N.E.2d 13 (1997).

The ability for the Commission to award and order prospective was also decided in Homebrite Ace Hardware v. Industrial Commission 351 Ill.App.3d 333, 814 N.E.2d 126 (2004), and the court relied on Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill.App.3d 650, 655–56, 239 Ill.Dec. 767, 714 N.E.2d 1064 (1999), the court held that the Commission's order directing the employer to provide written authorization for a prescribed surgery was proper.

In the current case before the Arbitrator, Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. (PX10). Respondent has not provided any rebuttal medical evidence or testimony.

The arbitrator found in sections C and F that an accident occurred on April 12, 2018, that arose out of and in the course of Petitioner's employment by Respondent and Petitioner's left knee injury and current ill-condition is causally related. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

Regarding Issue L:

What temporary benefits are in dispute? The Arbitrator finds the following:

A claimant is entitled to TTD when a "disabling condition is temporary and has not reached a permanent condition." Manis v. Industrial Comm'n, 230 Ill.App.3d 657, 660, 172 Ill.Dec. 95, 595 N.E.2d 158, 160-61 (1st Dist. 1992) The time during which a claimant is

temporarily totally disabled is a question of fact for the Commission; and to be entitled to TTD, claimant must prove not only that he did not work but that he was unable to work. City of Granite City v. Industrial Comm'n, 279 Ill.App.3d 1087, 1090, 217 Ill.Dec. 158, 666 N.E.2d 827, 828-29 (5th Dist. 1996). The dispositive test is whether the condition has stabilized, because the Commission reviews the evidence to ascertain whether claimant has reached maximum medical improvement, *i.e.,* the condition has stabilized. Beuse v. Industrial Comm'n, 299 Ill.App.3d 180, 183, 233 Ill.Dec. 453, 701 N.E.2d 96, 98 (1998).

Petitioner testified that she was sent by Respondent to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health, the treaters ordered her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3).

Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

Petitioner's medical records from Advocate Occupational Health and Dr. Tu all demonstrate that Petitioner was kept off work or on restricted duty beginning April 12, 2018. (PX1, PX2). Petitioner testified that she faxed her restrictions to Respondent, but she was not offered light-duty work and she has not received any Workers' Compensation disability pay. (Tr. pp. 15-17).

The Arbitrator holds, for the reasons stated in the "Accident", "Causation" and "Prospective Care" sections and based upon all testimony and medical evidence, Petitioner is awarded temporary total disability (TTD) benefits from April 13, 2018, up to the date of trial or 27 and 5/7 weeks times Petitioner's TTD rate of $398.62 per week (AWW of $597.94 as stipulated, Arb EX1) for a total of $11,047.35 in TTD benefits due.

CONCLUSION

In conclusion, the Petitioner's testimony was credible and convincing. Petitioner's medical records and testimony corroborate that she injured her left knee working for Respondent on April 12, 2018. The Arbitrator finds that Petitioner was injured in the course of her employment with Respondent on April 12, 2018.

The Arbitrator finds that Petitioner proved that her left knee injuries were caused by the work accident of April 12, 2018. The Arbitrator holds that Respondent shall authorize Petitioner's recommended left knee surgery, post-surgery physical therapy and other related post-surgical medical treatment as provided in Section 8(a) Act.

The Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injuries and the Arbitrator awards the $9,974.03 of medical bills listed in Section J above, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator finds that Petitioner is owed temporary total disability (TTD) benefits due and owing of $11,047.35 for the period of disability from April 13, 2018, up to the date of trial on October 23, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK TANTILLO,

Petitioner,

21IWCC0165

vs. NO: 12 WC 34352

PTO SERVICES, INC., and the
ILLINOIS STATE TREASURER as
EX-OFFICIO CUSTODIAN of the
INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, benefit rate, wages, temporary total disability benefits and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's award regarding causation and the duration of temporary total disability benefits. However, the Commission modifies the calculation of the average weekly wage as well as the amount of permanency and medical benefits awarded.

The Commission disagrees with the Arbitrator's finding that Petitioner's working overtime was mandatory. At no point did the Petitioner testify that overtime was mandatory, but only that he worked approximately 55 hours per week. (T. 18) Additionally, although the wage statements entered into evidence between December 16, 2011 and June 15, 2012 reflect some overtime in 21 out of 27 pay periods, the number of hours worked are not regular and vary significantly. (Px14)

In *Airborne Express*, the Appellate Court found, that overtime should not have been

included in the claimant's average weekly wage because, "Although the claimant consistently worked overtime he did not work a set number of overtime hours each week." *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n (Bronke)*, 372 Ill. App. 3d 549, 555, 865 N.E.2d 979, 985 (1st Dist. 2007).

The same rationale applies in the instant case. Although Petitioner may have worked *some* overtime based on the evidence presented, the hours were not consistent and no evidence was presented that overtime was mandatory. Therefore, the Commission finds that Petitioner's average weekly wage is $17.90 x 40 hours per week = $716.00.

Regarding the medical bills, Petitioner failed to prove that the Prescription Partners charges contained in Px21 were reasonable, necessary and causally related to the accident of June 2, 2012. Petitioner's claims include $5,079.35 in charges from Prescription Partners. However, there are several problems with the bill of Prescription Partners:

1) It lists a date of injury of June 1, 2013 – not the date of accident that is at issue in this case – June 2, 2012.
2) The first Date of Service listed is June 27, 2013.
3) It is for medication dispensed by Dr. Howard Freedberg at Suburban Orthopedics. There are no treating records from this provider in evidence.
4) This record only lists *total amounts* per date of service and *NOT an itemized list* of prescriptions that were dispensed. Therefore, there is no way to know how, if at all, these charges are related to Petitioner's work accident on June 2, 2012.

We next modify the Arbitrator's award of permanency. The following is our analysis of Petitioner's permanent partial disability under §8.1b(b) of the Act:

i) No AMA impairment rating was submitted so we give this no weight.

ii) The Arbitrator gave "significant weight" to Petitioner's testimony that that he "is not able to pursue higher paying jobs due to his medical condition." However, there is no evidence of this. Petitioner was released to full duty with no restrictions for both his cervical and right shoulder. The Commission therefore only gives this factor some weight.

iii) The Arbitrator gave "greater" weight to this factor and concluded that Petitioner was an older individual whose disability "will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations." Although Petitioner testified that he takes an occasional Meloxicam and rubs "horse liniment" on his shoulder and neck area "every couple days" in the winter (T. 41-43), most of his testimony focused on how his disability affected his outside hobbies. The Commission gives this factor some weight.

iv) The Arbitrator found that Petitioner's "earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting," the Arbitrator gave "greater" weight to this factor.

Petitioner was released with no restrictions. Petitioner testified that he currently works at a job where he does paperwork and doesn't drive very much. (T.44-45, 52) However, Petitioner failed to prove that his decision regarding where to work has been anything other than a personal choice. Petitioner testified:

> Q: How has your earning capacity been impacted by the shoulder and neck injury of 2012?
>
> A: Well, it hurt due to the fact that I can't pass a test to drive for Holland or UPS and they call me all the time because I have an excellent driving record.
> But I know I can't pass the physical capacity test and lift 140 pounds or lift 80.
>
> I am getting paid $24 an hour now.
>
> Q: What are they paying at UPS or Holland?
>
> A: I think it's $29.30 and XPO that's a non-union company, they're paying $30.45.

Petitioner testified that he "can't pass a test to drive", but no evidence was introduced regarding the requirements of said test. Assuming the "test to drive" refers to the DOT test, no evidence was presented regarding those test requirements. Since Petitioner was released without restrictions, this testimony does not support a finding of a reduction in earnings capacity. Petitioner's claim that he is presently earning $24 per hour but could possibly be earning $29+ elsewhere is self-serving speculation. The Commission therefore gives this factor little weight.

v) The Commission modifies the last paragraph of page 12 of 13 of the Arbitrator's decision regarding factor "(v)" as follows:

> The Commission adds the phrase "as per the opinions of Drs. Burra and Lorenz" to the first sentence after the word "accident".
>
> The Commission further modifies that paragraph and adds the following:
>
> Although Petitioner's cervical issues resolved as Dr. Lorenz noted at the time of Petitioner's office vision on April 8, 2013, Petitioner sustained a SLAP-type tear of the superior labrum with the tear extending into the proximal biceps tendon as corroborated by a high resolution MRI arthrogram performed on August 28, 2012. Notwithstanding the fact that the office visit note dated January 5, 2013 authored by PA David Tan indicates "the high field arthrogram study noted no full thickness rotator cuff tendon tears and we do not believe he would be a candidate for a shoulder arthroscopy at this time," said note also reflects that "the

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definitive treatment for him would be a total shoulder arthroplasty at some point in the future."

The remainder of the paragraph remains unchanged.

As the Commission finds that Petitioner sustained a SLAP lesion and not a rotator cuff tear, the Commission reverses that finding by the Arbitrator. The Commission further vacates the award of 20% loss of a person as a whole. Based on its finding that the Petitioner sustained an unoperated SLAP lesion, the Commission awards Petitioner 10% loss of a person as a whole.

Additionally, the Commission awards 2.5% loss of a person as a whole based on the unoperated cervical radiculopathy. Although Petitioner's first EMG on September 14, 2012 showed "marked abnormality with respect to the C5-6-7 roots," the second EMG on March 22, 2013, did "not reveal any active denervation in the Rt C5, C6 or C7 distribution. [P's] strength has significantly improved and his pain has improved in the Rt arm, although not totally so."

Based on the above, we find that Petitioner has sustained the loss of use of 12.5% of the person-as-a-whole under §8(d)2 of the Act. Since we have found that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $716.00, his weekly permanent partial disability rate is $429.60.

Furthermore, the Commission modifies the award for medical expenses from $33,695.24 to $28,615.89 as the Commission finds that the Petitioner failed to prove the Prescription Partners bill was related to the accident of June 2, 2012.

In addition to the foregoing, the Commission corrects the following scrivener's errors contained in the Arbitration Decision:

1) In the first sentence of the sixth full paragraph on page 4 of 13, the Commission corrects the date to "July 26, 2012", from July 23, 2012.

2) In first sentence of the first full paragraph on page 10 of 13, the Commission corrects the date to "July 26, 2012", from August 22, 2012.

3) In the last sentence of the paragraph under issues (H) and (I), contained on page 11 of 13, the Commission deletes the word "not" in regard to Petitioner's marital status.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $477.33 per week for a period of 52 3/7 weeks, from September 1, 2012, through September 2, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

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the sum of $429.60 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,615.89 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 020921
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TANTILLO, PATRICK
Employee/Petitioner

Case# **12WC034352**

21IWCC0165

PTO SERVICES INC AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKER BENEFIT FUND
Employer/Respondent

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
ANTIA M DeCARLO
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0000 PTO SERVICES INC
1000 JORIE BLVD
SUITE 228
OAK BROOK, IL 60521

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

21IWCC0165

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Patrick Tantillo
Employee/Petitioner

Case # **12** WC **34352**

v.

PTO Services, Inc. and the Illinois State Treasurer as Ex Offico Custodian of the Injured Worker Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other - Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer

FINDINGS

On **June 2, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**50,288.16**; the average weekly wage was $**967.08**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**644.72**/week for **52 3/7** weeks, commencing **September 1, 2012** through **September 2, 2013**, as provided in Section 8(b) of the Act

Respondent shall be given a credit for any temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $**33,695.24**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**580.25**/week for **100** weeks, because the injuries sustained caused the **20**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 – 2019

FACTS:

Petitioner filed an original Application for Adjustment of Claim on October 3, 2012 alleging an injury to his "right arm (shoulder) & neck" while working for his employer, P.T.O. Services, Inc. on June 2, 2012. The Application for Adjustment of Claim was mailed to the Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 on October 3, 2012. In response to that filing, Chilton, Yamber, Porter, LLP (hereinafter "Chilton") filed an Appearance on behalf of P.T.O. Services, Inc. with the Illinois Workers' Compensation Commission.

Petitioner filed a Stipulation to Substitute Attorneys on February 2, 2017 which was sent to Chilton, on behalf of P.T.O. Services, Inc. on March 1, 2017 (PX 2 & 3).

The Illinois Workers' Compensation Commission sent a Notice of Hearing to the employer Chilton, on behalf of P.T.O. Services, Inc. by mail on July 10, 2017. (PX4). The Notice contained the following language: "This is a legal notice informing you that the Petitioner has filed a case with the IWCC for workers' compensation benefits. Employers, forward this notice to your insurance carrier or attorney."

On June 15, 2017, Chilton filed a Motion to Withdraw as the Attorney of Record for P.T.O. Services, Inc. citing the reason: "Our firm filed an appearance in this case on behalf of and at the request of P.T.O. Services, Inc. to protect it against any potential workers' compensation exposures in this case. Per the attached exhibit #1, P.T. O. Services, Inc. voluntarily officially dissolved as a corporation with the Secretary of State on April 17, 2017 and no longer exists, and our firm has no client remaining." (PX5). Based on this Motion, Chilton obtained an Order allowing them to withdraw as the attorney of record in this matter.

On July 7, 2017 an Amended Application for Adjustment of Claim naming "State Treasurer & ex officio-custodian of the Injured Workers' Benefit Fund was filed with the Illinois Workers' Compensation Commission. (PX6). On July 11, 2017 Petitioner filed a Request for Information on Employer's Insurance Coverage which was returned 07/12/2017 an indicated that there was no insurance coverage on the date of accident. (PX 7).

On January 17, 2018, Petitioner filed a Request for Hearing before Arbitrator Erbacci on March 1, 2018, with notice to the Respondent, P.T.O. Services Inc at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX8). The case was set for trial on March 12, 2018 and Respondent P.T.O. Services, Inc. failed to appear on that date. That same day, the Arbitrator specially set this matter for Hearing on June 7, 2018. Due to a clerical error, the Arbitrator dismissed this matter that same day. The Commission issued a Notice of Case Dismissal on March 13, 2018, which was sent to P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX9).

On March 20, 2018, Petitioner sent a certified letter to Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 detailing that this matter is specially set for trial on June 7, 2018 along with a Motion to Reinstate the Case. (PX10 & PX11). These items were delivered to P.T.O. Services, Inc. on April 2, 2018. (PX10).

On the trial date, June 7, 2018 the Arbitrator reinstated the case. Petitioner and IWBF were present with their attorneys and Respondent PTO Service, Inc. failed to appear. This

matter was set for trial on 09/17/2018. Due to a clerical error notice was not sent to PTO Services and this matter was continued by Email to December 7, 2018.

On September 7, 2018 a letter was sent to PTO Services Inc at 1000 Jorie Blvd, #228, Oak Brook, IL 60521 advising of a trial date of December 7, 2018 by regular and certified mail. Both mailings were returned to sender. (PX 23). Further, on September 11, 2018, Petitioner filed a Notice of Motion Request for Hearing requesting the agreed trial date of December 7, 2018. Respondent P.T.O. Services, Inc. failed to appear on December 7, 2018 and the case proceeded ex-parte.

Petitioner presented a Certification from NCCI confirming that P.T.O. Services, Inc. did not have insurance on the date of accident, June 2, 2012. (PX 12).

Petitioner testified that he was an employed as a commercial truck driver with P.T.O. Services, Inc. on the date of accident, June 2, 2012. He submitted a copy of his job description obtained from P.T.O. Services, Inc. Driver Hiring Policy updated March 24, 2010. (PX13). This job description confirms that he was hired to "operate 26,000+ lb. trucks on interstate and/or intrastate routes: arrange, load, transport and unload freight." (PX13). Petitioner also submitted a compensation report from P.T.O. Services, Inc. for the period of October 23, 2011 to June 23, 2012. (PX14). Further, Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He also testified that he worked on average 48 hours every week. He worked overtime 21 of the 27 weeks prior to his accident and working overtime was mandatory.

Petitioner was driving his route as an employee of P.T.O. Services, Inc. on June 2, 2012 when he attempted to open the rear of his trailer. He was forced to use a crowbar in order to open the jammed metal doors. While prying the doors open he fell forward, striking his head and body on the open doors. He notified his supervisor, Tom, the same day, June 2, 2012.

Petitioner first sought medical treatment on June 5, 2012 with his Rheumatologist, Dr. Alnadjm. (PX15). Of note, Petitioner began treating with this doctor prior to this accident, on April 17, 2012. At that time, Petitioner complained of right shoulder pain, however the hand written notes seem to suggest the doctor believed there to be an issue with the biceps tendon. On June 5, 2012, the first visit following his work related injury, Dr. Alnadjm noted "R shoulder pain. Crowbar slipped at work on 6-2-12 and now has a hard area by neck." (PX15). That same day, he prescribed an MRI of the neck and shoulder. Further, it appears at the bottom of the hand written page the doctor administered a cortisone injection. Petitioner followed up with Dr. Alnadjm on July 23, 2012 and was referred to Southside Orthopedics. (PX15).

Petitioner went to Southside Orthopedics on July 23, 2012. He was diagnosed with severe degenerative joint disease of his right shoulder. Further, the doctor opined: "I think you can blame all his shoulder symptoms on these changes with some exacerbation from the crow bar incidences." The doctor noted that since Petitioner did not get much benefit out of the cortisone shot, he is probably at the end stage disease. Lastly, the doctor referred him to Hinsdale Orthopedics to explore the option of a total shoulder replacement. (PX16).

Dr. Alnadjm again prescribed an MRI to the shoulder on July 31, 2012. (PX15). An MRI was performed on the cervical spine, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative change in the cervical spine with multilevel disc disease.

2. At C2-3, left peridiscal posterior osteothytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C3 nerve root.

3. At C3-C4, 2 mm broadbased posterior disc protrusion with peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in bilateral neural foraminal enchroachment and abuts the exiting C4 nerve roots, more on the left side.

4. At C4-C5, 2 mm posterocentral disc protrusion with small peridiscal posterior osteophytes (hard discs). There is no central canal or neural foraminal stenosis.

5. At C5-C6, subtle diffuse posterior disc bulge and small peridiscal posterior osteophytes (hard discs). No central canal stenosis or neural foraminal stenosis.

6. At C6-C7, 4 mm broadbased posterior disc protrusion indents the thecal sac and abuts the cord. The disc protrusion with small peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C7 nerve root. (PX17)

An MRI was performed on the right shoulder, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative disease of the glenohumeral and acromioclavicular joints with large effusion. Areas of marrow edema adjacent to these joints. Clinicopathological correlation is suggested to rule out possibility of infective etiology.

2. Supraspinatus tendinosis with no evidence of tear.

3. Type II acromion process with acromioclavicular joint arthropathy this results in impingement.

4. Collection in the subcoracoid and subscapularis bursa.

5. Diffuse degeneration of the glenoid labrum.

6. Biceps tendon tenosynovitis. (PX17)

Dr. Alnadjm reviewed the MRI on August 7, 2012 and released him into the care of an orthopedic surgeon. (PX15). Petitioner first treated with Hinsdale Orthopedics, at the request of Dr. Alnadjim, on August 22, 2012. (PX18A). Hinsdale details his history of accident as follows:

He is a right-hand dominant truck driver. He drives a spotting Jeep which essentially takes trailers and lifts them on hydraulics, and he as to position them into a dock and then open the doors. Of late, he has been handling the same Jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open these doors, and in the process of doing so, he has had a few injuries the most recent being a slipping injury where the crowbar slipped forward and his arm essentially

> impacts as it slipped and crashed against the shipping container. He described a series of 3 injuries which happened on March 24, 2012, June 2, 2012 and June 9, 2012. All of these are associated with these stuck doors when he was prying open with this crowbar. Consequent to this he has developed significant pain in his right shoulder. While he has had other problems on the rest of his body he had never had any for a problem with his right shoulder. He used to swim. He used to play recreational softball and baseball and other athletic activities without any problems and he has also been performing his job without any problems until this present situation. He does complain of some neck pain which appears to be resolving. At this point, he does not have any paresthesias or weakness on the right side. In the course of his development of symptoms he has also noticed that he is developing significant scapulothoracic pain and loss of range of motion. (PX18A).

Dr. Burra performed a complete examination including reviewing the MRI images. He noted a bulge at C3-4 with neural foraminal encroachment on the left; some changes at C4-5 and C2-3; and the most significant issue at C6-C7 with a 4 mm posterior disc protrusion that his encroaching on the left neural foramen. He noted the MRI of the shoulder revealed a significant amount of atrophy changes and streaking in the infraspinatus and osteophyte formation and chondral pathology was quite evident. Based upon same, Petitioner was diagnosed with a rotator cuff tear and glenohumeral arthritis. In order to confirm the rotator cuff tear, a high field MRI arthrogram was prescribed. Further, Dr. Burra noted that a total reverse total shoulder could be required. (PX18A).

The high field MRA was performed by Hinsdale Orthopedics on August 28, 2012 and found: "(1) SLAP type of superior labrum with the tear extending into the proximal biceps tendon. (2) Severe glenohumeral osteoarthritis with virtually complete absence of articular cartilage and subchondral cysts in the humeral head. (3) Supraspinatus tendinosis but no full thickness tears. (4) Inferiorly projecting AC arthrosis with an acquired type III acromion. (5) Degeneration of the inferior remainder of the glenoid labrum." (PX18A). At his follow up appointment on September 14, 2012, Dr. Burra diagnosed a partial-thickness tear of the supraspinatus with approximately 75% atrophy of the supraspinatus, a longitudinal tear of the biceps, a SLAP tear of the labrum and severe glenohumeral space narrowing with virtual absence of articular cartilage. In addition, an EMG with neurology consult was prescribed in order to determine if there is any neurological compromise to his supraspinatus which could be causing the atrophy. (PX18A).

