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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REED McCOY,

Petitioner,

vs. NO: 19 WC 14569

STATE OF ILLINOIS – DEPARTMENT OF TRANSPORTATION,

Respondent.

20IWCC0577

DECISION AND OPINION ON REVIEW

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

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

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

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

20IWCC0577

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

DATED: OCT 1 - 2020
o: 9/17/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MCCOY, REED
Employee/Petitioner

Case# **19WC014569**

ST OF IL -DEPT OF TRANSPORTATION
Employer/Respondent

20IWCC0577

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

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

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

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

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

4993 ASSISTANT ATTORNEY GENERAL
CHELSA T GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

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

APR 2 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Reed McCoy
Employee/Petitioner

v.

State of Illinois-Department of Transportation
Employer/Respondent

Case # **19** WC **014569**

Consolidated cases: _____

20IWCC0577

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **February 28, 2020**. By stipulation, the parties agree:

On the date of accident, **2/25/2019**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**56,387.76**, and the average weekly wage was $**1,084.38**.

At the time of injury, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Petitioner has suffered 5% loss of use of a right leg the total amount of 10.75 weeks at rate of $650.63 per §8(e) 9 of the Illinois Worker's Compensation Act.

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

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

Signature of Arbitrator

3/25/20
Date

APR 2 - 2020

Findings of Fact

Date of Injury 2/25/2019
IWCC: 19 WC 014569
Injury: Right Knee

Reed McCoy, Petitioner, is a current employee at the State of Illinois at the Department of Transportation on a Bridge Crew. The Petitioner testified that his job was physical in nature and required heavy lifting and the use of a jackhammer. The Petitioner testified that he was working for the State of Illinois on February 25, 2019, when he was climbing the side of a bridge the snow covered "rip rap" gave way and he twisted his right knee. The Petitioner testified that rip rap is the rock on the side of bridges on interstate put in place for erosion protection. There was a witness report from a Neil Boesdorfer, which matched the Petitioner's accident description.

The Petitioner testified his right knee felt immediate pain after the incident. The Petitioner testified that prior to this accident he had a knee surgery, due to suspected infection, but had been released with good result after he had been correctly diagnosed with gout. After receiving gout treatment his knee pain improved dramatically and he returned to work full duty immediately prior to the accident in question. The Petitioner testified that before the accident his knee was in great shape and doing well.

The Arbitrator reviewed the medical records from before the accident and has summarized their findings. On January 1, 2019, the Petitioner reported that he had a history of severe pain in his knee of 8-9 out of 10 but after having his knee aspirated and with medicine his knee pain had reduced to 2 out of 10 on that visit. On January 10, 2019 Petitioner was 10 days post operatively from his right knee surgery and appeared to be doing well. Another note from January 11, 2019, documented that Petitioner's swelling was down 75% and he was seeking treatment for gout.

On January 17, 2019, the Petitioner was referred to Dr. Guthrie for gout examination. Dr. Gurthrie then began treatment for Petitioner's gout. On January 24, 2019, the Petitioner returned to Dr. Capecci, with Petitioner reporting that Dr. Guthrie was his "savior" and that his right knee swelling was improved with a pain rating of only 1 out of 10. Petitioner was released to return to work the following Monday. The Petitioner returned to Dr. Guthrie on January 25, 2019, and it was reported that Petitioner's gout was close to subsiding.

The next note is from March 7, 2019, after the claimed accident. Dr. Capecci recorded Petitioner injury history and noted that Petitioner's condition was not likely related to his gout. The Petitioner reported his had pain 3-4 out of 10 and that his right knee would give way with

activity. Dr. Capecci was suspicious for lateral dislocation of the patella. Dr. Capecci opined that Petitioner may have dislocated his patella. Petitioner was given work restrictions and ordered to begin therapy.

The Petitioner returned on March 21, 2019, with noted improvement to his pain and swelling and after rest no instances of his knee giving away. Dr. Capecci ordered Petitioner to start VMO strengthening and to wear a brace. Dr. Capecci continued Petitioner's work restrictions with plans to return to work in April.

The Petitioner returned on April 3, 2019, with new complaints of swelling and pain in his knee after returning to work. After returning to work and pouring concrete, Petitioner's pain returned and had complaints of instability in his knee. Dr. Capecci ordered an MRI of Petitioner's right knee.

On April 25, 2019, the Petitioner had a right MRI of his knee. The report impression was that there was subtle bone marrow edema along the medial aspect of the patella. The report concluded that the findings may be related to a subacute transient lateral patellar dislocation.

On April 29, 2019, the Petitioner returned to Dr. Capecci who reviewed the MRI. After reviewing the MRI, Dr. Capecci opined that the clinical exam was a lateral dislocation of the Patella with spontaneous relocation of the medial patellofemoral retinaculum. It was Dr. Capecci's opinion after reviewing the MRI that the MRI confirmed Petitioner's pathology but no operation was indicated at that time.

The Petitioner returned on June 10, 2019, with continued daily pain and popping of his knee and complaints of an unstable right knee. The doctor felt that Petitioner's examination was normal despite his complaints but continued his light duty restrictions and therapy.

The final visit was on July 22, 2019, and Petitioner continued to have concerns about his knee giving out, and a pain scale of 1-2 out of 10. Petitioner was released at full duty, something he had already started. Dr. Capecci ordered that Petitioner may wear a brace. The Petitioner may return in December if he has further complaints but was placed at MMI at that time.

At the time of trial the Petitioner admitted he does not use a brace but does have concern about his knee stability and pain with use. The Petitioner will notice his knee giving way more when he is climbing unstable areas like the rip rap on the side of bridges. Something he has to do on a regular basis.

Conclusions of Law

The only dispute on this file was as to Nature and Extent so the arbitrator's findings only note the following;

While Petitioner did have a recent non-work related surgery prior to his injury the record and his testimony supports that his right knee was fully functional with few complaints until the accident in question. After the accident the records support that Petitioner suffered from an unstable knee.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an AMA rating was not provided. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner testified he returned to work with no change in his employment. *Less* weight was given to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Petitioner is relatively young and continues to work in a physically demanding field. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings' capacity, Petitioner testified he returned to his work and is working full duty at his own position, this factor is given *less* weight.

With regard to subsection (v) of §8.1b (b), evidence of disability corroborated by the treating medical records, the Petitioner suffered a dislocated patella with prolonged complaints of instability to his right knee in a job at a physically demanding job, therefore this factor is given *greater* weight.

Petitioner has suffered 5% LOU of a right leg, the total amount of 10.75 weeks at rate of $650.63 per §8(e) 9 of the Illinois Worker's Compensation Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Tortoriello,
Petitioner,

vs.

No. 12 WC 006245

Cook County Highway Department,
Respondent.

20IWCC0578

DECISION AND OPINION ON REVIEW PURSUANT TO §8(a) AND §19(h)

This matter comes before the Commission on Petitioner's §8(a) and §19(h) Petition, seeking additional medical benefits for treatment after arbitration and alleging a material increase in his permanent disability. On April 24, 2013, the Arbitrator awarded Petitioner 14-5/7 weeks of temporary total disability, reasonable and necessary medical services of $510.87, and permanent partial disability of 5% loss of the person as a whole for multiple strains and contusions.

Petitioner timely filed this Petition for Review Pursuant to §8(a) and §19(h) on March 16, 2015. A hearing was held on the record before Commissioner Parker on February 19, 2020. Petitioner seeks additional medical benefits for his left shoulder and cervical spine treatment post-arbitration under §8(a) and an increase in permanent partial disability from the 5% loss of person as a whole to 45% loss of person as a whole under §19(h).

I. FINDINGS OF FACT

A. Background

At the time of the January 17, 2012 accident, Petitioner was a 59-year-old laborer/driver whose job included snow plowing and road maintenance. He had been employed by Respondent for 20 years. Petitioner had suffered a prior work accident on July 10, 2006, which resulted in a torn left rotator cuff and long biceps tendon head. Petitioner underwent surgery on November 16, 2006[1] to repair the tears and was awarded 50% loss of use of the left arm by the Arbitrator in 07

[1] Dr. Chudik's medical records and Petitioner's brief refer to a 2005 prior accident and rotator cuff repair. The actual accident occurred on July 10, 2006, with surgery on November 16, 2006.

WC 024616. This award was reduced to 40% loss of use of the left arm by the Commission in 08IWCC1419. Petitioner returned to work full duty on May 31, 2007 following the 2006 accident, and continued to work for Respondent, without seeking additional treatment for his left shoulder, until his second accident on January 17, 2012.

On that date, Petitioner returned to the yard to reload his truck with salt, when he slipped on the ice and fell, striking his back, both shoulders, neck and head. He was taken to Palos Community Hospital, where his primary complaint was a head injury. There the doctors were concerned that he might have suffered a concussion or brain bleed.

Petitioner reported headaches and dizziness to his primary care physician, Dr. Liu, on January 19, 2012, and Dr. Liu agreed to monitor him for concussion symptoms and to provide conservative treatment for Petitioner's soft tissue complaints of low back, neck and shoulder pain.

Dr. Liu referred Petitioner to Dr. Chudik at Hinsdale Orthopaedics for additional evaluation and treatment. At his February 15, 2012 appointment with Dr. Chudik, Petitioner noted stiffness in both shoulders and back, neck, head, and left hip pain from his fall. Dr. Chudik ordered Petitioner off work and prescribed physical therapy. On April 11, 2012, Dr. Bardfield, also at Hinsdale Orthopaedics, examined Petitioner and diagnosed him with a dorsal spine strain, along with bilateral shoulder and hip contusions. Both Dr. Chudik and Dr. Bardfield recommended physical therapy. Petitioner had completed two sessions when Respondent refused to authorize additional therapy until it obtained a §12 exam.

On March 27, 2012, Dr. Jeffery Coe at Occupational Medicine Associates performed a §12 examination at Respondent's request and diagnosed a head contusion and sprain/strain injuries to Petitioner's neck, back, shoulders, and left hip resulting from his January 17, 2012 fall at work. He found that Petitioner could return to work full duty but should be allowed to complete a course of physical therapy. Although he found Petitioner was not yet at maximum medical improvement, Dr. Coe estimated Petitioner's permanent impairment at 1% or less of the person as a whole.

Petitioner returned to work full duty on April 30, 2012 and his claim was heard on January 23, 2013. At arbitration, Petitioner testified that his right shoulder still stiffened and his arm fell asleep. He reported right shoulder pain with digging and plowing snow, cleaning and mopping. His lower back and left hip also bothered him with strenuous activity *but he described no left shoulder complaints at the time of arbitration.* In his April 24, 2013 Decision, the Arbitrator found that Petitioner suffered multiple contusions and strains as a result of his work accident and awarded him medical expenses, temporary total disability, and 5% loss of the person as a whole. On March 16, 2015, Petitioner timely filed this Petition for Review under §8(a), seeking additional medical treatment for his left shoulder and cervical spine conditions and under §19(h), seeking an increase in the award of permanent partial disability.

B. Post-Arbitration Treatment

At the review hearing of his §8(a) and §19(h) petition, Petitioner testified that his left shoulder and cervical spine had continued to cause him pain after the 2013 arbitration hearing. When the pain and stiffness worsened, Petitioner sought re-evaluation and treatment for both injuries.

On February 25, 2015, more than three years after his 2012 accident, Petitioner returned to Dr. Chudik's office complaining of left shoulder weakness dating back to his 2012 accident. When asked on his intake form whether he had any previous problems to this area, he responded that he had undergone rotator cuff surgery in 2005 [sic]. He reported to Dr. Chudik that that his shoulder had seemed fully healed and functional after his rotator cuff repair and that he had no problems related to that shoulder until the 2012 fall on ice. Although Petitioner had some pain and discomfort in 2015, his primary complaint to Dr. Chudik was weakness. Dr. Chudik noted that Petitioner's left shoulder condition was related to his 2005 [sic] surgery. This notation remained part of Dr. Chudik's office notes until six months later when he revised the history section of the note to include a notation that Petitioner's left shoulder condition is "s/p" his 2012 work accident. Based upon Petitioner's history of ongoing complaints since his 2012 fall, Dr. Chudik concluded that Petitioner's shoulder condition and his need for treatment were causally related to the 2012 work injury, rather than the 2006 rotator cuff repair. Petitioner also complained to Dr. Chudik of cervical and lumbar pain since the 2012 accident.

A March 17, 2015 MRI of Petitioner's left shoulder revealed supraspinatus and infraspinatus tendinosis with no definite evidence of rotator cuff tear, findings consistent with prior biceps tenotomy and superior labral debridement, and degenerative findings. Petitioner provided a history of pain for a year that was worsening, and the radiologist noted a possible rotator cuff sprain. Petitioner followed up with Dr. Chudik on March 18, 2015, complaining that his left shoulder strength was much decreased as compared to his right shoulder and was hampering his activities of daily living. Dr. Chudik ordered an EMG of Petitioner's left upper extremity to look for neurologic evidence of the weakness. Dr. Bardfield noted that the March 25, 2015 EMG revealed evidence of left carpal tunnel syndrome and abnormalities limited to the deltoid and teres minor muscles suggesting a left axillary neuropathy. On April 15, 2015, Dr. Chudik diagnosed Petitioner with left shoulder axillary neuropathy and returned Petitioner to physical therapy. Petitioner reported slow but steady progress in the return of his muscle strength and coordination.

On February 3, 2016, Dr. Chudik noted that Petitioner's pain and weakness had not resolved despite extensive physical therapy. Since the weakness had continued, the doctor recommended surgical release of the axillary nerve.

Surgery was performed on January 31, 2017 by Dr. Chudik and Dr. Fajardo to release the axillary and brachial prexus nerves, debride the rotator cuff and labrum, and remove the hardware from Petitioner's 2006 rotator cuff repair. The doctors also performed a capsular release, subacromial decompression, and manipulation. On February 13, 2017, Petitioner reported that his pain was well-controlled and he was attending post-operative physical therapy.

20IWCC0578

Petitioner also sought post-arbitration treatment for his 2012 neck strain injury. Petitioner testified at the review hearing that he had consulted a doctor at Rush University Medical Center for his worsening neck pain. Petitioner testified that the doctor had recommended immediate surgery, but these medical records were not offered as evidence. Petitioner testified that on November 16, 2017 he sought a second opinion from Dr. Ganju at Northwestern University Medical Center. Dr. Ganju opined that steroid injections might be necessary to alleviate his neck complaints at some point, but he recommended that Petitioner begin physical therapy before proceeding with injections. Dr. Ganju did not offer a causation opinion relating Petitioner's neck condition to his 2012 work accident. Petitioner did not return to Dr. Ganju or seek any additional treatment for his neck complaints.

C. Section 12 Examination

Respondent obtained a §12 evaluation of Petitioner's left shoulder condition from Dr. Lawrence Lieber on March 7, 2019. Dr. Lieber reviewed Petitioner's medical records, including his left shoulder x-rays and MRI, which he believed confirmed his diagnosis of moderate tendinosis of the rotator cuff. Dr. Lieber opined that the MRI showed degenerative changes and evidence of prior biceps tenotomy and labral debridement but no evidence of any acute abnormalities. Petitioner complained of persistent left shoulder problems with overhead activities, popping, weakness and numbness, and trouble sleeping.

On exam, Dr. Lieber noted significant atrophy and weakness about Petitioner's left shoulder as well as impingement, apprehension and instability, though he concluded that these conditions were not causally related to the 2012 accident. Dr. Lieber also concluded that there was no evidence that the alleged January 17, 2012 accident caused any injury to Petitioner's axillary nerve, and he believed that the only injury to Petitioner's left shoulder resulting from his 2012 fall would, at most, be a contusion. Petitioner did not provide a prior history of left shoulder problems, though Dr. Lieber discovered Petitioner's 2006 rotator cuff surgery through his review of his medical records.

Dr. Lieber found Dr. Chudik's initial evaluation in February 2012 reasonable, as well as Dr. Bardfield's exam and four weeks of physical therapy to Petitioner's neck and lumbar areas. He asserted that there was no evidence, however, that Dr. Chudik's surgical intervention was reasonable or related to Petitioner's 2012 accident.

II. CONCLUSIONS OF LAW

In order for Petitioner to establish that he is entitled to post-arbitration medical expenses under §8(a), Petitioner must prove that his current state of ill-being with regard to his left shoulder and cervical spine is causally related to his January 17, 2012 work accident and that the treatment he received for those conditions was reasonably required to cure or relieve him from the effects of the accidental injuries suffered as a result of his work accident. 820 ILCS 305/8(a). If the claimant fails to prove that his current condition of ill-being is causally connected to his work accident, his request for post-arbitration medical expenses pursuant to §8(a) of the Act should be denied. *City of Chicago v. Illinois Workers' Comp. Comm'n,* 409 Ill. App. 3d 258, 266-67 (1st Dist. 2011).

To obtain an increase in the permanent partial disability award under §19(h), Petitioner must show that the disability at the time of his initial hearing on January 23, 2013 has increased and the increase must be material. *Gay v. Industrial Comm'n,* 178 Ill. App 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). Section 19(h) seeks to redress changes in circumstances after the entry of an award and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare his left shoulder and cervical condition at the two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

After a careful review of the entire record, the Commission finds that Petitioner has failed to establish his left shoulder and cervical conditions for which he received treatment from 2015 through 2017 are related to his 2012 accident. Petitioner returned to work full duty on April 30, 2012 following his 2012 accident and sought no medical treatment for his left shoulder or cervical spine from that time until he returned to Drs. Chudik and Bardfield at Hinsdale Orthopaedics in 2015. Petitioner did not testify during the 2013 arbitration hearing that he was having any symptoms in his neck or left shoulder. He was diagnosed simply with strains/contusions. The Commission observes that Dr. Chudik's notes causally related Petitioner's post-arbitration shoulder complaints to his 2006 rotator cuff surgery, rather than his 2012 accident, for the first six months of treatment in 2015. Furthermore, Dr. Chudik's January 31, 2017 left shoulder operative report listed eight diagnoses. However, there is no medical testimony explaining how a left shoulder strain/contusion suffered in 2012 could have resulted in the conditions described in the operative note.

As to the cervical spine condition, Petitioner testified that he sought evaluation and treatment for his ongoing neck pain from an unnamed doctor at RUSH and Dr. Ganju at Northwestern University Medical Center. Dr. Ganju did not provide a medical opinion causally relating Petitioner's neck complaints in 2017 to his work accident five years earlier. Dr. Ganju diagnosed Petitioner with spondylosis or age-related wear and tear. There is no mention of the 2012 accident in Dr. Ganju's November 16, 2017 office note.

The Commission therefore denies Petitioner's §8(a) petition with regard to both conditions.

Petitioner also seeks relief under §19(h) of the Act for his alleged increased permanent partial disability. Having concluded that Petitioner failed to prove that his current left shoulder and cervical spine conditions are causally related to his 2012 work accident, the Commission finds that Petitioner is not entitled to an increase in the permanency awarded for that accident.

20IWCC0578

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) Petition for additional medical benefits and §19(h) for increased permanency is denied.

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 1 - 2020

Marc Parker

Barbara N. Flores

Deborah L. Simpson

o-2/19/20
mp/dak
68

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elliot Daymon,

Petitioner,

vs. NO: 16 WC 641

State of Illinois/Vienna Correctional Center,

20IWCC0579

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2019, is hereby affirmed and adopted.

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

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

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

DATED: OCT 1 - 2020
o: 9/3/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAYMON, ELLIOT
Employee/Petitioner

Case# **16WC000641**

STATE OF IL/VIENNA CC
Employer/Respondent

20IWCC0579

On 9/24/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

5472 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 24 2019

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

20 IWCC0579

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Elliot Daymon
Employee/Petitioner

v.

State of IL/Vienna C.C.
Employer/Respondent

Case # 16 WC 00641

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 26, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 30, 2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $58,032.00; the average weekly wage was $1,116.00.

On the date of accident, Petitioner was 32 years of age, married with 2 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $54,524.44 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $54,524.44. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.60 per week for 175 weeks because the injuries sustained caused the 35% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator

September 23, 2019
Date

ICArbDec p. 2

SEP 24 2019

Evidentiary Ruling

At trial, Petitioner's counsel tendered into evidence the transcript of the deposition of Dr. Ricardo Rao, one of Petitioner's treating physicians, which was taken on March 13, 2019. The deposition was taken in connection with a medical malpractice action filed against Dr. Rao in the State of Missouri (Petitioner's Exhibit 30).

Respondent's counsel objected to the admission into evidence of Dr. Rao's deposition on the basis of hearsay. Petitioner's counsel argued that the deposition of Dr. Rao was admissible and cited Illinois Rule of Evidence 804(b)(1) as authority. The Arbitrator reserved ruling on the objection and directed counsel for Petitioner and Respondent to brief the issue in their proposed Decisions.

Illinois Rule of Evidence 804(b)(1) provides as follows:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony given as a witness (A) at another hearing of the same or a different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination or (B) in a discovery deposition as provided for in Supreme Court Rule 212(a)(5).

There was no evidence tendered that the declarant, Dr. Rao, was unavailable to testify as a witness in this case. Obviously, counsel for Respondent was not present when Dr. Rao was deposed in connection with the medical malpractice action and did not have the opportunity to cross examine him.

Based upon the preceding, Respondent's counsel's hearsay objection is sustained and Petitioner's Exhibit 30 is not received into evidence.

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on November 30, 2015. According to the Application, Petitioner was "Restraining a combative inmate" and sustained an injury to the "Back, neck, body as a whole" (Arbitrator's Exhibit 2). Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship in regard to Petitioner's urinary condition. Petitioner and Respondent stipulated temporary total disability benefits had been paid in full (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Correctional Officer. On November 30, 2015, Petitioner and a Correctional Lieutenant were escorting an inmate down a flight of stairs. The inmate attempted to pull away which caused both Petitioner and the inmate to fall down the stairwell. At that time, Petitioner experienced pain in his neck and low back. Petitioner testified he previously sustained a low back injury, but had fully recovered. Petitioner received conservative treatment following that prior back injury and surgery was neither recommended nor performed.

Petitioner initially sought medical treatment at Harrisburg Medical Center on November 30, 2015. At that time, Petitioner complained of low back and bilateral leg pain as well as stiffness in the neck on the left side. CT scans were obtained of both the lumbar and cervical spine. The CT scan of the lumbar spine revealed disc bulges at L3-L4, L4-L5 and L5-S1. The CT scan of the cervical spine revealed mild spondylosis at C5-C6 and C6-C7 (Petitioner's Exhibit 3).

Petitioner was subsequently seen by Dr. Matthew Winkelman, his family physician, on December 1, 2015. Dr. Winkelman's record of that date noted Petitioner had a prior history of low back problems, but had been doing well up until the accident of the preceding day. Petitioner complained of low back pain with radiation into both buttocks and the left leg (Petitioner's Exhibit 5).

Petitioner was evaluated by Dr. David Raskas, an orthopedic surgeon, on December 1, 2015. Petitioner advised Dr. Raskas of the work-related accident of November 30, 2015, and complained of low back pain which radiated into both legs as well as neck pain. Dr. Raskas noted Petitioner had a prior low back injury for which he treated him conservatively about three years prior. Dr. Raskas reviewed the CT scans of both the lumbar and cervical spine and opined the CT scan of the lumbar spine revealed a broad based herniated disc at L5-S1. Dr. Raskas ordered MRI scans of the lumbar and cervical spine (Petitioner's Exhibit 6).

MRI scans of the lumbar and cervical spine were performed on December 15, 2015. According to the radiologist, the MRI of the lumbar spine revealed a central disc herniation at L5-S1 and mild disc bulging at L4-L5. According to the radiologist, the MRI of the cervical spine revealed right sided disc protrusions at C3-C4 and C5-C6 as well as a small central herniation at C4-C5 (Petitioner's Exhibit 7).

Dr. Raskas saw Petitioner on December 21, 2015, and reviewed the MRIs. His interpretation of the MRIs was consistent with that of the radiologist. Further, he noted that when the MRI of the lumbar spine was compared to a prior MRI of the lumbar spine performed on June 11, 2013, the central disc herniation had increased in size. Dr. Raskas opined the pathology in both the lumbar and cervical spine was caused by the accident, ordered physical therapy and authorized Petitioner to be off work (Petitioner's Exhibit 6).

Petitioner received physical therapy in January, 2016, and experienced some improvement of his neck symptoms, but minimal improvement of his low back symptoms. When Dr. Raskas again saw Petitioner on February 2, 2016, he recommended Petitioner undergo some epidural steroid injections in his low back and referred Petitioner to Dr. Patricia Hurford (Petitioner's Exhibits 6 and 8).

Dr. Hurford saw Petitioner on February 16, 2016. At that time, she administered an epidural steroid injection at L5-S1 (Petitioner's Exhibit 6).

Dr. Raskas subsequently saw Petitioner on March 1, 2016, and Petitioner advised the epidural steroid injection did not help. Dr. Raskas recommended Petitioner return to work and try to live with his symptoms and noted Petitioner was very young to be considering either a lumbar fusion or disc replacement surgery (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Kevin Rutz, an orthopedic surgeon, on June 2, 2016. In connection with his examination of Petitioner, Dr. Rutz reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Rutz opined Petitioner had a herniated disc at L5-S1 which was related to the accident (Respondent's Exhibit 2).

When Dr. Raskas saw Petitioner on July 8, 2016, Petitioner advised he continued to have significant low back pain with intermittent leg pain. Dr. Raskas opined Petitioner should undergo anterior fusion surgery at L5-S1 with pedicle screw fixation (Petitioner's Exhibit 6).

Dr. Raskas performed surgery on August 8, 2016. The procedure consisted of an interbody fusion with instrumentation/plating as well as a complete discectomy L5-S1 (Petitioner's Exhibit 6).

Dr. Ricardo Rao, a vascular surgeon, assisted Dr. Raskas in the surgery of August 8, 2016. As noted herein, the surgical procedure was an anterior surgery and Dr. Rao performed that portion of the surgery that was required to expose the L5-S1 disc space. Once that was completed, Dr. Raskas proceeded with the fusion/discectomy. Dr. Rao's surgical report did not note any complications (Petitioner's Exhibit 11).

Following surgery, Petitioner experienced swelling in the scrotum and abdominal pain. Because of the severity of his symptoms, Petitioner was airlifted to Missouri Baptist Hospital.

At Missouri Baptist Hospital, a CT scan was performed which revealed a large fluid collection with significant swelling in his scrotum. It was noted Petitioner was two to three days post anterior fusion. Petitioner was diagnosed with ureteral disruption and a stent was put in place. It was subsequently determined that there was a leak around the stent and Petitioner developed pneumonia, a high fever and possible sepsis. Petitioner was placed in the ICU and he subsequently underwent placement of a nephrostomy tube. Petitioner also had some GI problems and he remained hospitalized for 12 days. When he was discharged, the nephrostomy tube remained in place. While hospitalized, Petitioner's primary treating physician was Dr. David Keetch, a urologist (Petitioner's Exhibit 16).

Dr. Raskas saw Petitioner on August 31, 2016. He noted Petitioner's "...surgery was complicated by a tear in his ureter." He also noted Petitioner had received treatment for that condition (Petitioner's Exhibit 6).

Petitioner was again hospitalized at Missouri Baptist Hospital on September 14, 2016, because of constipation and severe flank pain. Again, Petitioner's primary treating physician was Dr. Keetch, who subsequently performed surgery on October 3, 2016, which consisted of removal the ureteral stent (Petitioner's Exhibit 17).

In regard to his low back condition, Petitioner continued to be seen by Dr. Raskas. When Dr. Raskas saw Petitioner on January 31, 2017, he ordered physical therapy and continued to authorize Petitioner to remain off work. When Dr. Raskas saw Petitioner on March 28, 2017, he recommended Petitioner continue physical therapy, but noted that Petitioner's activity levels needed to be increased and physical therapy needed to be more aggressive (Petitioner's Exhibit 6).

When Dr. Raskas saw Petitioner on May 16, 2017, he noted the complications from the injury seemed to have "calmed down." He ordered eight weeks work conditioning and that upon completion of same, Petitioner would undergo a functional capacity evaluation (FCE) and a CT scan (Petitioner's Exhibit 6).

At the direction of Respondent, Dr. David Trotter, an orthopedic surgeon in Palm Beach Gardens, Florida, conducted a utilization review on June 2, 2017, in regard to Dr. Raskas' recommendation Petitioner undergo eight weeks of work hardening. Dr. Trotter did not examine Petitioner, but reviewed medical records provided to him by Respondent. Based upon his review of the medical records, Dr. Trotter opined that work conditioning should be limited to five visits and that any further work conditioning would be medically unnecessary (Respondent's Exhibit 3).

Petitioner proceeded with the work conditioning as recommended by Dr. Raskas. The FCE was performed on August 1, 2017. The examiner opined Petitioner was capable of working in the medium physical demand category which was consistent with Petitioner's job as a prison guard (Petitioner's Exhibit 8).

Dr. Raskas saw Petitioner on August 4, 2017, and reviewed the report of the FCE. He also ordered a CT scan to confirm that the fusion L5-S1 was solid. At that time, Dr. Raskas authorized Petitioner to return to work at full duty (Petitioner's Exhibit 6).

Dr. Raskas last saw Petitioner on February 13, 2018. At that time, Dr. Raskas reviewed an outside CT scan and opined the fusion had been incorporated. He noted Petitioner had experienced a complication following surgery, but that those issues had resolved without any effect on his overall condition, at least in regard to his spine (Petitioner's Exhibit 6).

Petitioner was evaluated by Dr. Keetch on September 26, 2017, because of complaints of penile pain accompanied by a ventral curvature. Dr. Keetch diagnosed Petitioner with Peyronie's disease. He ordered an ultrasound of Petitioner's kidney and bladder and directed Petitioner to follow-up with him in one year. He did not opine as to the etiology of the Peyronie's disease (Petitioner's Exhibit 17).

Petitioner subsequently sought treatment for the Peyronie's disease from Dr. Sam Stokes, a urologist who evaluated Petitioner on February 13, 2018. Dr. Stokes confirmed the diagnosis and treated Petitioner with medication and injections (Petitioner's Exhibit 24).

Dr. Stokes was deposed on September 24, 2018, and his deposition testimony was received into evidence at trial. Dr. Stokes' testimony was consistent with his medical records and he stated he diagnosed Petitioner with Peyronie's disease. In regard to causality, Dr. Stokes testified that following Petitioner's lumbar surgery, Petitioner underwent several cystoscopic examinations and several urethral catheterization placements. "There was no prior history to these interventions. There was a development following. The likely case would be it formed as a result of the repeat cystoscopies and the repeat catheterizations." (Petitioner's Exhibit 28; p 8).

On cross-examination, Dr. Stokes agreed that development of Peyronie's disease was not typical following a scope unless the scope was "fairly aggressive." Dr. Stokes stated that typically, the onset of the condition is gradual (Petitioner's Exhibit 28; pp 14, 18).

Dr. Keetch was deposed by counsel for Respondent on March 8, 2019. Dr. Keetch testimony regarding his diagnosis and treatment of Petitioner was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Keetch saw Petitioner on March 23, 2017, and Petitioner had no specific urinary complaints at that time. He testified Petitioner did not have complaints consistent with Peyronie's disease. When questioned about its cause, Dr. Keetch testified in most cases it was unknown and he characterized it as idiopathic (Respondent's Exhibit 4; pp 16-18).

On cross-examination, Dr. Keetch agreed the urinary leak was a result of the spine injury, but the Peyronie's disease was not and the timing of the onset of its symptoms was coincidental (Respondent's Exhibit 4; pp 27-28).

While Respondent did not dispute liability for the fusion surgery, not all of the charges of Frontenac Surgery Center were paid. Laurie Thieman, the business office manager of Frontenac Surgery Center was deposed on September 24, 2018. Thieman testified she was familiar with the Illinois Medical Fee Schedule used in Workers' Compensation cases. She testified she was informed by Respondent that the bill was not paid in full because there was a PPO reduction imposed by a company called Foresight Medical Review. However, Thieman testified that there was no PPO agreement between Respondent and Frontenac Surgery Center and there remained a balance due and owing of approximately $14,000.00 after application of the fee schedule (Petitioner's Exhibit 27).

At trial, Petitioner testified he continues to have low back pain/discomfort especially with prolonged sitting/standing or walking for 20 minutes or longer. Petitioner agreed he was able to return to work as a Correctional Officer; however, Petitioner stated that he now calls for assistance whenever he has to deal with combative inmates because he is not physically able to engage with the inmates the way he was able to prior to the accident. Petitioner does continue to take over the counter medications on an as needed basis.

Petitioner also testified he continues to have symptoms related to the Peyronie's disease. Specifically, Petitioner has an abnormal curvature in his penis and experiences pain with erections.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of November 30, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on November 30, 2015, which caused an injury to his lumbar spine that ultimately required fusion surgery at L5-S1.

Both Dr. Raskas and Dr. Keetch opined the urinary issues Petitioner developed (shortly after the fusion surgery) were a result of that surgery.

In regard to the diagnosis of Peyronie's disease, Dr. Keetch opined it was idiopathic and not related to the fusion surgery and Dr. Stokes opined it was because of the repeat cystoscopies and catherizations administered to Petitioner while he was being treated for his post surgical urinary complications.

Both Dr. Keetch and Dr. Stokes were treating physician; however, Dr. Keetch's opinion that Petitioner being diagnosed with Peyronie's disease subsequent to the extensive amount of treatment he underwent for urinary issues is not persuasive.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Stokes to be more persuasive than that of Dr. Keetch in regard to causality of the Peyronie's disease.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid and, Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator does not see any basis for Respondent's refusal to pay the charges of Frontenac Surgical Center pursuant to the medical fee schedule. There was no basis to rely upon a PPO agreement because none existed.

The Arbitrator is not persuaded by the utilization review of a physician who never examined Petitioner and based his opinion solely upon a review of medical records. Petitioner's treating physician, Dr. Raskas, was in the best position to determine the appropriate duration of work conditioning.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 35% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked as a Correctional Officer for Respondent. As the circumstances of this accident clearly indicated, Petitioner has to deal with combative inmates and his back is susceptible to possible reinjury. The Arbitrator gives this factor moderate weight.

Petitioner was 32 years old at the time of the accident and 36 years old at the time of trial. Petitioner will reach normal retirement in approximately 30 years and will have to live with effects of this injury for the remainder of his natural and working life. The Arbitrator gives this factor significant weight.

There was no evidence the entry have any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

As a result of the accident, Petitioner underwent fusion surgery at L5-S1 which included metal hardware. Petitioner developed post operative complications as a result of the surgery and has been diagnosed with Peyronie's disease which, as noted herein, the Arbitrator has found to be related to the accident/surgery.

At trial, Petitioner still had ongoing complaints regarding both his low back and Peyronie's disease consistent with the injury he sustained and the complication he developed thereafter. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Linda Dawe, Widow of George Dawe,

Petitioner,

vs. NO: 14 WC 41579

20IWCC0580

Custom Staffing Industrial Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of occupational disease, permanent partial disability, legal and evidentiary error, sections 1(d) – 1(f) of the Workers' Occupational Diseases Act and burial expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 2019, is hereby affirmed and adopted.

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

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

20IWCC0580

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

DATED: OCT 1 - 2020
o: 9/3/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

DAWES, LINDA WIDOW OF DAWES, GEORGE Case# **14WC041579**
Employee/Petitioner

CUSTOM STAFFING INDUSTRIAL SERVICES
Employer/Respondent

20IWCC0580

On 9/18/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.87% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

20IWCC0580

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

Linda Dawe, Widow of George Dawe
Employee/Petitioner

v.

Custom Staffing Industrial Services
Employer/Respondent

Case # **14** WC **41579**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William R. Gallagher**, Arbitrator of the Commission, in the city of **Collinsville**, on **August 21, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Decedent's current condition of ill-being causally related to the injury?

G. [ ] What were Decedent's earnings?

H. [ ] What was Decedent's age at the time of the accident?

I. [ ] What was Decedent's marital status at the time of the accident?

J. [ ] Who was dependent on Decedent at the time of death?

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

L. [x] What compensation for permanent disability, if any, is due?

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

N. [ ] Is Respondent due any credit?

O. [x] Other **Exposure, Sections 1(d), (e) and (f) of the Occupational Diseases Act, statutory burial expense**

20IWCC0580

FINDINGS

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

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

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

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

Decedent's death ***is not*** causally related to the accident.

In the year preceding the injury, Decedent earned $**32,392.36**; the average weekly wage was $**622.93**.

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

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

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

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

The Arbitrator finds that Decedent died on **September 12, 2014**, leaving **one** survivor(s), as provided in Section 7(a) of the Act, including **Linda Dawe**.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher
Signature of Arbitrator

September 13, 2019
Date

SEP 18 2019

Findings of Fact

Petitioner, Linda Dawe, Widow of George Dawe, Deceased, filed an Application for Adjustment of Claim which alleged George Dawe died on September 12, 2014, because of his exposure to "...coal mine dust but not limited to coal dust, rock dust, fumes & vapors" (Arbitrator's Exhibit 2). Respondent denied liability on the basis of "No exposure/disease/disablement" and "No disease/causation" (Arbitrator's Exhibit 1).

Linda Dawe (hereinafter referred to as "Dawe") testified she was married to George Dawe (hereinafter referred to as "Deceased") for almost 45 years. Dawe testified Deceased began working as a coal miner in 1973 and he worked for Old Ben, Ziegler and Peabody. The last coal mine company Petitioner worked for was Peabody. Petitioner left the employment of Peabody on June 26, 2013, when he retired.

Deceased went to work for Respondent on July 1, 2013. His job was to interview and hire people to work at the Prairie State Mine. Deceased's office was located at the site of the Prairie State Mine, but he was employed by Respondent. Deceased worked for Respondent part time and usually worked two days a week, eight hours a day.

Dawe testified Deceased went underground to check out the mine, but she he did not know how many times he went underground, where he went underground or how long he was underground. Dawe also testified there were occasions when Deceased was working for Respondent that his clothing would have had a significant amount of dirt and coal dust on them.

Dawe testified Deceased had breathing problems which started when he was working for Peabody and were ongoing. Dawe stated Deceased had problems breathing when he attempted any kind of physical activity.

Deceased had numerous health issues and, on July 24, 2014, he was diagnosed with lung cancer. On August 19, 2014, Deceased underwent surgery for lung cancer which consisted primarily of a right lower lobectomy (Respondent's Exhibit 4).

Deceased was discharged from the hospital and returned home on August 22, 2014. However, Deceased began to experience breathing problems and was admitted to Herrin Hospital and subsequently transferred to Barnes Hospital on August 27, 2014. At Barnes, the Deceased was intubated, his heart stopped and he could no longer breathe on his own. Dawe testified the decision was made to remove life support and Deceased passed away on September 12, 2014 (Respondent's Exhibits 5 and 6).

Erin Higginson, Respondent's Vice President of Operations testified at trial. Higginson has worked for Respondent since 2011, and in her current position, since 2012. Higginson stated Respondent was not a coal mine operator, but provided interviewing/hiring services for Prairie State Mine. Deceased's job duties consisted of interviewing/hiring, talking to the miners if they needed anything, meeting with management/HR individuals associated with Prairie State Mine, going to safety meetings, etc.

Higginson stated Deceased worked in an office at the mine. The office building had air-conditioning and she described the office as being extremely clean. Deceased was not employed as a coal miner and Deceased was never required to go underground in connection with any of his job duties. Higginson did have occasion to go underground; however, Deceased never accompanied her.

Higginson also testified that before an individual was permitted to go underground, the individual was required to complete survival training which was required by the Mine Safety Health Administration. After completion of the training, the individual would be given a certificate that he/she had completed the training. Deceased did not have such a certificate. On cross-examination, Higginson agreed it was "possible" Deceased may have gone underground, but she was unaware of his doing so.

The Arbitrator notes that there is a voluminous amount of medical records and depositions of both Petitioner's and Respondent's medical experts. However, given the Arbitrator's conclusion of law noted herein, it was not necessary to abstract all of the aforementioned medical records and depositions.

Conclusion of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Deceased did not sustain an accidental injury arising out of and in the course of his employment by Respondent and his death was not causally related to his employment by Respondent.

In support of this conclusion the Arbitrator notes the following:

Section 1(d) of the Workers' Occupational Disease Act provides in part "...the term 'Occupational Disease' means a disease arising out of and in the course of the employment which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public."

In this case, the Arbitrator finds the evidence did not support Deceased was exposed to the hazards of an occupational disease while employed by Respondent.

While Dawe testified Deceased went underground while employed by Respondent, she had no knowledge as to when he went underground, where he went underground or for what purpose he would have gone underground.

Erin Higginson credibly testified on behalf of Respondent and described Deceased's job duties and the fact that he worked in an air conditioned, clean office environment. Higginson stated there would have been no reason for Deceased to go underground. Further, Higginson stated that for an individual to go underground, it was necessary to complete survival training as required by the Mine Safety Health Administration. Upon completion, a certificate would be issued to the

individual who completed the training. No such certificate was ever issued to Deceased during his employment with Respondent.

In regard to disputed issues (L) and (O) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAFAEL PALESTINA,

Petitioner,

vs. NO: 18 WC 5795

GURNEE PARK DISTRICT,

Respondent.

20IWCC0581

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 27, 2019 is hereby affirmed and adopted.

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

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

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

DATED: OCT 1 - 2020
o: 9/17/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PALESTINA, RAFAEL
Employee/Petitioner

Case# **18WC005795**

GURNEE PARK DISTRICT
Employer/Respondent

20IWCC0581

On 8/27/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0013 DUDLEY & LAKE LLC
PETER M SCHLAX
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0766 HENNESSY & ROACH PC
EDWARD HENNESSY
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20 IWCC0581

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rafael Palestina
Employee/Petitioner

v.

Gurnee Park District
Employer/Respondent

Case # **18 WC 05795**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Carolyn Doherty , Arbitrator of the Commission, in the city of **Waukegan** , on **July 22, 2019** . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 11, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **22,800.00** ; the average weekly wage was $ **440.00** .

On the date of accident, Petitioner was **51** years of age, ***single*** with **4** dependent children.

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

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

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

Respondent is entitled to credit under Section 8(j) of the Act for any and all medical expenses that were paid through group insurance.

ORDER

Petitioner has failed to provide sufficient evidence to establish notice, accident or causal relationship by a preponderance of the credible evidence. As such, the case is denied and Petitioner is awarded no benefits under the Illinois Workers' Compensation Act.

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

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

Carolyn M. Doherty

Signature of Arbitrator

8/26/19

Date

AUG 27 2019

FINDINGS OF FACT

At trial, Petitioner alleged that he sustained an accident arising out of and in the course of his employment on 4/11/16 while working as a custodian for Respondent Gurnee Park District. Specifically, Petitioner asserts that he injured his low back moving a treadmill at work on 4/11/16. At trial, Petitioner called Matthew Vanderkamp as an adverse witness in Petitioner's case. Mr. Vanderkamp testified that he started working at the Gurnee Park District in 2002. By spring of 2016 he held the position of Membership Services Supervisor. Mr. Vanderkamp left his job with Respondent in August 2016 to take a job with Lindenhurst. Mr. Vanderkamp has not worked for Gurnee Park District since late August 2016. T. 9.

Mr. Vanderkamp testified that he knew Petitioner worked as a custodian for Gurnee. Petitioner was not under his supervision in the spring of 2016. T. 11. Mr. Vanderkamp testified that he was aware that the park district purchased a property in October 2015, specifically, a former fitness facility in Gurnee that went out of business. He testified that the park district purchased "brand new" equipment that was moved into the facility by "the contractor that we purchased it all through. They came in, placed it, walked through the facility and told us what we needed to buy. It was all done through a contractor." T. 14. Mr. Vanderkamp testified that he never saw Petitioner move any equipment and did not become aware that Petitioner moved or assisted in the move of a treadmill at any time. T. 11-13

At trial, Petitioner testified via interpreter. Petitioner testified that he started working at Gurnee Park District when they opened some time in 2016. Petitioner testified he worked as a custodian for Respondent until his employment was terminated in January 2018. He estimated that he worked for approximately 3 years for Respondent. T. 17. He testified that the building he worked in was a one story building located on Grand Avenue in Gurnee. T. 18. He testified that he cleaned bathrooms and "everywhere there was cardio." Petitioner testified that on April 11, 2016, he hurt himself moving a treadmill from one level to another in the building. He testified that he moved the treadmill along with three other men namely Matthew, Sean and Pat. T. 19. Petitioner testified that he was holding the "back part" of the treadmill carrying the treadmill down one step to a lower level when he heard a crack in his back. T. 20. Petitioner testified that he was stepping backward from one step to another. T. 20. According to Petitioner the other men asked him if he was okay and he told them he was fine and was just feeling a little pain in his back. T. 21-22. Petitioner testified that Sean was the "main boss" who gave the directions and that Matthew was his assistant. T. 21. Petitioner testified that the pain in his back was "hot". He testified that the pain persisted through the day and that he went to see Dr. Frank. T. 22. Petitioner testified that after seeing Dr. Frank, he told Sean that he had been to the doctor because he hurt his back lifting the treadmill earlier that day. T. 22.

Dr. Frank ordered physical therapy followed by a CT scan. Thereafter, Dr. Frank sent Petitioner to see Dr. Breger. Petitioner again reported pain in his low back. Petitioner testified that the pain would travel on occasion up to his neck. Dr. Breger ordered an MRI and then sent Petitioner to Dr. Alzate who ordered more therapy and injections. Petitioner did not obtain this treatment as he had no health insurance following his termination from Respondent. T. 26. Petitioner testified that he continues to have low back pain which worsens with movement. T. 26. He takes prescription Tylenol as prescribed by Dr. Frank for daily pain. T. 27. Petitioner currently works part time for Lewis Produce. Petitioner was also working concurrently part time at Lewis while working for Respondent at the time of the accident. The job does not require heavy lifting but he is on his feet most of the time packing produce. He testified that he notices pain in his legs. T. 28. On the date of accident Petitioner had 4 children under the age of 18. T. 28.

On cross exam, Petitioner testified that he was not typically required to move equipment in his job as a custodian. However, he testified that his boss Sean asked for his help to move 2 treadmills. T. 31-32. Petitioner testified that he felt the crack in his back moving the second treadmill down the step. T. 34. Petitioner testified he took over the counter medication the day of the accident.

Petitioner testified on cross examination that the reported the incident to Sean about a month after the incident because he was afraid he would get fired. T. 36. Petitioner testified that he did not ask to file a workers' compensation claim, but reportedly told a Spanish speaking secretary at work that he wanted to get medical treatment under workers' compensation. However, he testified that he told Sean that he was not feeling well and needed to see a doctor. T. 37. Petitioner also testified that Matthew Vanderkamp was aware of the accident and about one month after the accident Mr. Vanderkamp prepared a report regarding the accident. T. 38-39. Petitioner does not recall the exact date of the report. T. 39.

Petitioner denied having problems with his low back prior to the accident in April 2016. T. 43. He did not recall treating for a low back problem in May 2015. T. 42. He testified that he did not lose time from work after this accident. T. 40.

Respondent called Mr. Vanderkamp to testify on behalf of Respondent. He testified that he has no recollection of the April 11, 2016 treadmill lifting event that Petitioner described. T. 45. Mr. Vanderkamp recalls lifting treadmills himself but does not recall Petitioner lifting or moving treadmills on any date. T. 46. Mr. Vanderkamp did not recall Petitioner reporting pain of any kind or that he had suffered a work-related injury. He denied ever completing a report pertaining to a workers' compensation claim and he denied ever having any discussions about pain or about an injury with Petitioner. T. 47-48. Mr. Vanderkamp had no recollection of a meeting with Petitioner in his office about medical treatment or workers' compensation. He was not aware of Petitioner having back problems and he had no personal knowledge of Petitioner's medical background. He attested that at no time did Petitioner ask for time off work or for any kind of work accommodation because of an injury. T. 48.

The earliest medical record in evidence is from Dr. Gerald Frank pertaining to a wellness exam he performed on April 11, 2016, the alleged date of accident. Two weeks prior Petitioner reportedly had treated at Vista for paronychia (infection of the tissue adjacent to a finger or toenail). His medical history was significant for a sebaceous cyst on his upper back. Dr. Frank made no mention of Petitioner's work or to a work injury. No mention is made of back pain is discernible from the records. Petitioner was seen for a well visit. PX 1, RX 3.

On May 4, 2016, Petitioner underwent blood work at Northshore University Health system, on the order of Dr. Gerald Frank. PX 1. Petitioner returned to Dr. Frank on May 12, 2016 with no health complaints but to receive lab results. Dr. Frank noted "will do x-rays in a few weeks. Works very hard at his job. Low back pain." PX 1. The impression was noted as HTN (high blood pressure) and low back pain. No mention of a specific work injury was made to Dr. Frank on May 12, 2016. Blood pressure medication was prescribed and lumbar spine x-rays were ordered. PX 1. RX 3,

Petitioner presented to Dr. Frank's office again on June 23, 2016 to have an x-ray. He also reported that the pharmacy would not fill his prescription. Dr. Frank again noted the diagnosis of hypertension and low back pain. There was no mention of Petitioner's work or to a work injury. Petitioner underwent a lumbar spine x-ray that day under a clinical history of "lumbago." The attending radiologist, Dr. Gregory Jackson found disc space narrowing at L5-S1, minimal anteriolisthesis of L4 upon L5, and bilateral facet arthropathy of the lower spine. Dr. Jackson's impression was, "lumbar spondylosis." PX 1.

Petitioner returned to Dr. Frank on August 25, 2016 for chronic back pain and a check on his blood pressure. Petitioner reported that his "back still hurts". Dr. Frank noted, "When he works hard he feels pain." There is no reference to a work injury. PX 1, RX 3. The diagnosis was chronic back pain. Petitioner was prescribed Naprosyn and Flexeril and sent to physical therapy. PX 1.

Petitioner returned to Dr. Frank on September 29, 2016 complaining that his back was still in pain. He rated it as a 6 on a 0 to 10 scale. Dr. Frank documented Petitioner's chronic back pain and he again recommended physical therapy. He also ordered a CT scan. RX 3, PX 1.

On October 24, 2016, Dr. Frank recommended an EKG and a CT scan of the lumbosacral spine. The CT scan was conducted at Northshore University Health System on December 2, 2016 and the impression was, "lumbar degenerative disc disease, as described above most pronounced involving the facets and the L4-5 level. No spondylolysis or spondylolisthesis." Dr. Joel Meyer is noted to be the attending radiologist. Petitioner also underwent an EKG and blood sample analysis. (RX 3)

Petitioner next treated with Dr. Frank on December 16, 2016 reporting pain in his back. If Dr. Frank consulted with Petitioner regarding the CT scan findings, it is not reflected in the document. PX 1, RX 3. Petitioner next treated with Dr. Frank on January 20, 2017. Petitioner reported back pain and Dr. Frank recommended an MRI of the lumbar spine.

On February 7, 2017, Petitioner sought treatment with Dr. Kenneth Breger. He noted midline low back pain without sciatica, unspecified chronicity for which he recommended physical therapy. No medications were prescribed. Dr. Breger makes no mention of Petitioner's work or to a work injury. PX 4.

On February 24, 2017, Dr. Frank noted that Petitioner still had back pain, but he reported that medication was helping. Despite the recommendation for an MRI, Petitioner had not undergone that study by that date. He also noted that Petitioner was referred to Dr. Breger. PX 1.

Petitioner underwent a lumbar spine MRI at Northshore University Health System on March 3, 2017 under a diagnosis of stenosis, low back pain ordered by Dr. Frank. Dr. Bojan Petrovic interpreted the study compared it to the December 2016 MRI and found evidence consistent with degenerative changes, greatest at the L4-5 level where there was mild spinal canal narrowing and mild foraminal narrowing. PX 1, RX 4.

Petitioner again saw Dr. Breger on June 23, 2017. He utilized the diagnosis of osteoarthritis/degenerative joint disease of the lumbar spine. Petitioner reported lower back pain, particularly when lifting more than 15 pounds. It appears that Dr. Breger was at that time recommending physical therapy. He refilled Petitioner's Naprosyn. He limited Petitioner to lifting under 15 pounds. PX 2. There is no mention of Petitioner's work or a work injury. PX 4.

Petitioner next treated with Dr. Breger on October 4, 2017. His main problem at that time pertained to a lump on his upper back. Dr. Breger found it to be a three-centimeter subcutaneous nodular mass just right of lower cervical spine midline which had been present for 7 years and had caused discomfort. The diagnosis was that of a subcutaneous cyst. Petitioner underwent surgical excision of the sebaceous cyst on his upper back at General Surgery Highland Park on November 20, 2017.

The record includes a January 16, 2018, (almost 2 years after the alleged accident), physical therapy note prepared by John Walker, a physical therapist at Highland Park Hospital. Petitioner at that time reported low back pain "over the past 12-18 months. Strained lower back while lifting a treadmill in April of 2016." PX 4. Petitioner was to participate in physical therapy two times per week for four weeks to address flexibility, stretching and strengthening. PX 4.

Petitioner failed to show for his physical therapy appointment on January 23, 2018. Petitioner's termination from work was effective January 30, 2018.

February 5, 2018, Petitioner did not show for his scheduled physical therapy appointment and he did not call to cancel. On February 12, 2018, Petitioner did not show for his scheduled physical therapy appointment and he did not call to cancel. On February 14, 2018, Petitioner did not show for his scheduled physical therapy appointment and he did not call to cancel. Therapist Walker spoke with Petitioner's wife who advised that she would have the patient return to the call. No such communication was received, and John Walker discharged Petitioner from physical therapy as of that date. RX 4.

On February 14, 2018, Petitioner's attorney sent a letter to Gurnee Park District advising that he would be filing an Application for Adjustment of Claim for an injury Petitioner alleged sustained to his back while lifting a treadmill on April 11, 2016. RX 1.

Dr. Gerald Frank issued a progress note dated February 23, 2018. Petitioner reported that he was having back pain and wanted a referral to see Dr. Citow. While he was there he was also checked for his high blood pressure. PX 3. Petitioner was referred to Dr. Citow.

The record includes a record from The American Center for Spine and Neurosurgery dated March 12, 2018. Petitioner was seen by Dr. Juan Alzate, a colleague of Dr. Citow. Petitioner reported a history of chronic lower pain that started with an incident at work two years before. He described the persistent symptomology in the lower back with intermittent radiation to both legs. Physical exam revealed negative straight leg raise bilaterally. Dr. Alzate reviewed Petitioner's MRI that showed spondylolysis between L4 – S1 with anterolisthesis between L4/L5 and small disc bulging. Dr. Alzate did not believe that Petitioner required surgery at that time, but he would recommend facet injections and physical therapy. If such conservative management would not improve Petitioner's condition, he would re-evaluate the indication for surgery. Dr. Alzate provided Petitioner with a work status report dated March 12, 2018 indicating that Petitioner would be capable of working within a 40-pound lifting restriction. PX 3.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? Was timely notice of the accident given to Respondent? Is Petitioner's current condition of ill-being causally related to the injury? What is the nature and extent of Petitioner's injury?

Petitioner claims that he injured his back in an acute incident at work on April 11, 2016 as he was lifting/carrying a treadmill down some steps from one level to another. He claims that he was assisted in this

endeavor by two supervisors, Matthew Vanderkamp and Sean and a co-worker named Pat. Mr. Vanderkamp credibly testified at trial. He had no recollection of Petitioner lifting a treadmill and he had no recollection of assisting Petitioner with the moving of a treadmill. He denied having discussed with Petitioner anything about pain, an injury or Petitioner's desire to treat through workers' compensation.

Petitioner did in fact see Dr. Frank on the same date of accident April 11, 2016 but the visit was clearly for well care. There is no mention of acute back pain or of any work duties contributing to back pain that same day. The Arbitrator notes that Petitioner's subsequent treatment records from Dr. Frank starting on May 4, 2016, reference back pain and prescribed diagnosis and treatment. However, neither Dr. Frank nor Dr. Breger documented any mention from Petitioner that his back pain stemmed from a work injury or even from his work duties.

Petitioner treated for nearly two years after the alleged accident with no mention of a specific work injury or any relationship between his work duties and his back pain. Rather, only a few records from Dr. Frank during that two year period only vaguely reference Petitioner's work as "hard". These references are too tenuous on which to base a finding of accident on April 11, 2016 or on any date, or causal connection, given the record in its entirety which includes the more credible testimony of Mr. Vanderkamp. Neither Dr. Frank nor Dr. Breger offered comment as to whether Petitioner's back pain complaints or objective MRI findings were caused or aggravated by a work accident occurring on April 11, 2016 or even by Petitioner's work duties. The Arbitrator further finds unpersuasive the treatment notes of the physical therapist and Dr. Alzate rendered in late January and March 2018 referencing injury from lifting a treadmill two years earlier. When considered in the light of Petitioner's imminent termination and Application filing, these notations carry little weight. Based on the foregoing, the Arbitrator finds there to be insufficient evidence to establish accident or causal connection based on a preponderance of the credible evidence.

Based upon a review of the credible evidence, the Arbitrator finds Respondent's first notice of an alleged work injury on April 11, 2016 came in February 2018 when it received the Application for Adjustment of Claim from petitioner's lawyer via U.S. Mail. (RX 1) Petitioner imprecisely remembers a meeting with Mr. Vanderkamp in his office concerning medical issues. He could not remember however when that meeting occurred. Mr. Vanderkamp denied that such a meeting took place. Petitioner admits that at the time of the occurrence he advised his supervisor that he was okay. His claim of reporting the injury possibly a month later to an unidentified secretary is vague and not supported by any documentation. The evidence supports a finding that Petitioner failed to provide timely or proper notice to Respondent of his alleged accident as provided by the Act.

Based on the Arbitrator's findings on the issues of accident, causal connection and notice as stated above, the Arbitrator finds that Petitioner is not entitled to benefits under the Act and no benefits are awarded. No findings are made on the issue of nature and extent as the issue is rendered moot.

What number of minor children did Petitioner have at the time of alleged accident?

Based on the unrebutted testimony, the Arbitrator finds that as of April 11, 2016, Petitioner was the father of four children under the age of 18.

Evidentiary ruling

Petitioner's attorney advised prior to the start of trial that Petitioner objected to the admission of RX 2. RX 2 is Petitioner's personnel records from Gurnee Park District. The objection was hearsay, relevance, and unfair

prejudice without probative value. The Arbitrator reserved ruling on RX 2 for the Decision. It was acknowledged that the personnel records would satisfy the hearsay exception as business records. The Arbitrator further notes that the parties stipulated that Petitioner was terminated from his job with Respondent on January 30, 2018. T. 7. Petitioner further stipulated that his Application for Adjustment of Claim was filed after his employment was terminated on February 26, 2018. T. 7. The Arbitrator is thus able to consider these stipulated facts to the extent they are relevant to the disputed issues of accident and notice without consideration of the personnel record offered at RX 2. Accordingly, the Arbitrator finds that any additional information contained in RX 2 regarding the circumstances surrounding Petitioner's termination from employment stands to present prejudice effect far outweighing its probative value on the issues of accident and notice. RX 2 in its entirety is rejected and was not considered by the Arbitrator in these findings.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID STUDER,

Petitioner,

vs.

NO: 15 WC 30092

THE AMERICAN COAL COMPANY,

20IWCC0582

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 1, 2019 is hereby affirmed and adopted.

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

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

20IWCC0582

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

OCT 1 - 2020

DATED:
d: 9/3/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STUDER, DAVID
Employee/Petitioner

Case# **15WC030092**

THE AMERICAN COAL COMPANY
Employer/Respondent

20IWCC0582

On 8/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

20 IWCC0582

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID STUDER
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # 15WC 030092

Consolidated cases: _____

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **May 22, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$881.62**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

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

ORDER

No benefits are awarded.

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

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

Signature of Arbitrator

8/1/19
Date

AUG 1 - 2019

20IWCC0582

FINDINGS OF FACT

The Arbitrator finds:

Petitioner lives in Herrin, Illinois. He was 62 years old at the time of arbitration and married. Petitioner graduated from high school and had some college course work in mining technology and EMT training at John A. Logan College, but he did not receive a degree. Petitioner worked in the coal mines from 1979 to 2015. He testified that of those 33 years, approximately 22 or 23 years he worked underground. Petitioner testified that in addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes and smoke from coal fires.

Petitioner's last date of exposure was May 22, 2015. At that time he was working for Respondent's New Era Mine in Galatia. He was 58 years old when he left the coal mine. His last job classification was electrical hoisting engineer, which was an above ground job. He testified that this was his last day of work because he was laid off. He testified that he had planned on working longer. Petitioner testified that he did not look for any other mining employment because at 58 years old he knew that if he went back into the coal mines, he probably would wind up going back underground. He considered himself too old to go back underground doing hard, manual labor. He testified that if he could have kept his job above ground, he would have continued working.

Petitioner testified that he works for Abbco Service Corporation which is a custodial firm based out of St. Louis. He started working there on July 1, 2015. The company has the contract for the Carbondale Elementary School District and he is the account manager. He does all the hiring, firing, discipline and scheduling. He testified that basically he is the HR Department. He testified that he does not do any of the actual cleaning. Most of his duties require sitting behind a desk doing paperwork. He earns approximately $31,000 per year. He testified that the last year he worked in the coal mine, his income was a little less than $55,000. Petitioner worked as a correctional officer for Williamson County from 1988 to 1990 during a layoff from the coal mines. Petitioner also worked as a firefighter for a couple years at Johnston City right out of high school.

Petitioner started his coal mine employment in 1979 for Inland Steel. He was hired as a braddish man. In that classification he built concrete walls to control ventilation. He testified that alot of that work was done in the return air courses where all the gas and dust accumulated. He got out of this position after about four years. He then became a roof bolter. He used a large machine to drill a six foot hole into the ceiling or roof. He would insert a conventional bolt and tighten them into the ceiling. In the last several years as a roof bolter, he switched over to glue bolts where he would stick a tube of glue in the hole and insert the bolt and as the bolt would spin it would mix the glue. Petitioner testified that as he was drilling into the roof, silica dust would be falling on him. Petitioner testified

that the glue had an odor which was pretty strong at times depending upon the ventilation in the area where he was working. Petitioner was a roof bolter for six to seven years. He then became a pumper which he described as the plumber of the coal mine. He would set up pumps to help get the water out of the coal mine. He worked as a pumper for six to seven years. He was also a mine examiner for awhile. In that job he walked throughout the area he was assigned including the intake air courses, the return air courses and the belt line. His main job was to look for hazardous conditions that he would report to his supervisor. He was also an underground mechanic. In that job he was assigned on a working section of the coal mine where they were extracting coal. His job was to work on the equipment as it broke down. Petitioner testified that a lot of times the equipment would break down right at the face where they were mining the coal. At Inland Steel, Petitioner spent about a year working on the surface as a top shop mechanic. Petitioner worked at Inland Steel which became Consolidation Coal from 1979 to 2002.

Petitioner's first day with Respondent was Thanksgiving Day 2002 and he worked there until he was laid off. Petitioner testified that the New Era Mine where he last worked is now closed. He was hired as an underground mechanic at Respondent. He testified that the job duties were about the same as at Inland Steel, but the mining conditions at Respondent were a lot worse. He testified that there was mud up to his knees constantly. He worked as a mechanic for less than a year and was then made an underground mine examiner. He went from examining to electrical hoisting engineer. His duties in that job were to make sure the cage was running and that it was safe. It was his job to fix the equipment in order to get the men safely in and out of the coal mine. Petitioner testified that this was a very good job because he liked being on the surface and working the 12-hour shift two days on and then two days off. He had planned to stay with that job until he was 65 or older. Petitioner testified that his decision about not going back to the mine did involve his breathing. He figured it was too hard on him to do the hard physical labor again and to try to carry heavy loads and to breathe at the same time.

Petitioner testified that he first noticed his breathing problems during the time that he was roof bolting in the mid 1980s. He testified that it was harder to breathe and he would cough up black stuff all the time. From that time until he left the mine, his breathing did not get better. He testified that he was always exposed to dust and whenever he blew his nose there was always black stuff coming out. Petitioner testified that as hoisting engineer he had to climb to the top of the head frame which was approximately 80 to 90 feet in the air. The stairs he had to climb had five different rungs. He could not make it all the way to the top without stopping once or twice to catch his breath. He testified that climbing the stairs was very hard on him. He testified that since leaving the mine his breathing has been about the same. Petitioner testified that he would not venture climbing more than two flights of stairs due to shortness of breath. Petitioner testified that he could walk at a normal pace on normal ground about a mile before becoming short of breath. Petitioner testified that as of arbitration he was not taking any breathing medications. He

testified that in the past he had used inhalers, but he stopped because they really did not do any good.

Petitioner testified that if he has to carry anything weighing more than 10 or 15 pounds it is harder to breathe. He testified that he usually tries to use a cart instead of carrying anything. He testified that he mowed his own yard until eight to ten years ago. It got hard for him to push a mower. He testified that it was hard on his back and hard on his breathing. He testified it was just more difficult with the mowing, weed eating and all the associated stuff.

Petitioner testified that his family doctor is William Hays. He testified that he has spoken to Dr. Hays about his breathing difficulties. When he was having a lot of problems, Dr. Hays referred him to a pulmonologist in Marion. Petitioner could not remember the name of the doctor. Petitioner saw him for about six months. It was this pulmonologist who prescribed the breathing treatments and inhalers. He testified that it had been years since he had seen the pulmonologist. Petitioner testified that he smoked for seven or eight years or maybe a little longer. He testified that the last time he smoked was probably 1990. When he smoked, he averaged a pack of cigarettes per day. Petitioner testified that he has high blood pressure, diabetes II, sleep apnea and has recently been diagnosed with blood cancer. He also has heart disease and has had a stent placed. He takes medicine for angina and carries nitroglycerin with him all the time. The blood disorder is called myelodysplastic syndrome. He is not being treated for same as he was told the treatment carries a higher risk than the cancer does at this time.

Petitioner testified that his job as hoist engineer was probably the best job he ever had in coal mining. He testified that he would have reported for his next shift if he had not been laid off. Petitioner signed up for and collected unemployment for a short period of time before finding work with Abbco. Petitioner testified that in his job as hoist engineer his time would be spent in the main hoist house or at the slope hoist house. He would also take items from the warehouse and use a fork truck to put supplies on the cage to send them underground. Petitioner testified that he did not do much physically as far as sending supplies down. He mostly used a fork truck, but he had to climb in and out of it and open gates to put supplies on the cage.

Petitioner testified that at the end of his employment at the mine he was overweight. He underwent bariatric surgery in January 2017 due to his weight and heart disease. With that surgery he lost approximately 100 pounds.

Petitioner testified that when he is not working he tries to do a little wood working. He testified that mostly when he gets home from work, he is very tired and just goes home, sits and watches a little TV, and takes a nap. He testified that his job with Abbco is year round. He works 40 to 50 hours per week.

Dr. Henry K. Smith, board certified radiologist and B-reader, interpreted chest x-ray of Petitioner dated May 10, 2016. Dr. Smith interpreted the chest x-ray as positive, profusion 1/0 with P/P opacities in middle and lower lung zones. (Petitioner's Exhibit No. 2).

Petitioner saw Dr. Glennon Paul on May 10, 2016, at the request of his counsel. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 2). Dr. Paul was Director of St. John's Respiratory Therapy and Clinical Assistant Professor of Medicine at the SIU Medical School. (Petitioner's Exhibit No. 1, p. 6). Dr. Paul was the senior physician at the Central Illinois Allergy and Respiratory Clinic. Those physicians specialize in allergy and pulmonary disease. They take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. (Petitioner's Exhibit No. 1, p. 7). Dr. Paul is retired from his active practice. He is still performing black lung examinations for Petitioner's counsel. (Petitioner's Exhibit No. 1, pp. 46-47). Dr. Paul is board certified in asthma, allergy and immunology. (Petitioner's Exhibit No. 1, pp. 9-10). Dr. Paul testified that at the time he did his fellowship in 1970 to 1972 there were not any pulmonary fellowships developed. He testified that it was strictly in allergy, asthma and respiratory disease. (Petitioner's Exhibit No. 1, p. 10). Dr. Paul is not an A-reader or a B-reader of films. He has never been board certified in pulmonary disease. (Petitioner's Exhibit No. 1, p. 52). Dr. Paul has seen a hundred or more individuals at the request of Petitioner's counsel. (Petitioner's Exhibit No. 1, p. 46).