Petitioner followed up with Hinsdale orthopedics on September 25, 2012. At that time, Dr. Burra reviewed his neurological consultation and EMG. The EMG revealed "evidence of right sided C5-6 radicular process. Based on the fact that there is some denervation of the tricep muscle, there may be some degree of C7 involvement as well. Not only are there findings of ongoing denervation corresponding to the described myotomes, but there is also evidence of chronic neurogenic change in these myotomes." Based upon same, Dr. Burra diagnosed "Disc Disease: Cervical" and prescribed "immediate spine consult before going forward with treatment for the right shoulder." He was again prescribed to be off work. (PX18A).

On October 17, 2012, Hinsdale Orthopedics noted complaints of fatigue and weight change. Petitioner was instructed to follow up with his PCP and remain off work. (PX18A).

Dr. Lipov from Oak Brook Surgical Center examined Petitioner on November 2, 2012 and diagnosed cervical radiculopathy with pain in the neck and right arm. That same day, he performed a cervical epidural steroid injection at C5-C6. (PX20).

On November 5, 2012, Dr. Burra again discussed the continuing right shoulder diagnosis of a SLAP lesion, bicep tendnitis, impingement, ACJ pain, PRCT with atrophy from neurological process, glenohumeral OA. However, he could not address the conditions with surgery until the neurological issues had been fully addressed. Petitioner was prescribed off work and to continue his spine and neurologic treatment. (PX18A).

Petitioner saw Dr. Lorenz at Hinsdale Orthopedics on November 21, 2012 and was diagnosed with: "1.Rotator Cuff Tear. 2. SLAP lesion. 3. Radiculopathy C5, 6, and 7 on the right which is really quite severe with nerve atrophy." Further, he was prescribed a myelogram and post Myelogram CT and to remain off work. (PX18A).

The CT of the cervical spine was performed at Hinsdale Hospital on December 7, 2012. It revealed: "broad based left paracentral disc protrusion at C6-C7 with resulting moderate spinal stenosis and broad-based central disc osteophyte complex at C3-C4 resulting in mild spinal stenosis. (PX19). Further, his final diagnosis from Hinsdale hospital that day was "brachial neuritis or radiculitis NOS." (PX19).

Dr. Lorenz reviewed the Myelogram on December 10, 2012 and noted "spinal stenosis most predominantly at C6-7 but also at C5-6 with fairly significant degenerative changes. L4-5 is only mild." Lorenz prescribed a decompression at C5-6 and C7; a second opinion with Dr. Franczak and continued off work. (PX18A).

Dr. Burra examined the shoulder again on January 5, 2013. Despite, Petitioner's reported improvement with strength and pain, the doctor noted that a total shoulder arthroplasty would be necessary at some point in the future. In an attempt to immediately address the pain, Burra performed cortisteroid injections to the primary pain generators in the biceps tendon and subacromial space, prescribed physical therapy and continued off work. (PX18A).

At Petitioner's follow up on April 9, 2013 with Hinsdale Orthpedics he reported 25% improvement of shoulder pain. His right shoulder diagnosis on that date was bicep tendinitis, impingement, ACJ pain and glenohumberal OA. Based upon his response to the injection, surgery may be appropriate to address the bicep, impingement and ACJ narrowing. However, Dr. Lorenz needs to provide clearance before proceeding with surgery. Lastly, he was again restricted from any kind of work. (PX18A).

Dr. Lorenz examined Petitioner on April 18, 2013 and noted that his cervical radiculopathy resolved and prescribed a functional capacity assessment to determine work limitations, if any, with the cervical spine. He further indicated the cervical issues were not an impediment to shoulder surgery by Dr. Burra. (PX18A).

On May 6, 2013, Dr. Burra addressed the right shoulder again. The best way to address his pain generators is to proceed with an arthroplasty of the right shoulder however Patrick does not want to proceed due to the potential effect on his ability to return to work. Dr.

Burra agreed with Lorenz' prescription for a functional capacity assessment to determine functional abilities and to remain off work until the results were reviewed. (PX18A)

On July 9, 2013 Petitioner returned to Dr. Burra for continued deep shoulder pain. As a result, a series of synvisc injections were prescribed, the first ultrasound guided injection on the right glenohumeral was performed on this day. Further, Petitioner remained off work and the FCA was put on hold until all three injections were performed. (PX18A).

The second ultrasound guided injection of the right subacromial space was performed on July 16, 2013 and the off work note was extended. The third and final viscosupplementation injection with Synvisc into his right shoulder on July 22, 2013. The doctor released him to return to modified duty on July 23, 2018. (PX18A). However, Petitioner testified that a light duty job was not offered at that time.

On August 8, 2013 the Functional Capacity Evaluation prescribed by both Dr. Burra and Dr. Lorenz was performed at Newsome Work Performance Center. The evaluation found: "This job specific evaluation was performed using a 100% kinesiophysical approach and Mr. Petitioner demonstrated the ability to perform 0.00% of the physical demands as a Truckdriver." (PX18A). However, Mr. Petitioner also "demonstrated the physical capabilities and tolerances to perform within the HEAVY physical demand level based on an occasional lift/carry of 80 lbs. and a frequent lift of 45 lbs. from floor to waist." (PX18A). Lastly, the evaluation concluded that Petitioner was putting for "maximum effort" during the testing. (PX18A). After reviewing the FCE, he was returned to work full duty, for his cervical condition on, August 14, 2013. It was specifically noted that he was not released to return to work for his shoulder condition. He returned to Hinsdale Orthopedics on August 27, 2013 and was returned to work full duty, for his shoulder condition. Specifically, it was noted that he continues to have limitations on range of motion. The doctor specifically noted Petitioner's motivation to return to work full duty. Further, the injections were expected to "work well for at least 6-8 months" but he "may be a candidate for a future series" depending on symptoms or "to postpone or avoid any total joint replacement." (PX18A).

Petitioner testified that he is currently employed as a truck driver but he is working in a supervisory capacity. He performs limited driving and no lifting in his position. His earnings are similar to what he was earning at the time of his accident. However, he did note that his earnings were impaired due to his lifting limitations. He is unable to pursue higher paying jobs as a truck driver due to his inability to lift and load cargo into the trucks.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (A.), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds and concludes as follows:

Petitioner testified that he began working for Respondent-Employer, P.T.O. Services, as a commercial truck driver in December 2011. He further testified that the Respondent-Employer was in the freight business stationed in Minooka, Illinois, and it delivered freight to various places all over the country. As a commercial truck driver, Petitioner drove trailers to various locations, then picked up

trailers from other locations. He also acted as a spotter, which involved opening shipping containers and moving the contents from one area of a shipping yard to another. Based upon the unrebutted testimony and other credible evidence, as well as the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

In Support of the Arbitrator's Decision relating to (B.), Was there an employee-employer relationship, the Arbitrator finds and concludes as follows:

The Arbitrator finds an employee-employer relationship did exist between the Petitioner and P.T.O. Services. The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties. While, the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. Roberson v. Indus. Comm'n, 225 Ill. 2d 159, 175 (2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Id.

Petitioner's testimony and other evidence established that he was employed by P.T.O Services. He was hired by Tom Wistlow in December 2011, and was paid by payroll check (PX 14). He clocked in and out daily, and received a ticket containing his duties for the day when he clocked in. P.T.O Services provided all of the equipment required to complete the job. As a commercial truck driver, Petitioner's work encompassed P.T.O. Services' general business as a freight distribution company.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 an Employee-Employer relationship existed between the Petitioner and Respondent-Employer P.T.O Services Inc.

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (D.), What was the date of accident, the Arbitrator finds and concludes as follows:

On June 2, 2012, Petitioner arrived at work and punched into a payroll clock. He obtained a ticket that laid out his "spotter" duties for the day. Petitioner was in the process of attempting to pry open a shipping container with a crow bar when something broke on the door, and he smashed his head in the door of the shipping container. Petitioner sat down on the ground due to experiencing head pain. Another employee walked by while Petitioner was sitting on the ground and asked Petitioner if he was ok. Petitioner's head and knuckles were bleeding. He immediately reported the accident to Tom Wistlow.

Petitioner sought medical attention on June 5, 2012 with Dr. Alnadkim. (PX 15). Petitioner reported that he was experiencing right shoulder pain after a crow bar slipped at work, and Dr. Alnadjim noted that Petitioner had a hard area by his neck. Id. Petitioner went to Southside

Orthopedics on June 26, 2012, where he reported that he was injured while pushing a crowbar at work. (PX 16).
Petitioner was subsequently referred to Dr. Burra at Hinsdale Orthopedics, who he saw on August 22, 2012. (PX 18). Id. Dr. Burra noted that Petitioner is a right-hand dominant truck driver, and he drives a spotting jeep which takes trailers and lifts them onto hydraulics, and he has to position them into a dock and open the doors. Id. Dr. Burra reported that Petitioner has been handling with same jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open the doors, and in the process, he has had a few injuries. Id. Petitioner reported that he injured himself at work on June 2, 2012 when the crowbar slipped forward and his arm impacted it, and, as it slipped, it crashed against the shipping container. Id. Petitioner was diagnosed with a right rotator cuff tear and glenohumeral arthritis, and a MRI arthrogram was ordered. Id.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that on June 2, 2012, he sustained an accidental injury which arose out of in the course of his employment by Respondent-Employer P.T.O Services, Inc.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner established that Respondent-Employer was aware of Petitioner's accident. Petitioner testified that he informed his supervisor, Tom Wistlow, of the accident immediately after it occurred on June 2, 2012. When Petitioner was given authority to return to work light duty, he informed Mr. Wistlow, who told him there was no light duty work available.

Based upon the unrebutted testimony and credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that he provided Respondent-Employer with timely notice of the accident as defined by the act.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner, as well as the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates establish that the injury of June 2, 2012 caused injury to the Petitioner's right shoulder and neck (cervical spine). The Petitioner, thereafter, commenced a continuous course of medical treatment for those injuries. The Arbitrator concludes that the Petitioner has proven by a preponderance of the evidence that his present condition of ill-being relative to his right shoulder and neck (cervical spine) is causally connected to his injury of June 2, 2012. This conclusion is based upon the unrebutted testimony of the Petitioner and an examination of the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

Petitioner alleges that his earnings from Respondent-Employer were $967.08 per week, or $50,288.16 per year. (Arb Ex 1). Petitioner submitted "compensation reports" dated November 1,

2011 through June 27, 2012. (PX 14). The compensation reports submitted show that Petitioner was paid a total of $18,615.80 over a 27-week period in "regular" pay, and $6,815.48 in "overtime" pay. *Id.*

Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He worked overtime in 21 of the 27 weeks prior to his accident and he testified that working overtime was mandatory. Petitioner's earnings were $50,288.16 in the 52-weeks prior to his injury of June 2, 2012. The Arbitrator concludes that Petitioner has proven beyond a preponderance of the evidence that his average weekly wage was $967.08. The basis for this conclusion was the unrebutted testimony of the Petitioner and the wage statements admitted into evidence as PX 14.

With respect to Issue (H), What was the Petitioner's age at the time of the accident, and (I), What was the Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of the Petitioner as well as the emergency room records, established that the Petitioner's date of birth is January 26, 1954, making him 58 years of age on the date of accident. The unrebutted testimony of the Petitioner established that he was married and he had no children under the age of 18 on the date of injury. Based upon the unrebutted testimony and other credible evidence the Arbitrator finds that Petitioner was 58 years old on the date of accident and that that Petitioner was not married and had no children on the date of injury.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the Petitioner has established by more than a preponderance of the credible evidence that the medical bills related to the treatment of the Petitioner's work injury of June 2, 2012are reasonable, necessary and causally related to the accident, and that the Respondent shall pay for those medical expenses under Section 8(a) of the Act and pursuant to the Illinois Fee Schedule. This conclusion is based upon the testimony of the Petitioner and an examination of the medical records. Respondent has paid no medical bills to date. As such, Respondent shall pay reasonable and necessary medical services of $33,695.24, as provided in Sections 8(a) and 8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner testified, and the medical records indicate that the Petitioner was off work as a result of his injuries from September 1, 2012 through September 2, 2013. Based upon the Petitioner's unrebutted testimony and the medical records admitted into the record, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 1, 2012 through September 2, 2013, a period of 52 3/7b weeks.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered a rotator cuff tear, SLAP lesion, C5,6,7 radiculopathy on the right with nerve atrophy as a result of this accident. He was prescribed a shoulder replacement and a cervical decompression that he did not pursue due to his fear of the surgeries themselves. He received physical therapy and injections to work through the pain. Further he testified that he continues to perform home exercises every day in order to deal with these physical conditions. Petitioner testified to continued need to take over the counter medication and horse liniment depending on the weather. He testified to continued work as a truck driver, however earning less at a job requiring less physical lifting.

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a truck driver, which the Arbitrator notes includes some heavy work. The Arbitrator notes that the Petitioner has been working in a position that requires limited driving and no lifting. Because of the testimony that petitioner is not able to pursue higher paying jobs due to his medical condition, the Arbitrator gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 58 years old at the time of the accident. The Arbitrator considers the Petitioner to be an older individual and concludes that because of his age the Petitioner's permanent partial disability will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations. The Arbitrator therefore gives greater weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that his earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting, the arbitrator therefore gives greater weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes significant surgeries of a shoulder replacement and cervical decompression at three levels have been prescribed for the Petitioner as a result of this accident. The Petitioner credibly testified that he currently experiences a loss of strength in his arm as well as pain in his shoulder and neck. These complaints are corroborated in the medical records of the Petitioner's treating

physicians. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 20% disability to his whole person.

In Support of the Arbitrator's Decision relating to (O.), Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer the Arbitrator finds and concludes as follows:

This matter was heard on December 7, 2018. It proceeded *ex parte* against Respondent-Employer P.T.O. Services. The Injured Workers' Benefit Fund was represented by the Attorney General's office by Assistant Attorney General Danielle Curtiss. A review of the Illinois Workers' Compensation Commission records by Roguens Loriston failed to reveal any workers' compensation insurance coverage for the Respondent-Employer ASM Transport Services, Inc. on June 2, 2012. (PX 12).

On the hearing date, no one from P.T.O. Services was present, and the hearing proceeded *ex parte* against the Respondent-Employer. Petitioner introduced into evidence correspondence from Petitioner's attorney's office sent via certified mail to the Respondent-Employer's addresses including the addresses filed with the Secretary of State registered agent for P.T.O. Services (PX 8; PX 10; PX 11; PX 24).

Based on the above, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that the Injured Workers' Benefit Fund of Section 4(d) of the Illinois Workers' Compensation Act , applies and that the Injured Workers' Benefit Fund has been properly named as a Respondent in this matter. Further, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Respondent-Employer P.T.O. Services had adequate and timely notice of the hearing.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM VRCHOTA,

Petitioner,

vs. NO: 13 WC 34611

DD&G DEVELOPMENT & RESTORATIONS, and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

21IWCC0169

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the January 8, 2020 Decision of the Arbitrator. Therein the Arbitrator found no employment relationship existed between Petitioner and Respondent DD&G Development & Restorations, and Petitioner failed to prove he sustained an accidental injury on October 9, 2013.

While the matter pended on Review, Respondent DD&G Development & Restorations ("DD&G") filed a Motion to Dismiss Petitioner's Review. Respondent Injured Workers' Benefit Fund subsequently joined the motion. The parties briefed the issue, and the matter was taken under advisement for ruling by the full panel. Notice having been provided to the parties, the Commission, after reviewing the record in its entirety, hereby dismisses Petitioner's Review for the reasons stated below.

In its Motion to Dismiss, DD&G noted, on April 9, 2020, Petitioner executed a settlement and release of his civil claim against DD&G for the injury at issue and a dismissal order was thereafter entered stating "said cause having been settled by agreement of the parties." Motion Exhibit B. DD&G further noted the dismissal order is a public record of a civil court case and therefore subject to judicial notice. DD&G argued, under Sections 5(a) and 11 of the Act and *Rhodes v. Industrial* Commission, 92 Ill.2d 467 (1982), Petitioner is now precluded from continuing his workers' compensation claim. The Commission agrees.

Initially, the Commission finds the April 29, 2020 Dismissal Order is subject to judicial notice. Illinois courts recognize that documents containing readily verifiable facts from sources of indisputable accuracy may be judicially noticed if doing so will aid in the efficient disposition of a case. *City of Centralia v. Garland*, 2019 IL App (5th) 180439, ¶ 10; *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 36. Public documents that are included in the records of courts and administrative tribunals are subject to judicial notice. *People v. Davis*, 65 Ill. 2d 157, 164 (1976); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009); *NBD Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520 (1993); see also *People v. Ernest*, 141 Ill. 2d 412, 428 (1990) (observing that trial court was authorized to take judicial notice of transcripts in underlying action); *In re McDonald*, 144 Ill. App. 3d 1082, 1085 (1986) (recognizing that trial court has authority to take judicial notice of hearing transcripts). While we do not believe judicial notice can be extended to the Release and Settlement Agreement itself, the Commission emphasizes the Dismissal Order states the civil claim "has been settled by agreement of the parties." Black letter contract law states there must be consideration in order to have a settlement.

The Commission further concludes *Rhodes* is dispositive of the instant matter. In *Rhodes*, the Supreme Court of Illinois held as follows:

> The legislative intention underlying section 5 of the Workmen's Compensation Act would obviously be frustrated if an injured employee could recover damages in a common law action and workmen's compensation benefits as well. If an employee initiates a common law action for his injury and receives payment from his employer as a result of such suit he is disqualified from obtaining an award under the Workmen's Compensation Act. The statute's design was to serve as a substitute for an employee's common law right of action and not as a supplement to it. 92 Ill.2d at 471. (Emphasis added).

The Commission finds the language of the Dismissal Order is sufficient to establish "the receipt of payment from the employer." Therefore, Petitioner "is disqualified from obtaining an award" under the Act, and his Petition for Review is hereby dismissed.

The Commission further notes, assuming *arguendo*, Respondent's Motion to Dismiss was denied and we reached the merits of Petitioner's Review, the Commission would affirm and adopt the Decision of the Arbitrator. The Commission finds the injury did not arise out of Petitioner's employment. We emphasize Mr. Kowalski credibly testified he works by himself, and on those occasions he needs assistance with flooring, he chooses the person; at no time would Mr. Schwager assign an assistant to him. As such, there is no credible evidence of an employment-related reason for Petitioner's use of the miter saw, and we find Petitioner was acting outside the scope of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review filed February 3, 2020, is hereby dismissed.

21IWCC0169

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2020 is final.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
TJT/mck
051
o020321

APR 13 2021

Thomas J. Tyrrell

Stephen J. Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on February 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VRCHOTA, WILLIAM
Employee/Petitioner

Case# **13WC034611**

DD&G DEVELOPMENT AND RESTORATIONS LLC & THE ILLINOIS STATE TREASURER AS EX-OFFICO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0169

On 1/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

4239 LAW OFFICE OF JOHN ELIASIK
BRIAN C HERCULE
180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

0210 CANAN & SHAPIRO PC
JOHN MORRIS
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

6285 ASSISTANT ATTORNEY GENERAL
DANIEL KALLO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Vrchota
Employee/Petitioner

v.

DD&G Development and Restorations, LLC

&

The Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund

Employer/Respondent

Case # **13 WC 34611**

21IWCC0169

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **October 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **10-09-13**, Respondent ***was not*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$5,541.00**; the average weekly wage was **$307.83**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds Petitioner was not an employee of Respondent on October 9, 2013 and that Respondent was not subject to the Workers' Compensation Act. As such, all claims for benefits are denied.

The Arbitrator finds Petitioner did not sustain an injury arising out of his employment. As such, all claims for benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

01-07-20
Date

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FINDINGS OF FACT

William Vrchota (hereinafter "Petitioner") alleges he sustained a work-related accident while employed by DD&G Development (hereinafter "Respondent") on October 9, 2013. Respondent disputes Petitioner was an employee and contends he was instead an independent contractor, and disputes Petitioner sustained a compensable work-related injury regardless of the employment relationship. Petitioner testified on behalf of himself. Dave Schwager, Respondent's owner, Kenneth Kowalski and Orian Phillips testified on behalf of Respondent.

MEDICAL RECORDS (PX 2 and PX 4)

The EMS notes contained within the certified records state Petitioner was found with lacerations to the arm. The records state his medications were Norco, Oxycodone and Meloxicam. Petitioner was also intravenously given Fentanyl and Midazolam.

Petitioner arrived at St. Alexius Medical Center by ambulance at 9:48 a.m. immediately following the accident. The past medical history was noted to be heartburn, drug abuse, sleep apnea and chronic back pain. Petitioner stated he was cutting wood with a saw when his forearm got caught and pulled into the saw. An x-ray of the arm was completed which showed an open comminuted fracture with the distal defect at the ulnar.

Dr. Thomas Fendon evaluated Petitioner. The record stated Petitioner narcotized but arousable and able to communicate. Dr. Fendon noted the significant laceration and recommended surgery, which Petitioner underwent that day. The surgery included a number of tendon and muscle repairs as well as a debridement and irrigation of the ulnar fracture. Petitioner was released from the hospital later that day.

Petitioner next presented to APAC Groupe Centers for pain management on October 17, 2013. Petitioner stated he had been cutting hardwood flooring and put his arm up to protect his chest from getting cut. He stated it was not a workers' compensation case. He did state the injury was aggravated by movement and had associated numbness and swelling. Petitioner was diagnosed with an arm injury and musculoskeletal deformity of the upper arm as well as an open wound of the upper arm with tendon involvement. He was instructed to begin 30-days OxyContin, though it was noted there would have to be an exit plan and the medications would be regulated by his wife. He was also instructed to continue his Norco for breakthrough pain and follow-up in one month to check on pain management.