Dr. Paul testified that Petitioner reported working for 34 years in the coal mine with 24 of those years being underground. Most of that time was working as a roof bolter. (Petitioner's Exhibit No. 1, p. 11). Dr. Paul testified that Petitioner had one big episode of shortness of breath which improved after they placed a stent in his heart. Dr. Paul testified that Petitioner could have also had shortness of breath from other causes than his heart condition. Petitioner smoked ten pack years. At the time of his examination Petitioner weighed 326 pounds which was obese. Petitioner's pulmonary function testing showed a diffusion capacity measurement of 66% which was mildly to moderately decreased. Dr. Paul diagnosed Petitioner with coal workers' pneumoconiosis. Dr. Paul testified that a reduced diffusion capacity is something that can be caused by coal workers' pneumoconiosis. (Petitioner's Exhibit No. 1, p. 12). Dr. Paul testified that interstitial disease of the lung and emphysema are things that cause a decrease in diffusion capacity. He testified that being fat will not cause same. (Petitioner's Exhibit No. 1, p. 13).

Dr. Paul performed Petitioner methacholine challenge testing on Petitioner. With eight breaths Petitioner had a drop in FEV1 of 13%. Dr. Paul testified that when it goes down less than 20% but more than 10%, the testing is compatible with chronic bronchitis. (Petitioner's Exhibit No. 1, p. 13). Dr. Paul testified that a person could have chronic bronchitis and pulmonary function test results that are compatible with it and not have

cough showing up daily in the treatment records. Dr. Paul testified that chronic bronchitis can be caused by a number of things and there was no way to know how much was caused by each of these components. (Petitioner's Exhibit No. 1, p. 14).

Dr. Paul testified that he reviewed a chest x-ray of Petitioner. Dr. Paul testified that when he interprets a chest x-ray for the presence of pneumoconiosis, he does not pay any attention to whether the nodules are round or big or small. He does not try to classify the severity of pneumoconiosis on the chest x-ray. He testified that one either has evidence of pneumoconiosis on chest x-ray or he does not. (Petitioner's Exhibit No. 1, p. 15). Dr. Paul testified that Petitioner had coal workers' pneumoconiosis caused by coal dust exposure. (Petitioner's Exhibit No. 1, p. 16). Dr. Paul testified that Petitioner had a reduced diffusion capacity resulting from his coal workers' pneumoconiosis, at least in part. Dr. Paul testified that in light of Petitioner's coal workers' pneumoconiosis and reduced diffusion capacity, he could not have any further exposure to the environment of a coal mine without endangering his health. (Petitioner's Exhibit No. 1, p. 17).

Dr. Paul testified that in order to have pneumoconiosis, in addition to coal mine dust deposited in the lungs, one must have a tissue reaction to it. (Petitioner's Exhibit No. 1, p. 22). He testified that the tissue reaction can be called scarring or fibrosis. The scarring of coal workers' pneumoconiosis cannot perform the function of normal healthy lung tissue. By definition, if one has coal workers' pneumoconiosis, he would have some impairment in the function of the lung at the site of scarring whether it can be measured by spirometry or not. (Petitioner's Exhibit No. 1, p. 23). Dr. Paul testified that a negative chest x-ray can never rule out the existence of coal workers' pneumoconiosis. He testified that when one has abnormalities of pneumoconiosis that show up on pathology, at autopsy or biopsy, those are the same ones that are seen on x-ray, just smaller lesions. (Petitioner's Exhibit No. 1, p. 41). Dr. Paul testified that the gold standard for diagnosing pulmonary disease such as coal workers' pneumoconiosis would be pathology. (Petitioner's Exhibit No. 1, p. 44). Dr. Paul is aware of studies that indicate that 50% or more of long time coal miners who never had radiologic evidence of pneumoconiosis during their life were found to have pneumoconiosis at autopsy. (Petitioner's Exhibit No. 1, p. 45).

Dr. Paul testified that there are causes for shortness of breath and shortness of breath with exertion other than respiratory disease. He testified that heart disease is high on that list. He testified that deconditioning can also cause shortness of breath. (Petitioner's Exhibit No. 1, p. 47).

Dr. Paul described Petitioner as obese. Petitioner did not relate to Dr. Paul any past medical history of respiratory disease. Petitioner did not relate ever having taken breathing medications. (Petitioner's Exhibit No. 1, p. 48). Petitioner did not tell Dr. Paul that he left work at the mine due to respiratory disease or symptoms. He did not relate an inability to physically complete his last job duties at the mine. Dr. Paul testified that the

spirometry he performed on Petitioner was normal. There was no sign of obstruction and his lung volumes were normal. (Petitioner's Exhibit No. 1, p. 49). Dr. Paul testified that Petitioner had no sign of restriction. With regard to the pulmonary function testing that he performed, the one thing that was not normal was Petitioner's diffusion capacity. Dr. Paul attributed that abnormality to scarring of Petitioner's lung. Dr. Paul did not know the inspiratory time for the tracer gas used in the diffusion capacity testing. He testified that he did not know the hold time for the tracer gas used in said testing. (Petitioner's Exhibit No. 1, p. 50). Dr. Paul did not know the inspiratory volume for the tracer gas. (Petitioner's Exhibit No. 1, p. 51).

Dr. Paul did not know the date of the chest x-ray he reviewed for Petitioner. He testified that different types of opacities were present. He testified that he usually sees different sizes and different shapes and that is the way coal dust looks. Dr. Paul did not give the film a profusion rating. He testified that he felt there was involvement to a moderate degree in the mid lung fields stretching down to the lower lung fields. (Petitioner's Exhibit No. 1, p. 51).

Dr. Paul testified that based on his examination, testing and experience with Petitioner, he was able to form an opinion that Petitioner probably has chronic bronchitis. The cause of same would be coal dust exposure. In light of his chronic bronchitis, Petitioner cannot have any further exposure the environment of a coal mine without endangering his health. (Petitioner's Exhibit No. 1, p. 53).

At the request of Petitioner's counsel, Dr. Cristopher Meyer reviewed films of Petitioner. Dr. Meyer reviewed a chest CT scan from Herrin Hospital dated April 20, 2008. He also reviewed a chest x-ray dated July 29, 2009, from Herrin Hospital and a chest x-ray dated May 10, 2016, from Central Illinois Allergy and Respiratory. (Respondent's Exhibit No. 4, p. 40). Dr. Meyer testified that the CT scan revealed some mild dependent atelectasis. Dr. Meyer saw no nodules or large opacities on the CT scan. He testified that dependent atelectasis means that the lungs are affected by gravity and so the portions of the lung that are closer to the table when the patient is lying on his back have a tendency to lose volume. The air in the lung is a little bit less. The alveoli, or the little air sacs in the lungs, have a tendency to get smaller and closer together causing the density of the lungs to increase slightly. (Respondent's Exhibit No. 1, pp. 41-42). In his report Dr. Meyer also mentioned azygous fissure. He testified that same is a normal variant. There is a vein that is called the azygous vein which is normally seen in the mediastinum. In some individuals the vein does not migrate all the way to the middle of the chest before it descends and can actually descend through the lungs causing the lung to have an extra fissure or an extra pleural reflection. He testified that same is of no consequence. (Respondent's Exhibit No. 1, p. 43).

Dr. Meyer testified that the chest radiograph of July 29, 2009, was quality 1. (Respondent's Exhibit No. 1, p. 40). Dr. Meyer testified that there were no small or large opacities on this film. The azygous fissure was seen. Dr. Meyer testified that there were no findings of coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, p. 43). The chest x-ray of May 10, 2016, was quality 2 because of some background mottle or image noise which caused a grainy appearance to the examination. (Respondent's Exhibit No. 1, p. 40). He testified that the lungs were clear without small or large opacities. The azygous fissure was seen again. There were no radiographic findings of coal workers' pneumoconiosis. Dr. Meyer testified that it was notable that he had the 2009 examination for comparison to the 2016 examination. He testified that there were no changes between those examinations. (Respondent's Exhibit No. 2, p. 43).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 1, p. 7). Dr. Meyer has been a B-reader since 1999. (Respondent's Exhibit No. 1, pp. 19-20). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot who was part of the original committee that designed the teaching program which is called the B-reader course. (Respondent's Exhibit No. 1, pp. 20-21). Dr. Meyer has recently been asked to have a more academic role in the B-reader program. Dr. Meyer is on the College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the B-reader course and submitting cases for the B-reader training module and exam. Dr. Meyer testified that the faculty for the B-reading course is typically experienced senior level B-readers. (Respondent's Exhibit No. 1, pp. 32-33).

Dr. Meyer testified that to become a B-reader one takes the weekend course which includes a series of lectures describing the B-reading classification system. The teachers of the course go through standard examples of the various components of the B-reading system. The course participants then review a series of practice examples with mentors overseeing the practice examples. At the end of the weekend there is an exam. (Respondent's Exhibit No. 1, pp. 32-33). Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making the distinction between a film with a 0/1 profusion and a film with a 1/0 profusion. (Respondent's Exhibit No. 1, pp. 34-35).

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities or any linear opacities and based on the size and appearance of those small opacities they are given a letter score. (Respondent's Exhibit No. 1, p. 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described as small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, will be described as small linear opacities. (Respondent's Exhibit No. 1, p. 28). Distribution of the

opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper lung zone predominant process. Idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of an interpretation is the extent of lung involvement or the so-called profusion. (Respondent's Exhibit No. 1, p. 23). Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung. (Respondent's Exhibit No. 1, p. 30).

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and chest x-ray for Petitioner. (Respondent's Exhibit No. 2, p. 21). Dr. Castle is a pulmonologist and is board certified in internal medicine and the subspecialty of pulmonary disease. (Respondent's Exhibit No. 2, p. 4). Dr. Castle testified that board certification in pulmonary disease was first recognized in 1941. (Respondent's Exhibit No. 2, p. 77). Dr. Castle practiced in Roanoke, Virginia for 30 years. His practice was limited to pulmonary disease and chest disease, which encompassed critical care medicine. (Respondent's Exhibit No. 2, p. 7). Dr. Castle's practice included treating patients with occupational lung disease. He had some patients in his practice who had coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 8). Dr. Castle was a B-reader continuously from 1985 through June 30, 2017. (Respondent's Exhibit No. 2, pp. 13-14). Dr. Castle testified that he elected to let his certification lapse at that time. (Respondent's Exhibit No. 2, p. 114).

Dr. Castle reviewed a chest x-ray for Petitioner dated May 10, 2016, from Central Illinois Allergy and Respiratory Service. Dr. Castle testified that there were no parenchymal abnormalities consistent with coal workers' pneumoconiosis on this film. He testified that there was evidence of azygous lobe which is a normal variant. Dr. Castle testified that the chest x-ray did not show evidence of coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, p. 61).

Dr. Castle testified that for a proper reading of a chest x-ray for pneumoconiosis, the reader first looks at the quality of the film. Dr. Castle testified that the reader then determines whether or not there are any opacities in the parenchyma and that is done by comparing the film that is being looked at to the standard ILO classification films. If there are opacities present, then they are characterized based on their size and whether they are round and regular or linear or irregular. (Respondent's Exhibit No. 2, pp. 61-62). Dr. Castle testified that once the reader classifies the abnormalities, if any, then he determines the profusion by comparing the chest x-ray he is reviewing to the standard ILO classification films. (Respondent's Exhibit No. 2, p. 62). Dr. Castle testified that the reader then determines if there is any pleural disease and if so, he would classify that. If not, then he goes on to check any obligatory symbols. These symbols are at the bottom of the ILO form and if any of those changes are seen, the appropriate box would be checked. Dr. Castle testified that it is important to note the obligatory symbols because it

indicates that there could be a confounding issue such as emphysema, cardiomegaly or cancer. (Respondent's Exhibit No. 2, pp. 62-63).

Dr. Castle testified that a 1/0 profusion is the lowest level of profusion that can be present and the film be positive. He testified that the distinction between a film that is minimally positive (1/0) or negative (0/1) is something that is stressed in the ILO B-reading course. He testified that this distinction is also stressed in the B-reading examination as well. Dr. Castle testified that this is the most difficult distinction to make in interpreting a film. (Respondent's Exhibit No. 2, pp. 63-64).

Dr. Castle testified that it is very unlikely for simple coal workers' pneumoconiosis to progress once the exposure ceases. Dr. Castle agreed with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels of dust until he reaches retirement age. Dr. Castle testified that in his review of the medical in this case, there was no pathologic evidence of pneumoconiosis revealed in same. Dr. Castle testified that there is no physiologic significance to subradiographic pneumoconiosis. It simply means that there is pneumoconiosis present, but it is of such minimal degree and amount that it cannot be detected radiographically and generally is asymptomatic. (Respondent's Exhibit No. 2, pp. 64-65). Dr. Castle testified that Petitioner's normal diffusion capacity performed at Methodist Hospital on July 12, 2016, would tend to rule out any significant parenchymal lung disease. Dr. Castle testified that he did not find any evidence of emphysema in the chest x-ray he reviewed. He testified that none of the B-readers who reviewed Petitioner's films found the presence of emphysema. (Respondent's Exhibit No. 2, p. 65).

Dr. Castle testified that CTs are more sensitive than chest x-rays in picking up emphysema because they will discern things that are of a smaller nature than what can be seen on a standard chest x-ray. The CT scans of Petitioner's chest, according to the interpretations Dr. Castle had for same, did not reveal the presence of emphysema. (Respondent's Exhibit No. 2, pp. 66-67).

Dr. Castle agreed with Dr. Paul that a reduced diffusion capacity due to scarring of the lung from pneumoconiosis would be permanent. Dr. Castle testified that for diffusion capacity testing to be valid, the test must be done correctly. Dr. Castle testified that he did not have any values or tracings for which to validate the diffusion capacity testing performed by Dr. Paul. He testified that the results from the diffusion capacity testing at Methodist Hospital were valid and revealed no impairment in gas exchange. (Respondent's Exhibit No. 2, pp. 67-68). Dr. Castle testified that chronic bronchitis is not diagnosed with methacholine challenge testing. The diagnosis of chronic bronchitis did not appear in any of the treatment records that Dr. Castle reviewed. He testified that Dr. Paul did not obtain a history from Petitioner of chronic cough. (Respondent's Exhibit No. 2, pp. 69-70). Dr. Castle testified that the diagnosis of chronic bronchitis requires a

chronic cough productive of sputum on most days for at least three consecutive months for two consecutive years. (Respondent's Exhibit No. 2, p. 70).

Dr. Castle testified that the results from the spirometry performed on Petitioner were normal. There was no evidence of an obstruction. The results from the lung volume testing performed on Petitioner were normal. He testified that there was no evidence of restriction. Dr. Castle testified that based upon the results of the objective testing performed on Petitioner, he was capable of heavy manual labor. (Respondent's Exhibit No. 2, p. 70). Dr. Castle testified that he is familiar with the *AMA Guides To The Evaluation of Permanent Impairment, Sixth Edition*. He testified that if he applied Table 5-4 of the *Guides* to the objective test results from the pulmonary function testing performed on Petitioner, he would fall in Class 0 impairment. (Respondent's Exhibit No. 2, pp. 70-71).

Dr. Castle testified that based on his review of medical records, Petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure while working in the coal mines. Petitioner worked in or around the underground mining industry for a sufficient enough time to have possibly developed coal workers' pneumoconiosis if he were a susceptible host. (Respondent's Exhibit No. 2, pp. 71-72). Another risk factor for the development of pulmonary symptoms and disease is that of obesity. Petitioner was found to be morbidly obese on virtually all occasions. Dr. Castle testified that this degree of obesity may be associated with a number of different health issues including cardiovascular disease with coronary artery disease, hypertension, diabetes mellitus, shortness of breath, restrictive lung disease, resting hypoxemia, obstructive sleep apnea syndrome and other medical problems. Petitioner had evidence of a number of these conditions including coronary artery disease, hypertension, diabetes and rather severe obstructive sleep apnea syndrome. (Respondent's Exhibit No. 2, pp. 72-73). Another risk factor for the development of pulmonary symptoms is that of cardiac disease. Petitioner had a history of shortness of breath occurring in association with heaviness of his chest, both of which occurred with exercise and were relieved somewhat with rest. Petitioner underwent a thorough cardiac evaluation and was found by cardiac catheterization to have significant coronary artery obstruction. He underwent stenting on one occasion.

Another risk factor for the development of pulmonary symptoms is that of gastroesophageal reflux disease. Petitioner had evidence of very significant GERD which was difficult to control. As a result, he had episodes of shortness of breath and cough as well as dyspepsia occurring after an episode of acid reflux. Petitioner was noted by his wife to choke periodically after eating resulting in cough. These occurrences frequently resulted in shortness of breath, cough, sputum production and may result in bronchitic infections. (Respondent's Exhibit No. 2, pp. 73-74). Petitioner did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process.

He did not have the consistent finding of rales, crackles or crepitations. (Respondent's Exhibit No. 2, p. 74).

Dr. Castle testified that there were two physiologic studies in the data set that he reviewed. One study by Dr. Tazbaz in 2009 was an entirely normal study showing no evidence of obstruction, restriction or diffusion abnormality. Dr. Paul obtained a study at the time of his examination in 2016. Dr. Castle testified that his study was entirely normal showing no evidence of obstruction, restriction or diffusion abnormality after correction for alveolar volume. A diffusion capacity obtained from Methodist Hospital on July 12, 2016, was also entirely normal. The study showed no evidence of any respiratory impairment from any cause including coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, pp. 75-76). In the history Petitioner related to Dr. Paul regarding his respiratory complaints, he indicated that he did not suffer much shortness of breath after his stent placement. Dr. Castle testified that this was consistent with what he saw in the medical records and what was revealed by the objective pulmonary function testing performed on Petitioner. (Respondent's Exhibit No. 2, pp. 36-77).

Dr. Castle testified that no matter what he saw on the chest x-rays, it would not rule out the possibility that Petitioner could have pneumoconiosis that could be found pathologically or at autopsy. (Respondent's Exhibit No. 2, p. 82). Dr. Castle testified that there are studies that have shown that as many of 50% of long term coal miners have pathologic coal workers' pneumoconiosis that was not appreciated by a radiographic study during their life. (Respondent's Exhibit No. 2, p. 83). Dr. Castle testified that coal workers' pneumoconiosis is basically an x-ray diagnosis, except for the caveat about pathology. (Respondent's Exhibit No. 2, pp. 86-87). Dr. Castle testified that the abnormality of coal workers' pneumoconiosis is basically trapped coal dust in the part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it. The affected tissue of the scarring and emphysema, cannot perform the function of normal healthy lung tissue. By definition, if a person has coal workers' pneumoconiosis, he would have an impairment in the function of his lungs at the site of this scarring and emphysema. (Respondent's Exhibit No. 2, pp. 87-88).

In the treatment records that Dr. Castle reviewed there were entries for Combivent and Advair. He testified that those are medicines that are used for cough. Dr. Castle noted that in the entry for same it was noted that Petitioner had bronchitis for one week with persistent cough. Dr. Castle testified that an entry in the medical records where it stated cough would not necessarily indicate there may be some abnormality going on in terms of a persistent or chronic cough. He testified that a diagnosis is not based on the symptom of cough alone. Dr. Castle testified that Petitioner seldom had sputum production. He testified that the medications, although they may have been prescribed were not necessarily being accurately used. He testified that a diagnosis of COPD in the

medical records is clearly an unequivocally erroneous as Petitioner did not have COPD. (Respondent's Exhibit No. 2, pp. 122-124).

Medical records of Harrisburg Medical Center were admitted into evidence. Petitioner underwent a preemployment chest x-ray on November 19, 2010. Same was interpreted by Dr. Hisham Youssef as negative, classification 0/0. Dr. Youssef noted the azygous lobe. (Respondent's Exhibit No. 4, p. 24). Petitioner underwent chest x-ray on October 10, 2008. Same was interpreted by Dr. Youssef as showing no active cardiopulmonary disease. (Respondent's Exhibit No. 4, p. 12).

Medical records of St. Joseph Memorial Hospital were admitted into evidence. Petitioner was admitted to the hospital on January 14, 2008, with left flank pain. On review of systems respiratory he denied any shortness of breath, cough or wheezing. Physical examination of the chest showed no wheezing, crackles or rales. The assessment was kidney stone. (Respondent's Exhibit No. 5, pp. 322-323). Petitioner was seen for sleep study on September 16, 2009, and as a result of same he was diagnosed with obstructive sleep apnea. (Respondent's Exhibit No. 5, pp. 271-273). Petitioner was seen by SIH Urology on June 26, 2014. On that date he was noted to be a former smoker. His review of systems respiratory was positive for dyspnea. On examination his respiratory effort was normal. (Respondent's Exhibit No. 5, pp. 120-126). Petitioner was seen on July 29, 2014, for a procedure involving his kidneys. On the preanesthetic evaluation, shortness of breath with exertion was noted. He reported that he quit smoking 10 years prior. (Respondent's Exhibit No. 5, p. 107).

Medical records of Herrin Hospital were admitted into evidence. A history and physical report dated December 9, 1996, recorded that Petitioner had shortness of breath and chest discomfort on December 2, 1996. (Respondent's Exhibit No. 6, p. 64). Petitioner underwent a stress test on that date which was reported as negative. In the interpretation it was noted that Petitioner's breathing difficulty was induced by exercise. (Respondent's Exhibit No. 6, p. 66). Petitioner was seen on April 27, 2003, with complaints of chest pain that started that morning and continued while working all night at the coal mine. He also reported dyspnea at rest and on exertion. (Respondent's Exhibit No. 6, p. 56). Petitioner underwent a chest x-ray on April 27, 2003. Same showed no active cardiopulmonary disease and no change since October 4, 2000. (Respondent's Exhibit No. 6, p. 39). Petitioner underwent a chest x-ray on June 3, 2013. The history was chest pain. The chest x-ray was interpreted as showing no acute cardiopulmonary process and no change from prior examination of May 22, 2013. (Respondent's Exhibit No. 6, p. 3).

Petitioner was admitted to the hospital on May 28, 2014. He underwent two day Bruce protocol myocardial perfusion imaging. The reason for same was chest pain and coronary artery disease. The test was negative for ECG response to stress. His

myocardial perfusion was normal without stress induced ischemia. (Respondent's Exhibit No. 10, pp. 208-210). Petitioner was admitted to the hospital on February 15, 2016, for right total knee replacement. He was noted to be morbidly obese and was being treated for gout, hypothyroidism and hyperlipidemia. Review of systems respiratory was negative for cough, dyspnea at rest or on exertion and wheezing. Physical examination of the chest revealed the lungs were clear to auscultation with no adventitious sounds. (Respondent's Exhibit No. 10, pp. 132-134). Petitioner was admitted to the hospital on January 30, 2017, for bariatric surgery. His review of systems respiratory was negative for wheezing. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. His weight on that date was 316 pounds with a BMI of 46. (Respondent's Exhibit No. 10, pp. 74-82). Petitioner was seen on January 24, 2018, for postoperative evaluation. On this date his weight was 254 pounds giving him a BMI of 37.3. His oxygen saturation was 96%. Review of systems respiratory was negative. Physical examination of the chest revealed normal effort and breath sounds. (Respondent's Exhibit No. 10, pp. 4-8). Petitioner was admitted to the hospital on September 8, 2018, with complaint of recurrent chest pain, nausea and dry heaves. He never had chest pain like that before. He did not have cough or shortness of breath. His past medical history was devoid of any pulmonary problems beyond sleep apnea. Review of systems respiratory was negative for cough or shortness of breath. Physical examination of the chest revealed normal breath sounds. The assessment was unstable angina, coronary artery disease, essential hypertension, hypothyroidism, diabetes and esophageal reflux. (Respondent's Exhibit No. 10, pp. 11-26). Petitioner underwent a chest x-ray on September 8, 2015. Same revealed no active disease. (Respondent's Exhibit No. 10, p. 58). On December 26, 2018, Petitioner underwent a CT guided biopsy of the bone marrow. The clinical indication was thrombocytopenia of uncertainty etiology. (Respondent's Exhibit No. 10, pp. 62-63).

Medical records of Logan Primary Care were admitted into evidence. Petitioner was seen on March 10, 2000, complaining of shin splints bilaterally for the past two weeks and bursitis of the right shoulder. He had changed to a job about one month prior where he had to walk approximately four miles per night with a time limit. At first, he would breathe quite hard during this effort, but this had improved with time. The assessment included chronic exertional compartment syndrome. (Respondent's Exhibit No. 8, p. 294). Petitioner was seen on April 26, 2000, with complaint of bronchitis onset one week prior. He reported persistent cough which was non-productive. On examination his chest had scattered rhonchi. The assessment was bronchitis and Biaxin was prescribed. (Respondent's Exhibit No. 8, p. 292). Chest x-ray taken on April 26, 2000, showed no radiographic evidence of cardiopulmonary disease. (Respondent's Exhibit No. 8, p. 291). Petitioner was seen on September 13, 2000, for complaint of cough that had been persistent for about a week and a half. Same was non-productive. He had no wheezing. On examination his lungs revealed coarse breath sounds with mild expiratory wheeze. The diagnosis was bronchitis. He was prescribed Medrol Dose Pak, Levaquin and Tessalon

Perles. (Respondent's Exhibit No. 8, p. 280). On November 28, 2000, Petitioner presented with complaint of non-productive cough present for two weeks. He also complained of shortness of breath and chest pressure. On examination his lungs were clear to auscultation with no wheezes, rhonchi or rales. The assessment was rhinosinusitis. (Respondent's Exhibit No. 8, p. 276).

Petitioner was seen on May 29, 2001, complaining of congestion on the right side of the nose for a few days. Physical examination of the lungs showed that they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. The assessment was rhinitis. (Respondent's Exhibit No. 8, p. 274). Petitioner was seen on April 23, 2002, for evaluation of GERD and to discuss his testosterone treatment. Examination of the chest was clear to auscultation. Assessment included GERD. (Respondent's Exhibit No. 8, pp. 265-266). Petitioner returned for his GERD on October 30, 2002. Physical examination of the chest showed the lungs were clear to auscultation. He had no abnormal breath sounds, wheezing, rales or rhonchi. (Respondent's Exhibit No. 8, pp. 257-258). Petitioner was seen on November 6, 2002, with continued complaints of GERD. Physical examination of the chest remained clear to auscultation. (Respondent's Exhibit No. 8, pp. 253-254). Petitioner was seen on April 30, 2003, for evaluation of testing performed April 27 through April 28. It was noted that he had a family history of coronary artery disease, and he had elevated cholesterol. Physical examination of the chest was clear to auscultation. There were no abnormal breath sounds, wheezing, rales or rhonchi noted on auscultation. (Respondent's Exhibit No. 8, pp. 246-247). Petitioner was seen on March 17, 2004 for GERD and other conditions. He had no new complaints except for his sciatic nerve. Physical examination of the chest remained clear to auscultation with no abnormal breath sounds, wheezing, rales or rhonchi. (Respondent's Exhibit No. 8, pp. 239-240).

Petitioner was seen on February 6, 2005, with upper respiratory infection symptoms. He reported runny nose and cough present for five days. Physical examination of the lungs showed they were clear to auscultation with no rhonchi or wheezes noted. The diagnosis was upper respiratory infection. (Respondent's Exhibit No. 8, pp. 233-234). Petitioner was seen on March 4, 2005, for his GERD. He reported he had problems with reflux waking him at night. He reported that he also wakened with coughing and dyspnea. (Respondent's Exhibit No. 8, pp. 231-232). Petitioner was seen on May 31, 2005, for monitoring of his symptoms. His reflux had been doing well. He was walking approximately five to six miles a day in his job as a mining inspector. Physical examination of the chest was clear to auscultation. (Respondent's Exhibit No. 8, pp. 229-230).

Petitioner was seen on April 28, 2006, for recheck of all of his conditions. He was doing well with no complaints. Physical examination of the chest was clear to auscultation. There was no wheezing, rales, rhonchi or abnormal breath sounds. (Respondent's Exhibit No. 8, pp. 204-205). Petitioner was seen for routine checkup on

July 31, 2007. Physical examination of the chest remained clear to auscultation. (Respondent's Exhibit No. 8, pp. 192-193). Petitioner was seen on March 24, 2008. He reported no chest pain or shortness of breath. Physical examination of the chest and lungs showed they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. (Respondent's Exhibit No. 8, pp. 190-191). Petitioner underwent a CT of the chest on April 20, 2008, following a motor vehicle accident. The impression was a normal CT of the chest. (Respondent's Exhibit No. 8, p. 184). Petitioner was seen on October 14, 2008, for evaluation of hypertension. His blood pressure was elevated, but he denied any chest pain or shortness of breath. Physical examination of the lungs showed they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. (Respondent's Exhibit No. 8, pp. 172-174).

Petitioner was seen on April 2, 2009 for medication refills. He believed that he might have sleep apnea. He reported that he quit smoking two weeks prior. Review of systems for the lungs was negative. Physical examination of the lungs was also clear bilaterally with no wheezes, rhonchi or rales. (Respondent's Exhibit No. 8, pp. 166-168). Petitioner was seen on June 18, 2009, for recheck of back and right hip pain. Review of systems respiratory was negative. Physical examination of the lungs remained clear to auscultation. (Respondent's Exhibit No. 8, pp. 154-156). Petitioner was seen on June 30, 2009, for refill of his medications. Review of systems respiratory was negative and clinical examination of the lungs remained clear to auscultation. Assessment included cough. It was suggested that he have a chest x-ray, but it was also suggested that he wait and see if the cough improved. (Respondent's Exhibit No. 8, pp. 149-151).

Petitioner was seen on July 8, 2009, with dyspnea that he had had all day on Sunday. At the ER he was told that he had COPD and black lung due to working 30 years in the coal mine. He was prescribed Combivent which did not seem to be working. Petitioner also noted nasal congestion and cough. Physical examination of the lungs showed they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. The assessment included dyspnea. Advair discus was also prescribed. He was referred to Dr. Tazbaz, a pulmonologist. (Respondent's Exhibit No. 8, pp. 140-142, 146-148). Petitioner underwent pulmonary function testing on July 9, 2009. The impression from Dr. Tazbaz was normal FVC with normal FEV1 and normal FEV1/FVC ratio. His diffusion capacity was also normal. Smoking history indicated that Petitioner quit in 2009 and had a 10-pack year smoking history. (Respondent's Exhibit No. 8, pp. 136-137). Petitioner also underwent a CT of the chest with contrast on July 9, 2009, for a history of dyspnea. Same was interpreted as showing accessory azygous fissure/azygous lobe which was considered a normal variant. The examination was otherwise normal. (Respondent's Exhibit No. 8, p. 138). Petitioner was seen on July 14, 2009. He reported that he had not been feeling well and had been having difficulty breathing. He denied any cough. He had been taking Advair without relief. Physical examination of the lungs showed they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. Assessment included dyspnea,

obesity and concern for sleep apnea. (Respondent's Exhibit No. 8, p. 127-129). Petitioner followed up for his dyspnea on August 5, 2009. He stated he was still having a hard time breathing. His O2 saturation that day was 93%. He requested a referral to a cardiologist to help with his breathing. Petitioner noted an occasional non-productive cough. Physical examination of the lungs continued to be clear to auscultation bilaterally with no wheezes, rhonchi or rales. The assessment remained dyspnea. Petitioner was referred to Prairie Cardiovascular Consultants. (Respondent's Exhibit No. 8, pp. 122-124). Petitioner was seen on August 13, 2009, for follow up of shortness of breath. He reported that the shortness of breath came on suddenly after having an acid reflux episode approximately two months prior. He reported that he sometimes had a cough that was non-productive. Physical examination of the lungs showed they were clear to auscultation bilaterally with no wheezes, rhonchi or rales. Assessment was sleep apnea and dyspnea. He was given a prescription for Advair. The stress test was reviewed and showed no ischemic changes. His resting ECG was normal and functional capacity was moderately decreased. Overall impression was normal stress test. (Respondent's Exhibit No. 8, pp. 105-108). Petitioner was seen on August 26, 2009, for management and ongoing care of shortness of breath. He reported that his mine job had changed and he was much more sedentary than in the past. Physical examination of the chest showed the chest was clear to auscultation. There were no abnormal breath sounds, wheezing, rales or rhonchi. Assessment included dyspnea and suspected sleep apnea. (Respondent's Exhibit No. 8, pp. 99-100). Petitioner returned for evaluation of shortness of breath on September 9, 2009. Physical examination of the chest remained clear and normal. (Respondent's Exhibit No. 8, pp. 93-94).

Petitioner was seen on September 30, 2009, a week after having a heart stent placed. Physical examination of the chest remained clear bilaterally to auscultation. (Respondent's Exhibit No. 8, pp. 86-87). Petitioner was seen again on October 30, 2009, for ongoing care for all of his conditions. He denied dyspnea with exertion or at rest. On examination his chest was clear to auscultation with no abnormal breath sounds, wheezing, rales or rhonchi. His diagnoses included dyspnea. (Respondent's Exhibit No. 8, pp. 81-83). Petitioner was seen on December 21, 2009, with complaints of congestion and cough which had been present for four days. He denied any shortness of breath. Physical examination of the lungs showed they were clear to auscultation and percussion. The assessment was acute bronchitis. (Respondent's Exhibit No. 8, pp. 76-77). Petitioner followed up for these symptoms on January 6, 2009. He reported sore throat, headache, sneezing and cough. His past medical history noted that he did not have COPD. Physical examination of the lungs showed they were clear to auscultation. The assessment was acute sinusitis and sinusitis and cough. (Respondent's Exhibit No. 8, pp. 73-75).

Petitioner was seen on April 1, 2010, with complaints of sinus drainage. He also complained of congestion and sneezing. Physical examination of the chest showed that it was clear to auscultation. He had no abnormal breath sounds, wheezing, rales or rhonchi.

The assessment included COPD. He was prescribed Augmentin. (Respondent's Exhibit No. 8, pp. 71-72). Petitioner complained of cough with upper respiratory infection symptoms on April 26, 2011. He denied any shortness of breath. Physical examination of the lungs showed they were clear to auscultation. (Respondent's Exhibit No. 8, pp. 63-65). Petitioner was seen on February 23, 2012, with upper/lower respiratory symptoms that had been present for one week. He complained of runny nose, nasal congestion, sore throat, chest congestion and cough. He had no shortness of breath. Physical examination of the lungs showed they were clear to auscultation bilaterally. He had no wheezes, rhonchi or crackles. The assessment was upper respiratory infection and cough. (Respondent's Exhibit No. 8, pp. 58-60). Petitioner was seen on January 4, 2013, with upper respiratory infection and sinusitis which began two days prior and included a high fever. He denied any shortness of breath or cough. He also did not have any asthma or bronchitis/COPD. Physical examination of the lungs showed they were clear to auscultation bilaterally. Petitioner was given Tamiflu. (Respondent's Exhibit No. 8, pp. 55-57). Petitioner was seen on May 9, 2014, for chest pain of three day duration. It was occurring with physical activity. He did not have shortness of breath or cough. There was no wheezing. Physical examination of the lungs showed they were clear to auscultation bilaterally. (Respondent's Exhibit No. 8, pp. 52-53). Petitioner was seen for cough and congestion with upper respiratory symptoms on March 23, 2015. Physical examination of the lungs showed they were clear to auscultation. It was reported he had trouble taking deep breaths without coughing. The assessment was acute bronchitis and cough. (Respondent's Exhibit No. 8, pp. 44-45).

Medical records of Shawnee Health Services were admitted into evidence. Petitioner completed a Health History Form on July 9, 2009. On that date he indicated that he was a former smoker having quit 18 years prior. He noted that he had smoked a pack of cigarettes per day for 10 to 12 years. He also gave a history of working in a coal mine for 30 years. (Respondent Exhibit No. 7, p. 43). Petitioner was seen by Dr. Dani Tazbaz on July 15, 2009. The reason for the consultation was shortness of breath. According to Petitioner he had been doing well up until about 10 days prior when he developed an episode of shortness of breath and had gasping until he caught his breath. He had been placed on Advair about a week prior. He coughed infrequently and his cough was dry. He also had a history of GERD and hiatal hernia. Physical examination of the chest was clear to auscultation with no wheezing or crackles. It was suggested that Petitioner's shortness of breath might be partially due to his obesity. His PFT, chest x-ray and CT of the chest were all normal. Nasal congestion was also a potential cause of shortness of breath that could not be ruled out. Petitioner reported that he could walk up to two miles before stopping due to shortness of breath. Dr. Tazbaz stopped his Advair. Dr. Tazbaz noted that Petitioner was questionable for black lung although his pulmonary function testing and chest x-ray were within normal limits. He was also suspicious for sleep apnea. (Respondent's Exhibit No. 7, pp. 38-40). Petitioner was seen by Dr. Tazbaz on August 19, 2009. He reported that he felt short of breath and had low energy and could

not do much work at home. He had a little cough. Petitioner reported that he had GERD and slept in a recliner. He reported that he could still walk up to two miles if he took his time. He had no nocturnal cough or wheezing. He reported that he snored at night and had excessive daytime sleepiness. Physical examination of the chest showed his lungs were clear to auscultation with no wheezing or crackles. Assessments included shortness of breath and snoring with excessive daytime sleepiness suspicious for sleep apnea. It was still believed that his obesity might be contributing to his shortness of breath as well as post nasal drip. He was given a nasal spray. He was to continue on the Albuterol as needed and he was also taking Advair. (Respondent's Exhibit No. 7, pp. 28-29). Petitioner was seen by Dr. Tazbaz again on September 3, 2009. His shortness of breath was not much improved. It would come in episodes. Physical examination of the chest was clear to auscultation with no wheezing or crackles. His assessment remained shortness of breath and suspicious for sleep apnea. (Respondent's Exhibit No. 7, pp. 25-26). Petitioner was seen by Dr. Tazbaz on October 15, 2009, for shortness of breath and snoring. He was status post stenting of his coronary artery. Petitioner reported that the shortness of breath was mildly improved. He had no chest pain or nocturnal coughing or wheezing. He did not think the Advair was helping him. Physical examination of the chest was clear to auscultation without wheeze or crackles. Impression was shortness of breath, post nasal drip and sleep apnea. Dr. Tazbaz still believed that the shortness of breath was a combination of obesity and post nasal drip. His Advair was stopped as his PFT was normal and it was not believed that he had asthma. (Respondent's Exhibit No. 7, pp. 3-4).

Medical records of SIH Cancer Institute were admitted into evidence. Petitioner was seen on October 31, 2017. Petitioner's CBC since 2016 had shown PLT 100-110. On examination of the chest his respiratory effort was normal and breath sounds were normal. The doctor noted that his lower platelets predated the gastric surgery with no bleeding during the surgery. The plan was to monitor his PLT every three to four months. (Respondent's Exhibit No. 11, pp. 2-10). Petitioner was seen again on December 21, 2017. His review of systems respiratory remained negative. He had normal respiratory effort and breath sounds on physical examination. The doctor was concerned about a B12 deficiency. (Respondent's Exhibit No. 11, pp. 11-20). Petitioner was seen on February 1, 2018. The history of present illness noted that he had moderate/mild thrombocytopenia. He was asymptomatic. His review of systems respiratory was negative for chest tightness, cough, dizziness on exertion and shortness of breath and wheezing. His pulmonary examination was normal. (Respondent's Exhibit No. 11, pp. 21-26). Petitioner was seen on May 7, 2018. His review of systems respiratory was negative. On physical examination he had normal respiratory effort and breath sounds. No wheezing or rales. The plan was to continue surveillance of his mild macrocytic anemia. (Respondent's Exhibit No. 11, pp. 27-34). Petitioner was seen on September 4, 2018, for thrombocytopenia. His platelet levels were stable compared to the year prior. The doctor recommended continued monitoring. (Respondent's Exhibit No. 11, pp. 34-38).

Petitioner was seen on December 3, 2018. He was feeling well overall and denied any acute complaints. The doctor noted on this date his platelet count was 174, but his hemoglobin was slowly trending down. A bone marrow biopsy was recommended. (Respondent's Exhibit No. 11, pp. 39-42). Petitioner was seen on January 18, 2019, to discuss results of the bone marrow biopsy. An ultrasound of the abdomen showed an enlarged spleen. The bone marrow biopsy was suggestive of Myelodysplastic Syndrome with multilineage dysplasia. The doctor noted that given low risk to disease and mild cytopenias, he recommended observation. (Respondent's Exhibit No. 11, pp. 43-47).

Medical records of Prairie Cardiovascular Consultants were admitted into evidence. Petitioner was seen on October 13, 2008, for myocardial spect stress test. The conclusion was normal stress/rest myocardial profusion scan. Dr. Alexander's office was advised that the stress test showed mild LV dysfunction and no ischemia. (Respondent's Exhibit No. 9, pp. 165-167). Petitioner was seen on September 4, 2009. He reported that two months prior he started experiencing shortness of breath. He went to the emergency room and was told that he had COPD. His pulmonary function testing showed no abnormalities. He was then told that his problems were likely related to his sinuses. He was prescribed antibiotics but was still experiencing shortness of breath. This was mainly with activity and during the shortness of breath he also had some chest heaviness. Petitioner was noted to be a non-smoker. His review of systems respiratory was positive for snoring. His review of systems cardiovascular showed chest heaviness and shortness of breath. His chest was clear to auscultation on examination. It was recommended that they proceed with cardiac catheterization for delineation of his coronary anatomy. (Respondent's Exhibit No. 9, pp. 153-157). On September 24, 2009, Petitioner underwent selective coronary angiogram as well as placement of a stent in the proximal left anterior descending artery. (Respondent's Exhibit No. 9, pp. 145-147). Petitioner was seen on October 30, 2009. At that time he was doing well with no chest pain or shortness of breath. His chest was clear to auscultation. (Respondent's Exhibit No. 9, pp. 125-129). Petitioner was seen on August 13, 2010. He denied any chest pain or shortness of breath. He was listed as a former smoker. He denied any chronic cough. His chest was clear to auscultation. (Respondent's Exhibit No. 9, pp. 116-120). Petitioner was seen for chest pain on September 20, 2012. He was admitted into Herrin Hospital for a myocardial spect stress test. Same revealed normal stress/rest myocardial profusion scan. (Respondent's Exhibit No. 9, pp. 109-111).

Petitioner was admitted to Herrin Hospital on June 3, 2013. Cardiology consultation was requested. On review of systems respiratory Petitioner denied any chronic cough. His chest examination was clear to auscultation. Chest x-ray was performed and showed no acute cardiopulmonary process. The assessment was unstable angina, coronary artery disease status post percutaneous transluminal coronary angioplasty with stenting, hypertension, morbid obesity and obstructive sleep apnea. Catheterization was ordered. (Respondent's Exhibit No. 9, pp. 103-106). Left and right coronary

angiography was performed at that time. Impression showed moderate coronary artery disease, predominantly involving the RCA. The stent in the LAD was patent. Medical therapy and risk factor modification were recommended. (Respondent's Exhibit No. 9, pp. 97-99). Petitioner was seen on July 1, 2013, for follow up. Dr. Al-Dallow explained that his chest pain was most likely from spasms. Dr. Falcone recommended Indur. Review of systems respiratory was negative. Physical examination respiratory was clear to auscultation. (Respondent's Exhibit No. 9, pp. 91-94). Petitioner was seen on September 6, 2013, for follow up. Despite taking Indur, he was continuing to have chest discomfort. Dr. Falcone did not feel the pain was very typical for coronary artery disease. Review of systems respiratory remained negative and physical examination respiratory also remained clear to auscultation. (Respondent's Exhibit No. 9, pp. 84-87). Petitioner was seen on November 22, 2013. He was doing well from cardiac standpoint. Review of systems respiratory remained negative and his physical examination respiratory remained clear to auscultation. (Respondent's Exhibit No. 9, pp. 80-83). Petitioner was seen on May 16, 2014, for a stress test. He continued to have chest pain, especially with activity. He went to the emergency room the week prior for retrosternal chest pain after lifting an 80 pound bag. Petitioner denied any proximal nocturnal dyspnea, orthopnea, syncope or preexisting syncope. His review of systems respiratory was otherwise negative and physical examination respiratory showed the chest was clear to auscultation. (Respondent's Exhibit No. 9, pp. 75-79). Petitioner was seen on November 21, 2014. He was doing well from a cardiac perspective. Review of systems respiratory remained negative and physical examination respiratory remained clear to auscultation. (Respondent's Exhibit No. 9, pp. 58-61).

Petitioner was seen on January 26, 2016, for preop evaluation prior to right knee surgery. Petitioner had done well in the last two years and had no new complaints. His review of systems respiratory remained negative and physical examination respiratory remained clear to auscultation. He was stable from a coronary standpoint on his medical therapy. (Respondent's Exhibit No. 9, pp. 47-51). Petitioner was seen for follow up on his coronary artery disease on October 5, 2016. He did not complain of any chest pain. His social history indicated that he smoked one pack a day for 10 years quitting in 2001. His review of systems respiratory was negative. Physical examination respiratory showed no respiratory distress and breath sounds and effort were both normal. (Respondent's Exhibit No. 9, pp. 18-22). Petitioner was seen on April 28, 2017, for follow up. His symptoms were well controlled. Review of systems respiratory remained negative. Physical examination respiratory remained normal and negative. (Respondent's Exhibit No. 9, pp. 22-26). Petitioner was seen on September 29, 2017. He reported an episode of angina the prior week. It was associated with exertion as well as carrying heavy 20 pound bags. He had to take nitroglycerin tablets. He did not report any shortness of breath. Review of systems respiratory was negative for cough and wheezing. Physical examination respiratory remained normal and negative. (Respondent's Exhibit No. 9, pp. 27-30). On October 12, 2017, Petitioner underwent myocardial profusion imaging

through Bruce Protocol. The impression showed normal myocardial perfusion without stress induced ischemia. (Respondent's Exhibit No. 9, p. 31). Petitioner was seen on February 6, 2018, for follow up of his symptoms and preop clearance. Petitioner did not report any shortness of breath. Review of systems respiratory was negative. Physical examination respiratory remained normal and negative. (Respondent's Exhibit No. 9, pp. 32-35). Petitioner was seen on October 31, 2018, complaining of angina symptoms with exertion. He denied shortness of breath. Review of systems remained negative. (Respondent's Exhibit No. 9, pp. 40-44). Petitioner was seen on January 18, 2019. He had known thrombocytopenia and was being followed by oncology. He was awaiting results of his bone marrow biopsy. He did not report any shortness of breath. His review of systems remained negative for any cough or new or significant shortness of breath. (Respondent's Exhibit No. 9, pp. 7-11).

CONCLUSIONS OF LAW

Issue (c): Did an occupational disease occur that arose out of and in the course of Petitioner's employment with Respondent?

Issue (f): Is Petitioner's current condition of ill-being causally related to his occupational exposure?

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment.

The Arbitrator finds the x-ray interpretations of Dr. Castle and Dr. Meyer to be more credible than the interpretations by Dr. Paul and Dr. Smith. Dr. Paul is not a B-reader. Dr. Meyer testified that a specialized training course and examination must be taken in order to become a B-reader. Dr. Paul does not have that training or certification. Dr. Paul's history of treating coal miners for coal mine-induced lung disease and interpreting chest x-rays of coal miners cannot be said to be the same as taking the B-reading course and passing the B-reading test. Dr. Paul did not know the date of the chest x-ray that he reviewed. Dr. Paul testified only that he believed the film was positive for coal workers' pneumoconiosis. Dr. Paul did not determine the profusion of the film. The Arbitrator finds it instructive to have testimony of a B-reader that explains what goes into a B-reading and, more specifically, a positive and/or negative B-reading finding. For these reasons, the Arbitrator finds Dr. Meyer's testimony helpful and more persuasive than the x-ray interpretation report of Dr. Smith. See *Slightom v. Tri County Coal*, LLC, 14 WC 015253, 19 IWC 0068 (February 1, 2019).

Dr. Meyer reviewed the chest x-rays dated July 29, 2009, and May 10, 2016. Dr. Meyer found both chest x-rays to be negative for coal workers' pneumoconiosis. He testified that there was no change between the two examinations. This is consistent with

the medical records. There was no finding of coal workers' pneumoconiosis in any of the chest imaging interpretations contained in the medical records. Dr. Meyer noted that the chest x-ray of May 10, 2016, was quality 2 due to background mottle and image noise. Dr. Meyer testified that mottle can make the film look grainy and simulate small opacities. Dr. Smith found the May 2016 film to be quality 1 indicating he did not take into account the mottle on the film. Dr. Smith noted only small opacities in the mid to lower lung zones. Dr. Meyer testified that coal workers' pneumoconiosis is generally an upper lung zone predominant process.

Dr. Paul diagnosed Petitioner with a reduced capacity based on testing diffusion performed as part of his examination. Dr. Castle testified that he did not have the criteria needed to determine if Dr. Paul's diffusion capacity test was valid. Dr. Castle testified that the valid diffusion capacity testing from Dr. Tazbaz in 2009 and Methodist Hospital in July 2016 revealed no diffusion abnormality. Dr. Castle testified that the testing from 2009 as well as Dr. Paul's testing in May 2016 revealed no obstruction or restriction. Dr. Paul did not diagnose Petitioner with COPD.

Dr. Paul testified that Petitioner had chronic bronchitis based on his methacholine challenge testing. Dr. Castle testified that chronic bronchitis is not diagnosed with methacholine challenge testing. Dr. Castle testified that the diagnosis of chronic bronchitis requires a chronic cough productive of sputum on most days for at least three consecutive months for two consecutive years. Dr. Paul did not obtain a history from Petitioner of chronic cough nor did history of chronic productive cough appear in the medical records. There was no diagnosis of chronic bronchitis in the medical records.

Issue (o) Other: Whether Petitioner proved timely disablement pursuant to Sections 1: (e) and (f) of the Occupational Diseases Act?

The Arbitrator concludes that Petitioner failed to prove a timely disablement pursuant to Sections 1(e) and 1(f) of the Occupational Diseases Act.

The Petitioner testified that he first noticed breathing problems at work while working as a roof bolter in the mid 1980s. There was no evidence that any treating physician ever restricted Petitioner from work due to a pulmonary condition. Petitioner was continuing to perform his job duties in the coal mine up until he was laid off at age 58. Petitioner testified that he had intended to work until age 65 at least and would have reported for his next shift but for the layoff. Petitioner did not relate to Dr. Paul leaving the mine at the time he did on the recommendation of a physician or because of an inability to physically do his job. Dr. Castle testified that the pulmonary function testing performed by Dr. Paul was normal and did not reveal an obstruction or restriction. Dr. Castle testified that Petitioner was capable of heavy manual labor based upon his ventilatory status. Dr.

Castle further testified that if he applied the *AMA Guides* to Petitioner's test results, he would fall in Class 0 impairment.

Petitioner's claim for benefits is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Carlile,

Petitioner,

vs. NO: 16 WC 29744

Hiltz Propane Systems, Inc.,

20IWCC0583

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2020, is hereby affirmed and adopted.

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

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

20IWCC0583

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

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

OCT 1 - 2020

DATED:
o: 8/6/20
BNF/wde
45

Barbara N. Flores

Marc Parker

SPECIAL CONCURRENCE

I concur with the Decision of the majority with the exception that I would have affirmed the Arbitrator's Decision without relying on any opinions that Dr. Gornet formed based upon the MRI spectroscopy and CT discogram results. The law of the case is that Petitioner proved he sustained accidental injuries that arose out of and in the course of his employment on June 13, 2016, and that his current condition of ill-being regarding his low back was causally related to said accident as of the first §19(b) hearing date. Following that theory and considering the evidence presented at the second §19(b) hearing, Petitioner is entitled to the medical treatment he seeks. However, I agree with Respondent that the results of the MRI spectroscopy and CT discogram should not be considered in evaluating this case.

Both Dr. Gornet, Petitioner's treating doctor, and Dr. Mather, Respondent's §12 examiner, agreed that the MRI spectroscopy is not a widely adopted test. It is not recognized as a reliable test, nor accepted as a medically diagnostic tool. Dr. Mather opined that MRI spectroscopies were not reliable, and to his knowledge, Dr. Gornet's center was the only location that used them. Dr. Gornet continues to use MRI spectroscopies in an effort to have them accepted, recognized, and relied upon; however, MRI spectroscopies have not achieved this standard yet.

I would have also found that the CT discogram results cannot be relied upon, because the test was not properly performed. Dr. Gornet's failure to use a control disc during the procedure performed on August 29, 2017 significantly weakens its validity and reliability. Dr. Gornet's reasoning for not using a control disc was that Petitioner was maxed out on lidocaine; however, Dr. Mather was highly critical of this possibility during a two-level discogram. Dr. Mather further stated that Dr. Gornet had used such a small amount of fluid during the procedure that the fluid never reached the outer layers of the disc. Dr. Mather explained that a discogram could produce pain in anyone if the dye did not reach the outermost disc layers. Lastly, as both Dr. Mather and Dr. Sinha testified, the best way to objectify a discogram is to have it performed by an independent physician. Given that Dr. Gornet had a financial interest in the facility that performed the

discogram and was Petitioner's treating physician, the objectivity of the discogram was compromised.

Although I would not rely on the MRI spectroscopy or CT discogram results, I concur with the majority's finding that Petitioner's current condition of ill-being remains causally related to the June 13, 2016 work accident. There was no intervening event to establish any break in the previously determined causal connection. Moreover, the recent medical records support Petitioner's current pain complaints and indicate that the provided conservative treatment had failed to resolve his ongoing issues. Board certified radiologists noted objective findings that corroborated Petitioner's pain complaints. Specifically, abnormal findings from L4 to S1 were indicated by Dr. Cizek's reading of Petitioner's February 1, 2018 lumbar CT and by Dr. Ruyle's reading of his January 10, 2019 lumbar MRI. The record reflects that Petitioner experienced improvement in leg pain after his laminotomy on October 20, 2017; however, he has continued to have back symptoms and has not yet achieved maximum medical improvement.

Based on the lack of intervening event and the objective findings that substantiate Petitioner's ongoing subjective complaints, I concur with the majority's finding that there was no break in causal connection related to Petitioner's low back condition after the first §19(b) hearing. However, I would have affirmed the Decision of the Arbitrator without relying on the opinions that Dr. Gornet formed based on the unreliable MRI spectroscopy and CT discogram results.

DLS/met
46

Deborah L. Simpson

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

CARLILE, ROBERT
Employee/Petitioner

Case# **16WC029744**

HILTZ PROPANE SYSTEMS INC
Employer/Respondent

20IWCC0583

On 1/13/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5983 CARAWAY FISHER & BROOMBAUGH
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

5074 QUINTAIROS PRIETO WOOD & BOYER
DANA BENEDETTI
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

R. Carlile v. Hiltz Propane Systems, Inc., 16 WC 029744

20 IWCC0583

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Carlile
Employee/Petitioner

Case # **16** WC **029744**

Hiltz Propane Systems, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **07/15/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **06/13/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,055.00**; the average weekly wage was **$1,282.20**.

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

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

Respondent shall be given a credit of **$13,971.57** for **PPD Advance**, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$13,971.57**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $854.80/week for 109 weeks, commencing 6/13/2017 through 7/15/2019, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the Medical Fee Schedule, of the bills set forth in Petitioner's Exhibits 7(a) – 7(e), as provided in Sections 8(a) and 8.2 of the Act and as is set forth below.

Respondent shall authorize and pay for the surgical procedure recommended by Dr. Matthew Gornett, along with all related services, as is set forth below.

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

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

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

Signature of Arbitrator

January 13, 2020
Date

ICArbDec19(b)

JAN 13 2020

PROCEDURAL BACKGROUND

This matter was previously tried pursuant to §§19(b) and 8(a) of the Act in 2017. The Decision of the Arbitrator (finding in favor of Petitioner on all disputed issues) was affirmed by the Workers' Compensation Commission (with Commissioner Simpson dissenting) on March 16, 2018 and the Commission's Decision subsequently became final, so certain issues are governed by the law of the case doctrine. Arbitrator's Exhibit 2 was the IWCC Decision in said case, No. 18 IWCC 0157.

This issues in dispute at the July 15, 2019 trial were: Causal connection as to Petitioner's current condition of ill-being; Respondent's liability for medical expenses incurred from and after September 15, 2017; TTD from June 13, 2017 through the date of trial; and whether Petitioner is entitled to prospective medical care. It was agreed that Respondent would be entitled to a credit for all awarded medical expenses that it has satisfied and would receive a credit for a PPD advance in the amount of $13,971.57.

FINDINGS OF FACT

On 8/29/17, Petitioner underwent the previously awarded lumbar discogram under flueroscopic guidance. (PX. 3) The L5-S1 disc space was said to show a posterior annular tear and an anterior annular tear with the patient reporting concordant pain. Dr. Gornet's report opines "provocative discs with annular tears at L4-5 and L5-S1". As to L4-5 specifically, the medical record states, "We then stimulated L4-5 and L4-5 revealed an opening pressure of again 20 psi with a P-max of about 50. This revealed severe concordant pain initially from the very beginning, 8 on a scale of 10. The patient was maxing out on lidocaine at this point and we felt that it is unwise to proceed with the L3-4 level. We felt we had enough information now and the L3-4 morpohologically is normal on MRI and we felt that this is probably sufficient." (Id.) The corresponding CT scan post discogram was read by Dr. Greg Cizek. (PX. 4) Dr. Cizek's impression was "Midline annular tear with small focal protrusion at L4-5 towards the right side with bilateral formainal stenosis and degenerative disc disease L5-S1 with a broad based annular fissure which may not be complete but the protrusion extends across the middling to the foramina where there is bilateral foraminal stenosis." (Id.)

Petitioner testified that he experienced great pain during the discogram study. "The pain was so intense that it was like—it was like the first day right when I got hurt. All the pain came back. It was unbelievable. I never want to feel that pain again." (R. 11) Petitioner was further asked whether despite the pain, whether he did his best to make it through the procedure, petitioner responded, "I did." (Id.)

Dr. Gornet was deposed on March 21, 2019. (PX. 6) Dr. Gornet opined the discogram was medically necessary, opining, "Well, in this case, he had objective pathology at L4-5, more significant, and he also had some strong suggestion of an annular tear and objective pathology at L5-S1. It was important for us to evaluate and treat him, we're treating him appropriately in all the levels that need to be treated. (PX. 6 at 11-12) With regards to the findings of the discogram, Dr. Gornet further opined, "The findings showed structural disc pathology with a fairly classic central annular tear at L4-5; also, a tear at L5-S1. Both of these produced concordant pain. We were planning on testing then another disc, but unfortunately, from a medication standpoint, we felt it was unsafe at that time to move forward to test the L3-4 level. We had enough information we felt. Oftentimes, tests are not ideal, but this was the best we could do at the time." (PX. 6 at 12)

Dr. Gornet was cross examined about the admitted lack of utilizing a control disc at L3-4. He was asked "So this discogram that you performed had no control and no comparison to a normal disc performed, is that a fair assessment?" (PX. 6 at 56) Dr. Gornet responded, "The discogram did not have a negative pain response disc is a fair assessment, that's correct." (Id.) In follow up, counsel for Respondent asked, "So you would not be able to identify whether the pain response was from the injection itself rather than a positive concordant sign of back pain correct?" (Id. At 56-67) Dr. Gornet responded, "No. I think I have the ability to do that based on performing 2000 to 3000 discograms, so I believe it was related to the injection. And at this point given the fact that we're now discussing the validity of discogram and acting like it's valid, in this situation, I felt that it was not medically sound to do that based on the unique circumstances of this individual discogram. Normally, I would have tried to do that, but it just didn't work out in this situation. (Id. At 57) Dr. Gornet was next asked whether, "It's possible to have false positive discograms; true? Possible?" (Id. At 58) Dr. Gornet responded, "Well, possibility is not what we're talking about here, we're talking about things within a reasonable degree of medical certainty. I've seen more within a reasonable degree of medical certainly false negatives because of anesthetizing the disc a little bit with Lidocaine. As far as false positives, I've not seen that, but I'm sure it could happen, I'm sure it's possible." (Id.)

Post discogram, Petitioner returned to see Dr. Gornet on 9/15/17. (PX. 1) Dr. Gornet noted Petitioner's weight was 266 pounds and that he was continuing to lose weight. Dr. Gornet opined, "At this point, he has won his case at the arbitrator level, but it is being appealed. I think his best option really would be a disc replacement at L4-5 and there is no question in my mind regarding this. I would consider a disc replacement at L4-5 and small laminotomy at L5-S1 left. I think this would preserve motion at both levels and give him the best option of moving forward. We have talked about the risks and benefits of these procedures at this point. My plan is to tentatively move forward with laminotomy and foraminotomy L5-S1, left and the follow this by a staged two level disc replacement at L4-5 and L5-S1. (PX 1)

On 10/20/17, Petitioner underwent the laminotomy and foraminotomy at L5-S1. (PX. 3) The operative report states, "We began at L5-S1 and a laminotomy was performed. We identified and removed approximately 30% to 40% of the facet joint undercutting it. There was compression of the L5 nerve root from the joint itself at S1 shingling up into the foramen. Both nerve roots were decompressed successfully and hemostasis was well controlled....There were no changes in evoked potentials throughout the case." (Id.)

When asked about the necessity of the L5-S1 laminotomy and foraminotomy, Dr. Gornet opined, "Because he had objective pathology in his joint that correlated with a portion of his subjective complaints. We felt this was the first reasonable step, and as my note and as we discussed earlier, recommended potentially staging this and seeing if we could help him. Particularly because his symptoms were left side, left leg, we felt this was appropriate. This would remove any irritation of the nerve, but it would not—from the facet joint, but it would not alleviate the structural disc pathology that could also cause nerve pain." (PX. 6 at 13-14)

When asked in follow up about the effectiveness of the surgical procedure, Dr. Gornet opined, "It went very well. It helped his leg pain, he still had some numbness, but unfortunately, again, as we move forward, it did not fix his structural back pain. Decompressions really never fix structural back pain. If you think about any procedure that inherently removes part of the structure, the structure is weaker after that removal, and statistically and biomechanically from the medical literature, we are confident to state

that about—there's a decrease in about 30 percent of the structural stability of the segment once you do a simple laminotomy and foraminotomy." (Id. At 14) Continuing and discussing the need for the follow up disc replacements, Dr. Gornet opined, "So in this situation, he has a weaker back, he does have some removal of the irritation around his nerve, but the only way to really cure and relieve the effects of his work injury at this point is to fix the structural problem." (PX. 6 at 14-15)

Petitioner was asked what, if any results occurred after the L5-S1 laminotomy and foraminotomy, petitioner testified, "I had a lot of pain down the left side of my leg. It never stopped; and the layman's terms that I know it as is a decompression surgery is what it was called. He went in and fixed and cleaned up whatever was there, and I no longer had the pain shooting down my leg anymore. Since then, my feet kind of get numb occasionally still; but the pain is not there anymore." (R. 12)

On 2/1/18, a CT scan of the lumbar spine of Petitioner was performed. (PX. 4) Dr. Craig Cizek, read the scan and opined it revealed an "abnormal L5-S1 level with posterior element hypertrophy, possibly post-operative change and a linear defect in the left pars regions, possibly a pars defect or even result of a stress fracture but with minimal displacement. Left greater than right foraminal stenosis is present at this level however. Degenerative changes at the remaining levels, particularly L4-5 where there is a broad based disc bulge and foraminal narrowing. (Id)

On 4/2/18, Petitioner returned to see Dr. Gornet. (PX. 1) Dr. Gornet opined, "Robert returns today. He was won his case at the arbitrator and commission levels. The employer has now appealed the decision to the circuit court level. This obviously has a huge implication on this clinical result, as a delay in treatment significantly affects patient's outcome, especially in this case, where we have battled for so long to try to get him treatment. Our recommendation is lumbar disc replacement at L4-5 and L5-S1. His weight today is essentially the same. Exam is essentially the same." (Id.)

In his deposition, Dr. Gornet explained his surgical recommendations moving forward towards the pending surgery, "Path forward with him is, again, either what we would say is a fusion disc replacement or two disc replacements. We're favoring two disc replacements in patients such as this, because their outcome seems to be better as long as we don't run into the complication of subsidence, which is what we've described earlier. That's a little bit unusual in a man at his age to get that, so again probably will be two disc replacements." (PX. 6 at 24) In follow up, Dr. Gornet was asked, "Let's ask another question for the arbitrator then. When you say 'probably two' you are well aware that the arbitrator has to make a decision on connection and reasonableness of the surgery. When do you decide the probably one or two?" (Id.) Dr. Gornet answered, "Well, no, it will be two levels. The issue will be is whether I do a fusion with a disc replacement or two disc replacements, and that is determined intraoperatively. So every patient is always consented for disc replacement, possible fusion. That decision will be made intraoperatively." (Id.)

Petitioner returned to see Dr. Gornet on 10/25/18. The medical record indicates, "Robert returns today. He was won his case at the arbitrator level and won at the commission. It is also now being appealed. His weight today is 278 pounds. We have recommended disc replacement surgery at L4-5 and L5-S1 versus fusion at L5-S1 and disc replacement at L4-5. At this point, they have resigned their appeal at the civil level and he has moved forward with his case and now they seem to be trying a ploy on utilization review, which is silliness. I believe I can help him and we have talked about this today. I have asked him to drop his weight now and we will move forward rapidly with surgery. In all my time of doing this 25 years, I have never seen a case like this, which essentially has been so disruptive to this life and

quality of life, in circumstances where I believe I can dramatically help him. A delay in treatment I am confident will affect his outcome, but my hope is that we can still move this forward." (Id.)

Regarding Petitioner's weight and the pending surgery. Dr. Gornet was asked, "There's been a question throughout this case about Mr. Carlile's weight, and I assume that question will continue to be asked. Can you explain, because you note this in 2/1/18, you note his weight every time he comes in? Dr. Gornet responded, "The weight is only important in the sense that if we have to address him with an anterior approach to this spine. That means we go through his abdomen. And so the more belly fat he has, it makes it technically more difficult. That being said, his weight is not, you know, beyond the scope. We operated on a patient yesterday with two-level treatment who weighed 285 pounds. So some of it has to do with the individual's belly size more than it does with their gross weight." (PX. 6 at 18)

Dr. Gornet was cross examined about Petitioner's fluctuating weight, "For example, weight, weight has been, as we know a big factor throughout this case, and at numerous times throughout the case, two of which I've just referenced, you had said that he would need to drop his weight before any further treatment would even be able to ensue; fair?" (Px. 6 at 37) Dr. Gornet responded, "Yes, I've stated that I wanted his weight in the 260s. He achieved that. Unfortunately, his treatment was delayed, and therefore, he regained some of that weight. I'm confident that he will lose that weight again, but if he does not, I would not move forward with treatment until he does." (Id. At 37-38) In a follow up question on cross examination, Dr. Gornet further explained his previous answer, "So again patients will meet the expectations you want when you want them and to do that—but, obviously, you yourself may become depressed if you can't move forward with treatment when you have pain every day in your life that affects your quality of life. That could cause you to be depressed and gain weight. The medicines we prescribed could cause him to gain weight. So, unless patients have hope there's difficulty in moving forward with treatment--." (PX. 6 at 39) Dr. Gornet was interrupted in his answer with the question of, "Doctor, you're not a psychiatrist or a psychologist; correct?" Dr. Gornet answered, "That's correct." (PX. 6 at 39) The next question was, "You have no training in diagnosing anxiety, depression and so forth?" Dr. Gornet responded, "No, I would disagree with that statement. I wrote a paper on depression and treatment in spine surgeries. So in some ways, I'm more qualified than probably most people in the spinal community, because I've actually done peer reviewed and published in this matter." (Id.)