Petitioner returned on November 26, 2013 for medication management. He stated his pain was aggravated by movement but alleviated by medications. Petitioner stated the pain was disabling. He was prescribed Norco and Morphine. The next visit was December 24, 2013 at APAC Groupe, and Petitioner's chief complaint was pain in his thoracic spine and arm pain. There was no explanation for the start of the thoracic pain. Petitioner stated he was not working and had no therapy ordered by the orthopedic surgeon in Elgin. Petitioner was instructed to begin therapy and follow-up in one month, as well as continue medications as directed. On January 28, 2014, Petitioner presented with lower back pain with numbness down the right leg. Petitioner stated he was now a vegetarian. He still was not working and described chronic ongoing disabling pain. Dr.

Pang noted the pain was self-limiting. The diagnoses were back pain, myalgia, current drug user and shoulder pain. The impression was chronic myofascial back pain, and it was noted he was three months out from the left upper extremity trauma. Petitioner stated he was reducing the dosage and he was to continue decreasing his Norco.

The last medical record is a drug screen which was collected on January 28, 2014. The drug test noted inconsistent results based on the presence of pregabalin, cocaine metabolic, ethyl glucuronide sulfate. It was noted pregabalin was detected but did not match any of the reported prescriptions and that cocaine is a schedule 2 controlled substance with limited pharmaceutical application.

Testimony of KENNETH KOWALSKI

Kenneth Kowalski was the first to testify in this case as he testified via evidence deposition on June 27, 2018 given he was, at the time, in the process of undergoing chemotherapy. Mr. Kowalski testified he was a laborer with safety and OSHA certification and used to be a part of the laborers union. Mr. Kowalski testified he performed handyman work such as carpentry, flooring and drywall. He testified he worked for himself, though not under any corporation. He secured most of his work by word-of-mouth or with customers calling him directly. Mr. Kowalski testified he had no financial interest in the claim, and was in fact losing money by appearing.

Mr. Kowalski testified he met Mr. Schwager about 20-years prior and had performed work for Respondent for five or six years as a handyman. To secure work with Respondent, Mr. Schwager would call Mr. Kowalski and advise he had a possible job for him. Mr. Kowalski would then review the job and provide Mr. Schwager with an estimate, or bid, for what the work would cost. Mr. Kowalski stated that if his bid was chosen, he worked as an independent contractor. He stated if he had to bring extra help in for the work, he would bring one of his kids, at his own discretion and cost. Mr. Kowalski stated he was paid by the job, not on an hourly basis. He testified taxes were not taken out of his checks and he himself was responsible for paying taxes. He testified he would bring his own tools, unless he did not have something in which case he would ask Mr. Schwager if he could borrow his tools. He testified he was not required to wear any clothing with Respondent's name on it. He was not required to keep his hours and could arrive at the jobsite at his discretion. While doing work for Respondent, he was allowed to have concurrent employment and set his own hours, and testified he sometimes told Mr. Schwager he would not be present if he had another job, and that there was no problem with Respondent when such issues arose. He testified he and Mr. Schwager both had the right to terminate the contract. He stated he was only responsible for the flooring, and that he had discretion over how to do the work. He testified Mr. Schwager was not present at all times watching over him and Mr. Schwager was only present once or twice on the whole job. He was not given any type of vehicle by Respondent.

Mr. Kowalski testified he was working October 9, 2013. Mr. Kowalski's services were retained by Respondent to install flooring for a remodeling job on a residential home. Mr. Kowalski stated the house was essentially a three level building. The garage was down a little from the main level of the house, then there was a second staircase going to the top second floor. At the top of the second flight of stairs, to the right, there was a bedroom where all the tools were kept. There was also a children's bedroom on the same side of the staircase, and a closet in a room on the left-hand side

of the staircase. Mr. Kowalski stated all of the power tools were kept in the bedroom on the second floor to keep them away from children living in the house.

He testified he was doing the flooring by himself, and arrived at about 7:20 a.m. or 7:30 a.m. No one was present when Mr. Kowalski arrived. He testified Petitioner showed up much later while Mr. Kowalski was in the garage. Petitioner and Mr. Kowalski briefly talked, and Petitioner told Mr. Kowaski he was there to clean up. Mr. Kowalski testified, after this discussion with Petitioner, he witnessed Petitioner walk over to a corner and "crushed up a pill, rolled up a dollar bill, snorted [the pill], and immediately became lethargic, started slurring his words, stumbling" (RX 7, pg 27) Mr. Kowalski was about 6 feet from Petitioner during these actions. After snorting the pill, Petitioner became lethargic and started slurring his words and stumbling. He started walking towards Mr. Kowalski and almost head butted Mr. Kowalski given how close he was, all characteristics Mr. Kowalski did not notice before he witnessed Mr. Vrchota snort the pill. Mr. Kowalski testified he instructed Petitioner to go home but Petitioner told Mr. Kowalski he was not his boss and therefore not to tell him what to do. Given Petitioner refused to leave, Mr. Kowalski returned to his own work and instructed Petitioner not to touch any tools. Mr. Kowalski testified he was measuring the inside of a closet, with his head inside, when he heard a "Bam" and a yell. He ran to the room from where he heard the noise and Petitioner was bleeding everywhere. He wrapped the injury and took Petitioner downstairs. He called 911 and stayed with Petitioner until the ambulance arrived.

Mr. Kowalski testified Petitioner was not working with Mr. Kowalski on of the flooring job. Mr. Kowalski testified the flooring was his own job and, to the best of his knowledge, Petitioner was not supposed to help or aid in doing the flooring work. He testified he did not ask Petitioner do any work for him, and prior to that date had not ever asked Petitioner to help them with any flooring work. He also testified there was no other carpentry work going in the house besides the flooring, or any other work in the house besides the flooring which would necessitate use of the saw.

The saw was present during the deposition of Mr. Kowalski. He testified it was a Bosch 12 inch circular compound miter saw, or sliding compound miter saw. He testified it was the same saw present at the job on October 9, 2013. Mr. Kowalski noted the blade had a guard over it, which was in place on October 9, 2013. He testified he had used the saw on October 9, 2013 before Mr. Vrchota did, and that there were no problems with the saw. He testified the blade worked fine and was not dull. He stated there were no alterations made to the machine and that the saw was new at the time of the accident, having been bought for a job right before the one in question. Mr. Kowalski stated he would likely use the saw even if the cover were off, but that he was certain the cover was not off on the date in question. Mr. Kowalski explained how to use the saw, noting one would put a piece of wood onto the plate and against a back guard. He noted the safety switch on the handle, and that the blade guard only raised when the blade went down. He stated the hand holding the wood would be kept a couple inches from the blade, and the blade would come straight down into the lumber. He noted the blade could not move left to right given the lock on it, which would have to be released in order to move it side to side. He also stated the plate itself cannot be moved.

Mr. Kowalski testified there were no problems with the locking of the machine. He also testified the back stop for the lumber not only keeps it straight but prevents it from launching backwards

when the blade enters the wood. He noted the wood would be pressed against the blade when cut, and that if there was an issue the wood would stall against the backstop. He testified based on the direction the blade moved it could not shoot the wood forward, only backward, which would then have it hitting the backstop. He opined it was physically impossible for the wood to have caught and pulled Petitioner forward because, at worst, if the blade was dull it would just bump and stop. He testified, based on where the lumber is held, it would be impossible for the cut like Petitioner's to have occurred as the wood can only be pulled backwards, not forwards, and there is a backstop to prevent the wood from actually moving.

On cross-examination, Mr. Kowalski confirmed he did not know what the actual pills were that Petitioner crushed and snorted. Mr. Kowalski testified he saw Petitioner come upstairs and walk past him, but did not stop him as he was there to do his own job. He testified the arrangements to do any particular job were generally verbally made with Mr. Schwager, and that they had a general agreement each year rather than one done before each specific job. He testified he was present during one of the first jobs Petitioner had with Respondents in which Petitioner provided an estimate for a painting job. He was also unaware how many jobs Petitioner had with Respondent. Mr. Kowalski was asked if the wood could slip one way or the other before the blade engaged with the wood, and Mr. Kowalski testified the wood could move before the blade engaged. He testified it was not possible for that to happen after the blade engaged. Mr. Kowalski again confirmed he had never use the saw with the blade cover off. On examination by the State, Mr. Kowalski confirmed the blade comes straight up and down and does not come at an arc.

Mr. Kowalski, on redirect, testified he instructed Petitioner to go home but had no reason to believe he would disobey the statement of not using the tools. He also testified there was no benefit to having the blade guard taken off. He testified it did not make the saw work quicker and there was no reason someone would take the blade off. He also testified the only difference between the blades on the date in questioned and at the deposition was that it was newer, but there were no other differences.

Testimony of PETITIONER

Petitioner testified on his own behalf at trial. Petitioner testified DD&G Development was his employer on October 9, 2013. Petitioner stated he had worked for Respondent for a few years. He testified he made $15.00 per hour and worked full time, sometimes six days a week. He testified he did plumbing, carpentry, and some general stuff like picking up supplies, driving the truck and cleaning up around a job site. He testified he never did painting for Respondent, but he had done flooring for them one or two times before the accident. He testified he was paid in cash and checks and was paid hourly, not by the job. He testified he kept track of hours on his phone and then compared them with Mr. Schwager, and would be paid for the hours worked. He stated Mr. Schwager was his boss. He testified he did not sign anything when he was first hired nor fill out an application. He also stated, when he first started, he drove a truck one day to pick up supplies and started doing general helping, but was eventually asked to sign the Independent Contractor agreement to continue working for Respondent. Petitioner testified Mr. Schwager appeared at a job site and said Petitioner had to sign the document to get paid. Petitioner testified he did not want to sign the form, but was told he would not receive his money for the week if he refused to do so.

Petitioner testified he had never worked under the name, owned a business or solicited business as Bill's Painting. He testified he was not familiar at all with the name Bill's Painting.

Petitioner testified that, in order to determine his job duties, Mr. Schwager would come in to the job site at the end of the day and tell him to be there the following day. He testified Mr. Schwager set his hours and he was basically instructed to appear at a specific time, generally around 7:30 or 8:00 a.m., and worked 8 1/2 or 9 hours per day. Petitioner testified he had no other jobs while working for Respondent. He testified he had done a little construction but mostly plumbing prior to working for Respondent and, when asked whether he could've taken other jobs, testified he did not have the time. Petitioner testified he was not allowed to come and go from job sites as he pleased, and would have to secure permission from someone else at the jobsite. Petitioner testified he and other workers would take lunch together but could do so whenever they wanted. He testified he did sometimes have to run errands for Respondent such as picking up supplies, at which point he would use a company credit card. He testified he would do this once or twice a day. Petitioner testified he did not bring his own tools, or in fact own any, as they would be provided by Mr. Schwager. Petitioner also testified Mr. Schwager had bought him some clothes given he was unhappy with the clothes Petitioner chose to wear to a job site.

Regarding the alleged date of accident, Petitioner testified he was working a hardwood floor job in Schaumburg. He testified he was supposed to cut the wood and bring it back and forth to Mr. Kowalski. He stated it was only the first or second day they had been on this job. Petitioner testified it was him and Ken working at the job site that morning. He testified Dave had been there briefly in the morning but left once the work started. Petitioner testified he was using the saw to cut a piece of hardwood and that the saw blade was older. He testified having said that they needed a new blade given the saw was not cutting properly. He also testified the safety guard on the blade was taped up because Mr. Schwager had said he and Mr. Kowalski were working too slow. Petitioner testified when he brought the saw down, the wood got bound up and pulled him forward, at which point he put his arm up to block his chest, and cut his arm on the blade. Petitioner testified the cut was on his left arm right above his wrist, and he did show the Arbitrator the cut during the trial. The Arbitrator noted the scar started at one part of the arm and sort of went around creating a Y shape at both ends. The Arbitrator does note pictures of the initial injury were entered into evidence as Petitioner's Exhibit 7. The Arbitrator noted he would not notice the scar from where he was sitting. He noted the scar was long and significant, but not prominent and that he would not have noticed a scar even if the sleeve had been rolled up as it was not a raised scar.

Petitioner testified after the injury he was rushed to the emergency room by ambulance where he underwent immediate surgery at St. Alexius. He reported he was released the same day of the surgery and was given pain medication immediately. He also testified he had been completely knocked out for the surgery. He testified he was supposed to have physical therapy but did not due to insurance issues. He testified he did follow up to treat with Dr. Peng for pain in his arm. He testified he wore an open cast for about a month and a half to two months. Petitioner testified he never returned to work for Respondent or anyone else given he could not use his arm properly. He testified he also got a staph infection in his leg that ate the skin off his shins, though clarified he was not alleging he injured his shins during the work accident. Petitioner testified he was receiving Social Security disability benefits since November of 2018. He testified to having difficulty

gripping items and that he did not have the same strength he used to. He also testified he still had pain in his arm which was at a seven at the time of the trial.

On cross-examination, Petitioner reviewed payment screens for his work with the Respondent. He noted they show payments to Bill's Painting and were not weekly or biweekly paid. He testified again he had never done any painting for Respondent. Petitioner also noted that, when Respondent had bought him clothes to wear, he had been wearing jeans and a Tupac shirt. He testified none of the clothes purchased for him had Respondent's name anywhere on the clothing. Petitioner testified he still had issues with the arm and was still treating for the issue every week or so, though he then clarified that it was actually for issues with his leg. He testified treatment for his arm went on for about a year or year and a half after the accident. Petitioner also testified he was not required to clock in or out, just to keep track of time. Petitioner testified he did not have any pay stubs. He testified Respondent had five or six employees, including himself, Mo, Bud (Orian Phillips) and Kenny, as well as Kenny's kids who were brought in sometimes.

Testimony of DAVID SCHWAGER

Dave Schwager testified first on behalf of Respondent at the trial. He testified he currently owns a company called Quality Building Renovation Services, which does general contracting. He testified on October 9, 2013, he was the sole owner of Respondent. He testified Respondent was an LLC, which also performed general contracting. He stated he started Respondent in 2004, but did not register with the State until 2008 or 2009. He testified the company is no longer in existence as it was dissolved in 2015 or 2016. Mr. Schwager testified Respondent did not have workers' compensation insurance on October 9, 2013 based on the way the business was set up as a general contractor. He stated he was the only person doing work for the Respondent, unless he retained other independent contractors. In that case, they would be required to carry their own insurance. He testified Respondent had general liability insurance based on discussions with his agent in which he inquired what insurance was needed as an LLC doing general contracting. His agent had instructed him he did not require workers' compensation given he was the only "employee" and would not be covered under workers' compensation policies. He testified he secured a balloon policy, which included workers' compensation coverage, after October 9, 2013 to protect himself and his company. He testified Respondent did a total of 30 or 40 jobs over the years he owned it, most of which were residential. The jobs all involved remodeling and most were small, such as kitchens and bathrooms, facelifts and painting, flooring and hardwood changes.

Mr. Schwager stated he would do most of the work himself, but if he needed assistance, he would usually find help with referrals from other contractors or some of his suppliers. Mr. Schwager testified anyone who did work for him was required to sign an independent contractor agreement, such as those signed by Mr. Kowalski, Petitioner and Mr. Phillips. Mr. Schwager specifically testified as to Respondent's Exhibit 1, which is the independent contractor agreement between Petitioner and Respondent. The top of the exhibit states the contract was entered into between Respondent and William Vrchota D/B/A Bill's Painting and Remodeling. There was writing on the front page which has both Mr. Schwager's and Petitioner's signatures, and the last page of the contract was signed by both parties. The contract was signed on March 1, 2013. Mr. Schwager testified he was present when Petitioner signed the contract. He testified anyone who did work for Respondent would have to sign a similar agreement. Mr. Schwager testified if someone had not

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done work for him in the year prior to a new job and wanted to do work, he would have them sign a new agreement. He testified that was why Petitioner's was signed March 1 despite having worked for Respondent before then. He testified the agreements were mostly the same, with some minor tweaks as the contracts were updated. Mr. Schwager testified he chose to use independent contractors rather than hiring employees because it was not often he needed other people to complete jobs for him and he generally preferred to do the work on his own. He also sometimes would need to bring in a licensed worker, for things such as plumbing or roofing, for which he would again use the independent contractor agreements.

In order to hire independent contractors, Mr. Schwager would call five or six different people and inform them he had a project coming up for which he would need help on. Of those, some sent a quote/bid for the job. Mr. Schwager would then pick the best bid. He would pay the independent contractors once the work was completed or once he got paid. He testified the contract would be paid per the bid, regardless of how many hours it actually took to do the work. Mr. Schwager testified Respondent did not take taxes out of payment for contractors. He testified anyone who did jobs for him would provide their own tools, though noted he would also have his tools present given he would generally also be working. He testified the bid would decide who provided materials as that would be part of the bidding process. He testified he did not instruct people when they had to appear, but he would give them a timeframe in which work would be allowed at a job site. He testified contractors could work for other companies while they were doing work for him as well. He testified he would be at most jobsites doing his own work, but had no say in how other workers did their jobs. He testified people could reject a job he offered them without repercussions and noted there were multiple instances when he had offered someone a job and they had rejected it, yet he had still called them later to offer more work. He testified his subcontractors could hire anybody they wanted as it had nothing to do with him. He testified people working for him did not wear any clothing bearing the Respondent's name or logo. He testified people who did work for him had no other benefits such as retirement or health insurance, and that there were times during the existence of Respondent in which they did not have work and no one was paid.

Mr. Schwager testified he was familiar with Petitioner as he met him several years prior through his sister. He testified Petitioner had performed work for Respondent doing one job in 2009 or 2010 when they first met. He testified they hired him to do some painting work, but that at the time it did not seem to be working and thus he did not bring him back for further jobs for some time. Mr. Schwager testified when they did hire Petitioner, they brought him in to do painting and cleanup work for light painting jobs, or for dry-walling and sanding. Mr. Schwager was asked on cross-examination why he would use Petitioner despite the fact he did not feel he was the best painter, and Mr. Schwager testified it was because Petitioner was cheaper.

Regarding the job on October 9, 2013, Mr. Schwager testified they had done some drywall work in the client's basement and were replacing all the hardwood floors in the upstairs of the house, as well as all the floor trim and quarter round in the house. Mr. Schwager testified Petitioner was called to paint and do clean up. He stated most of the hardwood had been done at that point. He testified he brought Petitioner to the job site on the first day he arrived to drop off hardwood given Petitioner lived nearby, and offered Petitioner the chance to do painting work. Petitioner provided Mr. Schwager with his estimation for how much the job would cost. Mr. Schwager testified he retained Mr. Kowalski to do the hardwood flooring, and Petitioner was the only other person on

the job. Mr. Schwager testified Petitioner had requested $300.00 to do the job, which Mr. Schwager had agreed to pay. Mr. Schwager testified this would have been how much Petitioner was paid regardless of how many hours it took to complete the work. Mr. Schwager also testified Petitioner had refused work from the Respondent in the past, yet was still offered this job. He testified the tools necessary for Petitioner's job would be sponge, broom, paintbrush, dustpan and tarp, all of which Petitioner would have brought in on his own. Mr. Schwager testified he had never retained Petitioner to do any carpentry job, either at this project or at prior projects. He testified he never provided Petitioner with a specific time to arrive, but did provide a time range when Petitioner could appear at work. Petitioner was never given a DD&G Development vehicle to drive, and did not have any direct supervisor watching his performance.

Mr. Schwager testified the saw present at the trial was the same saw on which Petitioner alleges he injured himself, which Petitioner confirmed at the Arbitrator's request was the same saw as well. He testified Mr. Vrchota did not require the use of the miter saw to perform his duties for his job, nor was he authorized to use the miter saw in the performance of his duties. He testified he was not aware of Petitioner having any training to use a miter saw. He testified he had purchased the saw possibly three weeks to a month before the alleged accident date, and that it was his saw. He testified he and Mr. Kowalski were both retained to do carpentry work, and that Petitioner was not retained to help or assist Mr. Kowalski in performing the carpentry work in any way.

Mr. Schwager testified October 9, 2013 was his birthday and he did not go to the job site at all that day. He testified both Mr. Kowalski and Petitioner were authorized to work without him present as they did not require his direct supervision. Mr. Schwager testified he first heard about the accident when he received a text from Mr. Phillips saying to call Mr. Kowalski. Mr. Schwager then went to the hospital where Petitioner was taken. Mr. Schwager testified he requested a drug test, which was never completed given the emergency room physician informed him they had already given him significant pain medications.

After leaving the hospital, Mr. Schwager returned to the job site, where he went to the room with the miter saw. He noted a little blood on the floor and another trail of blood leading outside. He testified no one had used the saw since the accident. He also testified he did not see any partially cut pieces of wood on which a blade had been caught. Mr. Schwager testified, given Petitioner's work had not been completed prior to the injury, he did have to bring someone in to complete the work. He brought in Mr. Phillips, his half-brother, who had a similar independent contractor agreement as Petitioner. He stated Mr. Phillips provided him with the cost of the job, but he did not take other bids given the job needed to be completed and he did not have time for such action.