Petitioner testified about his weight. Petitioner was asked, "Now if we look at Petitioner's Exhibit No. 1, the records of Dr. Gornet, the last note which incurred as well was April 11, 2019. That says you were at 260 pounds." (R. 13) Petitioner testified he understood Dr. Gornet's target weight for him was 260 pounds. Petitioner credibly testified at present he was not at the desired weight level. When asked why, he testified, "After I was told that we going to end up going back to trial, I kind of just gave up hope. Depression set in. I just really didn't care." (R. 14) Petitioner was then asked, "Now, Mr. Carlile, you realize that you and I are asking Arbitrator Huebsch to award a two level surgery, aren't we?" Petitioner responded, "Yes sir." In follow up, Petitioner was asked, "What can you say? What kind of evidence can you give the Arbitrator that you will get back down to 260?" Petitioner testified, "I guarantee you I will be at that weight as soon as he tells me when I need to be there." The record in this case shows that Petitioner has been able to drop weight to the targeted weight. (PX. 1) Petitioner testified at hearing his current weight was 276 pounds. (R.23)

In the record there are also discussions of physical therapy, or the allegation of the lack thereof in petitioner's treatment history. This issue was present in the prior record as well. In the prior 19(b) record, petitioner was asked about his physical therapy at ATI and why he only went to two visits. (prior record at 33). Petitioner responded, "Because the pain was too intense, and it was not helping." (prior record at

34) Further, both records indicate conservative measures short of, and before surgery were completed by the petitioner in the form of multiple injections and a radio frequency ablation on 1/3/17. (PX. 5)(Prior record – medical records of Associated Physicians Group and prior record at 34-35) Petitioner testified none of the "conservative" treatment measures, such as PT, injections and RFA provided lasting relief from his symptoms. (R. 11-12)

Petitioner was cross examined in a number of areas. Petitioner was asked if he was still taking narcotics, as he was at the time of the prior 19(b) hearing. (R. 15) Petitioner testified credibly that he was, just as he had testified at the prior hearing. (R. 15) Petitioner testified he was not being prescribed these medications at both the first hearing and the instant hearing. (Id.)

Petitioner was also cross examined about a Facebook post regarding motorcycle riding. (RX. 4) The post was from 10/21/17, one day after the laminotomy and foraminotomy. (R. 18) Petitioner did not recall the post, but testified he had "wanted a Harley my whole entire life." (Id.) On redirect examination, Petitioner testified he didn't even remember the last time he had actually ridden a motorcycle. (R. 26)

Another area of cross examination was regarding a trip to Florida. (R. 21) Petitioner was asked whether he had "road tripped from southern Illinois to Florida in June of 2018?" Petitioner acknowledged he had. (Id.) When asked how long the drive had been, Petitioner testified, "Forever. It was a lot of stops, ma'am." (R. 22) Petitioner was asked on re-direct how he had traveled to the hearing site. (R. 28) Petitioner testified he was driven to the hearing site from southern Illinois by his attorney and the trip had required four stops. (Id.)

The most recent imaging of 1/10/19 is a MRI of the lumbar spine, read by Dr. Matthew S. Ruyle. (PX. 2) Dr. Ruyle opined the film showed, "microdecompression changes at L4-5 and L5-S1, a central broad based disc bulge with a hyperintensive zone at its apex at the L4-5 level, likely representing residual disc bulge and a scarred central annulus. No residual central canal or foraminal stenosis is observed. There is facet arthropathy at this level. L5-SI left foraminal protrusion with left greater than right facet arthropathy. There is moderate left foraminal stenosis but no central canal or right foraminal stenosis. (Id.)

As to his current state of ill-being at hearing, Petitioner testified he was in pain and spends "80 percent of my time in bed. My back is—It's constantly hurting. The way of life—This isn't a way of life. I just want to go back to work." (R. 15-16) When asked if he wanted to undergo the proposed two level back surgery, Petitioner testified "I just want my life back, sir. I want to go back to work. To sum it up real easy is this isn't me."

Petitioner has been excused off work by Dr. Gornet during the entire TTD period claimed. There is no evidence of any subsequent accident or back injury of any kind.

At Respondent's request, Petitioner was seen by Dr. Steven Mather for a §12 examination on November 15, 2018. Dr. Mather's physical examination revealed, "On physical examination, he is a healthy but heavyset male. He has a large overlapping abdominal pannus. He limps with every step because of complaints of lower back pain. He has a well healed one inch incision on the lumbar spine. He has severe pain complaints with any light palpation of the skin. He has severe pain complaints with simulated axial rotation or axial compression of the spine (three positive Waddell findings). He cannot extend past neutral. He can flex forward only 20 degrees because of complaints of severe left lower back pain. He states he cannot put any weight on the left lower extremity due to severe left lower back pain."

Sensory exam was normal. There was no calf atrophy. Motor exam was symmetrical and 5/5. SLR was positive for low back, but not leg pain. Dr. Mather thought Petitioner's back pain complaints were mechanical in nature. (Rx. 1)

Dr. Mather was deposed on April 4, 2019. (RX. 1) Dr. Mather is a board certified orthopedic surgeon. (RX. 1, 5) He sees approximately eighty patents per week and performs approximately six to eight lumbar surgeries per week. (Id., 7) Petitioner gave him a consistent history and mechanism of his work place injury. Dr. Mather opined the 9/21/16 MRI, was "normal" (Id. -14) The Arbitrator notes this MRI was previously opined to show annular tears at L4-5 and L5-S1 by Dr. Gornet and Dr. Gornet's opinions were found persuasive in the prior decision. (Arb. X 2 at 7 and 9) Dr .Mather further opined the discogram findings were "very minimal". (Id.- 15) Dr. Mather reviewed the CT film done in 2018 and opined that he believed Dr. Gornet didn't perform a foraminotomy at all. "If someone is going after foraminal stenosis, let's pick this disk (sic), L5-S1 foraminal stenosis, you would need to either remove the spinous process, which was not done, or you would have to remove 80 to 90 percent or all of the facet joint to get to the nerve root, neither one of which were done. (Id.-16) The operative report states that 30-40% of the facet joint was removed. (PX. 3) There was no comment regarding this portion of the operative report by Dr. Mather or Dr. Gornet. Dr. Mather was critical of all aspects of the discogram. (Id. 20-24) In fact, Dr. Mather testified his view of the record as a whole did not reveal a single "abnormal finding" (Id. 30)

Dr. Mather opined none of the scripts, the laminotomy and foraminotomy or essentially any of the treatment that occurred after four months from the work injury (10/2016?) to be causally connected, reasonable or necessary. (Id. 30-32) Dr. Mather opined Petitioner should have been at MMI four months after the injury, which does conflict with the law of the case.

Dr. Mather opined Petitioner should have been able to return to work and can work full duty at present, safely lifting 100-120 pounds, picking up chains and securing loads similar to a road paver, which includes climbing on top of the loads. (Id. 32) On cross examination, Dr. Mather did not know Petitioner's current weight, how much the Petitioner smokes, how many total hours a week Petitioner was working prior to his injury, how many of those hours consisted of driving, what kind of truck Petitioner drove, or how many hours Petitioner was required to drive without a break. (Id. 65-67)

Dr. Mather testified he does 4-5 IME's per week, unless he is on vacation. (Id. 44) Dr. Mather does not currently perform any lumbar disc replacements and has done in total 15 throughout his career. (Id. 39-40) He has performed more cervical disc replacements and currently does perform single level disc replacements as insurance companies will pre-approve and pay for them. (Id. 39) Dr. Mather has never been published on discograms, disc replacements or MRI Spectroscopy. (Id. 46-40) Dr. Mather did not have, nor did he review, the most recent film in the record, the MRI of 1/10/19 (Id. 61)

Dr. Gornet was asked about his opinion of Dr. Mather's conclusions. (PX. 6 at 26-28) Respondent's *Ghere* objection as to opinions regarding the Mather report was sustained. Dr. Gornet was asked if Petitioner had only suffered a lumbar strain in his index injury, to which Dr. Gornet responded, "No. The records are very consistent that this is not a lumbar strain for—for several reasons. Again lumbar strain is a condition that resolves in six weeks 90 percent and pretty much 100 percent by three months. We're so far beyond that. That's like saying you have a cough, but it's due to a cold, but yet, it's going on for two years. It's probably not a common cold. So in this situation, that diagnosis is inconsistent with the clinical course. No. 2, it's inconsistent in the fact that we have objective disc pathology at both L4-5 and L5-S1 causing structural back pain. No. 3, we have objective facet pathology

causing neurologic impingement and irritation, which was partially rectified by surgery and visualized at surgery. So in this situation, that is ignoring not only the clinical course, it's ignoring the objective pathology on all the clinical studies, it's ignoring the clinical result of the patient. In short, the diagnosis (of a lumbar strain) makes no sense. (PX. 6 at 27-28)

After the examination by Dr. Mather, Respondent secured a Utilization Review by Dr. Swastik Sinha. (RX. 2) Dr. Sinha testified via evidence deposition on June 11, 2019. Dr. Sinha found both the two level disc replacement and the potential hybrid surgery to be non-certified. (RX. 2) Dr. Sinha became a board certified orthopedic surgeon in 2014. (Id. 8) Dr. Sinha has not been published outside of his residency and fellowship. (Id.) Dr. Sinha's practice involves seeing 80-100 patients a week. He performs five to ten surgeries per week. (Id.) He opined there was a lack of radiographic evidence to support either procedure. (Id. 14) He supported this opinion by testifying, "However, also on the MRI there was no notable disc herniations, annular tears. The discs were noted to be pristine." (Id.) He also based his opinion on his determination on what he considered the lack of physical therapy, testifying "So they were trying to, in my opinion, look for a diagnosis, which is reasonable, but that early on, without letting therapy take its course, I thought was a little aggressive." (Id.)

On cross-examination, Dr. Sinha admitted he had never published any material on lumbar disc replacements. (Id. 21) Dr. Sinha has never performed a disc replacement surgery in the cervical spine, but assisted on this type of surgery in training. (Id. 22) When asked how this squared with his numerous concerns about the efficacy of disc replacements on cross examination, he testified, "I had concerns. And they were definitely—we had you know, journal clubs and we had discussions with spine surgeons. And when you are scrubbed in a case, sometimes you just kind of go where you are told." (Id. 24) Dr. Sinha has never performed the hybrid procedure he non-certified. (Id. 25)

Dr. Sinha acquires his files for utilization review from a company called Claims Direct. (Id. 26) He acquires between 20 and 40 utilization cases every month. (Id. 27) He reviews one or two of these reviews per day. (Id. 28) He said his review for both of his non-certifications in the instant case took, "I'd say maybe 30, 45 minutes." (Id.) He said that he sometimes performed these reviews while waiting to operate, "And while I'm waiting for the patient to get prepped and draped, sometimes I'll have 45 minutes or so to go over a utilization review while I'm twiddling my thumbs waiting for the patient to get set up." (Id. 29-30) He is paid "maybe 50 to a hundred bucks" per review. (Id. 31) He testified, further, "So for me, I use it as a learning experience. So I can understand why my surgeries are getting denied or why my patients potentially you know, getting their denials." (Id.) Dr. Sinha did not review any of the actual diagnostic films. In his own practice, he reviews the films of his patient because, "Sometimes radiologists miss the forest for the trees." (Id.)

In his report non-certifying the hybrid procedure, Dr. Sinha says that Petitioner had "abnormal" imaging findings at both L4-5 and L5-S1. (Id. 41) In his deposition, under cross-examination he testified that was "false" (Id.) In follow up, he was asked who typed his reports. He testified he was supplied and uses a "template". (Id. 42) He could not recall which aspects of his report were from the template or his own hand. (Id. 43) When asked how the medical literature supported his opinion, he said the literature cited in his reports was from a "template" (Id. 49) In further questioning about the templated literature and Claims Direct who hired him, he testified, "No that's all part of the initial template I gave to them. So I have different ones for lumbar fusions, cervical disc replacements, and so on, that I've submitted to them. I'm sure they've made some edits and grammar or whatever correction that I threw out in the middle of the night and gave them my ones that I use for other file reviews and other companies, but by and large, this is probably a template that was edited by them, more or less." (Id. 50)

Lastly, Dr. Sinha testified that Petitioner was not at MMI. He was asked, if Petitioner was his patient, what he would do, he answered, "I would try two different types of therapy. I would want to see his response to a land based manual therapy with muscle energy, possibly doing some McKenzie-based exercises, possibly doing things like dry-needling, Graston, seeing if he has some myofascial pain. Before I even got to that point I would like to—like you said, lay eyes on him, kind of ask him more questions, do an exam..." (Id. 55) He endorsed both aquatic therapy and an interventional pain management treatments, to include epidurals, medial branch blocks and radiofrequency ablations would be considered. (Id. 55)

Petitioner underwent both epidurals and a radiofrequency ablation by his treating doctors prior to the utilization review. In summary of these potential treatment options for the petitioner, Dr. Sinha testified, "So if he were my patient, I would just start from scratch as far as getting his history, physical you know, restarting his therapy, getting pain management involved, because he deserves a good crack at non-surgical intervention." (Id. 56)

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

The Arbitrator again finds Petitioner's testimony to be credible. The Arbitrator observed Petitioner's demeanor on direct and cross-examination. The law of the case is that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on June 13, 2016 and his condition of ill-being regarding his low back is causally connected to the injury as of June 12, 2017.

While Petitioner's continued use of narcotics that are not prescribed by a physician (indeed in contravention of the recommendations of the physician who possibly perform a major surgery on Petitioner's back with the potential for catastrophic outcomes) is troubling, there was no evidence adduced at the hearing of drug seeking behavior or anything else that would convince the Arbitrator that Petitioner is not credible, or a faker.

Causal Connection

Petitioner's current condition of ill-being regarding his low back (to wit: lumbar radiculopathy, status post 10/22/2017 surgery as described by Dr. Gornet in PX. 1 and PX. 3) is causally related to the injury. This finding is based on Petitioner's credible testimony regarding severe lingering back pain (with much improved leg pain post surgery), the lack of any intervening event, the persuasive opinions of Dr. Gornet, the treating medical records after the prior trial and the prior decision herein.

Dr. Mather's opinions are not persuasive, especially since the law of the case is that Petitioner suffered a low back injury that resulted in the need for treatment almost one year after the accident, thus negating from a legal perspective any possibility that petitioner suffered a minor low back strain and was at MMI six weeks after the accident. Dr. Gornet's opinions best comport with the evidence adduced, including the opinions of the radiologists that read the MRI's and post discogram CT.

Liability for Incurred Medical Expenses

Petitioner's bills exhibit was PX. 7. The claimed medical services and the related expenses are found to be causally related and reasonable and necessary to cure or relieve the effects of the injury. Accordingly, Respondent shall satisfy the claimed §8(a) expenses set forth in PX. 7(a) – 7(e) pursuant to §8.2 of the Act and the Medical Fee Schedule. Respondent is given a credit for all awarded bills that it has already satisfied.

Prospective Medical Treament

Respondent shall authorize and pay for the lumbar fusion/disc replacement or two level disc replacement surgery offered by Dr. Gornet, along with all related services. The Arbitrator bases this award on the finding above regarding causation and the persuasive testimony of Dr. Gornet.

An admissible utilization review shall be considered by the Commission, along with all other evidence and in the same manner as all other evidence, and must be addressed along with all other evidence in the determination of the reasonableness and necessity of the medical bills or treatment. 820 ILCS 305/8.7(i)(5). When an employer obtains a utilization review opinion denying care, the burden shifts to the employee to demonstrate by a preponderance of evidence that variance from the standards of care used by the person or entity performing the review is reasonably required to cure or relieve the effects of his or her injury. 820 ILCS 305/8.7(i)(4). The UR evidence submitted by Respondent is said to show that the proposed lumbar hybrid fusion/disc replacement procedures is experimental, unsupported by the medical evidence and evidence-based literature, and procedures that Dr. Sinha would not feel comfortable performing on his own patients. The proposed two-level lumbar disc replacement at L4-5 and L5-S1 was not medically indicated or certified. Dr. Gornet's testimony convinces the Arbitrator that a variance from the UR standards set forth by Dr. Sinha is reasonably required to cure or relieve the effects of Petitioner's injuries.

Petitioner testified that he wishes to undergo the procedure in order to relieve his pain and get back to work. Based upon the evidence in this case, the Arbitrator believes that the offered surgery gives Petitioner the best chance to reduce his pain to an acceptable level and to return to a productive job. The proposed surgeries are controversial, but they are not illegal. The morbidity result of the surgery will be included in the studies that will either weigh in favor of the future acceptance of the procedures or against them. If Dr. Gornet did not think that the proposed surgery would lead to a good outcome, he would not offer the surgery.

Dr. Mather's recommendation to do nothing is not persuasive. Dr. Sinha's recommendation to start from scratch with PT and injections is not optimal in this case.

The Arbitrator believes that the best action to get Petitioner back to work is to go forward with the proposed surgery. Further delay may lead to a less favorable outcome. According to Petitioner, Dr. Gornet told him at the April 11, 2019 visit that he would not proceed with any further treatment until the end of litigation.

Petitioner is urged to lose weight, cease taking narcotic medication and stop smoking as recommended by Dr. Gornet.

T.T.D.

Based upon the Arbitrator's findings above regarding Causation and Prospective Medical Treatment, Petitioner is entitled to TTD benefits from June 13, 2017 (the day after the last awarded TTD in the prior decision) and July 15, 2019 (the day of the hearing that is the subject of this decision), a period of 109 weeks. Petitioner is not able to return to work and he is not yet at MMI. See: Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n, 236 Ill. 2d 132 (2010)

Respondent may apply the PPD advance against the awarded TTD.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JERRY FARUZZI,

Petitioner,

vs.

NO: 15 WC 19933

20IWCC0584

VILLAGE OF ALSIP,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice provided to all parties, the Commission, after considering the issues of accident, causal relationship, medical expenses both incurred and prospective, temporary total disability benefits, and Respondent's Motion to Dismiss, and being advised of the facts and the law, reverses the Decision of the Arbitrator and denies Respondent's Motion to Dismiss.

FINDINGS OF FACT

Petitioner's Testimony

Petitioner, a 48-year-old firefighter and paramedic, testified at the November 28, 2016 hearing at length regarding his duties over the past 28-years while employed with the Village of Alsip Fire Department. He was a firefighter and paramedic through 2005, when he became a lieutenant firefighter paramedic, his current position. (11/28/16) T. 16. Since February 1989, Petitioner's schedule required he work 24 hours on-duty and 48 hours off-duty. (11/28/16) T. 16-17.

Petitioner testified regarding his job duties as a paramedic which require him to treat and transport patients. As a lieutenant firefighter, Petitioner also supervises a crew which requires him to lead the crew into whatever situation is presented in order to assure the crew's safety and the safety of the public. (11/28/16) T. 17-18. Petitioner performs supervisory firefighting duties which require him to wear an air pack, go into burning buildings, fight fires and confront hazardous materials situations. (11/28/16) T. 18. Petitioner starts work at 7:00 a.m. *Id.* On a

typical day as a lieutenant firefighter paramedic, Petitioner meets with the crew and reviews the possible day's events; checks vehicles and equipment; then performs general housework duties. (11/28/16) T. 19. Then depending on the day of the week, training in the morning and/or afternoon with dinner at 5:00 p.m. barring any emergency calls *Id.*

As for emergency calls, Petitioner testified such calls range from ambulance calls for injuries and cardiac events as well as fire calls for car fires, trash fires, and structure fires. (11/28/16) T. 19. Petitioner described the municipality of Alsip which includes residential, commercial, and industrial areas. (11/28/16) T. 20. Relative to the industrial, Petitioner described fires occurring at a paper factory as well as other businesses including refineries which utilize hazardous materials. (11/28/16) T. 21-22. Petitioner testified Alsip Fire Department assists different townships when requested. (11/28/16) T. 25-26.

Petitioner, in certain circumstances such as general calls/alarms, would be called to work even during his time off-duty as the circumstances necessitated. (11/28/16) T. 26-27. Over the past three to four years, such calls occurred approximately twice a week where previously they occurred approximately eight times a week. (11/28/16) T. 28-29. Petitioner testified when receiving such a call, everyone immediately reacts and mans the appropriate vehicle. (11/28/16) T. 29. Relative to a fire call, prior to leaving the station, the crew dons protective equipment, *i.e.*, bunker pants, boots, insulated jacket, a Nomex hood, gloves, and a helmet. (11/28/16) T. 30-31. En route to the call, air packs are attached. (11/28/16) T. 31.

Petitioner identified PX17- the firefighter paramedic job description, and indicated it accurately depicted and described the job duties of a firefighter with the Alsip Fire Department. (11/28/16) T. 32. PX17 noted the firefighter wears personal protection equipment weighing approximately 50 pounds while performing tasks about which Petitioner agreed. (11/28/16) T. 33. With the air pack, Petitioner believed the total of all equipment weighs between 50 to 70 pounds. *Id.*

Petitioner testified Dr. Moisan performed fitness-for-duty examinations during Petitioner's career; these exams were required bi-annually prior to age 40 and, thereafter, annually. (11/28/16) T. 34. During his January 16, 2015 examination, Dr. Mosian noted an abnormal EKG and recommended an evaluation with a cardiologist. (11/28/16) T. 35. Prior to this recommendation, Petitioner had not sought treatment for heart disease. (11/28/16) T. 34. On January 23, 2015, Petitioner sought treatment with Dr. Yogesh Tejpal, a cardiologist who performed an angioplasty the next day. (11/28/16) T. 36. Thereafter, Petitioner underwent cardiac rehabilitation which he completed on May 18, 2015. (11/28/16) T. 37.

Petitioner testified Dr. Tejpal cleared him to return to work in May of 2015, and on June 13, 2015, Dr. Moisan did so as well. (11/28/16) T. 38. On June 15, 2015, Petitioner returned to work. *Id.* During a rescue call, Petitioner experienced shortness of breath causing him to seek further treatment on June 29, 2015 with Dr. Tejpal; finding no cardiac abnormality, Dr. Tejpal again released Petitioner to return to work without restrictions. (11/28/16) T. 39.

On July 15, 2015, Petitioner was performing a training exercise utilizing his full equipment when he experienced shortness of breath. (11/28/16) T. 40-41. He advised Chief

Styczynski who instructed Petitioner to remain off work until a re-evaluation by Dr. Mosian. (11/28/16) T. 42. Thereafter, on August 11, 2015, Petitioner sought treatment with Dr. Tejpal who authorized Petitioner off work and recommended further evaluation. (11/28/16) T. 43-44. On November 18, 2015 on the referral of Dr. Tejpal, Petitioner was evaluated by Dr. Ortiz-Cantillo, a pulmonologist, who diagnosed coronary artery disease and shortness of breath. (11/28/16) T. 44-45. To date, Dr. Mosian has not released Petitioner to return to work. (11/28/16) T. 45-46.

On cross-examination, Petitioner testified on January 16, 2015, he was to report to Dr. Moisan's office for his physical examination and then proceed to work. (11/28/16) T. 47. Forty-eight hours prior to January 16, 2015, Petitioner worked his normal shift. (11/28/16) T. 48. Nothing unusual occurred during the 48-hours prior to January 16, 2015. *Id.* Dr. Moisan previously evaluated Petitioner for a fitness for duty examination in January of 2014. (11/28/16) T. 48. Since early 2000 and through the current time, Dr. Joshi has been Petitioner's primary care physician. (11/28/16) T. 48-49.

Petitioner testified he has a history of high cholesterol due to which he, at one time, took medication. (11/28/16) T. 49. Petitioner agreed that his medical records evidence Dr. Comer discontinued the use of Lipitor in 2008 due to adverse effects of the medication. (11/28/16) T. 50-51. Between 2008 and 2015, Petitioner did not take medication for his high cholesterol and continued under the care of Dr. Joshi. (11/28/16) T. 51. Also, during this period, Dr. Joshi counseled Petitioner on heart disease given his family history of the same. *Id.* Petitioner's mother suffered a cardiac event at age 70 requiring open heart surgery. (11/28/16) T. 52. Petitioner's father suffered from congestive heart failure. *Id.* To his knowledge, Petitioner's siblings do not suffer from heart disease. *Id.*

Petitioner testified to a prior history of smoking from 1984 to 1994 of approximately one-half pack per day. (11/28/16) T. 53. Petitioner testified prior to January of 2015 he suffered from shortness of breath especially with heavy exertion with an initial onset in 2014. (11/28/16) T. 54-55. Petitioner experienced shortness of breath following his return to work in July of 2015 when performing a rescue exercise. (11/28/16) T. 56-57. Petitioner testified in March of 2015, he was initially released to return to work by Dr. Tejpal, his cardiologist, but Dr. Mosian did not release him until June of 2015. (11/28/16) T. 59-60. Petitioner testified he is able to walk three minutes a day and bike eleven miles per day during which he periodically experiences shortness of breath which is less so following his angioplasty. (11/28/16) T. 59-60.

Petitioner received his salary as well as sick time benefits until November of 2016 at which time he received a letter from Respondent advising of his separation from Respondent. (11/28/16) T. 66-67. Petitioner testified he applied for a duty disability pension in September of 2016. (11/28/16) T. 67-69. Petitioner has not sought alternative employment or enrolled in a vocational rehabilitation program since being authorized off work in July of 2015. (11/28/16) T. 70.

Petitioner examined RX13, which evidenced payroll documents for Petitioner for the period of December 28, 2013 through October 28, 2016. Over Petitioner's Attorney's continuing objection, Petitioner was questioned regarding the records. (11/28/16) T. 76. Petitioner testified

between February of 2015 and June 26, 2015, he received bi-weekly payments in the amount of $3,682.34. (11/28/16) T. 81. Thereafter, Petitioner returned to work and began receiving his regular salary through August 7, 2015 which also equaled $3,682.34. (11/28/16) T. 82-83. From August 21, 2015 through March 18, 2016, Petitioner received monies in the amount of $3682. 34 designated as "WCOMP." (11/28/16) T. 84-85. During this time period specifically on December 11, 2015, Petitioner's compensation increased to $3,802.63 due a retroactive raise. (11/28/16) T. 85. Petitioner received a lump-sum payment for his pay increase for the period of May 2015 through February 2016. (11/28/16) T. 86. After April 1, 2016, Petitioner utilized his accrued sick-time benefits. (11/28/16) T. 87. From January 16, 2015 to April 1, 2016, Petitioner confirmed he received compensation benefits from Respondent directly deposited into his account every two weeks. (11/28/16) T. 88-89.

Petitioner testified he last sought treatment with Dr. Tejpal in August of 2016 at which time no treatment was recommended for Petitioner's complaints of shortness of breath other than continued cardiac rehabilitation and activities modification. (11/28/16) T. 92-93. Petitioner testified he last sought treatment with Dr. Ortiz-Cantillo in November of 2015 at which time no treatment was recommended for Petitioner's complaints of shortness of breath. (11/28/16) T. 93.

Petitioner testified carrying heavier loads, approximately 30 pounds or greater especially climbing stairs cause shortness of breath or difficulty with breathing whereas normal walking does not. (11/28/16) T. 94-95. Petitioner is able to garden such as pulling weeds or raking leaves and helps with the cooking. (11/28/16) T. 97-98. Petitioner's wife has a business, Creative Vinyl Expression, where she fabricates stickers and has made 30 or 40 to date. (11/28/16) T. 98-99. Petitioner denied generating any income outside what he earned from Respondent from 2014 through 2016. (11/28/16) T. 100.

Petitioner confirmed coverage through Blue Cross/Blue Shield provided by Respondent through which he submitted his medical expenses and was unaware of any outstanding balances. (11/28/16) T. 101-2. Petitioner confirmed he was evaluated by Dr. Everett, Dr. Samo, Dr. McDonough, and Dr. Zanetti. (11/28/16) T. 102-5.

Petitioner confirmed one oil refinery remained, and he last responded to an oil refinery fire three or four years prior as such fires were infrequent. (11/28/16) T. 107-8. Since the start of his career, fires occurred at the paper factory on a more frequent basis but less in the last ten years. (11/28/16) T.108-9. Petitioner was unaware as to the number of vehicular, structural, residential, and marine fires to which he responded in 2014. (11/28/16) T. 110. Petitioner was unaware as to the number of rescue and recovery and hazardous material calls to which he responded in 2014. *Id.*

Petitioner experiences shortness of breath under moderate to heavy exertion as well as periodic heart palpitations which he reported to Dr. Tejpal. No medical treatment nor medication has been recommended for either condition. (11/28/16) T. 113-4. Dr. Tejpal is to re-evaluate Petitioner in six-months, and no additional appointments are scheduled. (11/28/16) T. 114.

Franson's Testimony

Ms. Kathy Franson was called to testify on behalf of Respondent. Ms. Franson testified she began her employment with Respondent in February of 2015 in the capacity of the HR Manager. (11/29/16) T. 8. The HR Manager's duties involve employee relations, benefits, safety, insurance, and payroll. As for the safety responsibilities, Ms. Franson would convene department heads, when necessary, to discuss injuries and illnesses as well as disseminate information to employees. *Id.*

Ms. Franson testified as part of her duties she maintained records including regarding Petitioner. (11/29/16) T. 9. Ms. Franson identified Respondent's Exhibit 13 as the payroll records from Paylocity for the period of December 28, 2013 to October 28, 2016 regarding Petitioner. (11/29/16) T. 9-10. Ms. Franson explained after January 15, 2015, Petitioner continued to receive his full salary paid by Respondent. (11/29/16) T. 12. In turn, Respondent received reimbursement from its workers' compensation carrier, IPRF, of 66 2/3 percent of Petitioner's salary. *Id.* Petitioner's payroll records evidence he received workers' compensation pay from February of 2015 through April 1, 2016 when he began utilizing sick time. (11/29/16) T. 13-14.

Ms. Franson testified as part of an employee's benefit package, health insurance was provided from Blue Cross/Blue Shield, and Petitioner was a participant in the health plan, which was subsidized, in part, by Respondent. (11/29/16) T. 15-16. Ms. Franson identified Respondent's Exhibit 16- a print-out of payments made by Blue Cross/Blue Shield. (11/29/16) T. 16.

On cross-examination, Ms. Franson explained the payments were not only for Petitioner's health expenses but also family members. (11/29/16) T. 21. If the health plan covers a family, then a $2500.00 annual deductible exists, $1000.00 paid by the family and $1500.00 by Respondent. (11/29/16) T. 25. If a claim is not accepted for workers' compensation, the payment is made by Blue Cross/Blue Shield instead of Illinois Public Risk Fund, IPRF. (11/29/16) T. 28. Ms. Franson was unable to identify the dollar amount of out of pocket expenses paid by Petitioner from the information contained in RX16. *Id.* Ms. Franson was also unable to identify the dollar amount paid for his claimed workers' compensation injury from the information contained in RX16. (11/29/16) T. 29-33.

Ms. Franson testified Respondent is required to pay Petitioner his full salary for on the job injuries for one year pursuant to the Public Employee Disability Act. (11/29/16) T. 36. Ms. Franson was unaware whether Illinois Public Risk Fund reimbursed Respondent. (11/29/16) T. 40.

Ms. Franson reviewed RX13 and identified "REG" to mean regular pay of $34.94 an hour which may have increased due contractual negotiations. (11/29/16) T. 41. Ms. Franson identified "WCOMP" to mean workers' compensation indicating Petitioner was off work and being paid through the workers' compensation code in the payroll system. (11/29/16) T. 42. Ms. Franson identified "BONUS" and "RETRO" but did not know why Petitioner received such

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payment. (11/29/16) T. 49. Ms. Franson explained "SICK" referred to sick pay, irrespective of its cause, occupational versus non-occupational. (11/29/16) T. 50-1.

Ms. Franson testified Petitioner is no longer receiving compensation from Respondent as his final accrued benefits where exhausted with final payment on November 15, 2016. (11/29/16) T. 59. Petitioner received $297,799.19 in total compensation in 2016. (11/29/16) T. 61.

On re-direct examination, Ms. Franson testified when an employee applies for a pension either duty or non-duty, he must pick a specific retirement date, and Petitioner requested September 1, 2016 in writing to the Chief. (11/29/16) T. 62-3. Ms. Franson explained if an employee is off work for an injury, he receives PEDA benefits for 52 weeks which can be converted to sick pay if the claim is subsequently denied. (11/29/16) T. 65-6. In Petitioner's case, his claim was not accepted. (11/29/16) T. 67. If a claim is accepted, the Village of Alsip pays the employee's salary and receives a percentage of that salary in payment from IPRF to the finance department. (11/29/16) T. 68-9. In Petitioner's case, if the claim were accepted, Respondent would not need to make further payments as Petitioner previously received his salary. (11/29/16) T. 69.

Payments made to Petitioner were coded as "WCOMP" as there was a delay from IPRF in reporting, so payments should have been coded as regular pay which would not change the amount of compensation received by Petitioner. (11/29/16) T. 70. Petitioner received $99,206.61 in benefits coded as "WCOMP" following January 16, 2015. (11/29/16) T. 71-2. Petitioner also received compensation coded as REG for four payment periods which if added to the compensation coded as "WCOMP" would total Petitioner's salary minus his sick time. (11/29/16) T. 74.

On re-cross examination, Ms. Franson confirmed Petitioner would receive his salary for a year under PEDA irrespective if his injury was duty or non-duty related. (11/29/16) T. 84. Ms. Franson confirmed reimbursement would be made by IPRF based on whether the case was denied or accepted. (11/29/16) T. 84-5. Ms. Franson was not aware if Respondent has received the reimbursement. (11/29/16) T. 85.

Ms. Franson testified Dr. Moisan is the contact person for the firefighters and paramedics regarding care and annual check-ups; in order to return to work, an employee must be cleared by Dr. Moisan. (11/29/16) T. 87. Dr. Moisan is not an employee of Respondent but is paid by Respondent when he provides requested services and he is the only physician who does so on behalf of Respondent. (11/29/16) T. 105.

Styczynski's Testimony

Chief Thomas Styczynski testified at the November 29, 2016 hearing via video conference. (11/29/16) T. 110-11. He has been employed by the Alsip Fire Department full time since December 1997. (11/29/16) T. 112. Prior to December 1997, he was employed as a part-time firefighter from September 1985 until June 1991, and between 1991 and 1997, he worked full time at Community High School in maintenance. *Id.* For Respondent from June to August

2010, he was employed as a Lieutenant paramedic; from August 2010 until July 2012 as the Deputy Fire Chief; since July 2012 as the Fire Chief. (11/29/16) T. 113. His job duties as Chief consist of administering the fire department; managing day-to-day operations; and overseeing the firefighters. (11/29/16) T. 114. There are two fire stations in Alsip, both of which he oversees. *Id.* He is Petitioner's supervisor and has been so since he was Deputy Fire Chief. (11/29/16) T. 114.

Chief Styczynski testified Petitioner is assigned to Station 2 which receives about half of the calls of Station 1 as Station 2 is located in an industrial area whereas Station 1 is more residential. (11/29/16) T. 115. Respondent previously responded to calls from Premcor and Clark Oil, both oil refineries which closed in 2001, therefore, there have been no calls in 15 years. (11/29/16) T. 116. Respondent also responded to calls from a paper factory regarding content fires with the most recent call being six years ago. (11/29/16) T. 118. There are also residential fires which include kitchen, bedroom, contents, and structural fires. (11/29/16) T. 119. There are typically 14 to 17 structural residential calls per year. (11/29/16) T. 120. Additionally, there are hazardous material calls when the firefighters perform mitigation; Petitioner is not part of the regional hazardous material team which requires specialized training. (11/29/16) T. 123.

Respondent participates in mutual aid to other fire stations throughout the State of Illinois. (11/29/16) T. 114. They participate in approximately 30 calls a year due to large fires or multiple causality incidents where more ambulances are necessary. *Id.* Respondent also participates in automatic aid to certain townships. (11/29/16) T. 125. During Petitioner's tenure, he would have responded to the Village of Oak Lawn or Village of Crestwood. (11/29/16) T. 126.

Chief Styczynski testified regarding the general alarm system which would call off-duty firefighters to return to the fire station. (11/29/16) T. 127. Prior to 2011, this occurred 15 to 20 times per week due to multiple ambulance calls. *Id.* The called-in firefighter generally would be on standby at the firehouse and would respond to less than five calls. (11/29/16) T. 128. After 2011, the general alarm calls occurred only three to four times a month, and a firefighter's response was voluntary. (11/29/16) T. 129-30.

Chief Styczynski explained a firefighter would respond to 3 to 20 calls on a typical day, and during a typical week maybe 2 to 3 fire calls. (11/29/16) T. 130. Generally, the firefighter would wear his duty uniform for a call as a fire engine was sent for all ambulance calls. (11/29/16) T. 131. If turnout gear with the air pack was worn, it weighed approximately 40 or 45 pounds and without the air pack, approximately 20 pounds. *Id.*

Chief Styczynski was familiar with Dr. Terrance Moisan as he was contracted by Respondent to perform physical exams and back-to-duty releases. (11/29/16) T. 131-132. Respondent would receive bills for services rendered from Palos Medical Group. (11/29/16) T. 133.

Chief Styczynski testified prior to January 16, 2015, Petitioner, to his knowledge, did not report a work injury regarding his heart condition or shortness of breath. (11/29/16) T. 133. Chief Styczynski would respond to fires along with the firefighters, and he did not notice

Petitioner exhibiting shortness of breath issues. (11/29/16) T. 134. Petitioner did not report a work injury on January 16, 2015, but instead Chief Styczynski testified, "No. He was at Dr. Moisan's office for a physical, and he found an abnormality with his EKG." (11/29/16) T. 134. Chief Styczynski testified he completed a Form 45 as well as supervisory report. (11/29/16) T. 135. Chief Styczynski testified Petitioner never related to him the abnormal EKG was related to his job as a firefighter. *Id.*

Chief Styczynski testified Petitioner returned to work in June of 2015 at his full duty capacity. (11/29/16) T. 136. Petitioner did not complain about his ability to perform his job nor regarding his heart condition. Chief Styczynski could not recall if Petitioner complained regarding shortness of breath. *Id.* Chief Styczynski could not recall Petitioner having problems, and if so, he would have taken Petitioner off-duty. (11/29/16) T. 137.

On cross-examination, Chief Stycyznski confirmed he was employed at Respondent in 1988 along with Petitioner, and during that time frame, Petitioner would have been involved in all types of residential fires as well as industrial fires. (11/29/16) T. 138-9. There was also Clark Oil refinery which from time to time experienced fires that might be responded to by Petitioner. (11/29/16) T. 140. The refinery closed in 2001 due to a fire. *Id.* Chief Stycyznski testified Petitioner possibly would have responded to warehouse fires along with structure fires, prairie fires, and car fires. (11/29/16) T. 143. During his career, Petitioner also worked out of Station 1, but Chief Stycyznski was not aware of the breakdown as to the time periods Petitioner was stationed at each fire house. (11/29/16) T. 144.

Chief Stycyznski was asked to review Petitioner's Exhibit 17, job description for a firefighter/paramedic and confirmed it was a true and accurate copy of the job description. (11/29/16) T. 147. As a lieutenant, Petitioner's job duties would be more supervisory than participatory in fighting fires, but he still participated in fire fighting and paramedic duties. (11/29/16) T. 148. Chief Stycyznski reviewed the job description and agreed during Petitioner's career, he would perform the functions and responsibilities identified. (11/29/16) T. 150-1.

Chief Stycyznski agreed that annually a report is generated identifying what tasks the fire department performed. (11/29/16) T. 152. Chief Stycyznski identified Petitioner's Exhibit 18- the annual report from 2013; Petitioner's Exhibit 19- the annual report from 2014; and Petitioner's Exhibit 20- the annual report from 2015, all three which he authored. (11/29/16) T. 153-4. On page 8 of Exhibit 20, the report indicated Respondent responded to 3,206 incidents which Chief Stycyznski explained included both fire and paramedic responses as well as mutual aid responses. (11/29/16) T. 155-6. Chief Stycyznski was unaware as to whether an annual report was generated prior to 2013 as he was not fire chief at that time. (11/29/16) T. 156.

Chief Stycycznski testified he was unable to determine how many fires Petitioner responded to throughout his career as such records no longer exist. (11/29/16) T. 160. He could determine how many fires Petitioner responded to found in the FIREHOUSE records but was not asked to do so. (11/29/16) T. 160-1. During Petitioner's career, he was exposed to smoke, carbon monoxide, hydrogen cyanide, and particulate matter both in fighting the fires and clean-up after. (11/29/16) T. 161-2. Petitioner was also exposed to heavy physical exertion, heat stress, and

possible noise exposure as in 2006 the fire trucks were modified to reduce the noise to the occupants. (11/29/16) T. 162-3.

Chief Styczynski reviewed the Form 45 dated January 16, 2015 which he signed that day. (11/29/16) T. 175-176. Chief Styczynski testified he did not write the part of the Form 45 which listed under illness or injury, "heart, (cardiac)." (11/29/16) T. 176. Chief Styczynski testified he wrote the notation which states, "discovered during yearly physical." (11/29/16) T. 176-177. Chief Styczynski testified on the second page, No. 19 states, "while at yearly physical, Dr. Moisan company physician saw unusual activity on EKG and recommended to see a cardiologist for follow-up and remain off work." (11/29/16) T. 179. Chief Styczynski testified he was notified on January 16, 2015, Petitioner was unable to return to work, so he completed a workers' compensation form. (11/29/16) T. 179-180. He was notified Petitioner should be pulled off-duty at Dr. Moisan's recommendation. (11/29/16) T. 180. The Village of Alsip and the Alsip Fire Department were notified that Petitioner was unable to return to work, and he was claiming a workers' compensation injury as of January 16, 2015. *Id.*

Chief Styczynski identified a Form 45 relating to a date of accident of July 15, 2015 wherein it is documented Petitioner experienced shortness of breath while participating in a training exercise. (11/29/16) T. 188-9. Chief Syyczynski testified he was notified by Petitioner of the shortness breath during training on July 15, 2015 and he prepared his response included in the Form 45 on July 17, 2015. (11/29/16) T. 199-200.

Chief Styczynski testified firefighters participate in training exercises in order to maintain, evaluate, and learn new skills. (11/29/16) T. 206-5. There is an initial hazardous training class of 40 hours and additional training of several hours per year. (11/29/16) T. 207. A hazardous material team has been in existence since the late 1980's. *Id.*

Medical Treatment

The medical records of Dr. Joshi from Palos Medical Group evidence on January 8, 2003, Petitioner was seen for complaints of chest pain for a one-week duration. Petitioner did not voice complaints of shortness of breath. On February 18, 2003, a stress test was performed which was normal. On March 29, 2004, an echocardiogram was performed which was normal. A Holter Report indicated normal results from wearing a Holter monitor. A CT coronary calcification scoring report noted total calcium score was zero indicating no identifiable calcification. It was noted this would predict a very low probability of significant coronary artery disease. A CT scan of Petitioner's heart was also performed, and the report noted Petitioner complained of chest pain one year previously with recent heart palpitations for the past four months on and off. A stress test performed one year prior was negative. The following was noted: "Some shortness of breath when working. Has a Hi stress job. Family history of cardiac problems. Mother and father have CHF and had CABG Surgery." PX4 (part of Motion to Supplement Transcript granted August 29, 2017).

The medical records evidence on January 16, 2015, Dr. Moisan performed a fitness for duty examination and noted the EKG performed was abnormal and recommended a

cardiovascular evaluation. Dr. Moisan authorized Petitioner off work. On June 13, 2015, Dr. Moisan found Petitioner fit to return to work. PX6.

The medical records evidence on January 22, 2015, Dr. Tejpal evaluated Petitioner wherein it was noted: "Referred by work MD Dr. Moisan for an EKG. Pt reports palpitations followed by a skipped beat, chest pain, short of breath sometimes with activity. Going on for several months, palpitations -yrs." The following history is noted: "This is a 48-year-old Caucasian gentleman who is a fireman/paramedic comes in for evaluation of an abnormal EKG and physical. Patient states that he's noticed for the past 6 months that he'll have symptoms of shortness of breath with activities that he was normally able to (do) without any difficulties. In addition, he was asking me for a refill of his Nexium as he states that he is been having more heartburn. He describes heartburn is an acid feeling in his chest that occurs at nighttime but in addition he's had new symptoms of chest discomfort which he describes as a generalized ache in his chest with no activity. Patient reports that he does not do much in the way of heavy exertional activity and therefore does not have symptoms with that. In addition, patient also has been experiencing frequent palpitations/skipped beats that he's noticed." Under Review of Systems, Respiratory is noted: "Patient with sensation of shortness of breath with activities that he was previously able to do; no wheezing." Under Cardiovascular is noted occasional episodes of chest discomfort that occurs all over his body with no particular activity; no tightness or pressure; has palpitations where he feels skipped heartbeats. Under Gastrointestinal is noted Petitioner has acid reflux symptoms. Under past medical, a history of hypercholesterolemia is noted. Under family history, it is noted Petitioner's mother had a history of cardiac disorder, hypertension, lung cancer, type II diabetes mellitus. It was also noted Petitioner's father had a history of cardiac disorder, cerebral infarction, congestive heart failure and hypertension. Under social history it was noted Petitioner was a former smoker. PX1.

On examination, Dr. Tejpal found Petitioner was 5'6" tall and weighed 171 pounds. Petitioner exhibited a normal respiratory effort with symmetrical lung expansion; his lungs were clear to auscultation and no adventitious sounds were noted. Cardiovascular examination evidenced PMI not displaced; no thrills, lifts or S3 or S4; regular rate and rhythm; no murmurs, gallops, rubs or abnormal heart sounds. Arterial pulses evidenced normal carotid pulses with no bruits; no palpable enlargement or bruit of the abdominal aorta; normal femoral pulses with no bruits or enlargement; normal pedal pulses and capillary refill. Dr. Tejpal's assessment was: 1) chest pain; 2) abnormal EKG; 3) dyspnea on exertion; 4) hyperlipidemia. Dr. Tejpal's plan was to have Petitioner undergo an angiogram. Under Discussion/Summary, Dr. Tejpal noted: 1. Chest pain/dyspnea/abnormal EKG: "Patient gone in for a routine physical examination as part of a work physical and had a twelve-lead EKG done which revealed that he developed new T-wave abnormalities (inversion) in leads V4 through V6. Compared to EKG done in 2012 and 2014 these were new findings. In addition, the patient has been experiencing symptoms of chest tightness along with dyspnea with activities that he was normally able to do. Patient has multiple cardiac risk factors including a very strong family history of heart disease as well as a prior history of tobacco use and marked hyperlipidemia. Given the symptoms, risk factors and abnormalities seen on EKG which are new I recommended patient undergo a cardiac angiogram." Angiogram was scheduled. 2. Hyperlipidemia: LDL 205, total cholesterol 282; HDL cholesterol is 40. "Patient reports that he was placed on statin therapy in the past however

developed arthralgias and therefore discontinued the medication." Dr. Tejpal noted depending on angiogram results, he will determine statin therapy dose. PX1.

In the Cardiac Catheterization RU report dated January 23, 2015, the following post-operative diagnoses were noted: 1) left main artery was normal; 2) the left anterior descending artery was disease-free; 3) the circumflex artery had sequential 20% lesions in its proximal and mid portion; 4) the right coronary artery had 30% sequential mid lesions; the distal right coronary artery had a 95% lesion and did fill via left-to-right collaterals; 5) the estimated ejection fraction was 65%. In another Cardiac Catheterization Report dated January 23, 2015, the following was noted: Procedure: stent of the distal right coronary artery, right femoral angiography, Angio-Seal of the right groin. Indication for procedure: coronary insufficiency, unstable angina. PX1, PX2.

On January 29, 2015, Dr. Tejpal reevaluated Petitioner status post coronary angiogram and stent. Petitioner complained of right lower quadrant constant pain which started the day before. Petitioner rated his pain 3/10 when not moving and 7/10 when moving. He also complained of right groin/abdominal pain. Petitioner report on the previous Saturday he sat on a stool and when he pushed on his right leg, he felt a shooting pain in his right groin/abdominal area. He reported it was painful all day long and he rested until it felt better. Dr. Tejpal noted it was not exactly at the puncture site of his angiogram and was a few inches above in his right lower quadrant. He felt well until the day before this visit. Petitioner reported he felt like he pulled a muscle in his right quadrant. It was worse with palpation or with any movement. On examination, Dr. Tejpal found no increased work of breathing or signs of distress; lungs were clear to auscultation. Cardiovascular results were normal PMI, no thrills; normal rate and rhythm, normal S1 and S2 without murmurs; carotid pulses were normal; abdominal aorta was normal; carotid pulses, femoral pulses and pedal pulses were normal. Examination of the abdomen was abnormal with moderate tenderness in the right lower quadrant and guarding was present. Blood pressure was within normal limits. Dr. Tejpal's assessment was: 1) hyperlipidemia; 2) abdominal pain; 3) coronary artery disease (CAD). Petitioner was to continue prescribed medications. PX1.

On February 5, 2015, a CT scan and groin ultrasound were performed and were both relatively benign. Petitioner reported his discomfort currently had resolved. Petitioner reported he was currently doing well without any symptoms, although he has not really pushed himself. Under Review of Systems, respiratory, Petitioner denied any breathing problems. Under cardiovascular, Petitioner denied any chest pains, tightness or pressure, palpitations or shortness of breath. Dr. Tejpal's examination and assessment were the same. Dr. Tejpal noted Petitioner would be initiated on Phase II cardiac rehabilitation. Petitioner reported he would be seeing Dr. Moisan for a release to return to work as a firefighter/paramedic, which required a treadmill stress test, which was to be scheduled. Petitioner was to continue statin therapy, dual antiplatelet therapy and beta blocker therapy. PX1.

Petitioner underwent a Treadmill Stress Test on February 26, 2015. It was noted: "The patient exercised according to the BRUCE for 10:31 minutes, achieving a work level of Max. METS: 13.70. The resting heart rate of 78 bpm rose to a maximal heart rate of 173 bpm. This

value represents 100% of the maximal, age-predicted heart rate." The test was stopped due to fatigue. The conclusion was negative for ischemia or arrhythmias; FC 1. PX1.

In a letter dated February 26, 2015 to Dr. Moisan, Dr. Tejpal noted the angiogram results, stent placement, cardiac rehabilitation and the treadmill stress test results. Dr. Tejpal noted Petitioner currently had recovered well from his cardiac procedure and was on good medical therapy. Dr. Tejpal noted, "From my standpoint he is cleared to return to work without any restrictions." Petitioner was to follow-up on a routine basis with him. PX6.

In a letter to Dr. Tejpal dated March 6, 2015, Dr. Moisan noted Petitioner's firefighting duties exposed him to "extremes of environmental conditions and excessive, high stress levels under ambient conditions." Dr. Moisan noted if Dr. Tejpal felt Petitioner could safely return to work, he (Dr. Moisan) generally recommended a three-month period of cardiac rehabilitation prior to resuming extensive fire prevention duties. PX6.

In a letter dated March 24, 2015 to Dr. Moisan, Dr. Tejpal noted he had received the March 6, 2015 letter. Dr. Tejpal noted Petitioner may safely return to full activities as previously outlined. Petitioner would be following up for his underlying cardiac care long-term in Dr. Tejpal's office. Petitioner was to be seen two to three months after his last visit. PX6.

The medical records from Silver Cross Hospital evidence Petitioner began Phase II Cardiac Rehabilitation on February 9, 2015 and he was to attend every other day. His last session was on May 15, 2015 and he completed Phase II Cardiac Rehabilitation on that date. It was noted Petitioner had improved METS on six-minute walk. He had lost four pounds and 3% body fat. Home exercises were given, and Petitioner reported he planned to continue with regular exercise at work as the firehouse had equipment. PX3.

The medical records evidence Petitioner called Dr. Tejpal's office on May 28, 2015. It is noted, "pt asked for a note to be sent to Dr. Terence Moisan stating Dr. Tejpal reviewed his cardiac rehab notes and is ok to be released back to work." Under Reply it is noted, "It looks like the stress test and letter was sent to Dr. Moisan before and he has been released to work." PX1.

On June 13, 2015, Dr. Moisan noted he received multiple records from Petitioner's treating cardiologist describing his prior revascularization with stent and subsequent use of dual anti-platelet agents. Dr. Moisan noted Petitioner was undergoing cardiac rehabilitation without issue and he felt great at that time. Dr. Moisan noted Petitioner's examination was unremarkable with normal cardiovascular, respiratory and gross neurologic findings. Dr. Moisan noted he discussed with Petitioner and his family all the issues about NFPA, special certification and the ability to return to firefighter/paramedic duties. Dr. Moisan noted Petitioner understood and accepted the slightly increased potential risks with coronary artery disease. PX6.

The medical records evidence on June 29, 2015, Dr. Tejpal evaluated Petitioner for his four-month follow up. Dr. Tejpal noted, "He tells me that he has been back at work and has not had any issues at all. He reports no symptoms of chest pains or shortness of breath." Petitioner reported exercising on a regular basis and was complying with medical therapy. Dr. Tejpal noted Petitioner's examination was normal. Dr. Tejpal's assessment was: 1) coronary artery

disease; 2) hyperlipidemia. Petitioner was to continue medications and therapies. Petitioner was to continue working without restrictions. PX1.

The medical records evidence on July 16, 2015, Petitioner telephoned Dr. Tejpal's office complaining of labored breathing while performing a training exercise at work. Symptoms were discussed with Dr. Tejpal who did not believe it was cardiac related and recommended to monitor. On July 17, 2015, Dr. Tejpal's office telephoned Petitioner who advised he was placed off work by "WC MD" and needed to be evaluated. On August 11, 2015, Dr. Tejpal evaluated Petitioner who reported shortness of breath associated with exertional activity. Dr. Tejpal diagnosed dyspnea and coronary disease and recommended a stress echocardiogram. PX1.

The stress echocardiogram was performed on August 27, 2015. On October 15, 2015, a pulmonary function test was performed which was border line for airflow obstruction. On December 8, 2015, Dr. Tejpal re-evaluated Petitioner who continued to complain of shortness of breath on exertion. Dr. Tejpal reviewed the results of the stress test which were unremarkable. Dr. Tejpal felt Petitioner's symptoms were unrelated to his cardiac condition but possibly a side effect of his medication (beta blocker). Dr. Tejpal diagnosed 1) coronary disease, 2) dyspnea on exertion, 3) hypertension, and 4) hyperlipidemia. PX1.

On March 17, 2016, Dr. Tejpal evaluated Petitioner who continued to complain of shortness of breath with exertion. It was noted Petitioner's hypertension was under good control. As such, Dr. Tejpal felt the hypertension was not the cause of his symptoms and recommended a repeat angiogram to rule out coronary disease which Petitioner wished to consider. On April 21, 2016, Dr. Tejpal re-evaluated Petitioner after the repeat angiogram which showed minimal obstructive disease. As such, Dr. Tejpal ruled out coronary disease as the cause of Petitioner's symptoms and suggested follow-up with his primary care physician. On August 11, 2016, Dr. Tejpal evaluated Petitioner who continued to complain of shortness of breath with exertion and no improvement of symptoms. No additional treatment was recommended. PX1.

In the interim, on September 15, 2015, Dr. Joshi evaluated Petitioner who complained of shortness of breath with heavy exertion and exercise. Dr. Joshi recommended a chest x-ray and laboratory tests. PX4. On October 15, 2015, Dr. Ortiz-Cantillo evaluated Petitioner and recommended Pulmonary Function Test and a Six-Minute Walk test which were subsequently performed on October 23, 2015. On November 18, 2015, Dr. Ortiz-Cantillo authored a letter to Dr. Joshi advising she found no pulmonary limitation as a cause of his symptoms and to follow-up on an as needed basis. Petitioner was to be re-evaluated by his cardiologist. PX7.

Expert Testimonies

The July 13, 2016 deposition of Dr. Terrence Moisan was admitted into evidence as Petitioner's Exhibit 14. Dr. Moisan testified he is a physician board certified in internal medicine, occupational medicine, and respiratory disease. PX14, p. 4. Dr. Moisan testified he is the medical director of the Alsip Fire Department which is an unpaid position. PX14, p. 4-5. His job duties include performing fitness-for-duty examinations as well as evaluations for firefighters to return to work. PX14, p. 5. Dr. Moisan performs these same evaluations for many additional fire departments. PX14, p. 5-6. Dr. Moisan identified Exhibit 2- Village of Alsip Fire

Department/Paramedic Job Description. PX14, p. 6-7. Dr. Moisan explained paramedics must have the ability to respond to emergencies specifically sick individuals who may need to be carried and transported to the hospital all under potentially adverse conditions. PX14, p. 7. As for firefighters, they have similar duties, but they must wear turn-out gear as well as function under adverse conditions such as high heat, stress, high humidity, excessive cold, and carrying victims. PX14, p. 8. Dr. Moisan confirmed firefighters work 24hr./48hr. shifts. *Id.*

Dr. Moisan explained coronary artery disease is diagnosed when there is blockage or narrowing of one or more coronary arteries. PX14, p. 10. Firefighters are subject to certain stressors which on an individual basis can potentially cause heart disease with the biggest stressor being the sudden calls as smoke inhalation today is uncommon. *Id.* As to whether the duties of a firefighter can cause or contribute to heart disease including coronary artery disease, Dr. Moisan testified it is debatable explaining the duties were a low risk compared to smoking, hereditary heart disease, cholesterol, diabetes, and hypertension. PX14, p. 11.

Dr. Moisan testified he initially evaluated Petitioner in 1996 regarding fitness-for-duty examinations. PX14, p. 12. During Petitioner's 2015 examination, Dr. Moisan identified an abnormal EKG without additional symptoms and recommended a cardiovascular evaluation which was subsequently performed by Dr. Tejpal. PX14, p. 14. An angiogram was performed which evidenced a blockage of the coronary artery and a stent was placed. PX14, p. 15. Dr. Moisan testified he received a letter dated February 26, 2015 from Dr. Tejpal who advised of his diagnosis of coronary artery disease and releasing Petitioner to return to work. PX14, p. 16. In response, Dr. Moisan sent a letter dated March 6, 2015 advising of Petitioner's job duties and suggesting a three-month course of rehabilitation. PX14, p. 17. To Dr. Moisan's knowledge, Petitioner pursued this treatment. *Id.*

On June 13, 2015, Dr. Moisan authored a letter concerning Petitioner's return to work. PX14, p. 17-18. Dr. Moisan explained the NFPA, National Fire Protection Association created standards of "A" and "B" conditions. PX14, p. 18. "A" conditions should preclude a firefighter from returning to work, and "B" conditions, if not severe, allow a firefighter to return to work given the advances in treatment of heart disease. This does assume all parties, firefighter, fire department, and treating physician agree. PX14, p. 19. If a firefighter returns to work with a "B" condition, heightened medical surveillance meaning increased treadmill and cardiologist examinations are required. PX14, p. 20.

Dr. Moisan testified Petitioner's firefighting duties could potentially exacerbate or cause additional problems based on an individual basis. PX14, p. 21. Dr. Moisan testified Petitioner returned to work in June of 2015 and he was advised of an incident of July 15, 2015 involving Petitioner. PX14, p. 21. Dr. Moisan testified Petitioner experienced shortness of breath while participating in a training exercise. PX14, p. 22. Dr. Moisan testified given Petitioner's symptoms, he was excused from work as of July 17, 2015 until further evaluation. PX14, p. 23.

Dr. Moisan reviewed Petitioner's treatment obtained in 2015 and 2016 following his incidents of January and July of 2015. PX14, p. 23-28. Dr. Moisan testified based upon his review of Petitioner's treatment records, unless Petitioner experienced a substantial change in his

condition, Dr. Moisan would not release Petitioner to return to work due to his shortness of breath. PX14, p. 29.

The following exchange occurred: "Q. Now, do you believe that [Petitioner's] coronary artery disease is a result or has been caused or contributed to be caused by his firefighting activities with the Alsip Fire Department? A. Again, it's an individual thing. I can't know that. I can't exclude it." PX14, p. 29. As to Petitioner's non-work-related risk factors, Dr. Moisan identified genetics, smoking, idiopathic, juvenile vasculitis, and viral. PX14, p. 30. Dr. Moisan was unaware of Petitioner's hereditary risk factors. *Id.* Dr. Moisan was again asked regarding his opinion as to causation: "Q. So, as we sit here today, is it your opinion that [Petitioner's] activities as a firefighter/paramedic contributed at least in part to his coronary artery disease? A. I can't draw that conclusion. All I can tell you is that I can't excluded it as a component." PX14, p. 31. He then reiterated his opinion stating: "All I can say is it's more likely that there could be contribution of which can't be quantified." PX14, p. 32.

Dr. Moisan testified despite Petitioner being cleared from a cardiac and pulmonary standpoint, his symptoms of shortness of breath preclude him from returning to work. PX14, p. 33. Dr. Moisan testified it was more likely than not Petitioner would be able to return to work in the next five years given his normal heart and lungs. PX14, p. 34.

On cross-examination, Dr. Moisan testified Petitioner was unable to return to work due his shortness of breath, a cause for which has not been identified. PX14, p. 36. Dr. Moisan testified Petitioner's shortness of breath is unrelated to his coronary artery disease. *Id.* Dr. Moisan stated from a coronary artery disease aspect, if Dr. Tejpal released Petitioner to return to work at this juncture, he would agree given Petitioner's "essentially normal coronaries." *Id.* Dr. Moisan agreed Dr. Tejpal's opinion also appeared to be that Petitioner's shortness of breath was the cause of his inability to return to work. PX14, p. 37. Dr. Moisan testified Petitioner's symptom of shortness of breath is subjective. PX14, p. 38.

Dr. Moisan confirmed he is currently president of Palos Hospital and has been so for three years; as such, he has referred the surveillance examinations for firefighters and paramedics to colleagues. *Id.* As for Petitioner, Dr. Moisan based his opinion on his review of Dr. Tejpal's and the pulmonologist's records, and to Dr. Moisan's knowledge, Petitioner has not been re-evaluated since 2015. PX14, p. 39.

Dr. Moisan confirmed he is board certified in internal medicine, occupational health, and pulmonary disease but not cardiology although he has extensive training in cardiology. PX14, p. 39-40. Dr. Moisan testified in returning firefighters to work, he defers to the cardiologist's opinion as to the firefighter's cardiac health and uses that information in formulating his opinion as to whether a firefighter is able to return to work. PX14, p. 41.

Dr. Moisan testified he initially evaluated Petitioner in 1996 and beginning in 2000 due to Petitioner's age, the examinations were conducted on an annual basis. PX14, p. 43. Dr. Moisan explained a fitness-for-duty examination involved obtaining a history from the firefighter, performing a physical examination, performing basic laboratory tests, a breathing test, and additionally, a treadmill test depending on the risk factors. *Id.*

Dr. Moisan testified Petitioner suffered from elevated LDL cholesterols dating back to 1996. PX14, p. 45. Dr. Moisan confirmed certain risks associated with the development of coronary artery disease such as cholesterol, smoking, and high blood pressure as well as gender and age. PX14, p. 46-47. Dr. Moisan testified if both Petitioner's mother and father suffered from heart disease, it would be significant as genetics is the most significant factor. PX14, p. 48.

On November 11, 2015, Dr. Marlon Everett prepared a report regarding an evaluation performed on September 29, 2015 pursuant to Section 12 of the Act at Respondent's request. RX1. Dr. Everett identified the documents he reviewed in preparation of his evaluation. RX1, p. 1. Dr. Everett obtained a history from Petitioner which included Petitioner's recently diagnosed coronary artery disease. *Id.* Petitioner provided a history of good health until a fitness-for-duty evaluation performed by Dr. Moisan in January 2015 which demonstrated an abnormal EKG. Petitioner sought treatment from Dr. Tejpal who performed cardiac catheterization on January 23, 2015 with placement of a stent. RX2, p. 2.

Prior to cardiac catheterization, Petitioner was an active firefighter and participated in outdoor activities and exercise. Petitioner periodically sought treatment from his PCP, Dr. Joshi since 1999. He believed he was advised of high cholesterol but did not take statin medications. RX1, p. 2.

Dr. Everett documented that Petitioner began experiencing intermittent symptoms in the summer of 2014 of palpitations, chest discomfort, lightheadness, and exertional shortness of breath, but he sought no treatment at the time. Since cardiac catheterization, Petitioner successfully completed cardiac rehabilitation and was able to ride his bicycle without issue. Petitioner returned to work in June of 2015 but experienced shortness of breath while participating in a training exercise requiring a referral to Dr. Moisan. Dr. Moisan placed Petitioner on medical leave and referred Petitioner to a cardiologist who ordered an echocardiogram and stress test, results which are pending. RX1, p. 3.

Dr. Everett performed a physical evaluation. Dr. Everett noted the one episode of exertional shortness of breath which he associated to physical deconditioning rather than coronary artery disease. Dr. Everett agreed coronary artery disease needed to be ruled out as a cause, so an echocardiogram and stress test are reasonable. Dr. Everett opined if the tests are normal, Petitioner could return to work for Respondent. RX1, p. 4.

Dr. Everett answered certain interrogatories posed finding Petitioner suffered from coronary artery disease possibly caused by high cholesterol, tobacco use, and family history and unlikely related to his occupation. Dr. Everett felt Petitioner was not a maximum medical improvement as a review of the recommenced testing was necessary. Dr. Everett felt Petitioner's work status was to be determined. RX1, p. 5-6.

On September 27, 2016, Dr. Everett prepared an additional report based upon his evaluation of the same date. RX2. Dr. Everett noted Petitioner's ongoing symptoms associated to exertion, but both the recent cardiac catherization of 2016 and pulmonary testing were normal. Dr. Everett opined a causal relationship between Petitioner's job duties and his coronary artery

disease is speculative, and more likely related to Petitioner's high cholesterol, tobacco use, and possible genetic predisposition. RX2, p. 2. Dr. Everett placed Petitioner at maximum medical improvement from a cardiac standpoint and found Petitioner's shortness of breath was not caused by his cardiac condition. RX2, p. 5.

On October 18, 2016, Dr. Everett provided his opinions via evidence deposition. RX3. Dr. Everett testified as to his credentials as contained in his CV. RX3, p. 5-6. Dr. Everett testified he is a board certified in both interventional and nuclear cardiology. RX3, p. 6.

Dr. Everett discussed risk factors for cardiac disease those being family history, high blood pressure, poor dentition, and chronic inflammatory disorders. RX3, p. 9. Dr. Everett identified RX2- his November 11, 2015 report regarding his evaluation of Petitioner on September 29, 2015. RX3, p. 10. Dr. Everett discussed the medical records he reviewed as part of the evaluation. RX3, p. 11. Dr. Everett obtained a history from Petitioner consistent with what was noted in his November 11, 2015 report that being Petitioner underwent an EKG at the direction of Dr. Moisan which was abnormal. RX3, p. 11-12. Petitioner was subsequently treated by Dr. Tejpal who performed a cardiac catheterization with a stent. RX12, p. 12. Following the treatment including cardiac rehabilitation, Petitioner did well returning to vigorous exercise including bicycle riding and elliptical use and was released to return to work by his cardiologist, Dr. Tejpal. RX3, p. 12-13.

Dr. Everett testified he treats firefighters in his practice and is aware of the duties of a firefighter. RX3, p. 13. Petitioner provided an explanation of his duties which required him to fight fires without any limitations wearing gear weighing 60 to 70 pounds and his shifts were 24 hours on duty and 48 hours off duty. RX3, p. 14. Petitioner further advised he returned to work and was performing a training exercise wearing his gear when he experienced shortness of breath. RX3, p. 15.

Dr. Everett stated Petitioner complained of shortness of breath prior to January 2015 to Dr. Moisan during the routine annual physical but obtained no treatment at the time. RX3, p. 16. Petitioner provided a history of tobacco use of half a pack a day for ten years, quitting in 1994. RX3, p. 16-17. Petitioner also reported a family history of cardiac disease, a father with congestive heart failure which Dr. Everett identified as a possible risk factor. RX3, p. 17.

Dr. Everett testified he preformed both a physical and cardiac examination both of which were normal. RX3, p. 17. Following the review of the medical records, obtainment of history, and performance of a physical evaluation, Dr. Everett assessed Petitioner with shortness of breath due to deconditioning rather than coronary artery disease as Petitioner did not have a myocardial infarction and experienced complete resolution of symptoms following placement of the stent. RX3, p. 18. Dr. Everett suggested a stress test for reassurance to determine Petitioner's functional capacity and if the stress test was negative, it would be unlikely the shortness of breath was caused by the coronary artery disease. *Id.*

Dr. Everett explained Petitioner's abnormal EKG obtained during his routine physical was suggestive of poor blood flow (coronary artery disease) and not heart damage (myocardial infarction). RX3, p. 19. The abnormal EKG was not associated with an acute event. *Id.* Dr.