The saw in question was in the hearing room during Mr. Schwager's testimony, which was confirmed by Petitioner. Mr. Schwager testified the only potential change was that the blade would have been replaced multiple times in the last few years. Mr. Schwager testified he never requested the blade guard be lifted as it made no sense and would not make cutting any faster. Mr. Schwager noted when the saw is in its initial position, the blade guard would cover the entire blade. He stated once someone started cutting wood, they would keep the blade in a locked position going straight down. He also testified there was an electric brake on the unit and two safeties. He stated the worker would have to pull a knob and then squeeze a trigger before the saw would turn on. As soon as the hand/thumb lifted from the trigger, the blade would stop immediately. He also testified,

given the power of the saw, that even a flat blade would still cut the wood and not pull the wood or person forward. Mr. Schwager testified the hardwood floor would have been about 3/4 inches thick and 3 inches wide. As such, the hand would be about three quarter inches above the plate and about 3 inches back from the backstop. Mr. Schwager testified, given the setup of the saw, it was irrelevant if someone was right or left-handed, but would hold the piece of wood with the left hand and bring the saw down with the right hand. He testified there would be no reason for an arm to be near the center region as the person cutting would keep the arm and hand holding the wood to the side while bringing the saw down. In overruling an objection regarding the demonstration of the saw, the Arbitrator noted he was hoping to see Petitioner go through the mechanism of the accident.

Mr. Schwager testified when he first started Respondent in 2004, he did have some people work for him, but that when he became an LLC in 2008, he only used independent contractors. He testified he never hired Petitioner, but he did contract him to do painting and cleanup, such as sweeping. He again noted the independent contract stated Petitioner would have been retained to do residential remodeling and painting services. He also testified if Petitioner did not secure an actual painting job, he could still bid to do some cleanup work instead, but it would still be done in the same general manner with a bid process for specific hours it would take him to complete the job. He stated the pay would be the same regardless of the amount of hours it took based on the bidding process. When asked how he discovered the business he believed to be Bill's Painting, he testified that was how Petitioner had presented himself, and that he provided business cards. Mr. Schwager was asked about a prior testimony from 2016 in which he stated he was unsure if he had received a business card from Petitioner, but stated had thought more and did remember he had in fact received a business card from Petitioner. He also noted the paystubs were made out to Petitioner, not Bill's Painting, which Mr. Schwager testified was a common practice. He also testified he did not always check whether independent contractors had insurance, but generally would only do so if it was a job in which he believed insurance might be necessary. He did not check Petitioner for insurance given he had only had them to painting and general cleanup, neither of which he believed were likely to involve injuries in his mind. Mr. Schwager testified Petitioner was known as a painter to the representatives at Sherman Williams and they had business cards of him on a board there as well.

Mr. Schwager testified he would be the one to generally discuss hours and other issues with the homeowner, but sometimes the other workers would have to discuss issues directly with them. Finally, he testified he did not understand how someone could accidentally sustain the injuries Petitioner had. He again testified Petitioner did not belong in the room with the saw, let alone use the saw itself. He was asked if the room with the saw was locked, and testified it might not have been given people had already appeared for work that day. On redirect, Mr. Schwager confirmed he had never hired any actual employees as DD&G Development and Restoration, LLC. He also confirmed that, if Petitioner worked less hours than had bid, he would still receive the full cost of the bid given he was not paid hourly.

Petitioner entered a prior deposition transcript of Mr. Schwager into evidence as Petitioner's Exhibit #5. The deposition was taken on May 3, 2016 for the civil claim also arising out of this accident, *William Vrchota v. DD& G Development*, 2014 L 005680. Without going into significant

detail, the Arbitrator notes Mr. Schwager maintained throughout this deposition Petitioner was an independent contractor, not an employee.

Testimony of ORIAN PHILLIPS

Mr. Phillips testified he was brought in to complete Petitioner's work after the injury on October 9, 2013. He testified he was brought in for the same job as Petitioner, and that at no point did these job duties require use of the miter saw. He was never asked to assist Mr. Kowalski in the wood cutting or carrying process. He testified his duties for the job involved just painting. He also testified he had an independent contractor agreement similar to the one signed by Mr. Kowalski and Petitioner. He testified he was paid by bid, not hourly, he set his own hours, and did not have any supervisor from Respondent overlooking his work.

Petitioner's Exhibit 6

Petitioner's Exhibit 6 is a payment screen for payments made by Respondent to Petitioner for his work from June 11, 2013 through August 12, 2013. The "original amount" and "paid amount" on all payments was equal. On 13 of the 18 payments, the memo line included Bill's Painting in some fashion. Finally, the Arbitrator notes the payments were not paid on a consistent biweekly or weekly schedule, with some payments being made on back to back dates, such as July 10 in July 11, 2013. Finally, the Arbitrator notes that Respondent made a total of $5,541.00 per the payment screens over the course of the payment period.

CONCLUSIONS OF LAW

Regarding issues (A) and (B), whether Respondent was under the Workers' Compensation Act and whether there was an employee-employer relationship between Petitioner and Respondent, the Arbitrator finds as follows:

No rigid rule of law exists regarding whether a worker is an employee or independent contractor. *Area Transportation Co. v. Industrial Comm'n,* 123 Ill. App. 3d 1096 (1984). In determining whether one is an independent contractor or employee, courts have considered several factors. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309 (1990). The single most important factor is whether the purported employer has a right to control the actions of the employee. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000). Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities and whether income tax has been withheld. *Wendholdt v. Industrial Comm'n,* 95 Ill. 2d 76 (1983). A factor of less weight is the label the parties place upon their relationship. *Earley.* When applying the facts of the present case to the factors set forth by the courts, the Arbitrator finds Petitioner was an independent contractor

The Arbitrator notes there are discrepancies in the multiple testimonies regarding a number of the factors. The Arbitrator finds the testimonies of Mr. Schwager, Mr. Kowalski, and Mr. Phillips more credible than the testimony of Petitioner. The Arbitrator finds the payment screens and check stubs particularly persuasive. Petitioner testified he worked 8 ½ to 9 hours a day, 6 days a week for Respondent making $15 per hour, but the payment screens show Petitioner averaged $307.83

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per week, which would only equate to about 20 hours per week. Petitioner never testified to having been underpaid by Respondent. Petitioner testified he never did painting jobs for Respondent, and that he had never heard the name Bill's Painting. The Arbitrator finds this unbelievable given Petitioner cashed at least 13 checks with a memo line of Bill's Painting, most of which were written before October 9, 2013, and he signed an Independent Contractor Agreement which specifically stated he would do painting. The Arbitrator notes the agreement was signed on March 31, 2013, well before the date of the accident, and indicated Petitioner would do painting and general labor. The Arbitrator also notes the payment screens do not show weekly or bi-weekly payments. Finally, the Arbitrator notes the memo lines on most of the payments contain a specific job (ie. Bill's Painting/Bosshart, Bill's Painting/Fisher, etc), which would indicate Petitioner was receiving payments for the specific jobs. The Arbitrator does not see any reason the jobs would be noted if Petitioner was an employee who was just paid by the hour.

Furthermore, Petitioner testified he had worked for Respondent for years prior to October 9, 2013 but, despite the fact he had not done any painting jobs, had only done 1 or 2 hardwood flooring jobs. Petitioner testified Mr. Phillips and Mr. Kowalski were both employees, but both testified they were independent contractors. Petitioner also testified he could not work for other companies because he would not have had the time, yet also did not deny he was working on another project for his ex-wife.

The Arbitrator finds the testimony of Mr. Schwager credible. He testified he did most of the work for Respondent, and that if he was unable to complete a job on his own, he would bring in independent contractors for help. He testified Petitioner was an independent contractor and verified the independent contractor agreement between Respondent and Petitioner. He testified he did not control Petitioner's work, his hours or the means by which he completed his tasks. He testified Petitioner was brought in to do painting, which was corroborated by the payment stubs (RX 2) and the payment screens (PX 6). He testified Petitioner could have rejected work and he still would have been offered jobs, and that Petitioner could have had concurrent employment while working for him. Mr. Schwager testified contractors would secure work via a bidding process, which Mr. Kowalski testified he witnessed happening between Petitioner and Respondent. He testified Petitioner was paid at the end of a job, which appears to be corroborated by the payment screens showing payments not made on a weekly or bi-weekly basis. Mr. Schwager also testified Petitioner would be paid the bid amount, regardless of whether he actually worked more or less hours than he bid.

The Arbitrator also notes Mr. Schwager's testified regarding the employment status for a civil claim (PX 5), throughout which Mr. Schwager maintained Petitioner was an independent contractor, despite the fact such testimony would have been against his interests in that case as owner of Defendant. The Arbitrator also finds Mr. Kowalski and Mr. Phillips were independent contractors based on their testimony regarding relevant factors, and the Arbitrator does not believe Petitioner would be the only employee of Respondent.

Based on the above testimony, the Arbitrator finds Petitioner was an independent contractor and was not an employee of Respondent. As such, Respondent did not sustain injuries which are compensable under the Workers' Compensation Act.

Regarding issue (C), whether an accident from an employment-related or neutral risk occurred that arose out of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Additionally:

Even assuming, *arguendo*, Petitioner was an employee, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment. Petitioner bears the burden of proving that his injury both occurred in the course of his employment and arose out of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). The fact that an injury occurred at Petitioner's workplace is not dispositive as it does prove the injury "arose out of" Petitioner's work activities. Instead, the arising out of question addresses whether "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003). There are three types of risk: employment-related, neutral and personal. Employment related risks exist when Petitioner is performing a task he was instructed to perform by the employer, one he had a common law or statutory duty to perform, or one the employer might reasonably expect Petitioner to perform incident to his assigned duties. The Arbitrator finds Petitioner's injury did not arise out of an employment-related risk given he was never assigned any work that required cutting wood, nor did his employer expect Petitioner, as a painter, to cut wood, especially given Petitioner had no specific training in carpentry.

The Arbitrator notes there is a significant discrepancy in the testimony regarding Petitioner's job duties. The Arbitrator finds Petitioner's testimony was not credible for the reasons laid out above. The Arbitrator finds Petitioner was hired to do painting and general labor, and was not hired to do carpentry. None of the witnesses, Petitioner included, testified the jobs of painting and general labor required the use of a miter saw. Instead, Petitioner testified he was hired to do carpentry, despite the fact he had no expertise in this field, unlike Mr. Kowalski, who was a former labor union employee. The Arbitrator also relies of the testimony of Orian Phillips, who testified he was brought in to the job after Petitioner's injuries. Mr. Phillips testified he never had to use the saw to complete the tasks Petitioner had been hired to do. Similarly, Mr. Kowalski testified he was hired to do the carpentry work, and did not ask Petitioner for help. He testified that if he ever needed help, he would bring one of his sons in to assist him, which Petitioner testified was also the case. Mr. Kowalski and Mr. Schwager both testified they did not believe Petitioner had any special training in carpentry work. The Arbitrator therefore does not see any reason Mr. Kowalski would have asked Petitioner to assist Mr. Kowalski or would have been hired to do any carpentry work. The Arbitrator notes the memo line in most checks contained "Bill's Painting", but none included anything about carpentry. For all these reasons, the Arbitrator finds Petitioner was not hired to do carpentry work, that he had no common law or statutory duty to perform carpentry work, and that Respondent had no reasonable expectation Petitioner would do carpentry work. As such, Petitioner's injuries did not arise out of an employment-related risk.

The next question is whether Petitioner's risk was neutral or personal. A neutral risk is one which has no particular employment characteristics, but is instead incidental to Petitioner's employment. The Arbitrator does not find this risk to be neutral as it is not a risk to which the general public is exposed. The Arbitrator again notes Petitioner had no valid reason for using the saw for any work-related purposes, and thus use of the saw was not even incidental to his employment.

The Arbitrator instead finds Petitioner's injuries arose out of a personal risk, and thus the injury is not compensable. In this regard, the Arbitrator notes the Petitioner's explanation of the accident was not credible for any legitimate use of the miter saw based on the description of the miter saw and demonstration of its use at trial. Petitioner testified he was cutting wood and the blade, which he testified was old and dull, stuck in the wood and pulled him forward. Petitioner testified he then reached out his left arm to protect his chest. Mr. Schwager testified the saw only turned on when someone pressed their thumb down on a button on the handle/lever, and he testified, undisputed, that the blade stopped immediately when the thumb released the button, as an emergency brake system. Mr. Schwager and Mr. Kowalski both testified the blade cover was on the blade on October 9, 2013, and both testified that lifting or removing the cover would not affect the speed in any way. The Arbitrator agrees with this testimony based on his examination of the saw, noting the blade cover automatically lifts when the blade is brought down to the wood. The Arbitrator also notes there is a backstop behind the wood which would prevent it from being thrown backwards, as Petitioner claims occurred. As the wood could not be thrown backward, Petitioner could not be pulled forward toward the blade.

The Arbitrator notes the saw held a 12-inch blade, which would mean 6 inches in diameter on the cutting end, and Petitioner was cutting a piece of wood 3 inches thick. The Arbitrator does not believe Petitioner could have brought his arm from holding the piece of wood, which would have been 3 inches in front of the blade, back around behind his chest and in front of the blade in less time than it took to remove his thumb from the emergency brake. The Arbitrator also notes Mr. Schwager and Mr. Kowalski testified the saw was fairly new on October 9, 2013, and thus does not believe the blade in question was dull. Finally, the Arbitrator notes the saw was present in the hearing room and Petitioner had a chance on rebuttal to demonstrate how his injury occurred, which the Arbitrator encouraged him to do, yet refused to do so. For all these reasons, the Arbitrator does not find Petitioner's explanation of the accident possible, and does not find Petitioner credible.

Based on the above, the Arbitrator finds Petitioner finds the testimony of Mr. Schwager, Mr. Kowalski and Mr. Phillips credible, and finds Petitioner was hired to do painting and clean-up work, none of which required use of the miter saw. The Arbitrator finds Petitioner was not employed to do any carpentry work, nor was he asked on to do any carpentry work or wood cutting on October 9, 2013. As wood cutting was not part of the job for which Petitioner was hired, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Regarding issue (C), whether Petitioner was intoxicated to an extent he was considered no longer in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

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Additionally:

Petitioner bears the burden of proving his injury occurred in the course and scope of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An employer may raise a defense of intoxication, though intoxication itself is not a complete bar against compensability. Instead, the employer must show that either (1) the intoxication was the sole cause of the employee's injury or (2) the intoxication was so excessive as to constitute a departure from the course of the employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468 (1989). A decision on compensability is one of fact, which involves a number of factors, and the Arbitrator notes neither the Workers' Compensation Act, the Commission nor the Appellate Courts have found a blood test necessary for an intoxication defense.

One way in which an employer can prove intoxication is by showing a significant difference in behavior before and after the intoxicating activity. Mr. Kowalski testified he was the first person to arrive on October 9, 2013. He testified Petitioner arrived a while later, likely around 8:30 or 9:00, at which time Mr. Kowalski and Petitioner had a short conversation. Mr. Kowalski testified Petitioner, during this conversation, was speaking in a normal tone, was standing normal, and did not look impaired in any way. Mr. Kowalski testified that after their conversation, Petitioner went to a corner of the garage, crushed up a pill, and snorted the pill. Mr. Kowalski testified Petitioner's eyes looked glassy after Petitioner snorted the pill, and that Petitioner started slurring his words. He testified Petitioner started swaying and stumbling, to the point he almost hit Mr. Kowalski with his head.

The Arbitrator notes Mr. Kowalski testified before Petitioner given he was deposed before the trial, and that Petitioner had an opportunity to respond to and deny the accusation he took drugs prior to the accident. The Arbitrator finds it compelling Petitioner never denied Mr. Kowalski's testimony that he crushed and snorted the pill, either during his case in chief or on rebuttal. As such, the Arbitrator finds the testimony of Mr. Kowalski to be undisputed and therefore accepts the factual basis of his testimony. The Arbitrator also notes Mr. Schwager testified he requested a blood test be done at the hospital, but that the hospital staff informed him Petitioner had already been given pain medications and it would therefore be impossible to determine what was in his system before the accident. The Arbitrator finds this claim is corroborated by the EMT records showing Petitioner was given pain medications in route to the hospital. The Arbitrator also notes the initial hospital records showed Petitioner had a medical history of drug abuse, and that the last medical record in the file is a drug test in which Petitioner tested positive for cocaine and another unprescribed medication. For all these reasons, the Arbitrator finds Mr. Kowalski's testimony regarding Petitioner's drug use more probable than not.

The Arbitrator also finds Petitioner's drug use either was the sole reason for Petitioner's injury or at least constituted a departure from the course of the employment. The Arbitrator finds, for reasons discussed above, Petitioner had no reason to use the saw as part of his employment, and that Petitioner's explanation for how his accident occurred does not make sense based on the demonstration of how the saw is used. The Arbitrator notes that the mitre saw present in the hearing room at trial, the Petitioner was invited to give a demonstration of how the accident occurred and declined to do so. The mechanism of injury remains a mystery. The Arbitrator ttherefore finds the

only way Petitioner could have injured himself as he did was because of his intoxication or intentionally operating the saw in an improper manner. The Arbitrator does not find Petitioner's testimony regarding the blade guard being taped up credible. He therefore can find no explanation for why the blade guard, which only raises a couple inches when the blade goes down, and would not expose the chest to the blade in any way, would not have protected Petitioner's arm from the blade if the accident happened as Petitioner alleges. The only reasonable inference to draw from the evidence presented is that Petitioner was intoxicated while using the miter saw or intentionally using the saw in an improper manner so much so that he was no longer in the course and scope of his employment.

Regarding issue (F), whether Petitioner's current condition of ill-being is causally related to Petitioner's work activities on October 9, 2013, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's condition of ill-being is not causally related to Petitioner's work activities on October 9, 2013.

Regarding issue (G), Petitioner's earnings in the year preceding October 9, 2013, the Arbitrator finds as follows:

The Arbitrator notes the only evidence in the claim regarding wages aside from testimony of witnesses was the wage information Petitioner himself entered as Petitioner's exhibit 6. The Arbitrator notes the wage information indicates, at the top, that it includes all payments made from January 2013 through December 2015. No ruling is made on this issue. The Arbitrator finds that Petitioner was an independent contractor, not an employee.

Regarding issue (J), whether medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, nor that Petitioner sustained an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's did not incur any medical bills for which Respondent is liable.

Regarding issue (K), whether Petitioner is owed any TTD benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Respondent does not owe any TTD benefits as a result of Petitioner's activities on October 9, 2013.

Regarding issue (L), whether Petitioner is owed any nature and extent benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner is not entitled to any nature and extent benefits as a result of his activities on October 9, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☒ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DELLA DOWNING,

Petitioner,

20IWCC0657

vs.

NO: 11 WC 9902

DELNOR COMMUNITY HOSPITAL

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits, nature and extent, maintenance, and permanency and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission vacates the award of maintenance and strikes paragraph 2 of the Order section of the Arbitrator's Decision.

Additionally, the Commission replaces paragraph 3 of the Order section of the Arbitrator's decision with the following:

> Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.
>
> Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this

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credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Lastly, the Commission strikes paragraph 4 of the Order section of the Arbitrator's decision and replaces it with the following:

Respondent shall pay Petitioner permanent total disability benefits of $1,080.12 per week commencing on January 20, 2016, as provided in Section 8(f) of the Act. Commencing on the Second July 15th after the entry of this Award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act. Respondent shall pay Petitioner compensation that has accrued from January 20, 2016 through June 8, 2018.

Regarding page 6 of 22 of the Arbitrator's decision, the Commission strikes the second sentence of the first paragraph. Referring to page 17 of 22 of the Arbitrator's decision, the Commission strikes the last paragraph of Section (J) in its entirety, and replaces it with the following:

Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.

Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Referring to the last paragraph under Section (K) at page 19 of 22 of the Arbitrator's decision, the Commission strikes the last two sentences of said paragraph. The Commission also strikes page 22 of the Arbitrator's decision.

Lastly, in the fourth sentence of the last paragraph at page 13 of 22 of the Arbitrator's decision, the Commission corrects a scrivener's error and revises "board-based" to "broad-based".

Petitioner met her burden of proving that her current condition of ill-being regarding her cervical spine is causally related to injuries sustained in the work accident of August 29, 2010, and that this condition has rendered her permanently and totally disabled.

The award of permanent total disability is supported by a consistent and continuing course of treatment relating to Petitioner's cervical spine from the time of the initial 19(b) hearing on June 9, 2011, through the date of trial. The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies.

Following the 19(b) hearing, Petitioner continued treating with her neurosurgeon, Dr. Brayton, for her cervical spine condition (Px1), and at various pain clinics. (Px2, Px5, Px10) Petitioner continued these visits up through the date of trial. (Px10)

In February 2012, Petitioner underwent another cervical MRI, the prior one having been performed on February 9, 2011. The MRI study of the cervical spine performed on February 16, 2012 revealed: "the posterior disc protrusion at C5-C6 is slightly more broad-based with the presence of an annular tear." (Px2)

On March 2, 2012 Dr. Brayton reviewed the MRI results and noted "the slight progression in the C5-C6 along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal spine tenderness..." (Px1) However, as Dr. Brayton observed other findings requiring further explanation, he referred Petitioner to Dr. Santwani, a neurologist, for further testing.

In March 2012, Dr. Santwani diagnosed the Petitioner with multiple sclerosis. Significantly, Dr. Santwani also noted Petitioner's increased neck pain and arm paresthesias. (Px4) Petitioner makes no claim that her multiple sclerosis or treatment for same is related to the August 29, 2010 work accident.