Everett was unaware that Petitioner underwent a negative stress test approximately one month prior to his evaluation; had he been aware, he would have recommended cardiac catherization directly. RX3, p. 21. Dr. Everett opined Petitioner's suffered from shortness of breath due to deconditioning and further Petitioner's abnormal EKG was unrelated to his job duties as a firefighter. *Id.*

Dr. Everett identified other risk factors for coronary artery disease specifically Petitioner's family history of heart disease and tobacco use. RX3, p. 21-22. Dr. Everett testified Petitioner initially failed to disclose his history of high cholesterol and further explained untreated high cholesterol can potentially lead to coronary artery blockage which would be revealed with an abnormal EKG. RX3, p. 22.

Dr. Everett testified "it is unclear to me if his stress from being a firefighter has anything to do with the coronary artery disease." RX3, p. 22. Dr. Everett suggested a stress test and if the same was normal, then Petitioner could probably return to work. RX3, p. 24. Dr. Everett identified Respondent's Exhibit 2, a true and accurate copy of his November 11, 2015 report. *Id.*

Dr. Everett testified he evaluated Petitioner for a second time on September 27, 2016 and prepared a report of the same date which he identified as Respondent's Exhibit 3. RX3, p. 24-25. Dr. Everett testified as part of his evaluation, he reviewed additional medical records specifically those of Dr. Tejpal; Dr. Joshi, a stress echocardiogram dated May 27, 2015; a pulmonary function test dated October 23, 2015; and a letter from Dr. Moisan advising Petitioner remains off work. RX3, p. 25. Petitioner provided a history of decreased exercise due to lack of energy, experiencing shortness of breath when carrying items upstairs, but was able to ride his bike 10 miles at a time. RX3, p. 26.

Dr. Everett clarified he review a synopsis of Dr. Joshi's records in a letter he received which was marked as Respondent's Exhibit 4. RX3, p. 31. Petitioner suffered from hypercholesterolemia, which was treated with statin medication with good results, the statin medication was discontinued due to Petitioner's development of thrombocytopenia, low platelets. *Id.* Dr. Everett explained when Petitioner discontinued the medication, his LDL cholesterol increased. RX3, p. 32. LDL cholesterol is associated coronary artery disease. *Id.*

Dr. Everett testified Petitioner reported some symptoms in 2014, but the doctor did not have any corresponding treatment records. RX3, p. 35. To Dr. Everett's knowledge, Petitioner performed his firefighting duties prior to January of 2015. *Id.* Dr. Everett performed a physical examination with a focus on the cardiac examination and found no abnormalities. RX3, p. 36. Dr. Everett diagnosed shortness of breath with no known etiology. *Id.*

Dr. Everett performed a pulmonary evaluation in the context of the overall evaluation and found no abnormalities. RX3, p. 37. Dr. Everett reviewed the pulmonary function test which was minimally abnormal with mild obstructive airway disease. *Id.* Dr. Everett did not offer an opinion regarding the mild obstructive airway disease and Petitioner's shortness of breath as such would need to be addressed by a pulmonologist. *Id.*

Dr. Everett opined Petitioner's shortness of breath was unrelated to his cardiac condition. RX3, p. 38. Dr. Everett stated Petitioner's coronary artery disease was unrelated to Petitioner's duties as a firefighter, but the cause was unknown. RX3, p. 39. Dr. Everett identified Petitioner's risk factors for coronary artery disease those being tobacco use, hypercholesterolemia, and family history. *Id.* Dr. Everett recommended Petitioner have further diagnostic testing to determine the cause of shortness of breath specifically a cardiac catherization to assess the lung pressure. RX3, p. 39-40.

As for the additional treatment recommended, it was to assess Petitioner's lungs and possible pulmonary hypertension which a pulmonologist would assess. RX3, p. 42. Dr. Everett opined Petitioner was at maximum medical improvement from a cardiac and coronary purpose as of May 29, 2015 and was able to return to work. RX3, p. 43.

On cross-examination, Dr. Everett testified he performs less than 12 IME's annually and serves as an expert witness in cardiac cases concerning malpractice. RX3, p. 45. Dr. Everett agreed it was important for him to review all relevant material prior to rendering an opinion, and if such material was not provided, it could change his opinion. *Id.* Dr. Everett was not provided with a job description regarding Petitioner, but as he previously performed many IME's in the past, he was aware of a firefighter's duties. RX3, p. 45-46.

Dr. Everett was familiar with Dr. Moisan as he was the president of the hospital where Dr. Everett worked. RX3, p. 46. Dr. Everett testified he was provided with Dr. Moisan's records concerning Petitioner's abnormal EKG as well as Petitioner's complaints of shortness of breath where he was subsequently authorized off work. RX3, p. 47. Dr. Everett was aware that Dr. Moisan had preformed fitness-of-duty examinations yearly but not for 20 years, and he had not been provided the results of those examinations. RX3, p. 48. Dr. Everett was unaware that Dr. Moisan had provided his testimony via evidence deposition in the present matter. *Id.*

Regarding this case, Dr. Everett had not reviewed the NFPA standards nor any journal/scholarly articles. RX3, p. 49. Dr. Everett conceded he would prefer to review the medical records of Dr. Joshi not just a summary, and he had not been afforded that opportunity. RX3, p. 50.

Dr. Everett explained there are three coronary arteries of which Petitioner experienced blockage in one. RX3, p. 54-55. He conceded Petitioner's tobacco use was "low on the totem pole" as risk factors. RX3, p. 55. As for his report of November 11, 2015 wherein he indicated Petitioner's maximum medical improvement was to be determined, his opinion changed based on his review of additional tests. RX3, p. 55-56.

Dr. Everett questioned Petitioner regarding his history of high cholesterol, and Petitioner advised he stopped his medication and his cholesterol level increased; Dr. Everett had no reason to question Petitioner's truthfulness. RX3, p. 57-58. Dr. Everett agreed he did not know if Petitioner suffered from psychosomatic issues and further agreed Petitioner suffered from shortness of breath. RX3, p. 59-60.

Dr. Everett agreed firefighting activities were both physically and mentally stressful, and stress can lead to the development of coronary artery disease. RX3, p. 60. Dr. Everett was unaware of NIOSH which Petitioner's attorney explained is a division of the Department of Health and Human Services. RX3, p. 61. Dr. Everett testified he had on occasion reviewed materials from the agency but stated "I wouldn't say they're the gold standard." *Id.*

Dr. Everett agreed to some extent Petitioner was exposed to heat stress, shift work, and overtime which would cause or contribute to the development of coronary artery disease but given Petitioner only responded to two or three fires per year, it did not seem like enough. RX3, p. 67. Dr. Everett testified based upon Petitioner's history of fighting fires three or four times a year and training 20 days a year, the stress would not contribute to Petitioner's development of coronary artery disease. RX3, p. 69. Dr. Everett testified he does not know if firefighting activities can cause or contribute to coronary artery disease. RX3, p. 72.

Dr. Everett was tendered Exhibit B, report of Dr. Stefanos Kales with whom he was not familiar. RX3, p. 73. Dr. Everett agreed that psychological stress and shift work can cause coronary artery disease. RX3, p. 78. As for smoke exposure, Dr. Everett testified it would not cause coronary artery disease on an acute basis and did not know regarding chronic. RX3, p. 78-79. Dr. Everett reiterated psychological stress and shift work could possibly contribute to or cause Petitioner's development of coronary artery disease; it could not be ruled in or out. RX3, p. 80. Dr. Everett agreed his report indicating his opinion that the stress of Petitioner's occupation could not lead to cardiac disease could be modified to indicate it is his opinion that he does not know. RX3, p. 81. He still believed Petitioner's occupation was unlikely to contribute to his coronary artery disease but not impossible. RX3, p. 82.

Dr. Everett opined "it is unlikely to be the cause of his coronary artery disease. And I've said it. You can take it however you want, but that it's unlikely." RX3, p. 83. Dr. Everett went on to explain it was less than 50% as 80% of why a person develops coronary artery disease is unknown. RX3, p. 84. Dr. Everett agreed Petitioner was exposed to firefighting duties which would exacerbate an underlying cardiac lesion but would not cause it. RX3, p. 88. Dr. Everett testified the treatment undertaken by Petitioner has been reasonable and necessary. RX3, p. 91.

On September 16, 2016, Dr. Claude Zanetti performed an evaluation of Petitioner pursuant to Section 12 of the Act at Respondent's request. RX4. Dr. Zanetti reviewed Petitioner's medical records which indicated a work injury on January 16, 2015 when evaluated for his annual physical, an abnormal EKG was recorded. RX4, p. 1. Petitioner advised of a family history of coronary artery disease requiring bypass surgery for both parents. Petitioner took Lipitor from 2004 to 2009 due to high cholesterol and stopped the same on advice of his hematologist due to low platelet levels. *Id.*

Petitioner explained his job duties to Dr. Zanetti which included shifts 24 hrs. on-duty and 48 hrs. off-duty; fighting four to five fires a year; and rigorous training exercises twice monthly requiring wearing gear of 70 pounds. RX4, p.1

Due to Petitioner's symptoms, he was evaluated by Dr. Tejpal who preformed cardiac catherization with a stent. Petitioner underwent cardiac rehabilitation after which time he was

cleared to return to work by Dr. Tejpal. Petitioner returned to work but experienced dyspnea on exertion during a training exercise. The records indicated Petitioner's symptoms were due to COPD, diastolic dysfunction, and possible deconditioning. Diagnostic and lab tests were negative. Petitioner was evaluated on November 18, 2015 by Dr. Ortiz-Cantillo, a pulmonologist, due to shortness of breath. RX4, p. 2.

Dr. Zanetti further reviewed Petitioner's treatment with Dr. Tejpal who adjusted Petitioner's blood pressure medication without effect and recommended further diagnostic studies. According to Dr. Moisan, Petitioner is able to return to work from a cardiac and pulmonary perspective but unable to do so due to the shortness of breath. RX4, p. 3. Dr. Zanetti performed a physical evaluation including stair climbing with Petitioner. *Id.*

Dr. Zanetti diagnosed Petitioner with coronary artery disease, history of cigarette smoking, hypertension, hyperlipidemia, and dyspnea with load exertion. Dr. Zanetti found no objective evidence to support Petitioner's shortness of breath as all tests are completely normal. RX4, p. 4. Dr. Zanetti found no evidence that Petitioner's shortness of breath was related to his cardiac condition from a pulmonary perspective. Dr. Zanetti noted tests had not been performed which replicated his duties as a firefighter. Dr. Zanetti recommended further testing and as such, Petitioner was not at MMI. RX4, p. 4-5.

On October 26, 2016, Dr. Zanetti provided his opinions via evidence deposition. RX5. Dr. Zanetti testified he is a board certified in internal medicine, pulmonary disease, critical care, and undersea/hyperbaric medicine. RX5, p. 6. Dr. Zanetti performs approximately 12 medical evaluations a year. RX5, p. 8. Respondent's Exhibit 1, Dr. Zanetti's CV was marked and accepted without objection. RX5, p. 10.

Dr. Zanetti reviewed his report of September 16, 2016 which was marked as Respondent's Exhibit 2. RX5, p. 11. Dr. Zanetti performed an examination; obtained a history from Petitioner; and reviewed the medial records. RX5, p. 12-13. During examination, Dr. Zanetti found Petitioner to be relatively healthy with all his vital signs normal. Petitioner's lung examination was normal including his oximetry, oxygen levels, respitory rate, pulses, blood pressure, and forced expired time. RX5, p. 14. As part of the evaluation, Dr. Zanetti walked three flights of stairs with Petitioner while monitoring his oxygen saturation, respitory rate, and symptoms all of which were normal. RX5, p. 15. Dr. Zanetti utilized a pulse oximeter which monitors the saturation rate- how much oxygen is bound to the red blood cells; Petitioner's was normal. RX5, p. 15-16.

Dr. Zanetti testified Petitioner advised his symptoms manifested while performing training drills while wearing breathing equipment weighing 40 to 70 pounds in the heat. RX5, p. 17-18. Normal activity other than carrying laundry up stairs would not cause symptoms. RX5, p. 18. Dr. Zanetti explained the meaning of METS- a unit of work. RX5, p. 19. Before cardiac rehabilitation, Petitioner was able to achieve 13.4 METS and after 17.4 METS. RX5, p. 20-21. Dr. Zanetti explained achieving 15 to 17 METS is pretty strenuous and would have him "huffing and puffing." RX5, p. 21-22.

Dr. Zanetti testified that Petitioner advised in the two or three years prior to his acute event, he was slowing down and not able to keep up with his peers and ascribed it to aging. RX5, p. 22. Dr. Zanetti testified after Petitioner climbed three flights of stairs, his heart rate maintained at 100 which means he maintained a lot of heart reserve. During the treadmill test, Petitioner reached the maximum but quit due to fatigue not because of chest pain or dyspnea. RX5, p. 25.

Dr. Zanetti testified Petitioner's pulmonary function tests were normal. RX5, p. 26. Dr. Zanetti explained Petitioner underwent a methacholine challenge which stressed the lungs further. Dr. Zanetti explained this test replicated exposure to heavy exertion or toxic chemicals and smoke, and Petitioner's results were normal. RX5, p. 26-27.

Dr. Zanetti opined he could not find any evidence of primary lung problems such as COPD; work exposure; or reactive airway disease. RX5, p. 29-30. Dr. Zanetti opined there existed no objective evidence of pulmonary disfunction. RX5, p. 32. Dr. Zanetti found no limitations on Petitioner's activities based on his pulmonary function. RX5, p. 32.

On cross-examination, Dr. Zanetti agreed he was unable to determine the etiology of Petitioner's shortness of breath. RX5, p. 33. Dr. Zanetti recommended further testing to determine the etiology of Petitioner's shortness of breath and believed Petitioner was not at maximum medical improvement. RX5, p. 34-35. Dr. Zanetti agreed Petitioner should not return to work due to his subjective complaints of dyspnea. RX5, p. 36.

On October 7, 2016, Dr. Daniel Samo performed a pension disability examination of Petitioner. RX8. Upon examining Petitioner and reviewing the records from Dr. Ortiz-Cantillo, Palos Community Hospital, Dr. Joshi, Dr. Tejpal, and Dr. Moisan, Dr. Samo's impression was coronary artery disease, status post coronary artery stent, and shortness of breath on exertion – etiology unknown. RX8. Dr. Samo memorialized Petitioner "states that he cannot do heavy exertion due to his subjective feeling of shortness of breath. He has had an extensive work up of his heart and lungs, and there has been nothing found to explain his ongoing symptoms." RX8. Regarding Petitioner's ability to return to work, Dr. Samo concluded, based on NFPA 1582-1013 Version, "Lt. Faruzzi would be able to return to duty, but he continues to have the shortness of breath which he feels makes him unable to perform most of his essential job tasks as a firefighter." RX8. Dr. Samo indicated Petitioner would need to be limited to no heavy exertion. RX8. Dr. Samo opined Petitioner's condition is not related to his firefighter service. RX8.

The November 9, 2016 evidence deposition of Dr. Samo was admitted as Respondent's Exhibit 11. Dr. Samo currently practices occupational medicine with a special interest in public safety medicine. RX11, p. 6. Dr. Samo is board certified in emergency medicine. RX11, p. 6.

Dr. Samo reviewed the contents of his October 7, 2016 report. Dr. Samo testified he drafts the NFPA standards; chapter nine, which is referenced in his report, is the cardiac section and it is "to help a physician decide whether the individual that's in front of them is at increased risk for having a sudden incapacitating event, in this case a cardiac event. The point of this is to allow those who are not at increased risk to be able to return to work as firefighters." RX11, p. 30.

Dr. Samo testified the cardiac examination he performed of Petitioner did not reveal any significant findings or cardiac abnormalities. RX11, p. 27-28. Dr. Samo's impression was Petitioner had "coronary artery disease, which was documented on his angiogram, that he had had a stent placed, and that he had shortness of breath on exertion for which no etiology or objective reason could be found." RX11, p. 28. The doctor testified Petitioner's condition was not related to his firefighting: "Well, I don't believe that his heart disease - - his underlying coronary artery disease is related to firefighting. And, again, since I don't know what causes his shortness of breath, I can't answer that, although there's no sign of any asthma or chronic emphysema, COPD, so I don't know the answer to the pulmonary side of it or the shortness of breath." RX11, p. 36-37. Dr. Samo opined firefighting could not cause Petitioner's condition:

> The question is whether firefighting is causative of coronary artery disease, and the literature is very clear that there's no evidence of that. There is literature which does show that firefighting can be a trigger for a cardiac event, and that's really responding to, being at, returning from fire calls or actually even at drills and training. RX11, p. 38.

Presented with Respondent's Deposition Exhibit 3, Dr. Samo identified it as a list of articles which discuss whether there is an increased incidence of coronary artery disease in firefighters. RX11, p. 41. Dr. Samo testified the literature review shows there is "really no increased incidence of heart disease in firefighters..." RX11, p. 41.

On cross-examination, Dr. Samo confirmed he is neither a pulmonologist nor a cardiologist. RX11, p. 48. Dr. Samo agreed he is an owner of INSPE, which is a group that provides medical experts on behalf of insurance companies. RX11, p. 49. The pension disability exam he conducted with Petitioner was arranged through INSPE. RX11, p. 52.

Directed to Respondent's Deposition Exhibit 3, Dr. Samo testified he provided the list to Respondent's Counsel in their pre-deposition meeting. RX11, p. 56. The doctor agreed he has previously incorporated the list in pension disability reports, though he did not do that with Petitioner's report. RX11, p. 57. Dr. Samo stated he is familiar with the NIOSH report (RDepX6) and has relied on it in the past to render opinions regarding firefighters. RX11, p. 58. Directed to the NIOSH report's statement that coronary artery disease among firefighters is due to a combination of personal and workplace factors, Dr. Samo testified he did not agree: "No, I don't because coronary artery disease, not cardiac event, has not been shown to be related to firefighting as a profession, ergo, it's workplace." RX11, p. 79.

Presented with Petitioner's Deposition Exhibit 2, Dr. Samo identified it as an article he authored on research done by Lance Byczek. RX11, p. 82. Directed to the statement therein that line of duty exposures may increase firefighters' risk for cardiovascular disease, Dr. Samo disagreed: "I think that since then the literature has gone forward to show that when you look at the incidence of cardiovascular disease in firefighters, it's not increased. All these are potential risk factors, but in the end, firefighters don't have more heart disease than the general population." RX11, p. 83. The doctor further stated, "I think the point I'm trying to make is that the underlying coronary artery disease is not caused by the job." RX11, p. 89. Dr. Samo later

testified that smoke exposure, noise, psychological stress, shift work, physical workload, and heat have not been proven to cause or contribute to cause the development of coronary heart disease. RX11, p. 93. The doctor disagreed with the NIOSH report assertion that firefighters face special occupational circumstances that raise the risk of coronary heart disease. RX11, p. 95. Dr. Samo later explained why he does not believe firefighting causes coronary artery disease:

> I mean, there's a lot of literature about this, and really the literature does not show that there is increased incidence or presence of heart disease in firefighters over the general population as opposed to - - I mean, everybody tries to say, well, you can't say this guy had this and he had heart disease and, therefore, it had to be from him being a firefighter, when if he was a plumber, he would probably have the same heart disease. The point is that the firefighting is not what causes the underlying problem. All of these, all the literature, the NIOSH thing, the firefighter thing, the Kales articles also, they all say that the underlying heart disease, coronary artery disease, is not caused - - there's no evidence that shows it's caused by firefighting, but clearly that the event can be triggered by firefighting activities. RX11, p. 117-118.

On October 4, 2016, Dr. Timothy McDonough performed a pension disability examination of Petitioner. RX9. In addition to conducting a physical examination, Dr. McDonough reviewed medical records from Dr. Ortiz-Cantillo, Dr. Joshi, and Dr. Tejpal. RX9. Dr. McDonough's report reflects Petitioner had prolonged symptoms, eventually showing an abnormal EKG which led to coronary angiography and placement of a stent; the doctor noted Petitioner had long-standing significant hypercholesterolemia, along with age and gender as typical risk factors for development of coronary artery disease. RX9. Dr. McDonough memorialized Petitioner has shortness of breath with significant physical exertion, particularly when trying to carry heavy objects, and documented, '[e]xtensive evaluation has not demonstrated a clear-cut physiological abnormality, and his cardiologist has expressed some skepticism as to whether not [*sic*] his symptoms are due to coronary disease." RX9. Dr. McDonough concluded Petitioner's medical problems "appear related to his coronary risk factors, not to his firefighter service." RX9.

The November 18, 2016 evidence deposition of Dr. McDonough was admitted as Respondent's Exhibit 12. Dr. McDonough is board certified in internal medicine, cardiovascular diseases, and interventional cardiology. RX12, p. 6.

Dr. McDonough reviewed the contents of his October 2016 report. Dr. McDonough explained he performed the usual physical exam for a patient with suspected heart disease and Petitioner did not have any particular physical findings. RX12, p. 18-19. Dr. McDonough testified, based on the examination and record review, his diagnosis is "somewhat nonspecific which is more a description" of Petitioner's symptoms:

> He certainly has coronary artery disease. He had coronary artery disease that led to stent placement. With the stent placement, there was no finding of inducible ischemia or other things that would explain his symptoms that occurred beyond the stent placement. With that, he had had, you know, high cholesterol and along

> with age and gender and family history, are fairly typical for risk factors for coronary disease. RX12, p. 19.

Dr. McDonough identified Petitioner's ongoing symptoms as shortness of breath with physical exertion and occasional palpitations. RX12, p. 20. Dr. McDonough opined those problems are not related to Petitioner's firefighting. RX12, p. 20. The doctor explained the basis of his opinion:

> Well, because he had what appeared to be fairly typical coronary artery disease in someone with a reasonable number of standard risk factors for development of coronary disease, so I don't think that there's anything surprising that he would have coronary disease particularly with the risk factor profile he had, and I don't think that the science shows that firefighters are at increased particular risk of developing coronary artery disease as a result of fire activities. RX12, p. 20-21.

Dr. McDonough clarified Petitioner's risk factors include age, gender, high cholesterol, and family history of coronary disease. RX12, p. 21.

Dr. McDonough confirmed firefighting involves "a lot of stressful work" but reiterated that stressful work did not lead to Petitioner's development of coronary artery disease:

> I think there's two parts of these questions that get mixed up. One is, you know, can the stress of firefighting trigger a coronary event, and the answer for that is clearly true. The question - - the other question which is the long-term question is does firefighting activity provoke the development of coronary artery disease and that's what I don't think is true. RX12, p. 22-23.

The doctor defined coronary artery event as heart attack, arrythmia, and sudden death, none of which Petitioner had. RX12, p. 23.

On cross-examination, Dr. McDonough reiterated his opinion on whether firefighting activities have some contribution to the development of coronary artery disease is that such connection is speculation: "Is it possible that there could be? Well, yeah, anything is possible. I don't think there's any evidence that there is." RX12, p. 29. The doctor confirmed the connection could not be ruled out: "In the same way that there is no evidence that it causes, I don' think there's any substantial evidence that it doesn't." RX12, p. 30.

Dr. McDonough confirmed he has reviewed the NIOSH report, "Preventing Firefighter Fatalities Due to Heart Attacks and Other Sudden Cardiovascular Events." RX12, p. 30. He testified the article was of the sort reasonably relied upon by physicians in his field, though the doctor did not believe the article was peer-reviewed as that term is utilized in medical literature. RX12, p. 34-36. Dr. McDonough agreed the article indicates coronary artery disease among firefighters is due to a combination of personal and workplace factors. RX12, p. 37. The factors identified in the article include fire smoke, carbon monoxide, hydrogen cyanide, particulate matter, heat stress, noise exposure, shift work, and overtime. RX12, p. 38. Dr. McDonough disagreed the article states those factors could lead to development of coronary artery disease;

the doctor explained the majority of the factors are discussed in terms of triggering heart attacks, and only shift work and overtime are noted to have a possible association with the development of coronary artery disease. RX12, p. 40-41. Dr. McDonough testified he would assume Petitioner was exposed to fire smoke, increased heart rate in heavy physical exertion, heat stress, noise exposure, shift work and overtime as part of his firefighting activities for Respondent. RX12, p. 43.

Dr. McDonough confirmed he is familiar with the article "Heart Disease in the Fire Service." RX12, p. 44. The doctor stated the article reflects that aside from risk factors applicable to the general population, firefighters have special occupational exposures and hazards which might contribute to the risk of coronary heart disease: "...it's a speculative statement. They're clearly exposed to things that I'm not exposed to when they're fighting fires and those may but are not proven, which is what 'may' means, contribute to the risk of coronary heart disease." RX12, p. 48. He explained the article distinguishes between the development of coronary disease and the triggering of a cardiac event: "They state it's speculative as to whether or not these exposures lead to the development of coronary heart disease but that it's proven that they do increase problems with triggering the acute cardiovascular events." RX12, p. 49. Dr. McDonough agreed Petitioner would have been exposed to the occupational hazards identified in the article. RX12, p. 52.

Dr. McDonough confirmed he could not state to a reasonable degree of medical certainty that Petitioner's age, gender, smoking history, cholesterol level, family history, or his firefighting activities caused his coronary artery disease: "Right. I would answer the question the same way as anything else, that none of these things - - no individual thing can be proven to cause his coronary heart disease." RX12, p. 55. The doctor agreed he could not rule out that Petitioner's coronary artery disease developed as a result of his firefighting activities. RX12, p. 59.

CONCLUSIONS OF LAW

Accident/Causation

Section 6(f) of the Act provides, in part, as follows:

> Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. *820 ILCS 305/6(f)* (West 2013).

Petitioner is entitled to the presumption as defined by Section 6(f) of the Act as he is a 28-year plus firefighter who suffers from coronary artery disease. Pursuant to *Johnston v. Illinois Workers' Compensation Commission*, 2017 IL App (2d) 160010WC, ¶ 45, 80 N.E.3d 573,

Respondent is required "to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition." (Emphasis in original).

Respondent offered such evidence. Dr. Moisan, Dr. Everett, and Dr. McDonough all identified risk factors associated with the development of coronary artery disease- age, gender, high cholesterol, high blood pressure, tobacco use, and family history. PX14, p. 46-47; RX3, p. 21-22; RX12, p. 20-21. A review of Petitioner's medical records confirms he suffers from numerous of the identified risk factors- high cholesterol, high blood pressure, prior tobacco use, and most notably, both of Petitioner's parents suffer from cardiac disorders. PX1; PX4. All the experts agree, Petitioner suffered from risk factors outside his employment duties which increased the likelihood of his development of coronary artery disease. As Respondent has presented sufficient evidence to rebut the Section 6(f) presumption, "the presumption vanishes and the parties proceed as if the presumption never existed." *Johnston*, at ¶ 53.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. [citations omitted]." *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). "To satisfy this (arising out of) requirement it must be shown that the injury had its origins in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* The "in the course of employment" phrase "refers to the time, place and circumstances surrounding the injury" and, to be compensable, an injury "generally must occur within the time and space boundaries of the employment." *Id.*

The Commission finds Petitioner failed to prove he sustained an accident *i.e.*, that his development of coronary artery disease arose out of and in the course of his employment. Therefore, benefits are denied.

Petitioner testified following a routine fitness-for-duty evaluation, Dr. Moisan identified an abnormal EKG. (11/28/16) T. 35. Dr. Tejpal subsequently performed an angioplasty on January 23, 2015 with a stent placement, and following cardiac rehabilitation, Petitioner returned to work for Respondent on June 13, 2015. (11/28/16) T. 36-38; PX1.

On July 15, 2015, Petitioner experienced shortness of breath while performing a training exercise. (11/28/16) T. 40-41. Dr. Moisan authorized Petitioner off work and to date, has not cleared Petitioner to return to work. (11/28/16) T. 45-46. Following this incident of shortness of breath, Petitioner sought further medical treatment, and to date, no cause has been identified for Petitioner's shortness of breath. PX1; PX4; PX7.

Five physicians provided their expert opinions: 1) Dr. Moisan, board-certified in internal medicine, occupational medicine, and respiratory disease (PX14, p. 4); 2) Dr. Everett, board-certified in interventional and nuclear cardiology (RX5, p. 6); 3) Dr. Zanetti, board-certified in internal medicine, pulmonary disease, critical care, and undersea and hyperbaric medicine (PX5, p. 6); 4) Dr. Samo, board-certified in emergency medicine (RX11, p. 6); and 5) Dr. McDonough, board-certified in internal medicine, cardiology, and interventional cardiology (RX12, p. 6). (Dr. Zanetti confined his opinions to Petitioner's pulmonary condition). All physicians possessed a

solid understanding of Petitioner's job duties. PX14, p. 5; RX3, p. 13, 45-46; PX11, p. 10; and RX12, p. 22. As discussed above, all physicians identified risk factors outside of Petitioner's employment duties. Where the doctors diverged are their opinions as to whether Petitioner's firefighting duties were a causative factor in Petitioner's development of coronary artery disease.

Dr. Moisan testified as follows:

> Q. All right. And you indicated stress –for [Petitioner] stress would be a component that would cause or contribute to cause. Does that included the stresses that we discussed at work? A. It could be those. It could be personal stresses. It could be a lot of things, the old so-called Type A personality. Q. So, as we sit here today, is it your opinion that his activities as a firefighter/paramedic contributed at least in part to his coronary artery disease? A. I can't draw that conclusion. All I can tell you is that I can't exclude it as a component. PX14, p. 30-31.

Dr. Moisan went on to state "All I can say it is it's more likely than not there could be a contribution of which can't be quantified." PX14, p. 32.

Dr. Everett testified as follows:

> Q. Okay. My question is did you believe, did you continue to believe that his coronary artery disease was not related to occupation as a firefighter. A. Oh. Yes. Q. And what did you believe his coronary artery disease is related to? A. It was unknown, but all we can do is—and we never know why someone has coronary disease. We know there are risk factors associated with it, but there's no way we can prove it. RX3, p. 38-39.

On cross-examination, Dr. Everett conceded psychological stressors and shiftwork could possibly contribute to or cause coronary disease; it could not be ruled in nor could it be ruled out. RX3, p. 80.

Dr. Samo testified as follows:

> Well, I don't believe that his heart disease – his underlying coronary artery disease is related to firefighting. And, again, since I don't know what causes his shortness of breath, I can't answer that, although there's no sign of any asthma or chronic emphysema, COPD, so I don't know the answer to the pulmonary side of it or the shortness of breath complaint. RX11, p. 36-37.

Dr. Samo went on to state "The question is whether firefighting is causative of coronary artery disease, and the literature is very clear that there's no evidence of that. There is literature which does show that firefighting – certain aspects of firefighting can be a trigger for a cardiac event, and that's really responding to, being at, returning from fire calls or actually even drills and training. RX11, p. 38.

Dr. McDonough testified consistently with Dr. Samo testifying as follows:

> Well, because he had what appeared to be fairly typical coronary artery disease in someone with a reasonable number of standard risk factors for development of coronary disease, so I don't think that there's anything surprising that he would have coronary disease particularly with the risk factor profile he had, and I don't think that the science shows that firefighters are at increased particular risks at developing coronary artery disease as a result of fire activities. RX12, p. 20-21.

On cross-examination, Dr. McDonough reiterated his opinion on whether firefighting activities have some contribution to the development of coronary artery disease is that such connection is speculation: "Is it possible that there could be? Well, yeah, anything is possible. I don't think there's any evidence that there is." RX12, p. 29. The doctor confirmed the connection could not be ruled out: "In the same way that there is no evidence that it causes, I don't think there's any substantial evidence that it doesn't." RX12, p. 30.

Weighing the competing medical evidence, the Commission affords greater weight to the opinions of Dr. Everett, Dr. Samo, and Dr. McDonough. Dr. Moisan's opinion, in fact, supports the opinions of Drs. Samo and McDonough. None of these three physicians could either rule in or rule out Petitioner's duties as a firefighter as a causative factor in his development of coronary artery disease. To find such would be mere speculation. See, *Immaculate Conception Church v. Industrial Commission*, 395 Ill. 615, 623, 71 N.E.2d 70 (1947) ("This court has held in numerous cases that liability under the Workmen's Compensation Act cannot rest upon imagination, speculation or conjecture, or upon a choice between two views equally compatible with the evidence, but such liability must arise out of facts established by a preponderance of the evidence"); *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 106, 853 N.E.2d 799 (2006) (Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn.) Petitioner failed to prove he sustained an accident on January 16, 2015 which arose out of and occurred in the course of his employment.

Even assuming, *arguendo*, Petitioner proved he sustained an accident on January 16, 2015, Petitioner's current condition of ill-being, shortness of breath, is unrelated to his coronary artery disease. Petitioner is unable to return to work due to his shortness of breath which he experiences upon exertion. Dr. Moisan testified from a cardiac perspective, Petitioner is able to return to work, and moreover, Petitioner's cardiac condition is not the cause of his shortness of breath. PX14, p. 36. These same opinions are shared by Dr. Everett, Dr. Samo, and Dr. McDonough. RX3, p. 43, 38; RX11, p. 28; RX12, p. 20. Every physician including Dr. Zanetti agrees Petitioner's shortness of breath has no known etiology. PX14, p. 36; RX3, p. 38; RX11, p. 28; RX12, p. 20; RX5, p. 33.

Both Dr. Everett and Dr. Zanetti are recommending further treatment; specifically, Dr. Everett opined Petitioner "should be worked up for other causes of shortness of breath including pulmonary hypertension or some other structural lung disease" and recommended cardiac catherization to assess pulmonary pressures. RX3, p. 39-40. Dr. Zanetti, a pulmonologist, opines

he was unable find any evidence of primary lung problems such as COPD, work exposure, or reactive airway disease nor any objective evidence of pulmonary dysfunction. RX5, p. 29-30; 32. Dr. Zanetti, though, recommended further testing specifically a cardiopulmonary stress test which as he explained:

> [I]t relates how the lungs and the heart work together along with cellular respiration to see if there are different patterns that can point to different types of diseases that can relate to either primary diseases of the lungs, primary diseases of the heart or problems related to cellular respiration or combinations of any of them and how they all function together. RX5, p. 34-35.

Dr. Zanetti indicates Petitioner is unable to return to work until further testing is accomplished to determine the etiology of his shortness of breath. RX5, p. 33.

Based upon the foregoing, Petitioner failed to prove his current condition of ill-being, shortness of breath, is causally related to his coronary artery disease.