Although Petitioner missed some of her appointments at the pain clinic between March and October 2012, she consistently continued to complain of neck and arm pain. By December 31, 2012, Petitioner was presenting with continued pain, worse in her neck and shoulders. (Px2) Through mid-2013 Petitioner continued to voice complaints and received treatment at the pain clinic for same. (Px2)

On May 28, 2013 Petitioner underwent an EMG/NCV of the upper extremities. This was an abnormal study indicating acute C5 radiculopathy on the right and C6 radiculopathy on the left. (Px4)

On May 30, 2013 Petitioner began treating at the pain clinic at Kishwaukee Hospital for chronic neck pain. History reflects the "pain began in August 2010 when she was lifting a patient." (Px5) She treated with Dr. Gregory Arnold at the clinic through 2013. (Px5) He diagnosed Petitioner with cervical radiculopathy, fibromyalgia syndrome and prescribed opioid therapy along with cervical trigger point injections. (Px5)

By the end of 2013, Petitioner switched pain management clinics as her insurance would no longer cover visits to Dr. Arnold and she began treating with Dr. Todd Hagle.

On December 26, 2013 Petitioner was seen by Dr. Hagle whose diagnosis included

chronic neck pain and at which time he noted "she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this." (Px10) Petitioner continued to see Dr. Hagle on a monthly basis with complaints of pain in her neck and into her arms ranging from 8/10 to 10/10. (Px10)

On February 10, 2014 Petitioner complained of pain in her neck, shoulders and arms. She noted the pain was "severe, chronic and disabling." (Px10)

An updated cervical MRI performed on February 25, 2014 revealed persistent multi-level degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annular tear as well as right paracentral C5-C6 disc protrusion. (Px1)

In August 2014 Dr. Brayton related Petitioner's "severe, unremitting neck pain and cervicogenic headaches" to the work injury. (Px1)

A repeat cervical MRI performed on August 1, 2014 revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (Px7)

On October 22, 2014 Petitioner underwent provocative discography ordered by Dr. Brayton resulting in a positive provocation discogram at C4-C5 and C5-C6. (Px8)

On December 29, 2014 Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Throughout 2015 Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications. (Px10)

On December 29, 2014 Dr. Neil Allen conducted a medical records review at the Respondent's request. He did not examine Petitioner on this date. Although Dr. Allen opined Petitioner's current state of ill-being was related to multiple sclerosis, even he related Petitioner's upper extremity pain and in the back of her neck to the work injury. (Rx1)

On February 12 ,2015 Dr. Brayton met with Petitioner to review the results of the provocative discogram, the last MRI and to discuss further treatment options.

At the time of this visit, Dr. Brayton noted Petitioner had sustained a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic changes at C4-C5 and C5-C6. (Px1) Dr. Brayton also noted Petitioner had been diagnosed with multiple sclerosis and had dysesthetic pain in both the lower and upper extremities. (Px1) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6 with a negative control level at C6-C7. The MRI revealed a progressive large, broad-based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which had progressed since her last imaging study. (Px1) There was also an increase in the annular bulge and ventral CSF effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5.

(Px1)

In terms of future treatment, among options discussed were surgical intervention involving a C4-C5 anterior cervical decompression and fusion including the risk of accelerated spondylitic changes at C6-C7. (Px1) Petitioner chose to defer surgery and continue with pain management.

On February 26, 2015 Petitioner was evaluated by Dr. Allen at Respondent's request. Dr. Allen included the "cowl-like discomfort she has over her shoulder" as part of Petitioner's current state of ill-being. (Rx1) Dr. Allen also conceded that the decrease in pin-prick to both upper extremities and the cowl of her shoulders was consistent with Petitioner's work injury. (Rx1, p. 73) Dr. Allen also referenced a cervical MRI Petitioner underwent specifically indicating an early annular tear at C4-C5 which he testified explained neck pain. Dr. Allen also testified annular tears are very painful and some people are actually confined to bed with annular tears. (Rx1, p. 23) Dr. Allen also acknowledged that he never reviewed the discogram of Petitioner's cervical spine as he didn't understand them, was never trained in them and has a hole in his knowledge. (Rx1, pp. 88-89)

On January 21, 2016 Petitioner saw Dr. Brayton who noted Petitioner "continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain and cervicogenic headaches." Dr. Brayton opined these conditions were caused by her work accident on August 29, 2010 and were conditions distinct from her multiple sclerosis. (Px1)

Dr. Brayton further noted cervical disc herniation persists at C5-C6 and had not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (Px1) Disc disease was noted at the C2 through C4 levels which he deemed permanent. (Px1)

Overall, it was Dr. Brayton's opinion that Petitioner had a permanent disc injury at C5-C6. Considering Petitioner's concurrent multiple sclerosis diagnosis, Dr. Brayton was not in favor of surgery given the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the cervical fusion needed at C5-C6. (Px1) Dr. Brayton cautioned that surgery remained a future potential need but presently, he would advocate against surgery.

Dr. Brayton further indicated Petitioner would require "comprehensive and procedural pain management, chronic pain control and permanent disability as a consequence to her injury." (Px1)

Dr. Brayton determined Petitioner was "permanent disability" and issued a script dated January 21, 2016 indicating "permanent work restrictions of no lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent." (Px1)

In May 2016 Petitioner underwent a second Section 12 exam by Dr. Martin Herman at Respondent's request. Dr. Herman opined Petitioner sustained a disc herniation as a consequence

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of the August 29, 2010 accident but it had been effectively treated and she was at maximum medical improvement subsequent to her return to work with restrictions issued by Dr. Brayton. He further opined that in May 2016 Petitioner was *not* capable of returning to work but related same to the multiple sclerosis and not the work-related injuries. (Rx2, pp. 47-48, 60)

Dr. Herman failed to review films of the MRIs Petitioner underwent on February 16, 2012, May 5, 2013, August 1, 2014, January 21, 2015 and December 3, 2015, and the discogram performed on August 20, 2014. (Rx2, pp. 30-31) Dr. Herman also acknowledged that Petitioner's condition was multi-factorial. (Rx2, p. 43)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2016, 2017, and 2018. (Px10) She has continued to complain of neck pain radiating into her arms, as well as tingling and numbness. (Px10)

An accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003) *citing Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d 123, 127 (1967).

Notwithstanding Petitioner's ability to return to restricted work at various times subsequent to the work accident, Petitioner's work-related cervical condition continued to gradually worsen both in terms of the severity of her symptoms and as confirmed by multiple diagnostic tests.

Given the totality of the evidence, the Commission finds Petitioner's work-related cervical spine condition was a contributory cause in rendering her permanently and totally disabled. The Commission further finds Petitioner was permanently and totally disabled commencing on January 21, 2016 based on Dr. Brayton's opinion of permanent disability rendered on said date.

Additionally, the Commission vacates the award for maintenance benefits. Having found Petitioner was permanently and totally disabled effective January 21, 2016, the issue of Petitioner's entitlement to maintenance benefits subsequent to that date is moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for a period of 169 1/7 weeks, commencing June 10, 2011 through August 11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2014 through January 20, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for life commencing on January 20, 2016, as provided in §8(f) of the Act, for the reason that the injuries sustained caused the Petitioner to be permanently disabled. Commencing on the second July 15th after the entry of this award, Petitioner may

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become eligible for cost-of-living adjustments, paid by the rate adjustment fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 12 2020

Maria E. Portela

Thomas J. Tyrrell

MEP/dmm
O:091520
49

Dissent

I respectfully dissent from the majority. I would find that Petitioner has not sustained her burden of proving that she is permanently and totally disabled as a result of her August 29, 2010, accident. Rather, Petitioner's permanent total disability is because of her progressive multiple sclerosis (MS) disease, diagnosed after her work-related accident and after she had returned to work as a registered nurse. While I empathize with Petitioner's suffering, for the following reasons I would award permanency on the basis of §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7 with permanent restrictions.

Prior §19(b) Hearing and Award

Before the work accident of August 29, 2010, Petitioner underwent a cervical spine MRI on January 22, 2010, and was diagnosed with neck pain and right cervical radiculopathy secondary to a herniated disc at C5-C6 for which she treated with Dr. Brayton, a neurologist, and Dr. Cherala, in Respondent's pain management clinic. (ArbX2, 1, PX1) After a §19(b) hearing, the Arbitrator deemed the August 29, 2010, accident resulted in: 1) an *aggravation* of a pre-existing herniated disc at C5-C6; and 2) a new disc herniation at C6-C7. (ArbX2, 4) (emphasis added)

The Arbitrator's §19(b) Decision notes that Petitioner underwent a cervical MRI on February 9, 2011, at Dr. Brayton's recommendation, to determine whether the C5-C6 herniation had worsened. "The radiologist's impression was that there was little change from the previous MRI *with the possible slight decrease in size of the C5/6 right disc herniation.*" (ArbX2, 2) (emphasis added)

The Arbitrator's §19(b) Decision further notes Dr. Butler's second IME of Petitioner on February 17, 2011, which states, "[t]he MRI finding *had actually improved to some degree.* Her symptoms were primarily subjective in nature and there was no objective neurologic deficit." (ArbX2, 3) (emphasis added) In the §19(b) award, the Arbitrator noted the improvement detected by the cervical MRI of February 17, 2011, most notably at C5-C6.

The Arbitrator awarded physical therapy (P.T.) as reasonable medical treatment and specifically denied the epidural steroid injection (ESI) that Dr. Brayton recommended concluding that, "Petitioner failed to prove the ESI prescribed by Dr. Brayton are (sic) reasonable and necessary medical treatment. However, she has not reached MMI and is entitled to further treatment with Dr. Brayton....Dr. Brayton has prescribed P.T., which is reasonable treatment for Petitioner's exacerbation." (ArbX2, 4-5)

The §19(b) Decision was appealed to the Commission where it was later affirmed and adopted. (ArbX2)

Post §19(b) Medical Treatment and Return to Work

After the §19(b) award, Petitioner called Dr. Brayton on August 1, 2011, and requested a release to return to work. Dr. Brayton imposed work restrictions of no lifting greater than 10 pounds, and to avoid excessive pushing and pulling. (PX1) On August 10, 2011, Petitioner saw

Dr. Yang at Delnor for pain management to obtain a repeat ESI, despite the Arbitrator's denial of the ESI. (PX2) Dr. Yang reviewed the MRI from February 9, 2011, and noted a "C6-7 minimal disc bulge." There is no evidence that Petitioner ever attended the P.T. awarded by the Arbitrator intended to address her cervical issues.

Petitioner began working full-time as a nursing supervisor at Loretto Hospital on August 12, 2011. (T, 25-26)

Petitioner returned to Delnor pain management clinic on October 21, 2011, and saw Dr. Hanna where Petitioner's past medical history was positive for migraines, chronic neck and back pain, chronic bronchitis, DVT, asthma, sleep apnea, IBD, Crohn's disease, hypothyroidism, anxiety/depression, ADD, obsessive-compulsive disorder, fibromyalgia, and endometriosis. (PX10, 10/21/11). Review of systems on that same day reflects that Petitioner complained of some nausea, stress incontinence, and joint swelling. Dr. Hanna noted only her pre-existing cervical disc at C5-C6 on the right side, omitting any reference to the C6-C7 level. Dr. Hanna found that a large segment of her pain is also myofascial related. Thus, he administered trigger point injections to the bilateral levator scapular muscles. (PX2)

On November 9, 2011, Petitioner saw Dr. Hanna for an ESI and medication management. Dr. Hanna administered a cervical ESI at C7-T1 and trigger-point injection to her bilateral levator scapular muscles. On December 12, 2011, Dr. Hanna administered additional trigger-point injections at the same level. Dr. Hanna noted a new diagnosis of "Abnormal neurologic examination with clonus. And Dysphagia."

Petitioner continued working full-time as a nursing supervisor for Loretto Hospital. On February 15, 2012, Dr. Hanna noted Petitioner's dysphagia has been increasing, and she had to bend her head forward or tuck her neck to swallow and that Petitioner has an abnormal neurologic exam with clonus. Dr. Hanna recommended a repeat cervical MRI and administered trigger point injections. (PX2)

Petitioner underwent the cervical spine MRI scan on February 16, 2012. The findings at C5-C6 were as follows:

> "There is a posterior disc osteophyte complex an associated right paracentral small posterior disc protrusion. The overall posterior extent of this disc protrusion *has not significantly changed* although there is slight broadening at the base of the protrusion and presence of an annular tear now identified. Mild effacement of the ventral CSF space is again noted. There is slight right facet degeneration resulting in minimal thinning of the right neural foramen, stable." (PX2) (emphasis added)

The radiologist's impression states: "The posterior disc protrusion and at C5-C6 *is slightly more broad-based on the current exam than when compared to previous although the posterior extent of the protrusion is stable. Remainder of findings are unchanged.*"(PX2) (emphasis added)

Dr. Brayton authored a letter to Dr. Branshaw, Petitioner's PCP, dated March 2, 2012. He notes that she "[h]as an extensive history of pain and radicular symptoms after a work related

injury of her neck causing a C5-C6 disc herniation on August 29, 2010. ... concerning symptoms of swallowing dysfunction, increasing spasticity of her upper and lower extremities especially noted in her lower extremities.... There is also hyperreflexia at the patellar tendon including crossed adductor reflexes and distribution of reflexes. There is an exaggerated wrist extensor reflex as well as brachioradialis reflex in the upper extremities, again with distribution of reflexes. There is sustained clonus bilaterally. There is also Babinski sign." (PX1)

Dr. Brayton advised the cervical spine results showed, "the *slight* progression in the C5-C6 (disc) along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her focal spine tenderness but it certainly does not explain her pathologic reflexes, hyperreflexia, clonus, and Babinski signs. There is no evidence of intrinsic cord lesion on the presented cervical MRI scan, but I am concerned that *she has evidence of diffuse upper motor dysfunction.*" (PX1)

Dr. Brayton further wrote, "In summary, the patient's neck pain may be explained by the *relatively modest changes* of the C5-6 disk herniation which does not exert any further compression of the neural elements combined with the facet disease at C5-6 and C6-C7, but it certainly does not explain the patient's rather concerning finds consistent with diffuse upper motor dysfunction." (PX1) (emphasis added)

On March 2, 2012, an MRI of the brain confirmed a brain lesion at the right aspect of the pons and loss of the surrounding white matter material around the brain stem. Thereafter, on March 30, 2012, a spinal tap and lumbar puncture ordered by Dr. Santwani was performed because of the brain lesion, or abnormal mass in Petitioner's brain, the clonus and the increased reflexes. The spinal tap confirmed multiple abnormal bands consistent with a clinical diagnosis of MS. (RX1, 19-21, PX4)

During this work-up that diagnosed MS, Petitioner continued working full-time as a nursing supervisor. However, Petitioner was terminated from her position at Loretto Hospital for labor/union reasons unrelated to her physical condition on May 20, 2012. Petitioner testified that she continued to look for work in the nursing field. (T, 26, 33) The fact that the Petitioner was still looking for work at this juncture shows the work injury did not disable Petitioner from working at that time, and further, that her work-related condition was stable and not worsening.

On August 23, 2012, Petitioner advised Dr. Brayton she wanted to return to work and requested new, more lenient restrictions. Dr. Brayton assigned restrictions of lifting 50 pounds frequently and 100 pounds occasionally. (T, 31) Petitioner testified that essentially if she went into the doctor and said, "I feel like I can do this" they were willing to adjust her restrictions so she could take a job she located. (T, 66)

Petitioner underwent an EMG/NCV some nine months later, on May 28, 2013, which showed "evidence of a *trace*, acute, C5 radiculopathy on the right and a *mild,* acute C6 radiculopathy on the left. There is no definitive electrophysiological evidence of a brachial plexopathy or peripheral neuropathy affecting the upper extremities at this time." (PX4) (emphasis added) This is at the level of Petitioner's pre-existing C5-C6 disc herniation, and the findings are

the same or similar to the EMG/NCV of October 20, 2010. These objective tests do not explain Petitioner's ongoing symptoms and complaints.

In 2013, Petitioner applied for Social Security Disability Insurance (SSDI) benefits. (T, 67)

Petitioner began working full-time as a float nurse on September 9, 2013, at DuPage Convalescent Center. (T, 18) Petitioner continued to work until January 5, 2014, at which time Dr. Santwani provided an off-work slip excusing Petitioner from work through January 9, 2014, citing a flare-up of her MS condition or from multiple falls. Dr. Santwani further excused Petitioner from work on February 23, 2014, February 26, 2014, and February 27, 2014, and February 23 through March 9, 2014, again for flare-ups of her MS condition, or from multiple falls. No off work slips were related to her work-related cervical condition. (PX4, work status notes)

On February 25, 2014, Petitioner underwent a cervical MRI which showed her objective results were unchanged from previous scans. By that time, however, Petitioner was exhibiting symptoms of left foot drop. According to Dr. Allen, absent lumbar spine disease, which was confirmed by MRI on February 25, 2014, the lesion causing this symptom had to be above that level, at the neck or in the brain. In fact, she had findings both in the neck, but particularly in the brain, that would explain the foot drop. (RX1, 25)

Dr. Santwani released Petitioner to return to light duty work on March 12, 2014, after an MS flare-up. Petitioner was released to return to work *with no* restrictions on March 13, 2014. (PX4) (emphasis added) Thereafter, on March 30, 2014, April 2, 2014, and April 3, 2014, Dr. Santwani excused Petitioner from work after multiple falls attributable to her MS and unrelated to her cervical condition. She also received an off work note from Dr. Santwani on April 5 and April 6, 2014, again for MS exacerbation and severe falls. (PX4) On April 21, 2014, Petitioner reported to Dr. Santwani that she was hospitalized for an MS flare up. Petitioner reported that her legs were weak, she reported frequent falling and memory problems, increased dysphagia and choking on liquids, her vision was blurred, and her body was weak with generalized pain. (PX4)

Petitioner testified that she was terminated from her position at DuPage Convalescent Center in May 2014, "for missing work for medical reasons." When asked if she missed work because of issues regarding her cervical spine, Petitioner testified that she did. (T, 32) However, Dr. Santwani's off-work notes from January, February, March, and April 2014, indicate Petitioner missed work because of MS flare-ups or falls and not the work-related cervical condition. (PX4))

Petitioner testified that she looked for work in nursing management thereafter until she was awarded SSDI benefits in 2015. (T, 71) Petitioner never looked for work after her award of SSDI. (T, 67)

Petitioner had not seen Dr. Brayton in two years, since he wrote Dr. Branshaw in 2012 and referred her to Dr. Santwani at that time. On August 19, 2014, however, Petitioner returned to Dr. Brayton. After reviewing the August 1, 2014, cervical MRI, Dr. Brayton advised Dr. Branshaw that the continued herniation at the C5-C6 level *has not progressed much* and does not significantly compress the neural elements and suggested a provocative discography of the cervical spine both

at the C5-6 level and control levels. (PX1) He did not mention the disc at C6-C7. Dr. Brayton saw Petitioner only two more times, on February 12, 2015 and on January 21, 2016.

Petitioner underwent a discogram at Kendall Pointe Surgery on October 22, 2014. The discogram report states, "[a]t both the C4-C5 and C5-C6 discs, the patient experienced posterior bilateral cervical pain. (PX8) The pain experienced was equal at both levels. At the C6-C7 disc, the disc appeared normal, and no pain was produced." (PX8) On February 12, 2015, Dr. Brayton reviewed the discogram.

On December 2, 2014, Dr. Santwani ordered a functional capacity evaluation (FCE) to assess Petitioner's capabilities at that time. Petitioner never underwent the FCE to quantify her work capabilities.

Before trial, on March 28, 2018, Petitioner underwent another cervical MRI. The radiologist's impression states, "small central protrusion of the disc at C2-3 and C5-6 contributing to mild central stenosis; 2) multilevel degenerative disease of the cervical spine; 3) no abnormal signal or enhancement of the visualized spinal cord."

Dr. Allen's Medical Opinion

Petitioner was seen by Dr. Neil Allen at Respondent's request pursuant to §12. Dr. Allen authored two reports dated December 29, 2014, and February 26, 2015, and testified via evidence deposition on August 10, 2015. Dr. Allen is board certified in both internal medicine and neurology but also published and involved in presentation and research of MS for 15-20 years. (RX1, 8-9) He testified that he reviewed Dr. Brayton's medical records from 2002 noting that seven years prior to 2003, Petitioner was kicked in the head during a soccer game and had migraine type headaches including in the back of her head. (RX1, 15, 84) Dr. Allen reviewed the August 29, 2010, cervical MRI and confirmed the only new finding was the C6-C7 diffuse disc bulge. (RX1, 16)

Dr. Allen agreed with Dr. Brayton's assessment of her symptoms and that the February 16, 2012, cervical MRI showing that the C5-C6 protrusion was slightly more broad-based than on earlier examination and that the "MRI didn't explain her increased reflexes and clonus in her legs, difficulty walking, and problems swallowing." (RX1, 19) An MRI of the brain was performed on March 2, 2012, which showed a brain lesion at the right aspect of the pons which turned out to be a demyelinating area, an area of local inflammation, and loss of the surrounding white matter material around the nerves of the actual spinal—of the actual brain stem itself, consistent with MS. (RX1, 20) She underwent a spinal tap or a lumbar puncture because of the clonus in her ankles, the abnormal mass in the brain and increased reflexes. The puncture showed multiple abnormal bands, consistent with MS. (RX1, 21)

Dr. Allen opined that Petitioner's falling was from the lesion noted in the pons of the brain. Her increase in memory problems could be from the narcotic medications; the difficulty swallowing was likely from the lesion in the pons as was the occasional choking on liquids. Petitioner's problems finding words and lack of coordination were from narcotics and the MS. (RX1, 27-28, 34)

Dr. Allen also testified that lesions in the brain can be caused by the MS, migraines and encephalitis. (RX1, 37) Petitioner's hyperreflexia was caused by interruption in the transmission of impulses from the brain stem spinal cord to lower extremities. It is a manifestation of MS, the tumor, and a vitamin B-12 deficiency, which Petitioner had in the past. (RX1, 38) There was no evidence of myelomalacia (spinal cord damage) or spinal cord compression. The physical examination of February 26, 2015, revealed Petitioner complained of migraines dating to 1995 when she suffered a Grade 2 concussion. (RX1, 41-42, 84).

Dr. Allen's impression after the February 2015 examination was that her current condition of ill-being appeared to be a loss of balance, increased frequency of headaches, occurring two to three times a week, and the cowl-like discomfort she has over her shoulders secondary to the cervical spine injuries that have been previously adjudicated. It was his opinion that none of the conditions of MS, hyperreflexia in her legs or fibromyalgia were related to the work accident. (RX1, 50) He opined any work restrictions that she has at this time would be related to migraines and would not be related to her work accident. (RX1, 52)

Dr. Allen opined the only symptoms related to her work injury, were "[p]ain in her neck, pain in her arm, any numbness or weakness that she had in her upper arm as found by other examiners which I did not go into since that information had already been adjudicated." (RX1, p. 53) No lower extremity findings, headaches, intermittent and episodic dizziness, light sensitivity, sound sensitivity, nausea, her gait, spasticity of her lower extremities, weakness, lack of attention, and difficulty with memory are related. (Rx1, 53-56)

When asked if Petitioner was capable of working with regard to her injury which had been adjudicated in the §19(b) hearing, Dr. Allen opined that, "[i]t was documented that she returned to work subsequent to her neck injury in 2010, and she returned to work in 2011. She was performing her full duties as a nurse at Loretto Hospital when she did, in fact, return to work and was also capable of exercising up to three time per week. (RX1, 56) Dr. Allen testified that on August 23, 2012, Dr. Brayton released Petitioner to return to work with restrictions of lifting 50 pounds and occasional lifting of up to 100 pounds, consistent with the duties of a registered nurse and he was in agreement with those restrictions. (RX1, 23, 88)

Dr. Brayton's Medical Opinion

On January 21, 2016, Dr. Brayton opined that Petitioner continued to be disabled by pain requiring high-dose analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches, caused by her work injury which is a separate condition from her MS. He also opined that Petitioner's MS was triggered by her work injury and disc herniation. Dr. Brayton further stated that the cervical disc herniation persists at C5-C6 and has not healed or improved but does not progress. Dr. Brayton described her disc disease at C2-3 and C3-4 levels that are unrelated to the August 29, 2010, work accident. He advocated avoiding surgery. Dr. Brayton provided one work status note that was handwritten that states, "Permanent work restrictions no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment-permanent. He also provided a hand-written note on a prescription pad that documents, "Permanent Disability."

Dr. Brayton never testified regarding his January 21, 2016, opinions.

Dr. Herman's Medical Opinion

Petitioner underwent a second §12 exam by Dr. Martin Herman, a neurosurgeon, at Respondent's request in May 2016. Dr. Herman testified that Petitioner has three ongoing problems: 1) a pre-existing condition of long-standing neck pain since 1995 with cervical degenerative disease; 2) the disc herniation (C6/7) that occurred in 2010; and 3) progressive neurological abnormalities due to her MS. The pre-existing disc disease and the herniated disc did not prevent her from working as a registered nurse. The symptoms from the MS would prevent her from returning to work as a registered nurse. (RX2, 42-43) Dr. Herman opined that her (C6-C7) disc herniation was very small according to her reports and it is not possible to attribute the large number of not associated symptoms and signs that she's having to this disc herniation because people with disc herniations do not get loss of coordination, blurry vision, memory loss, or the kind of weakness she's describing. (RX2, 43-45) Dr. Herman testified that a 50-pound and a 100-pound restriction at medium duty, roughly two years after her injury was completely reasonable in regard to her work-related condition. (RX2, 22) He found that Petitioner had reached MMI when she was returned to work with the restrictions Dr. Brayton imposed of 50-pounds and 100-pounds occasionally. Petitioner did not need additional treatment for her work-related condition. (RX2, p. 17)

Analysis and Conclusions

The majority finds that, "The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies." I disagree. The medical records show Petitioner's work-related condition was stable and this stable work-related condition did not prevent Petitioner from working. Also, the condition that was progressively worsening was her MS condition that Petitioner stipulated was not causally related to the work accident.

The sole new finding resulting from the work accident, the disc at C6-C7, was non-symptomatic. Moreover, the February 16, 2012, cervical MRI confirmed the pre-existing C5-C6 disc was almost completely stable and unchanged. Objectively, Petitioner's work-related conditions at C5-C6 and C6-C7 were stable some two years post-accident. Also, the May 28, 2013, EMG/NCV (6/8/18 Hearing, PX4) documents the same or similar results as the October 20, 2010, EMG/NCV. (6/29/11 Hearing, PX1)

Petitioner was able to return to work and did, in fact, return to work. Petitioner worked as a full-time registered nurse after the accident from August 12, 2011 – May 20, 2012. Shortly thereafter, in August 2012, Dr. Brayton updated his employability assessment imposing more lenient restrictions, 50-pounds frequently and 100-pounds occasionally. Petitioner was working from September 9, 2013 – January 5, 2014, until taken off by Dr. Santwani because of her progressively worsening MS symptoms that even required hospitalization. (PX4) Dr. Santwani's treatment from April 23, 2012, solely addressed Petitioner's progressing MS symptoms. The only condition that was progressively worsening both symptomatically and per the objective diagnostic studies was Petitioner's non-work-related MS condition not her work-related cervical condition.

It is noteworthy that only after the progressively worsening non work-related MS condition, did Dr. Brayton change her work restrictions and find she was unemployable.

The majority's reliance on *Sisbro* to award PTD benefits is misplaced. (citations omitted) The majority asserts that the Petitioner's cervical condition is a "contributing cause" to her permanent and total disability. It is the responsibility of the claimant to establish that he or she is entitled to permanent total disability benefits. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 IllApp.3d 1117, 1129, 864 N.E.2d 838, 309 Ill.Dec. 597 (2007). A claimant is required to establish the elements of his right to compensation under the Workers' Compensation Act. *Certified Testing v. Industrial Com'n.*, 305 Ill.Dec. 797, 856 N.E.2d 602, 367 Ill.App.3d 938 (2006). In order to establish entitlement to PTD benefits, a claimant must establish that she is incapable of performing services except for those for which there is no reasonable stable labor market because of the effects of the work injury. *Federal Marine.*

The Appellate Court in *Alano v. Industrial Commission* stated:

> [T]he focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability, and 'if an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, such employee is not totally and permanently disabled.' *Alano v. Industrial Com'n.*, 282 Ill.App.3d 531, 668 N.E.2d 21 (1996) citing *E.R. Moore Co. v. Industrial Com'n*. (1978), 7 Ill.2d 353, 361, 17 Ill.Dec. 207, 376 N.E.2d 206.

In this case, Petitioner's work-related medical disability is her cervical condition at C5-C6 and C6-C7. However, the C5-C6 disc was stable and did not prevent her from returning to work, albeit with restrictions, in 2011, 2012, 2013 or thereafter. In fact, Petitioner returned to work full duty at Loretto Hospital in 2011 until she was terminated in 2012, and also at DuPage Convalescent Center, until she was terminated in 2015. The condition of disability preventing Petitioner from gainful employment was the progressively worsening and debilitating non-work related MS condition. Petitioner has failed to show her work-related medical disability impaired her employability.

Dr. Brayton is the only doctor who opined that Petitioner is permanently and totally disabled as a result of the August 29, 2010, work injury. Dr. Brayton's credibility is tainted for a multitude of reasons. First, he allowed the Petitioner to dictate her work restrictions on multiple occasions. Second, Dr. Brayton did not testify and thus never provided the basis for his opinion, that the aggravation of a pre-existing herniated disc at C5-C6, which was stable or smaller on the cervical MRI on February 10, 2011, caused Petitioner's permanent disablement. Finally, Dr. Brayton's opinion on Petitioner's employability regarding her cervical spine restrictions, lacks foundation, and the purview of that opinion belongs to a certified vocational counselor. The Appellate Court specifically rejected a medical opinion regarding an injured employee's employability in *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 865 N.E.2d 342 (2007). In *Westin,* the court held:

> As far as we can tell, Dr. Coe had not ordered or reviewed any vocational or rehabilitative tests, conducted a labor-market survey on claimant's behalf,

> attempted to find claimant a position within his restrictions, or prescribed a functional capacity evaluation. In fact, Dr. Coe acknowledged on cross-examination that he never reviewed a job description for claimant's position, that claimant only told him "in general in his limited way" what his job duties entailed, and that he never ordered any vocational evaluation of claimant. Although Dr. Coe emphasized that claimant's limited knowledge of the English language restricted his ability to be rehabilitated in an occupation other than a painter, our supreme court has suggested that one's language skill is insufficient to support a finding of odd lot. *Valley Mould & Iron Co.*, 84 Ill. 2d at 548. [***41]

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 544-545, 865 N.E.2d 342, 358, (2007).

The evidence is clear Petitioner's work-related cervical condition had stabilized and she was able to return to gainful employment until her progressively worsening MS rendered her unable to do so. Therefore, Petitioner did not sustain her burden of proving that she was permanently and totally disabled as a result of the injuries caused by the work accident.

Therefore, I find that the opinions of Dr. Allen and Dr. Herman are more credible than Dr. Brayton's unsubstantiated opinion that Petitioner is permanently and totally disabled as a result of the work injury. Dr. Herman opined Petitioner sustained a disc herniation from the August 29, 2010, accident but it had been effectively treated and she was at maximum medical improvement with her return to work with 50/100 pound lifting restrictions imposed by Dr. Brayton in 2012, comporting with Dr. Allen's opinion. He further opined that as of May 2016 Petitioner was *not* capable of returning to work but because of the MS and not because of the work-related condition. (Rx2, 47-48, 60) Further, the off work notes provided by Dr. Santwani in 2014 for MS flare-ups are consistent with Dr. Herman's opinion that Petitioner could not work because of her MS, not her cervical condition.

Several Commission Decisions support the proposition that when a Petitioner is disabled from another medical condition(s) unrelated to the work accident, it is the Petitioner's burden to prove that she is entitled to an award of permanent and total disability for her work accident. See, *Hamilton v. A T & T*, 99 IIC1127, (Petitioner was diagnosed with carpal tunnel syndrome and she ultimately underwent bilateral carpal tunnel releases for her condition. Subsequent to her surgeries, Petitioner was diagnosed with left reflex sympathetic dystrophy and later with bilateral epicondylitis and fibromyalgia. Eventually Petitioner was diagnosed with sarcoidosis. In denying benefits, the Arbitrator found, and the Commission upheld, that Petitioner was taken off work completely due to an unrelated lung condition in February of 1997); *Tidemann v. Homes By Hemphill*, 09 IWCC 0330 (Commission reversed the Arbitrator's decision regarding permanent and total disability, finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent, however that Petitioner failed to prove a causal connection between her work related injuries of August 14, 1989, and her current condition of ill-being with respect to her nose, left hip, right and left feet, and pre-existing rheumatoid arthritis and awarded permanency on the basis of §8(d)2 and §8(e)); and *Karen McCurrie v. Grove Dental*

Associates 09 IWCC 0050 (Commission upheld Arbitrator's denial of permanent and total disability award, where Petitioner had a compensable accident on December 10, 2002, which did aggravate an underlying condition in her lower back. She also had prior to that work accident complaints of headaches and chronic fatigue among other symptoms, which eventually were diagnosed in 2005 as fibromyalgia and chronic fatigue syndrome. In reviewing the treating records following the accident of December 10, 2002, the Arbitrator/Commission held that Petitioner's condition of ill-being about her lower back was related to the accident of December 10, 2002, but her prior and subsequent and present complaints diagnosed as fibromyalgia, chronic fatigue syndrome, and headaches are unrelated to the accident of December 10, 2002. While the Petitioner may very well be unable to work at the present time, that inability to work is related to the non-work related conditions of fibromyalgia, chronic fatigue syndrome, and headaches.)

Based on a careful review of the evidence, I would award Petitioner permanency on the basis of loss of use of a person-as-a whole under §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7, resulting in permanent restrictions. Therefore, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOWNING, DELLA
Employee/Petitioner

Case# **11WC009902**

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

20IWCC0657

On 8/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1876 CZAPLA LAW
EDWARD A CZAPLA
1821 WALDEN OFFICE SQ STE 400
SCHAUMBURG, IL 60173

2965 KEEFE CAMPBELL & ASSOC LLC
SHAWN R BIERY
118 N CLINTON STE 300
CHICAGO, IL 60661

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STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ XXNone of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DELLA DOWNING
Employee/Petitioner

v.

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

Case # 11 WC 9902

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Wheaton**, on **6/8/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **8/29/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$84,249.36**; the average weekly wage was **$1,620.18**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

1. RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR 169 1/7 WEEKS, COMMENCING JUNE 10, 2011 THROUGH AUGUST 11, 2011; MAY 21, 2012 THROUGH SEPTEMBER 19, 2013; AND MAY 5, 2014 THROUGH JANUARY 20, 2016, AS PROVIDED IN SECTION 8(b) OF THE ACT.

2. RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $1,080.12/WEEK FOR 124 AND 1/7 WEEKS, COMMENCING JANUARY 21, 2016 THROUGH JUNE 7, 2018, AS PROVIDED IN SECTION 8(a) OF THE ACT.

3. RESPONDENT SHALL PAY PETITIONER THE REASONABLE AND NECESSARY MEDICAL EXPENSES INCURRED FOR THE CERVICAL SPINE AS IDENTIFIED IN PX.1., PX.2, PX.4, PX.5, PX.6, PX.7, PX.8, PX9, PX 10, PX.11, PX.12, PURSUANT TO SECTION 8 (A) AND 8.2 OF THE ACT AND SUBJECT TO THE MEDICAL FEE SCHEDULE.

4. RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR LIFE, COMMENCING ON JUNE 8, 2018, AS PROVIDED IN SECTION 8(f) OF THE ACT. COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(g) OF THE ACT. RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM 8/29/10 THROUGH 6/8/18, AND SHALL PAY THE REMAINDER OF THE AWARD, IF ANY, IN WEEKLY PAYMENTS.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

KSSteffen **July 28, 2018**

Signature of Arbitrator Date

AUG 10 2018

PROCEDURAL HISTORY

On June 9, 2011, a prior 19(b) Petition for Immediate Hearing was heard before an Arbitrator. The Arbitrator found that Petitioner's current condition was causally related to her undisputed work accident of August 29, 2010. Specifically, Petitioner was found to have sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator Ex.2) Petitioner was awarded temporary total disability benefits commencing September 10, 2010 through November 11, 2010; February 3, 2011 through February 4, 2011; February 27, 2011 through March 10, 2011; March 12, 2011 through March 16, 2011; and March 19, 2011 through the June 9, 2011 19(b) hearing. (Arbitrator's Ex. 2) The Arbitrator determined Petitioner had not reached maximum medical improvement and was entitled to further medical treatment with Dr. Brayton (Arbitrator's Ex.2).

The Arbitrator's 19(b) decision was affirmed and adopted by the Commission on August 2, 2012 (Arbitrator's Ex.2) A transcript of the 19(b) hearing was admitted into evidence. (Arbitrator's Ex.2)

On June 8, 2018, the matter was heard by the Arbitrator Ketki Steffen. The issues of accident, notice and causation were previously decided Petitioner stipulated that there was no claim for multiple sclerosis attributable to the August 29, 2010 accident at work.

Unpaid medical charges and unpaid lost time in the form of TTD and maintenance were alleged at hearing along with the request for a finding related to Nature & Extent if the Arbitrator were to agree that the evidence presented supports a finding of Petitioner having reached a state of Maximum Medical Improvement. Petitioner alleged odd-lot permanent disability applies in regard Nature & Extent.

Petitioner further stipulated that Respondent was entitled to a credit pursuant to Section 8(j) of the Act for any payment of Petitioner's medical expenses. Respondent's counsel acknowledged that he was not disputing Petitioner's claim for permanent total disability benefits pursuant to Section 8(f) of the Act.

FACTUAL HISTORY

Petitioner is a licensed nurse and had worked in that capacity at the time of her accident on August 29, 2010 when sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6.

The following history entails the medical and other relevant facts after the prior 19B/8A hearing and decision:

On July 14, 2011 Petitioner telephoned Dr. Brayton complaining of left and right arm numbness and pain. (PX.1.) Dr. Brayton's August 1, 2011 office note reflects Petitioner "called in req release to work still has neck and arm SX but must RTW due to financial situation." (PX.1) Dr. Brayton released Petitioner back to work at her request with a 10-pound lifting restriction and no excessive pushing/pulling (PX.1.)

On August 12, 2011 Petitioner went to work at Loretto Hospital as a nursing supervisor. Petitioner worked full-time until May 20, 2012 when she was terminated. The nursing staff unionized and Petitioner lost her job.

Petitioner continued to experience radiating neck pain and was referred by Dr. Brayton to the Delnor Hospital pain clinic for a series of cervical epidural steroid injections. (PX.1.) Dr. Yang examined Petitioner on August 10, 2011 and noted Petitioner's neck pain radiating to her bilateral upper extremities (PX.2.) Petitioner complained of numbness in all 5 fingers on both hands. Dr. Yang reviewed the

February 9, 2011 cervical MRI which showed a C5-C6 right sided paracentral disc herniation, C4-C5 small disc protrusion and C6-C7 disc bulge. (PX.2.) Petitioner was diagnosed with cervical radiculopathy, secondary to spinal stenosis, cervical degenerative disc disease with overlying myofascial pain. (PX.2.)

On August 17, 2011 Petitioner received the first of a series of cervical epidural steroid injections at Delnor Hospital. Dr. Hanna prescribed Vistaril, Zanaflex and Norco for Petitioner's cervical pain. (PX.2)

On October 21, 2011, Dr. Hanna prescribed a Duragesic patch for Petitioner's cervical pain and Petitioner received trigger point injections to the bilateral scapular and a second cervical epidural steroid injection. (PX.2) On November 9, 2011, Petitioner received a third cervical epidural steroid injection and bilateral scapular trigger point injections. (PX.2.)

Petitioner returned to see Dr. Hanna on December 12, 2011, complaining of increasing neck pain. While Petitioner reported pain relief with the injections and Duragesic patch she continued to experience muscle spasms along the neck, upper shoulders and lots of right arm pain. (PX.2.) Dr. Hanna continued to prescribe Norco, Zanaflex, Vistaril along with the Duragesic patch for Petitioner's chronic neck pain and cervical radiculitis. (PX.2.) Petitioner received 5 trigger point injections to the scapula, trapezius and cervical paraspinal muscle.

Petitioner saw Dr. Hanna on February 15, 2012 complaining of *"worsening neck pain down both arms with numbness and tingling into the hands."* (PX.2.) Dr. Hanna refilled Petitioner's Duragesic patch, Norco, and Zanaflex. Petitioner received bilateral trigger point injections to the trapezius and levator scapula for her myofascial pain. (PX.2.)

MRI study of the cervical spine performed on February 16, 2012 revealed:

"The posterior disc protrusion at C5-C6 is slightly more broad based with the presence of an annular tear." (PX.2.)

Dr. Brayton reviewed the MRI results with Petitioner on March 2, 2012 and noted *"the slight progression in the C5-C6 disc along with the more pronounced annular tear explains some of her increased neck symptoms and pain. The increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal cervical spine tenderness, but it certainly does not explain her pathologic reflexes, hyperreflexia, Clonus and Babinski signs."* (PX.1) Petitioner was referred to Dr. Santwani, a neurologist, for electrophysiologic testing.

Dr. Santwani performed a number of tests including a lumbar puncture and spinal tap and ultimately diagnosed Petitioner with multiple sclerosis. (PX.4.) Petitioner stipulated at the onset of the hearing that treatment for the multiple sclerosis was unrelated to her August 29, 2010 injury at work.

Dr. Hanna continued to refill Petitioner's narcotic pain medications throughout 2012. (PX.2,3) Dr. Hanna noted on December 31, 2012 that the *"pain was severe with significant impact on functions and quality of life."* (PX.2.) Petitioner returned to Dr. Hanna on February 25, 2013 *"complaining of worsening pain in her fingertips, with neck pain across both shoulders, radiating down both of her arms with spasms on 9-10-out of 10 in severity, constant numbness and tingling into the arms."* (PX.2.) Dr. Hanna continued the narcotic pain treatment.

Cervical MRI study performed on May 5, 2013 revealed:
C4-C5 small central disc protrusion with minimal early annular tear;

C5-C6 disc desiccation and mild loss of disc height with broad-based central right paracentral disc protrusion which moderately indents the ventral sac with the associated central annular tear; and C6-C7 small lateral spurs.

Petitioner's last treatment with Dr. Hanna was May 13, 2013. Petitioner's insurance changed and she needed to switch to a pain physician in her network. Petitioner's medications were refilled and she was referred by her primary care physician, Dr. Branshaw, to Kishwaukee Hospital for pain management. (PX.2.)

On May 30, 2013, Petitioner presented to the pain clinic at Kishwaukee Hospital for her chronic neck pain. History reflects the *"pain began in August 2010 when she was lifting a patient"*. (PX.5.) Petitioner described the pain as aching, burning, constant, numb, pressure, radiating, sharp, squeezing, tingling, and tiring. Petitioner successfully underwent an opioid assessment to determine if she was an appropriate candidate for continued opioid therapy. (PX.5.) On June 12, 2013, Dr. Gregory approved long term opioid therapy and prescribed the Fentanyl Duragesic patch and Norco for breakthrough pain. (PX.5.)

Petitioner treated with Dr. Gregory at the Kishwaukee Pain Clinic throughout 2013. (PX.5.) He diagnosed Petitioner with cervical radiculopathy and fibromyalgia syndrome. On August 8, 2013, Petitioner received 4 cervical trigger point injections for her neck pain. (PX.5.) Patient reported that off of opioid medications she is not able to get out of bed and function, but with the medications, she is able to function. (PX.5.)

On September 20, 2013, Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was let go because of missing work.

On October 31, 2013, Dr. Gregory noted that Petitioner's pain has been worse since she has been back to work. (PX.5.) Dr. Gregory continued to prescribe the

Duragesic patch and Norco. In December 2013, Petitioner had to switch pain management physicians because of insurance coverage.

On December 26, 2013, Petitioner saw Dr. Todd Hagle for her chronic neck and back pain. (PX.10) Petitioner was referred to Dr. Hagle, a pain management anesthesiologist, by Dr. Branshaw. Dr. Hagle diagnosed Petitioner with chronic neck and back pain and noted *"she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this."* (PX.10) Dr. Hagle initially prescribed Lyrica and Baclofen for Petitioner's neck pain but she experienced side effects with Lyrica and it was discontinued. Thereafter, Dr. Hagle prescribed the Duragesic patch, Norco and Baclofen for Petitioner's neck pain. (PX.10)

Petitioner treated with Dr. Hagle on a monthly basis for her chronic neck pain. On February 10, 2014, Petitioner complained of pain in her neck, shoulders, and arms. Petitioner noted the pain was *"severe, chronic and disabling."* (PX.10) Dr. Hagle continued to prescribe the Duragesic patch, Baclofen and Norco for Petitioner's neck pain. Dr. Hagle's May 12, 2014 office note states ***"she*** (Petitioner) ***lost her job recently due to many falls/sick days."*** (PX.10)

A February 25, 2014 cervical MRI revealed persistent multilevel degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annual tear as well as right paracentral C5-C6 disc protrusion. (PX.1.)

Petitioner returned to Dr. Brayton on August 14, 2014 to discuss the recent MRI findings. Dr. Brayton noted that while recovering from her cervical disc herniation she was diagnosed with multiple sclerosis. Petitioner complained of severe painful dysesthesias in her arms and legs as well as severe unremitting neck pain and

cervicogenic headaches. (PX.1.) Dr. Brayton noted Petitioner has persistent pain associated with her work injury causing a C5-C6 disc herniation. (PX.1.) Dr. Brayton ordered provocative discography at C5-C6 which was performed at Kendall Pointe Surgery Center on October 22, 2014. Discography demonstrated posterior bilateral cervical pain at C4-C5 and C5-C6. (PX.8.) Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications.

An August 1, 2014 cervical MRI revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (PX.7.)

On December 29, 2014, Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Petitioner was also experiencing diffuse pain secondary to her multiple sclerosis. Petitioner continued to see Dr. Hagle on a monthly basis throughout 2015 to refill her pain medications. (PX.10)

Dr. Brayton discussed the results of the discogram with Petitioner on February 12, 2015. He noted at that time that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Dr. Brayton further noted that Petitioner had been diagnosed with multiple sclerosis and had dysethetic pain in the upper and lower extremities. (PX.1.) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6. MRI revealed a progressive, large, broad based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which have progressed since her last imaging study. (PX.1.) There was also an increase in the annular bulge and central CFS effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a

strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5. (PX.1.) Surgical intervention involving a C4-C5 anterior cervical decompression and fusion with plating was discussed including the risk of accelerated spondylitic changes at C6-C7. (PX.1.) Petitioner wished to defer surgery and continue with pain management.

Petitioner continued to refill her pain medications with Dr. Hagle on a monthly basis throughout 2015. (PX.10) Petitioner was awarded Social Security Disability benefits in 2015. MRI of the cervical spine completed on December 3, 2015 revealed no significant interval change.

Petitioner returned to Dr, Brayton on January 21, 2016 to discuss the MRI results. Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her M.S."* Examination revealed continued myelopathy with spasticity in both upper extremities. Cervical disc herniation persists at C5-C6 and has not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (PX.1.) There were also disc disease at C2-C3 and C3-C4 which is permanent. (PX.1.)

Dr. Brayton noted that *"overall it appears the patient has a permanent disc injury at C5-C6 I would favor against surgery given the concurrent diagnosis of MS and the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the surgical fusion needed at C5-C6." (PX.1.)* Dr. Brayton further noted that Petitioner *"will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a*

consequence to her injury." (PX.1.) Petitioner was issued ***"Permanent work restrictions of no lifting, frequent breaks, with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent."*** (PX.1.)

Petitioner refilled her pain medications with Dr. Hagle throughout 2016. (PX.10.) A follow-up cervical MRI performed at Kishwaukee Hospital on November 23, 2016 revealed some mild degenerative changes at C5-C6. (PX.10)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2017 and 2018. (PX.10). On January 16, 2017 Dr. Hagle stated *"I don't have much I can help or offer Della if she doesn't want to consider interventional therapy in the form of CESI or medial branch blocks." (PX.10).* Dr. Hagle continued to fill Petitioner's prescription for Norco, Baclofen and the Fentanyl patch. (PX.10) MRI of cervical spine performed on March 26, 2018 revealed a small central protrusion of the disc at C2-C3 contributing to the mild central canal stenosis and a small board-based central disc protrusion and mild osteoarthritis at C5-C6. (PX.10) Based upon the new MRI findings and Petitioner's persistent headaches and chronic neck pain Dr. Hagle recommended a cervical epidural steroid injection to relieve Petitioner's inflammatory radicular pain. (PX.10) Petitioner received the C7-T1 injection on June 1, 2018.

FINDINGS/ANALYSIS

WITH RESPECT TO ISSUE (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING OF THE CERVICAL SPINE CAUSALLY RELATED TO THE AUGUST 29, 2010 INJURY AT WORK, THE ARBITRATOR FINDS AS FOLLOWS:

The Commission affirmed and adopted the Arbitration Decision and Findings that Petitioner's current condition of the cervical spine causally related to her undisputed work accident of August 29, 2010, having sustained a new herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator's Ex. 2.) Respondent does not dispute the causal relationship between Petitioner's cervical spine and the injury at work. However, Respondent denies that Petitioner's multiple sclerosis is causally related to the August 29, 2010 injury at work. Petitioner stipulated at the onset of the hearing that she was not making any claim relating to multiple sclerosis diagnosis and that her claimed injuries were confined to the cervical spine.

The Arbitrator notes that Petitioner has consistently sought medical treatment for her cervical spine through the June 9, 2011 19(b) hearing. The treating medical records admitted into evidence document Petitioner's chronic neck pain and bilateral cervical radiculopathy resulting from her August 29, 2010 injury at work. Dr. Brayton noted on February 12, 2015 that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Discogram revealed concordant pain at C4-C5 and C5-C6 consistent with the MRI findings which demonstrate a progressive, large, broad based annular bulge at C5-C6, annular bulge at C4-C5 and continued spondylitic changes at C6-C7. (PX.1.)

On January 21, 2016, Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her MS"* (PX.1.)

The Arbitrator has carefully reviewed and considered all medical evidence along with the credible testimony of the Petitioner. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she sustained injury to her cervical spine which is causally related to the August 29, 2010 accident at work. It is undisputed that Petitioner injured her cervical spine lifting a patient at work. The Commission previously found that Petitioner sustained a disc herniation at C6-C7 and aggravation of a pre-existing herniated disc at C5-C6. (Arbitrator's Ex. 2) The medical records clearly document that progression of Petitioner's cervical disc disease which include permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.)

The Arbitrator finds the opinions of Dr. Brayton, a neurosurgeon, to be credible and persuasive. Moreover, the Petitioner credibly testified to the progression of her symptoms associated with her cervical disc disease. The Arbitrator finds it significant that Petitioner sustained no subsequent trauma to her cervical spine after the August 29, 2010 injury at work. Therefore, based upon the credible medical evidence along with Petitioner's uncontradicted testimony, the Arbitrator finds that the current condition of Petitioner's cervical spine is causally related to the August 29, 2010 accident at work. Additionally based on the testimony of Dr. Allen (RX.1.) and Dr. Herman (RX.2.), the Arbitrator finds that Petitioner's multiple sclerosis is not related to the August 29, 2010 accident at work.

The Arbitrator further finds that the lower back and any care related to the multiple sclerosis diagnosis, or any other diagnoses unrelated to the cervical spine condition is specifically determined to have no causal connection to the work injury alleged and awarded.

WITH RESPECT TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator having found that Petitioner's current condition of the cervical spine is causally related to the August 29, 2010 accident at work further concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment Petitioner received for her cervical spine was reasonably required to diagnose, treat, relieve and cure Petitioner from the effects of her cervical injuries and the medical services are causally related to her work injury. Respondent shall pay Petitioner all the reasonable and necessary medical services related to treatment of the cervical spine as contained in Petitioner's Exhibits No. 1, 2, 4, 6,7,8,9, 10, 11 and 12 (listed below), as provided in Section 8(a) and 8.2 of the Act, and subject to the medical fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner's Medical Exhibits

- PX1-Neurosurgery and Spine Surgery Dr. Brayton--$0.00 per statement
- PX2-Delnor Hospital--$0.00 per statement

- PX4-Suburban Neurology Group--$1,699.42 total which includes $423.81 for 2012 codes 99215($145.71) & 99255($278.10); $707.79 for 2013 codes 95886(POC53.2=$148.96 x 2) & 95910(POC53.2=$308.03) & 99214($101.84); and $567.82 for 2014 codes 99213($67.02) & 99232($91.85 x 3) & 99254($225.25).
- PX6-Kishwaukee Hospital--$0.00 per statement
- PX7-Center for Diagnostic Imaging--$0.00 per statement
- PX8-Kendall Pointe Surgery Center--$1,478.49 for 2014 code 62291 ($490.82 x 3)
- PX9-Interventional Pain Specialists--$1,701.68 for 2014 code 62291($490.82), code 72285($837.20), code 77003($218.26), code 99144($81.11), & code 99202($74.29)
- PX10-APAC Centers for Pain Management—$108.18 for 2018 code 99214
- PX11-Fox Valley Medical Associates/Dr. Branshaw--$0.00 per statement
- PX12-Tri City Radiology--$0.00 per statement

In conclusion, $4,987.77 is awarded per Fee Schedule with regard to the exhibits entered into evidence in conjunction with the findings related to causal connection for cervical issues only.

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner continued to be restricted from all work activities following the June 9, 2011 19(b) hearing. Respondent continued to deny Petitioner's weekly TTD benefits. Consequently, on August 1, 2011, Petitioner requested Dr. Brayton release her back to work with a 10 # lifting restriction and no excessive pushing/pulling. (PX.1.) Petitioner testified that she went to work for Loretto Hospital as a nursing supervisor on August 12, 2011. Petitioner worked full time until she was fired on May 20, 2012.

From May 21, 2012 through September 19, 2013, Petitioner remained unemployed and restricted to 10# lifting with no excessive pushing/pulling. Petitioner testified she looked for work as a nursing supervisor. On September 20, 2013 Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was terminated for missing work. Dr. Hagle's May 12, 2014 office note states "**she lost her job recently due to too many falls/sick days.**" (PX.10) Petitioner has not worked since that time despite looking for a nursing supervisor position. Petitioner was awarded SSDI benefits in 2015.

On January 21, 2016, Dr. Brayton issued Petitioner the following permanent work restrictions:

"No lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent" (PX.10)

Dr. Brayton wrote a script stating this was a ***"permanent disability".*** (PX.10)

Petitioner seeks temporary total disability benefits from June 10, 2011 through August11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2016 through January 20, 2016. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized (i.e., whether the claimant has reached maximum medical improvement). Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132,142; 923 N.E.2d 266, 271; 337 Ill. Dec. 707 (2010). The Arbitrator notes that Respondent previously terminated Petitioner on May 7, 2011 and denied her claim for temporary total disability benefits.

Therefore, based on the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner's condition had not

stabilized and finds that Petitioner is entitled to temporary total disability benefits of $1,080.12 /week for 10 and 1/7 weeks commencing June 10, 2011 through August 11, 2011; 64 and 4/7 weeks commencing May 21, 2012 through September 19, 2013; and 89 3/7 weeks commencing May 5, 2014 through January 20, 2016.

Furthermore, the Arbitrator finds that Petitioner reached maximum medical improvement on January 21, 2016 when Dr. Brayton determined Petitioner was ***"permanent disability** as a consequence to her injury"* and issued her permanent work restrictions prohibiting her from gainful employment. (PX.10). Petitioner's subsequent demand for permanent total disability benefits pursuant to Section 8(f) of the Act was ignored by Respondent. (PX.13) Therefore, the Arbitrator finds that Petitioner is entitled to maintenance benefits of $1,080.12/week for 124 and 1/7 weeks commencing on January 21, 2016 through the date of the hearing.

WITH RESPECT TO ISSUE (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY AND ISSUE (O) Other §8(f) PTD BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8(f) of the Workers' Compensation Act provides in part:

> *In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of a total permanent disability as provided in subparagraph 18 of paragraph e of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for Life. (820 ILCS 305/8(f))*

Therefore, a Petitioner is entitled to permanent total disability benefits where there is evidence of **"complete disability which renders the employee wholly and permanently incapable of work."** An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of

wages to him. A.M.T.C. of Illinois v. Industrial Commission, 77 Ill.2d 482,487 (1979). Thus, a Petitioner is entitled to permanent total disability benefits if there is medical proof to establish that he cannot work. Continental Drilling Co. v. Industrial Commission, 155 Ill.App.3d 1031, 508 N.E.2d 1246 (5th Dist. 1987).

It is undisputed that Petitioner injured her cervical spine lifting a patient at work on August 29, 2010 sustaining an aggravation of a pre-existing herniated disc at C5-C6 and a new disc herniation C6-C7. (Arbitrator's Ex. 2) The condition of Petitioner's cervical spine continued to progress and has led to permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.) Cervical fusion surgery was discussed with Dr. Brayton who believes the risk is too great considering Petitioner's MS and the potential for flare-up caused by the surgical stress. (PX.1.)

Petitioner continues to receive opioid therapy treatment for her chronic neck pain. On January 21, 2016 Dr. Brayton noted *"she continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches."*. (PX.1.) Dr. Brayton further noted that ***"She will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a consequence to her injury."*** (PX.1.)

Dr. Brayton determined Petitioner was ***"permanent disability"*** and issued a written script along with ***"permanent work restrictions of no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment – permanent".*** (PX.1.)

Thereafter, Petitioner requested permanent total disability benefits pursuant to Section 8(f) of the Act. (PX.13) Respondent failed to issue Petitioner's permanent total

disability benefits or prepare a written vocational assessment as required under Section 7110.10 of the Rules Governing Practice before the Industrial Commission.

Petitioner testified she continues to receive the Fentanyl patch along with Norco and Baclofen for her chronic and disabling neck pain. Petitioner sees Dr. Hagle on a monthly basis for her narcotic pain medications. Petitioner testified she experiences muscle spasms across the neck and top of the scapula (paraspinal spasms) on a daily basis. She has pain and stiffness in both arms with ongoing radiculopathy that causes numbness in all five fingers in both hands. Petitioner testified the neck pain *"affects her entire life".*

Petitioner testified she no longer cooks or performs household activities and relies on her husband and sons to do most of the housework. Petitioner is unable to work in the yard or perform any overhead activities. Petitioner testified she spends most of her time in a recumbent position and lives in her bedroom. Petitioner eats her meals in her bedroom, where she watches TV and can access her computer. Petitioner testified her daily pain level is 6 out of 10.

Therefore, based upon the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner met the burden of establishing that she is totally and permanently disabled pursuant to Section 8(f) of the Act. This Arbitrator notes §8(f) of the Act provides that compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life. Respondent shall pay Petitioner permanent and total disability benefits of $1,080.12/week for life, commencing June 8, 2018, as provided in Section 8(f) of the Act.

With regard to the maintenance period of January 21, 2016 to present, the evidence presented does not support an award for maintenance due to the lack of qualification due to the stated lack of vocational effort.

Respondent shall have credit for amounts paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim Nyberg,

Petitioner,

vs. NO: 19 WC 730

Vine Industries,

Respondent.

21IWCC0170

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent disability, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. CAUSAL CONNECTION

The Commission modifies the Decision of the Arbitrator with respect to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

The Arbitrator ruled that the causal connection between Petitioner's injury and his current condition of ill-being terminated as of September 17, 2018, the date on which Petitioner reported to his treating physician, Dr. Brian Chilelli, that he was approximately "80-90% better overall." In so ruling, the Arbitrator accepted the opinion of Dr. Shane Nho, Respondent's Section 12 examiner. Given the facts and circumstances of this case as stated in the Decision, the Commission declines to find that the causal connection between Petitioner's accident and his condition of ill-being terminated on September 17, 2018 based solely on Petitioner's broad self-estimate on a single date, or broadly accept the opinions of Dr. Nho.

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More significant is the November 19, 2018 surveillance video, which shows Petitioner engaged in activities expected of Petitioner as an electrician during a period when his treating physician had placed him off work. The video occasionally depicts Petitioner favoring his right leg and keeping weight off the left leg, but more often shows Petitioner placing weight on the left leg to descend from the porch or back of his van. Similarly, the video occasionally shows Petitioner leaning against the ladder in a manner to keep weight off his left leg, but more often depicts Petitioner standing on the rungs of various ladders using both legs as support. The video also tends to show Petitioner with a normal gait. In short, the video recording submitted in this case confirms that Petitioner was able to perform the job duties of an electrician, whether with restrictions or without, as of November 19, 2018. Conversely, Dr. Chilelli's treatment records do not suggest that Petitioner ever informed him of these activities, which may have affected Dr. Chilelli's decision to keep Petitioner off work rather than impose work restrictions, and the speed at which Petitioner was advanced to return to work.

Accordingly, after considering the record as a whole, the Commission concludes that Petitioner established a causal connection between his injury and his condition of ill-being that terminated as of November 19, 2018.

II. MEDICAL EXPENSES

The Arbitrator denied Petitioner's claim for $935.00 in physical therapy expenses between April 24, 2019 and May 30, 2019 based on the Arbitrator's determination that Petitioner reached maximum medical improvement (MMI) on September 17, 2018. The Commission determines that Petitioner reached MMI as of November 19, 2018, but Petitioner's claim is for medical expenses after this date. Accordingly, the Commission affirms the Arbitrator's denial of unpaid medical expenses.

III. TEMPORARY TOTAL DISABILITY

The Arbitrator concluded that Petitioner was entitled to temporary total disability (TTD) benefits from June 14, 2018 through September 17, 2018, the date on which the Arbitrator found Petitioner to be at MMI. Given that Respondent paid Petitioner more than the amount due under this calculation, the Arbitrator also awarded Respondent a credit for the difference to be applied against the permanency award. The Commission concludes that Petitioner is entitled to TTD benefits for a period of 22 and 5/7ths weeks, from June 14, 2018 through November 19, 2018, the date on which the Commission has determined that Petitioner reached MMI. In addition, Respondent is entitled to a credit of $5,621.29 in TTD benefits already paid against the increased TTD award.

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IV. PERMANENT PARTIAL DISABILITY

The Arbitrator awarded Petitioner permanent partial disability (PPD) benefits representing a 10% loss of use of the left leg. The Commission agrees with the award but writes additionally to elaborate on our view of the weight of the factors we considered in reaching our conclusion.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2016). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i), as the Arbitrator correctly noted that neither party submitted an impairment rating. The Commission places significant weight on factor (ii) because Petitioner continues to work for Respondent as an electrician, a job involving squatting, stretching, and climbing ladders, activities which Petitioner testified can aggravate his lingering symptoms. The Commission places some weight on factor (iii) because Petitioner is 51 years old, suggesting that his condition will be a factor in his work life, which may be expected to be as long as 14 years. Regarding factor (iv), the Commission observes that no direct evidence was submitted regarding Petitioner's future earning capacity and that Petitioner has returned to his job with Respondent and works as close to eight-hour days as possible, leading us to place no weight on this factor. Lastly, regarding factor (v), Petitioner testified that he still experiences pain, stiffness and soreness in his hip after a few hours of a little exertion. He stated that if he spends time squatting near receptacles, he would get a really bad charley horse in his calf. He also stated that he needs to rotate his sleeping position three or four times nightly or the hip becomes stiff and awakens him. According to Petitioner, "It's not horrible. It's just an annoying little pain." He added that he lost a lot of muscle mass but was regaining it slowly. Petitioner's testimony finds support in his treatment records, which suggested improving left lower extremity strength and neuromuscular deficits. The Commission places the greatest weight on this evidence.

Considering the statutory factors as a whole, but particularly the magnitude of Petitioner's current disability, the Commission affirms the Arbitrator's award representing a 10% loss of use of the left leg.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his left leg is causally connected to the accident alleged in this case, as the causal connection terminated as of November 19, 2018.

IT IS FURTHER FOUND BY THE COMMISSION that Respondent has paid all

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reasonable and necessary medical expenses incurred through November 19, 2018.

IT IS THEREFORE ORDERED that Petitioner's claim for additional unpaid medical expenses incurred after November 19, 2018 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.33 per week for the period from June 14, 2018 through November 19, 2018, a period of 22 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $5,621.29 in benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $264.00 per week for a period of 21.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for Penalties pursuant to §§19(k) and 19(l) of the Act, and Fees pursuant to §16 of the Act, is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 2, 2020 is hereby affirmed as modified herein.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2021
o: 4/1/21
BNF/kcb
045

/s/ *Barbara N. Flores*
Barbara N. Flores

/s/ *Christopher Harris*
Christopher Harris

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NYBERG, TIM
Employee/Petitioner

Case# **19WC000730**

VINE INDUSTRIES
Employer/Respondent

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On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0340 LAW OFFICES OF JOHN W TURNER
209 S MAIN ST
2F
MT PROSPECT, IL 60056

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tim Nyberg
Employee/Petitioner

v.

Vine Industries
Employer/Respondent

Case # **19WC 00730**

Consolidated cases: _____

21IWCC0170

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts** Arbitrator of the Commission, in the city of **Chicago**, on **8/22/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

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FINDINGS

On **6/13/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**22,880.00**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **50** years of age, married with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,621.29** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,621.29**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS CAUSAL CONNECTION BETWEEN THE ACCIDENT OF JUNE 13, 2018 AND THROUGH SEPTEMBER 17, 2018, ONLY.

RESPONDENT HAS PAID ALL REASONABLE AND RELATED MEDICAL BILLS INCURRED THROUGH SEPTEMBER 17, 2018. CLAIMED FOR ANY FURTHER MEDICAL BILLS/BALANCES/OUT OF POCKET PAYMENTS AFTER THAT DATE IS DENIED.

PETITIONER WAS TEMPORARILY TOTALLY DISABLED FOR A PERIOD OF 13 6/7'S WEEKS BETWEEN JUNE 14, 2018 AND SEPTEMBER 17, 2018. HE IS ENTITLED TO A SUM OF $293.33 PER WEEK FOR THAT 13 6/7 WEEK PERIOD. NO FURTHER TEMPORARY TOTAL DISABILITY IS DUE.

PETITIONER SUSTAINED ACCIDENTAL INJURIES TO THE EXTENT OF 10% LOSS OF USE OF THE LEFT LEG, UNDER SECTION 8(E) OF THE ACT. HE IS THEREFORE ENTITLED TO THE FURTHER SUM $264.00 PER WEEK FOR A PERIOD OF 21.5 WEEKS.

RESPONDENT IS ENTITLED TO A CREDIT OF $1,556.58 IN OVERPAID TEMPORARY TOTAL DISABILITY. THIS AMOUNT IS A CREDIT TOWARD THE FURTHER BENEFITS DUE PETITIONER.

CLAIM FOR PENALTIES AND ATTORNEYS' FEES IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 31, 2019
Date

JAN 2 - 2020

Tim Nyberg v. Vine Industries
Case Number: 19WC 00730

21IWCC0170

Statement of Facts Petitioner was employed with Respondent, his father's company, as an electrician, working one day per week about 30 weeks per year. (T.29) He described his duties as climbing ladders, pulling wire, bending pipe, and installing lighting for commercial customers. (T.8) When not working, Petitioner did work around the house, took care of his son, quoted customers for Respondent's business, and worked a hobby farm where he had an orchard, grew sweet corn, vegetables, and tended bees for honey. (T.29, 30) Petitioner also operated Vine Aquatic Designs, building fountains and ponds, although in calendar year 2018 Vine Aquatic Designs reported no income. (T.31, Resp.Ex.#2)

On June 13, 2018 he was working for Respondent at a bowling alley. As he stepped off a ladder, his foot slipped on the waxed alley and he landed on his left side. (T.10) He called his father and went home. (T.11) Petitioner did nothing June 14. On June 15, a Friday, he and his wife went up to Wisconsin for the weekend. (T.12) Petitioner testified he didn't do much up there, and that whenever he stopped down on his foot he felt "ungodly pain. I figured I had torn a muscle." (T.12)

Petitioner called his primary care physician and was given an appointment with Dr. Chilelli for June 25, 2018. (T.13) Petitioner admitted he was full weight bearing between June 13 and June 25, 2018, and that he did not make any attempt to seek emergency room or urgent care. (T.36, 37) On June 25, 2018 Petitioner reported left hip pain following the June 13, 2018 incident. Petitioner reported he had been able to bear weight on the left leg but did have pain with walking, standing or climbing stairs. X-rays performed by Dr. Chilelli on this date were negative for any fracture. The doctor suspected a stress fracture, abduction tendon injury or "other process." He ordered a MRI of the left hip. (Pet.Ex.#6)

MRI testing performed June 26, 2018 showed significant edema in the femoral head, suggesting a subchondral stress or insufficiency fracture. Transient osteoporosis was noted to already be present. A tiny linear tear of the musculoskeletinous junction was noted. (Id.)

Dr. Chilelli reviewed that MRI testing on June 28, 2018 as showing transient osteoporosis or an insufficiency fracture. He prescribed non-weight bearing and Vitamin D. (Id.) Petitioner testified he was told to "use crutches until early October and don't do any work." (T.14)

When seen in follow-up on August 6, 2018 Petitioner reported less left hip pain. He was directed to continue taking Vitamin D, to remain on crutches for two more weeks, and to not to work until a next exam September 17, 2018. (Pet.Ex.#6)

When seen by Dr. Chilelli on September 17, 2018 Petitioner reported he was "80% to 90" better. He reported some continued "discomfort" in the hip but had no report of weakness. He was directed to begin physical therapy and follow-up in six weeks. (Id.) At

trial, Petitioner stressed that he was still on crutches and keeping his left leg elevated. (T.39)

Petitioner admitted he posts on Facebook. On October 23, 2018 Petitioner admitted he posted ". . . trying to get these people to let me start working again, hopefully in a few weeks. I'm already sneaking out and doing things." A friend responded, asking Petitioner to come work on his salt water tank. Petitioner responded he was "sneaking in slowly." (T.41; Resp.Ex.#3)

At trial Petitioner claimed he was referring to having gone out fishing. He testified he went out with a buddy to fish on the Fox River for about three hours, off an 18 foot Skeeter bass boat. Petitioner claimed he just sat in the front chair on the boat for three hours. He also admitted to having gone to Port Clinton for two days in October, 2018, out 16 hours on a fishing charter on Lake Erie. (T.41 – 44) The arbitrator takes judicial notice that getting onto and ambulating on a boat on even the calmest days does require balance and weight distribution through the legs and into both hips.

Petitioner testified he was not released to return to work in any capacity until March 6, 2019, at which time Dr. Chilelli directed him to work part time and avoid climbing 8 – 10 foot ladders. (T.15)

On direct exam Petitioner admitted to performing electrical work at his sister's house in Park Ridge. He recalled being at the property from 9:00 a.m. to about 2:30 p.m. on November 19, 2018. (T.17-18) He testified he had asked his doctor about returning to work. (T.19) There is no reference to this request or that Petitioner was indicating any ability to return to work in any capacity in Dr. Chilelli's records. (Pet.Ex.#6)

Petitioner described the work at his sister's house as a "favor" and so that he could "gauge where my leg was so I could tell my doctor . . . and the therapist what was going on." (T.19) Petitioner testified his total work hours on that date was 1 ½ to 2 hours, and that he had to go inside the house a couple of times to take break and get the weight off his leg. (T.20) He admitted to using 2, 4 and 6 foot ladders, but claimed he put weight on his right leg and used his left leg "just like another third support, just a temporary balance measure . . ." (T.21) He described sitting atop the ladder so as to not put weight on his legs, sitting in a chair or with his back to the wall. (T.21) He described that if he had more than 20% weight on his left leg "the muscles would start shaking again. It was a really bad balance time." (T.22)

On cross exam Petitioner admitted he arrived in and climbed into and out of a Ford F250 van multiple times. He walked back and forth to obtain equipment and supplies from the van. He climbed up and down the ladders, bent, stooped, and stood. When asked if he brought or used his crutches, he stated "No, because it was in November." (T.47 – 51) When asked why at the next visit with Dr. Chilelli on December 6, 2018 he did not make mention of his trying to work or what he had done on November 19, 2018, Petitioner then said "I actually told the therapist because they were the ones trying to get me better." (T.51)

Petitioner's first physical therapy visit was with Fox Valley Physical Therapy November 28, 2018. He described "not pain as much as lack of strength." He described that he was "self employed: has 4-5 guys working for him." The therapist noted a standing prescription for a total knee replacement that Petitioner was hoping to put off until age 55. (Pet.Ex.#6) There is absolutely no report of Petitioner describing what he was doing on November 19, 2018 to the therapist on this or any subsequent visit. (Id.)

The Arbitrator notes that while Petitioner testified to prior injections for his knees at Dr. Chilelli's office, he did not disclose a pending knee replacement surgery nor discuss any impact his pre existing knee condition would have on his gait, ability to bear weight, climb ladders or work as an electrician full time.

When seen by Dr. Chilelli on December 6, 2018 he did report he was 80% better. He advised the doctor for some reason he had not yet been to physical therapy although clearly had commenced those services about a week before. Dr. Chilelli again ordered physical therapy. (Id.)

On January 24, 2019 Dr. Chilelli documented Petitioner was "significantly better." Physical therapy was continued as well as a "no work" status. (Id.)

On March 7, 2019 Dr. Chilelli again documented Petitioner was "significantly better." He noted Petitioner was in physical therapy. He was happy with Petitioner's progress. He noted Petitioner was in no acute distress. Petitioner demonstrated 90° of flexion, 10° of extension, 30° external rotation, with some pain with rotation of the hip and some mild trochanteric tenderness only. Dr. Chilelli ordered continued physical therapy due to some reported weakness and muscle deficits. He first cleared Petitioner to return to work in any capacity on this date. (Id.)

Dr. Chilelli reiterated continued therapy and restricted work April 18. On June 3, 2019 he noted Petitioner "appeared well." He was in no acute distress. Petitioner's sensation was intact. He had normal motor function, reflexes and pulse. He allowed Petitioner to return to full duty for half days and return to see him in six weeks. (Id.) At trial Petitioner testified he has not sought further medical attention with Dr. Chilelli or elsewhere, to date. (T.15)

Petitioner testified that with a few hours of exertion he feels some pain in his left hip, described as "stiffness, soreness." If he spent any time squatting, he got a "bad Charley horse" sensation in the upper part of his left leg. He needs to stretch and rotate. He described it as "just an annoying little pain." (T.26)

Petitioner continues driving a Ford F250 van and a 2006 Toyota Tundra pickup truck. (Id.)

Petitioner testified he returned to work for Respondent in May, 2019. He testified to working one job every week or two, on 8 hour jobs. (T.53) He described one at a

Bowlero in Glendale Heights, where he put a 50 foot, 4 head light atop a parking lot pole reached using a bucket lift. (T.53-54) He described a second job at Hosiden, where he installed a light fixture over a door while on a stepladder, after which he replaced LED lightbulbs in the ceiling of a hallway while on a six foot ladder. (T.55-56) He repaired a hot tub filter pump in his father's basement, cutting old PVC pipe, replacing and rewiring the pump. (T.56) Lastly, he climbed up two stairs and replaced a diesel transfer pump at another location. (T.57)

Gregory Spelson testified he is a private investigator working for Robison Group and hired by Respondent's carrier. He conducted and obtained surveillance of Petitioner on November 19, 2018. He positively identified Petitioner as the individual he shot surveillance of, at trial. (T.73-75)

On November 19, 2018 he followed Petitioner from his home in West Chicago to a gas station, obtained video at the gas station, followed Petitioner to a Menard's where he likewise obtained several minutes of video, then followed Petitioner to a private residence where he obtained several hours of video. T.76 – 79)

A highlight of the video shot by Mr. Spelson was viewed by the parties, at trial. (Resp.Ex.#5a). The full surveillance video was introduced into evidence and has now been viewed by the Arbitrator. (Resp.Ex.#5b) In pertinent part, the Arbitrator notes the following activities performed by Petitioner on November 19, 2019:

9:38 through 9:41 a.m. stands outside work van pumping gas. Ambulates without any obvious limp or difficulty.

10:26 a.m. walks from the van, across the street and to the Park Ridge address. Appears initially to have a bit of "drag" or limp in his step, but what appears to be even weight-bearing by the time he walks across the yard and steps up about 2 – 2 ½ feet onto the porch.

10:27 a.m. walks back to the work van, now without any noticeable limp or pause in his step.

10:29 a.m. walks back from van again, without obvious limp, climbing dirt incline up to left side of porch to hand off tools.

10:29 through 10:31 a.m., stands below porch level, appearing to be receiving instructions from an older gentleman (identified at trial as his father).

10:31 a.m. appears to try front door and finds it locked.

10:31 a.m. steps down from height of porch to ground with left leg first.

10:34 through 10:36 a.m. stands on porch discussing work with father.

10:36 a.m. steps down from 2 ½ foot porch height to ground on left leg first, walks to work van.

10:37 a.m. seen in back of van pulling out various pieces of equipment, stepping onto back bumper and then down with left leg to street level.

10:39 through 10:40 a.m. stands on smoke break outside porch, then walks across street to work van. Drives away.

10:54 a.m. walks across Menard's parking lot without limp.

10:59 a.m. inside Menard's store pushing cart, walking in rapid fashion without limp.

11:02 a.m. walks across Menard's parking lot carrying small bag, walking without limp.

11:18 a.m. back at Park Ridge home at ground level, bending forward and working with equipment/supplies.

11:19 a.m. standing on porch.

11:20 a.m. climbs ladder up four steps and begins working overhead on porch. Remains on ladder until 11:22 a.m., then climbs down.

11:23 a.m. bends forward to pick up small items and box from ground level, bending at knees and hips.

11:24 a.m. climbs a second ladder up three steps, using both feet to elevate self, then works overhead, remaining on ladder with arms extended overhead using tape measure until 11:25 a.m. when then descends ladder, bearing weight evenly on both legs as climbs down.

11:26 a.m. re-ascends same ladder, up three-rungs, using both feet and bearing weight evenly to again work overhead.

11:28 a.m. climbs down ladder, ambulating across porch with even gait.

11:29 a.m. again climbs up ladder with both feet, even weight-bearing.

11:33 a.m. ascends a third step ladder up 2 to 3 rungs, with both feet, to again work overhead. For next several minutes continues climbing and descending the ladders, to perform overhead work without break or interruption until 11:53 AM when walks back across street to van, walking with even gait and no obvious limp or disability.

Beginning at 11:55 a.m. seen bending forward while standing on porch, grabbing pieces of conduit and bending them, handing them to older gentleman on ladder. Continues with this activity until 12:05 p.m. when ascends up second step of step ladder to begin working overhead with conduit himself.

12:05 p.m. climbs three steps with left foot first and full weight bearing on left foot for some seconds before right foot placed on step ladder step. Then some seconds later climbs three steps back down, likewise with weight on left foot before right leg comes down on to step.

12:06 p.m. enters house with father, comes back out at 12:33 p.m.

12:35 p.m. walks on uneven ground in yard of property, descending from porch level to street level with even gait and no observable limp.

12:44 p.m. begins work up on ladder again.

Between 12:45 and 1:05 p.m. stands on porch observing and taking smoke break. At 12:59 and 1:01 p.m. steps down from height of porch about 2 ½ feet onto right foot, with all weight on left foot

1:03 p.m. begins bending conduit, bending forward, using right foot to step on conduit to bend with all body weight on left foot; repeats at 1:06 p.m., 1:12 p.m., 1:14 p.m.

Beginning at 1:13 p.m. seen bending forward at waist to porch floor to measure conduit, pick up equipment.

Continues in these activities until 2:22 p.m.

Petitioner was examined at Respondent's request by Dr. Nho on June 10, 2019. Dr. Nho was provided copies of medical records and the surveillance video. At the time of the examination Petitioner appeared in no apparent distress. He walked with non-antalgic gait. He demonstrated 5° loss of flexion in the left hip, a positive subspine but negative trochanteric pain, and a painful arc from 1 to 3 o'clock. He had normal strength, abduction and adduction, no tenderness and was neurovascularly intact. (Resp.Ex.#6)

Three x-rays taken on June 11, 2019 and personally reviewed by Dr. Nho showed no evidence of fracture, dislocation or acute abnormalities. Prior x-rays taken June 25, 2018 likewise showed no evidence of fracture, dislocation or acute bony abnormalities. The MRI of the left hip performed June 25, 2018 was personally reviewed and showed extensive bone marrow edema in the femoral head extending into the neck with a stress fracture of the femoral neck. (Id.)

Petitioner reported a dull achy pain rated 1 out of 10. He denied radiating pain. He reported pain worse with squatting, standing and working. Dr. Nho diagnosed a left hip

stress fracture with extensive bone marrow edema in the femoral head. He believed the work incident of June 13, 2018 resulted in that condition. He suggested Petitioner would have required a "no work" status for 12 weeks following the injury, but that Petitioner demonstrated he was capable full duty as the appointment with Dr. Chilelli September 17, 2018 when Petitioner reported 80 to 90% improvement.

Dr. Nho reviewed the surveillance of November 19, 2018 and concluded Petitioner demonstrated he was capable of working full duty per the activities demonstrated on the surveillance. Dr. Nho concluded Petitioner did not require work restrictions or treatment following September 17, 2018 when he reported he was 80 to 90% better and having little to no symptoms.

Conclusions of Law

Regarding F) is Petitioner's condition of ill being causally related to the injury, the Arbitrator finds the following:

Petitioner sustained an injury to his left hip when he slipped and fell while coming down a ladder on June 13, 2018. He did not require or seek immediate medical attention, accepting an appointment for June 25, 2018 with Dr. Chilelli's office. He continued weight bearing, climbing and walking on the left leg for that 15 day period. X rays taken June 26, 2018 and again June 11, 2019 failed to show any outright fracture; Dr. Chilleli diagnosed a subcondral stress or insufficiency fracture in the femoral head of the left hip per the MRI. Petitioner was directed to remain off all work duties until March 6, 2019, to be non weight bearing for at least three months following the injury and to participate in physical therapy he began November 28, 2018 and continued until May 30, 2019.

While Petitioner reported he was 80 – 90% better by September 17, 2018, he clearly did not disclose his outside activities or capabilities to either Dr. Chilelli or Fox Valley Physical Therapy at all. While on October 23, 2018 he provided on Facebook he was "trying to get these people to let me start working again," there is nothing to suggest he was making that request to any of his medical providers. He also confided in that same posting he was "already sneaking out and doing things."

Petitioner admitted to going out fishing with a friend on the Fox River, and on a two day, 16 hour fishing charter on Lake Erie.

While he admitted to doing a few hours' work at his sister's house on November 19, 2018, he claimed to have to go inside for breaks, and to sit or lean when performing work. The surveillance demonstrates Petitioner standing, walking and climbing while working for several hours, with only one half hour break. He was seen walking without a limp, stepping on and off a an approximately 2 ½ foot high porch, climbing up and down ladders with full, uncompromised weight bearing on his left leg, walking on uneven ground, bending to the floor to retrieve items, and bearing weight on his left leg while using his right foot to bend conduit. The Arbitrator concludes Petitioner demonstrated no evidence of any disability or inability to work by this date.

While noting treating physician Dr. Chilelli continued in his "no work" and therapy recommendations for the next several months, there is no evidence he was ever aware of Petitioner's actual activities and capabilities, and thus, those recommendations can be discounted.

Dr. Nho examined Petitioner at Respondent's request, reviewed all of the medical records, and viewed the surveillance. He concluded that Petitioner was actually at maximum medical improvement and capable of full duty by September 17, 2018, when Petitioner was demonstrating no continuing evidence of injury, to quote Dr. Chilelli just "discomfort" but "no weakness, and was reporting he was "80 – 90%" better.

The Arbitrator therefore finds causal connection through September 17, 2018 only, based on the fully informed opinions of Dr. Nho.

Regarding J) what medical bills are due, the Arbitrator finds the following:

Petitioner claimed $935.00 in medical bills incurred and paid by Petitioner for therapy between April 24 and May 30, 2019. Having found Petitioner at maximum medical improvement by September 17, 2018, claim for these medical charges is denied.

Regarding K) what temporary total disability benefits are due, the Arbitrator finds the following:

Petitioner is entitled to a sum of $293.33 per week for a period of 13 6/7's weeks, from June 14, 2018 – September 17, 2018, adopting the findings of Dr. Nho in this regard.

Regarding L) what is the nature and extent of the injury, the Arbitrator finds the following:

No impairment rating was offered by either party. Petitioner testified he is back to full duties for Respondent, working one day per week as he did before his injury. He is currently 51 years old. There is no showing the injury will result in any impact on his earning capacity. He testified to stiffness, soreness, an occasional Charley Horse sensation in his calf, and what he described as a "little, annoying pain."

The Arbitrator therefore finds Petitioner entitled to the sum of $264.00 per week for a period of 21.5 weeks, as the injury resulted in permanent partial disability to the extent of 10% loss of use of the left leg.

Regarding M) whether penalties and attorneys' fees should be imposed on Respondent, the Arbitrator finds the following:

Per the payment screen Respondent continued paying temporary total disability until November 7, 2018. Respondent continued paying medical bills incurred by Petitioner until mid December, 2018. (Resp.Ex.#1) Respondent received the surveillance

suggesting Petitioner was working as of November 19, 2018. Respondent notified Petitioner of suspension of benefits based on that information December 6, 2018. (Pet.Ex.#2) Respondent obtained Dr. Nho's exam finding Petitioner not entitled to temporary total disability or in need of medical care after September 17, 2018, thus solidifying the denial of further benefits.

For the foregoing reasons, claim for penalties and attorneys' fees is denied.

Regarding N) is Respondent due any credit, the Arbitrator finds the following:

Having found Petitioner entitled to $293.33 per week in temporary total disability for 13 6/7's weeks through September 17, 2018, a total of $4,064.71 would have been due. Petitioner was paid $5,621.29, and Respondent therefore has a credit of $1,556.58 toward the permanency due.