Motion to Dismiss

The Commission notes the Arbitrator filed her Decision on March 8, 2017. On September 7, 2017, Petitioner filed an Application for Adjustment of Claim, 17 WC 26201, alleging injury on July 15, 2015, shortness of breath during training. On October 17, 2017, Respondent filed a Motion to Consolidate cases 15 WC 19933 and 17 WC 26201 and a Motion to Dismiss Application for Adjustment of Claim for 17 WC 26201. The Motions were heard before Commissioner Luskin on October 24, 2017. At that hearing, Commissioner Luskin denied the Motion to Consolidate. (10/24/17) T. 14.

Regarding the issue of dismissal of the 17 WC 26201 Application for Adjustment of Claim, Commissioner Luskin allowed the parties to argue same at oral arguments and to brief same. (10/24/17) T. 14-15. Both parties filed briefs, which the Commission has reviewed. Respondent argues Petitioner's claim for an injury on July 15, 2015 should be dismissed under the doctrines of *res judicata* and collateral estoppel. Respondent posits Petitioner previously litigated the causal relationship of his alleged pulmonary condition, which was denied by Arbitrator Simpson in the present matter. Petitioner argues the Motion should be denied as the Commission does not possess jurisdiction regarding case 17 WC 26201, which has not been adjudicated.

The Commission denies Respondent's Motion to Dismiss Application for Adjustment of Claim for 17 WC 26201 finding it lacks jurisdiction. There has yet to be an arbitration hearing on the merits and a decision issued regarding case 17 WC 26201. The Commission allows the Application for Adjustment of Claim for 17 WC 26201 to proceed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's March 8, 2017 decision is reversed for the reasons stated herein.

20 IWCC0584

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on January 16, 2015, and his claim for compensation and medical expenses is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Application for Adjustment of Claim for 17 WC 26201 is hereby denied.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission.

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

DATED: OCT 1 - 2020

L. Elizabeth Coppoletti

LEC/mck

O: 6/19/2019

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA HIGLEY,

Petitioner,

20IWCC0585

vs.

NO: 11 WC 22921

WALMART # 1955,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission hereby corrects the Decision of the Arbitrator to award temporary total disability benefits commencing April 8, 2011 through April 15, 2011 and May 22, 2011 through October 16, 2018. This represents 387 4/7 weeks of temporary total disability at a rate of $255.91 per week totaling $99,183.29.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $255.91 per week for a period of 387 4/7weeks, commencing April 8, 2011 through April 15, 2011, and commencing May 22, 2011 through October 16, 2018; that

20IWCC0585

being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act. This award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent is due a credit for some TTD already paid in the amount of $24,894.72.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,941.11 billed by IWP, for medical expenses under §8(a) and 8.2 of the Act. These bills shall be paid to Petitioner per the statutory medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for reasonable and necessary prospective medical care per the direction of Dr. Michael Rock.

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

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

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

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

DATED: OCT 2 - 2020
SJM/msb
o: 8/5/20
44

Stephen Mathis

D. Douglas McCarthy

Douglas McCarthy

20IWCC0585

DISSENT

I concur with all aspects of the Majority's Decision save its award of temporary total disability benefits, its order compelling Respondent to authorize medical treatment, and its award directing payment to Petitioner of medical expenses. As to these issues, I, respectfully, dissent.

The Majority awards temporary total disability benefits for the periods of April 8, 2011 through April 15, 2011 and May 22, 2011 through October 16, 2018. I find Petitioner's medical treatment as evidenced by the medical records does not support this award. I would award temporary total disability benefits as follows: 1) April 8, 2011 through April 15, 2011; 2) May 22, 2011 through August 24, 2012; 3) February 24, 2014 through July 16, 2014; 4) March 2, 2015 through September 14, 2016 (Petitioner was paid benefits from August 17, 2015 through December 17, 2015); and 5) February 6, 2017 through October 16, 2018.

Petitioner suffers from chronic regional pain syndrome (CRPS), a condition which waxes and wanes meaning it will stabilize at times and then destabilize requiring additional treatment. See *Matuszczak v. Illinois Workers' Compensation Commission*, 2014 IL App (2d) 130532WC, ¶14 (once an injured employee's condition stabilizes, *i.e.*, once the employee reaches MMI, he is no longer eligible for TTD benefits); *Poore v. Industrial Commission*, 298 Ill. App. 3d 719, 723, ("The court explained that a period of temporary total disability can be the result of a period in which a Petitioner's permanet partial disability, which was once thought to be permanent, becomes unstable or degenrates and requires additional treatment to restabilize."). Petitioner began seeking treatment shortly after her accident. On June 14, 2011, Dr. Cirella recommended a spinal cord stimulator (SCS). PX4; PX5, p. 16. On September 20, 2011, Dr. Lipov concurred with Petitioner's diagnosis of CRPS as well as the need for a SCS. PX5. Petitioner, though, testified at the time, she was not inclined to proceed with this course of treatment. T. 24. Petitioner continued to receive conservative treatment and was placed at maximum medical treatment (MMI) on August 24, 2012 by Dr. Duckelow and August 17, 2015 by Dr. Weiss. PX9.

Thereafter, Petitioner obtained no medical treatment until February 24, 2014, when Petitioner presented to Dr. Weiss for a further evaluation pursuant to Section 12 of the Act at Respondent's request. Dr. Weiss recommended further treatment which Petitioner obtained subsequently ending on July 16, 2014. PX 13.

On March 2, 2015, Petitioner again commences additional treatment with Dr. Patel who eventually places Petitioner at MMI as of September 14, 2016. PX7; T. 34. Following a six-month hiatus, on February 6, 2017, Petitioner presents to Dr. Weil who refers Petitioner to Dr. Rock. On April 25, 2017, Petitioner is evaluated by Dr. Rock who is currently recommending the implantation of a SCS, treatment which Petitioner now desirers. PX11; PX2.

Given the above medical treatment, I would award temporary total disability benefits as follows: 1) April 8, 2011 through April 15, 2011; 2) May 22, 2011 through August 24, 2012; 3) February 24, 2014 through July 16, 2014; 4) March 2, 2015 through September 14, 2016 (Petitioner was paid benefits form August 17, 2015 through December 17, 2015); and 5) February 6, 2017 through October 16, 2018.

As for the Majority's order compelling Respondent to authorize medical treatment, I disagree. This issue was previously addressed by the Court in *Hollywoood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is

dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19.

In the recent matter of *O'Neil v. The Illinois Workers' Compensation Commission*, 2020 IL App (2d) 190427WC, the Court reaffirmed and extended its holding in *Hollywood Casino* to both penalties pursuant to Section 19(l) and attorneys' fees pursuant to Section 16 of the Act. The Court stated "Similar to *Hollywood Casino*, while Section 19(l) addresses a failure, neglect, refusal, or unreasonable delay in *payment of benefits*, the plain language of the statute contains no language authorizing an arbitrator or the Commission to assess penalties for an employer's failure, neglect, refusal, or unreasonable delay in *authorizing medical treatment*. (Emphasis in the original)." *Id.* at ¶ 22.

Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holdings in *Hollywood Casino* and *O'Neil*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

As for the Majority's award of medical expenses, I would order Respondent to pay the reasonable, necessary, and causally related medical expenses incurred in the care and treatment of Petitioner's CRPS, specifically the expenses of the IWP in the amount of $2,941.11, pursuant to Sections 8(a) and 8.2 of the Act.

For the above stated reasons, I, respectfully, dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

HIGLEY, ANGELA
Employee/Petitioner

Case# **11WC022921**

WALMART #1955
Employer/Respondent

20IWCC0585

On 3/12/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2573 MARTAY LAW OFFICE
STEPHEN R MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

5074 QUINTAROS PRIETO WOOD & BOYER
JULIE M SCHUM
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

20 IWCC0585

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Angela Higley
Employee/Petitioner

v.

Walmart #1955
Employer/Respondent

Case # **11** WC **22921**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **October 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 27, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,178.52**; the average weekly wage was **$426.51**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$24,894.72** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$24,894.72**.

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

ORDER

F. The Arbitrator finds Petitioner has proven by a preponderance of the evidence that she continues to suffer CRPS of the left foot and that her current condition of ill-being is causally related to her work-injury on March 27, 2011.

J. The Arbitrator finds Respondent is liable for unpaid bills to IWP totaling $2,941.11. These bills shall be paid to Petitioner per the statutory medical fee schedule.

K. The Arbitrator awards reasonable and necessary prospective medical care per the direction of Dr. Michael Rock.

L. The Arbitrator finds Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 8, 2015 through April 15, 2011 and May 22, 2011 through October 16, 2018. This represents 387 and 4/7th weeks of disability at a rate of $255.91 totaling $99,183.29. Respondent is due a credit for some TTD already paid in the amount of $24,894.72.

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

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

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

Signature of Arbitrator

3/6/19
Date

ICArbDec19(b)

MAR 12 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

20 IWCC0585

ANGELA HIGLEY)
)
Petitioner,)
vs.)
) No. 11 WC 22921
WALMART #1955)
)
Respondent.)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

On the accident date Petitioner was 27-years-old, employed by Respondent as a second shift inventory control person whose duties included unloading trucks, setting up trucks for unloading, and getting product ready to go to the sales floor (Tr. 10-11). Petitioner had worked for Respondent for approximately 12 years in several different departments and stores (Id., 8-10).

Respondent does not dispute that on March 27, 2011, a pallet dropped on the top of Petitioner's left foot. Petitioner reported the incident the same day, finished her shift and worked the following day although she had swelling and felt a burning pain in her left foot. (Id., 12-14).

On March 29, 2011, Petitioner presented to Swedish American Hospital with a history of left foot pain after an object fell on her left foot (Px 8). X-rays were performed, a contusion diagnosed and Petitioner was advised to take Tylenol (Id.).

On April 1, 2011, Petitioner presented to Morrison Community Hospital with continued left foot pain at an 8-9 after a wood pallet fell on her left foot on March 27, 2011 (Px 10). She was again diagnosed with a contusion, released to sitting only work and advised to follow-up- in one week (Id.).

On April 8, 2011, Petitioner presented to podiatrist, Dr. James Dukelow who noted a history of left foot pain after a wood pallet fell on her left foot on March 27, 2011 (Px 9). Dr. Dukelow advised Petitioner to use crutches, wear an Unna boot and remain off work (Id.).

Pursuant to Dr. Dukelow's April 15, 2011 recommendation an MRI of Petitioner's left foot was performed at Katherine Shaw Bethea Hospital on April 21, 2011 that was significant for nonspecific bone marrow edema of the posterior talus (Px 4).

On April 22, 2011, Dr. Dukelow advised Petitioner to continue use of the boot and crutches and released her to sitting only work (Px 9). Petitioner followed up with Dr. Dukelow on April 29, 2011 reporting that it felt like someone was sticking needles in her left foot. Dr. Dukelow diagnosed Petitioner with complex regional pain syndrome (hereinafter "CRPS") of the left foot and advised she seek pain management (Id.).

On May 6, 2011, Dr. Dukelow noted Petitioner's complaints of burning in her left foot with some episodes of the foot feeling ice cold (Px 9). On exam, the doctor noted mild edema and splotchiness of the left foot. Petitioner was advised to stay on crutches, seek pain management and perform sitting work only (Id.). On May 13, 2011, Dr. Dukelow noted increased swelling in Petitioner's left foot with splotches and warm skin temperature (Id.).

Pursuant to Dr. Dukelow's recommendation, Petitioner presented to Dr. Mark Cirella, an anesthesiologist, for pain management on May 16, 2011 (Px 3 at 6). Dr. Cirella noted complaints of sharp, stabbing and throbbing left foot pain that wrapped around to the back of her heel (Px 4). On exam, Dr. Cirella noted swelling in the top of the left foot radiating up above the ankle, skin changes in terms of color and temperature radiating up the shin and calf and mottled, reddened skin with sores as well as discolored left toenails compared to the right foot (Id.). The doctor noted a diagnosis CRPS and administered a lumbar sympathetic block. Dr. Cirella provided Petitioner with an off work note on May 20, 2011 (Px 3 at 12; Px 4).

On May 24, 2011, Petitioner followed-up with Dr. Cirella reporting that the lumbar sympathetic block helped briefly before her pain was returned to its previous state (Px 3 at 12). Dr. Cirella noted some continued discoloration over the dorsum of the foot and ankle (Px 3 at 13). He administered another lumbar sympathetic block (Id.). On June 1, 2011, Dr. Cirella noted Petitioner's left foot was cooler to touch as well as some mottling of the skin (Id., pp. 14). A third lumbar sympathetic block was administered and Petitioner's off work status was continued (Id.).

Dr. Cirella saw Petitioner again on June 8, 2011 and a fourth lumbar sympathetic block was done (Px 3 at 15). At this visit, Dr. Cirella discussed the possibility of Petitioner requiring a spinal cord stimulator if she did not make significant progress (Px 4). On June 14, 2011, Dr. Cirella noted significant allodynia, altered temperature as well as color and skin mottling (Id.). Dr. Cirella recommended Petitioner seek a second opinion with Dr. William Bush (Px 3 at 16-17). He also kept her off work (Px 4).

When asked why he was recommending a spinal cord stimulator, Dr. Cirella testified, "Because of her age, I did not think that loading her up with a bunch of medications, which is the other alternative, would be in her best interest" (Px 3 at 17).

On July 11, 2011, Petitioner presented to Dr. William Bush, an orthopedic foot surgeon, with complaints of pain at the top of her left foot with occasional radiating pain into her leg. Petitioner told Dr. Bush that her prior treatment did not help with her pain. Swelling was noted at the dorsum of the foot at the base of the 2d and 3rd metatarsals. The doctor diagnosed neuropraxia of the dorsum after a crush injury and recommended aggressive physical therapy as well as discarding the crutches and returning to regular shoes (Px 6).

On July 14, 2011, Dr. Cirella recommended Petitioner use Lidoderm patches for pain, attend aqua therapy and remain off work (Px 3 at 19 & Px 4). Petitioner followed-up on August 15, 2011 when Dr. Cirella noted the left foot was cooler to touch (Px 4). Dr. Cirella recommended Petitioner seek another opinion with Dr. Sean MacKenzie (Id.).

On September 20, 2011, Petitioner presented to Dr. Eugene Lipov, an anesthesiologist, pursuant to Respondent's Section 12 request. Dr. Lipov noted complaints of burning pain in the left foot radiating up the tibia to the knee as well as freezing temperature, swelling, hypersensitivity and discoloration (Px 5 at 9). On exam, discoloration of the left lower leg and left foot, minimal swelling and a slight temperature difference was noted (Id. at 10). Dr. Lipov's working diagnosis was CRPS noting Petitioner's exam findings consistent with her subjective complaints (Id. at 11-12). The doctor recommended a lidocaine infusion and if such failed to provide relief, a trial dorsal column stimulator (Id. at 16-17). Dr. Lipov opined that Petitioner's left foot injury was causally related to the work injury that occurred on March 27, 2011 (Id. at 18).

On October 11, 2011, Petitioner presented to physiatrist, Dr. Sean MacKenzie who noted her left foot was slightly darker and cooler to the touch than the right (Px 4). Dr. MacKenzie diagnosed reflex sympathetic dystrophy and recommended Petitioner undergo physical therapy and take medications (Id.). On November 8, 2011, when Petitioner followed up, Dr. MacKenzie recommended a three-phase bone scan which was performed on November 21, 2011. The scan was interpreted as showing vague increased activity localized to the left ankle and left mid foot that was nonspecific but could be post traumatic or related to bone contusion or underlying arthritis. When Dr. MacKenzie reviewed the scan on December 5, 2011, he noted the scan was nonspecific with multiple etiologies (PX. 12; PX 6). (Px 12).

Petitioner started physical therapy at Katherine Shea Bethea Hospital on December 23, 2011 which continued through March of 2012 (Px 12).

On January 4, 2012, Dr. MacKenzie noted Petitioner's foot was still mildly edematous and slightly cooler to touch (Px 4). He next saw her on February 1, 2012 when he recommended Petitioner use a Flector patch and do pool exercises (Id.). Petitioner's final visit with Dr. Mackenzie was on March 5, 2012 when he indicated Petitioner would likely only benefit from a spinal cord stimulator, so he sent her back to Dr. Cirella for a trial (Id.).

Petitioner presented back to Dr. Cirella on March 23, 2012 when he again recommended Petitioner try a spinal cord stimulator noting that was the only thing left that he could offer her (Px 3 at 21). Petitioner declined the spinal cord stimulator at that time because she was scared and thought there may be other treatments she could try before the spinal cord stimulator (Tr. 24).

Dr. Cirella testified that Petitioner's objective findings were in line with her subjective complaints and that she could not return to work (Px 3 at 24). With respect to causation, he testified Petitioner's current condition of ill-being was related to her March 27, 2011 work-injury (Px 3 at 24-25).

On March 26, 2012 Petitioner was discharged from Katherine Shea Bethea Hospital physical therapy after 25 visits (Px 12). Petitioner presented back to Dr. Dukelow on July 13, 2012 when he administered a local block of the common peroneal nerve at the head of the fibula (Px 9).

At the request of Respondent, Petitioner presented to Dr. Stephen Weiss, an orthopedic foot surgeon, for another Section 12 examination on August 17, 2012 (Rx 6 at 7). Petitioner complained of left foot pain following her March 27, 2011 work-injury (Id., at 9-10). Dr. Weiss diagnosed a resolved contusion of the left foot noting Petitioner showed signs of symptom magnification (Id., at 17). He believed she was at maximum medical improvement and could work full duty (Id., at 19).

Petitioner followed-up with Dr. Dukelow on August 24, 2012 when he recommended she undergo Calmare treatments (Px 9). Petitioner saw Dr. Dukelow for a final time on September 28, 2012 and noted in his report, "I believe that this truly is CRPS" (Id.).

Petitioner was terminated by Respondent on October 23, 2012 (Tr. 43).

Petitioner did not treat again for several months because Respondent was denying additional medical care. Petitioner and Respondent began the process of moving towards trial by taking the depositions of Dr. Cirella, Dr. Weiss and Dr. Lipov throughout early and mid- 2013.

On February 24, 2014, at the request of Respondent, Petitioner was again evaluated by Dr. Stephen Weiss at which time Petitioner reported "my whole foot feels like it is on fire" (Rx 7 at 3). Dr. Weiss noted decreased temperature of the left foot with some puffiness and swelling (Id., pp, 4). He now noted a diagnosis of possible CRPS (Id.). The doctor stated she could continue with Calamare treatments but needed no other care and was capable of working with a 10lb lifting restriction in a sedentary to light duty capacity (RX.6, 7).

When asked about causation, Dr. Weiss "Yes, I believe her current left foot condition is secondary to the work incident in question" (Id, pp. 5).

Petitioner started a series of 10 Calmare injections at Spero Pain Relief of Illinois on June 30, 2014 (Px 13). She received her final injection on July 12, 2014 (Id.). Petitioner testified those injections initially helped bring her pain down and help her walk normal rather than on the side of her foot (Tr. 28). Over time, Petitioner noted the relief from the injections wore off and the pain came back full force (Id.).

A phone note from October 23, 2014 indicates that Petitioner called Dr. MacKenzie requesting permanent work restrictions. (PX.6). Dr. MacKenzie's office notes that she was advised to follow up as she had not been seen in two years. (Id.).

Petitioner presented to Udit Patel, DO, at Pain & Spine Institute on March 2, 2015 with severe left foot pain (Px 7). Dr. Patel noted dorsal edema, redness on the dorsal aspect of the foot, an inverted foot and abnormal coolness with a temperature 10.5 degrees cooler than the right foot (Id.). He diagnosed Petitioner with Reflex Sympathetic Dystrophy and chronic pain syndrome (Id.). Dr. Patel indicated that Petitioner was a candidate for a spinal cord stimulation trial but wanted to try a TENS unit first. He also kept her off work (Id.).

On March 13, 2015, Dr. Patel examined Petitioner noting dorsal edema, redness and abnormal coolness of the left foot (Px 7). He recommended Petitioner return to Spero Pain Clinic for more Calmare treatments and remain off work (Id.). Petitioner saw Dr. Patel again on June 10, 2015 and he again noted dorsal edema, redness, an inverted foot and abnormal coolness of the left foot (Id.). He continued to recommend additional Calmare treatments and for Petitioner to remain off work (Id.). He made the same recommendation at a follow-up appointment on July 8, 2015 (Id.).

At the request of Respondent, Dr. Weiss prepared a Supplemental Report on April 13, 2015 (Rx 7). He noted the Calmare treatment Petitioner underwent successfully relieved her pain and indicated if she needed more treatment, Calmare injections should be repeated (Id.). He did not believe Petitioner required a TENS unit or a spinal cord stimulator (Id.). Dr. Weiss did not comment on Petitioner's ability to work (Id.).

On July 20, 2015, at the request of Respondent, Petitioner presented back to Dr. Weiss for another in person Section 12 examination. Petitioner complained that her left foot pain returned about 4-5 months after the Calmare treatments in 2014 and she again had constant pain with burning and swelling (Id.). Dr. Weiss opined the additional Calmare treatments were appropriate and related to the original work-injury on March 27, 2011 (Id.). As for work, he opined Petitioner could return to work with no lifting over 20 lbs., no frequent lifting over 10 lbs. and should alternate sitting and standing throughout the day (Id.).

On August 5, 2015, Petitioner returned to Dr. Patel who continued to recommend Calmare treatments and that she remain off work (Px 7). Dr. Patel noted the same recommendations on September 2, 2015 and September 30, 2015 (Id.).

On October 22, 2015, at the request of Respondent, Petitioner presented to anesthesiologist Dr. Richard Noren for another Section 12 examination (Rx 8 at 8). This is now Respondent's third different Section 12 examiner and Petitioner's fifth in-person Section 12 exam. Dr. Noren did not believe Petitioner suffered from CRPS (Id., pp. 44). He believed Petitioner showed signs of symptom magnification and malingering (Rx 8 at 46). He believed she was at maximum medical improvement (Id., pp. 48). Dr. Noren also did an AMA impairment rating which concluded Petitioner had an impairment rating of 30% of the lower extremity or 12% whole person (Id., pp. 53). He opined that all treatment to date had been reasonable and necessary (Id., pp. 82). Lastly, he opined she would require permanent sedentary duty work restrictions (Rx 8 at 81-82).

Petitioner presented back to Dr. Patel on January 19, 2016 and he detailed his disagreements with Dr. Noren's IME report (Px 7). He noted discoloration of Petitioner's skin and nailbeds (Id.). Dr. Patel continued to believe Petitioner would benefit from another round of Calmare treatments (Id.). Petitioner saw Dr. Patel again on February 5, 2016 and he continued to authorize her off work (Id.).

The first deposition of Dr. Noren was completed on February 8, 2016 and trial for this claim was to proceed on July 20, 2016 (Tr. 32).

Petitioner started another round of Calmare treatments on August 8, 2016 (Px 13). Petitioner saw Dr. Patel again on August 10, 2016 and he recommended Petitioner continue her Calmare treatments (Px 7). The final Calmare treatment was done on August 17, 2016 (Px 13).

Petitioner saw Dr. Patel again on September 14, 2016 and reported complete relief of the CRPS following the Calmare treatments (Px 7). It was recommended Petitioner get booster treatments every 6-8 weeks (id.). Dr. Patel released Petitioner from his care at maximum medical improvement except for the boosters every 6-8 weeks (id.).

On October 24, 2016, Dr. Patel saw Petitioner again and noted she did not meet the criteria of CRPS (Id.). He referred her to an orthopedic surgeon, returned her to work at light to sedentary duty, and indicated she may still need a spinal cord stimulator (Id.).

Petitioner presented to podiatrist Dr. Lowell Weil Jr., for an examination on February 6, 2017 (Px 11). Dr. Weil reviewed Petitioner's past medical treatment, examined Petitioner and recommended an updated MRI and bone scan to ascertain whether the etiology of her symptoms is orthopedic and to help rule in or rule out the diagnosis of CRPS.

A left ankle MRI report from Weil Foot & Ankle Institute dated February 7, 2017 noted low-grade active plantar fasciitis, mild ATFL swelling/sprain, low-grade peroneus longus tendinosis and inframalleolar posterior tibial tendinosis without tear. An "Old Shepard fracture favored over os trigonum" was noted (id.). No evidence of CRPS was noted as the marrow signal alteration pattern typical for such was not visible.

On February 18, 2017, a bone scan performed at Swedish Covenant Hospital was negative for fracture, dislocation or soft tissue abnormalities. (Id.).

On March 6, 2017, Petitioner followed up with Dr. Weil who noted the MRI and bone scan clearly showed no underlying orthopedic etiology for her pain. Dr. Weil noted "this is strictly a pain syndrome issue" and recommended Dr. Jay Joshii or Dr. Michael Rock for pain management (Px 11). Dr Weil noted a diagnosis of CRPS type 2 of the left lower extremity (Id.).

On April 25, 2017, Petitioner presented to anesthesiologist Dr. Michael Rock at the Chicago institute for Neuropathic Pain reporting a history of left foot pain since a pallet fell on the dorsum of her foot on March 27, 2011 (Px 1 at 7). Dr. Rock noted the left foot was reddened and swollen and the toes were showing very mild trophic skin changes (Px 1 at 9-10). He diagnosed her with CRPS type I (Id., at 10). Dr. Rock prescribed Petitioner three medications to alleviate some of her pain (Id., at 13). Petitioner followed up with Dr. Rock on May 23, 2017 reporting she did not respond well to the medications (Id., at 14). Petitioner testified that the medications made her feel like her head was going to explode and gave her hives (Tr. 39).

On June 28, 2017, Dr. Rock noted Petitioner was suffering from neurocognitive issues including problems reading (Id., at 16-17). He noted these were typical symptoms for someone suffering from CRPS (Id., at 17). Dr. Rock noted his continued recommendation for a neurocognitive evaluation at follow-up visits on July 26, 2017, August 23, 2017 and September 20, 2017 (Id., at 17-18).

On October 22, 2017, at the request of Respondent, Petitioner presented to pain medicine specialist Dr. Richard Noren for another Section 12 evaluation. (RX.8, 25). Petitioner complained of constant burning pain in her left foot as well as intermittent swelling, color changes, and temperature changes. Petitioner reported she could drive with no limitations, sit for a maximum of one hour, stand for no more than 30 minutes or walk more than a half a block. She reported doing her own shopping, household chores and cleaning the house. Dr. Noren diagnosed a superficial common peroneal neuropathy. He did not find any objective findings on exam that supported a CRPS finding noting she did not meet the Budapest criteria. In making this finding, he noted a lack of objective findings, negative diagnostics and a failure to obtain significant relief from sympathetic nerve blocks. Dr. Noren noted no swelling, abnormal color changes, or abnormal hair growth as further illustrated by the color photographs attached to his report and deposition. He opined that both her behavior and exam led him to suspect symptom magnification and malingering. With regards to the same, he noted Petitioner reported losing a toenail a month before but presented at that visit with a fully intact toenail. He also noted Petitioner had no pathology to explain her antalgic gait.

Dr. Noren concluded Petitioner was at MMI and no further interventional treatment was warranted. He opined she could return to work in a light to sedentary duty level. (RX.8, 50. He further opined Petitioner did not require a neuropsychological evaluation or a trial spinal cord stimulator (Rx 8 at 48-49, Dep #2).

Dr. Noren did another AMA impairment rating which now came to a 3% impairment (Rx 8 at 53, Dep #2). It must be noted that this impairment is 27% less than his original impairment rating done on October 22, 2015 (Rx 8 at 53).

Dr. Rock testified that Dr. Noren's suggestion that Petitioner was malingering was "disingenuous" because there has never been a neuropsychological evaluation conducted on Petitioner (Px 1 at 25).

On January 17, 2018, Dr. Rock recommended Petitioner seek a second opinion from Dr. Timothy Lubenow (Px 1 at 27-28). Dr. Rock's continued recommendations that Petitioner obtain a neuropsychological opinion and remain off work were noted by on February 14, 2018, March 14, 2018, June 13, 2018, July 25, 2018, August 22, 2018, September 19, 2018 and October 10, 2018 (Px 2).

Dr. Rock testified that a neuropsychological evaluation is done before a trial spinal cord stimulator is implanted in order to see if major depression, secondary gain or psychosis are issues with the patient (Px 1 at 15-16). At a follow-up appointment on June 28, 2017 Dr. Rock noted Petitioner was suffering from neurocognitive issues including having issues reading (Id., at 16-17). He noted that these were typical symptoms for someone suffering from CRPS (Id., at 17). Dr. Rock made the same recommendations for a neurocognitive evaluation at follow-up visits on July 26, 2017, August 23, 2017 and September 20, 2017 (Px 1 at 17-18).

Dr. Rock testified that Petitioner has been unable to work due to both her "obvious physical problem" as well as her incapability to concentrate (Px 1 at 30). He noted "even a sedentary desk position would be impossible for her because she cannot perform intellectual or physical work (Id.).

Dr. Rock testified, "I believe the pallet falling on her foot causing a crushing injury" was the cause of her issues (Id.).

Dr. Rock clarified he is recommending a trial stimulator and not a permanent stimulator, "If the trial should fail, then I would have no argument. But to deny her a simple procedure, such as a trial, and this deposition probably is costing more money than the trial itself, to me is punitive and incomprehensible, in terms of the approach that is being taken denying this young lady care" (Px 1 at 31-32).

On February 8, 2016, Dr. Noren was deposed relative to this matter. He reiterated all of the findings from his report and testified that in addition to the other suspect behaviors, Petitioner walked with a faster gait when observed outside of his office than she had within. He also noted that Petitioner's reactions to stimulus were inconsistent – while she would grimace at an initial touch, when it was repeated 30 seconds later, she would express no discomfort. A second inconsistently was noted in that she would complain of pain during a touch test but then had no complaints of pain when the area was being wiped with an alcohol wipe. Additionally, Petitioner complained of pain when her temperature was being taken with an infrared sensor – which has no contact with her skin. Her report was also inconsistent with her presentation in that she reported extreme pain to any touch of her leg from her foot to her knee but presented with her legs shaved. Dr. Noren further noted that if Petitioner had CRPS, she would have had a pilomotor or psuedomotor response in conjunction with her complaints – hair standing on end or immediate color change for example – which was not present during his exam. Dr. Noren also noted that Petitioner complained of pain to touch even at the heel of her right foot – where her skin was the thickest and it was not involved with her normal left foot complaints. Dr. Noren reiterated his conclusion that she suffered from an injury to the peroneal nerve which was at MMI at the time of his exam. (RX.8, 25).

Petitioner testified her CRPS has been life changing (Tr. 44). She has good days and bad days (Id.). She can no longer go running, bike, go roller skating or bowl (Id., 45). There are days when it feels like her whole body

is on fire (Id.). She can also no longer read for long periods of time (Id.). Her food and drink intake has changed substantially because several different things now make her sick (Id., 46). She has trouble with memory and concentration (Id.).

On good days she tries to get out and shop or see friends, but will later pay for such activity in terms of the CRPS flaring up (Id., 47-48). Another issue Petitioner described was she only wears sandals now and has for several years (Id., 48). This is well documented throughout her medical records. She noted that the pain is the worst in the winter months or when there are weather changes (Id., 49).

CONCLUSIONS OF LAW

Regarding the issue (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

After careful review and consideration, the Arbitrator finds Petitioner has established that she suffers from CRPS as a result of her March 27, 2011 work-injury while employed by Respondent. The Arbitrator bases this decision on the preponderance of evidence contained in the record including Petitioner's credible testimony and the medical evidence and opinions.

The Petitioner's March 27, 2011 workplace accident in which a pallet fell on her left foot, is undisputed (Tr. 12-13). In the first weeks following the accident, she was diagnosed with a foot contusion. Since then, she has met with numerous physicians who have diagnosed CRPS:

- Dr. James Dukelow (podiatrist) first diagnosed CRPS on April 29, 2011 (Px 9);
- Dr. Mark Cirella (an anesthesiologist) diagnosed CRPS on May 16, 2011 (Px 4);
- Dr. Sean MacKenzie (physiatrist) diagnosed Reflex Sympathetic Dystrophy, another term for CRPS, on October 11, 2011 (Px 4);
- Dr. Mitchell Weisberg diagnosed Petitioner with CRPS on an unknown date before Petitioner's Calmare injections (Px 13);
- Dr. Udit Patel, (D.O.) diagnosed CRPS on March 2, 2015 (Px 7);
- Dr. Lowell Weil Jr., (podiatrist) diagnosed CRPS on February 6, 2017 (Px 11);
- Dr. Michael Rock (anesthesiologist) diagnosed CRPS on April 25, 2017 (Px 2);

Regarding causation, treating physicians, Dr. Mark Cirella testified Petitioner's current condition of ill-being was related to her March 27, 2011 work-injury (Px 3 at 24-25) and Dr. Michael Rock testified, "I believe the pallet falling on her foot causing a crushing injury" was the cause of her issues (Px 1 at 30);

The Arbitrator finds Dr. Noren's opinions less persuasive given the overwhelming amount of evidence to the contrary, including the opinions of the first two Section 12 examiners:

- Dr. Eugene Lipov, an anesthesiologist, on September 20, 2011, noted Petitioner's complaints of burning pain in the left foot radiating up the tibia and to the knee as well as freezing temperature, swelling, hypersensitivity and discoloration. On exam, Dr. Lipov noted discoloration of the left lower leg and left foot, minimal swelling and a slight temperature difference. Dr. Lipov's working diagnosis was CRPS noting Petitioner's exam findings consistent with her subjective complaints. The doctor recommended a lidocaine infusion and if such failed to provide relief, a trial dorsal column stimulator. Dr. Lipov

opined that Petitioner's left foot injury was causally related to the work injury that occurred on March 27, 2011;

- Dr. Stephen Weiss, an orthopedic foot surgeon, on February 24, 2014 evaluated Petitioner noting decreased temperature of the left foot with some puffiness and swelling. He noted a diagnosis of possible CRPS and testified Petitioner's left foot condition is secondary to the work incident in question.

The Arbitrator notes objective findings of temperature changes in Petitioner's left foot are documented throughout Petitioner's treatment records dating back to her early treatment. Dr. Noren confirmed a temperature differential between Petitioner's feet of 6.4 degrees but dismissed such finding as a vascular issue from lack of use. The Arbitrator finds Dr. Rock's testimony, that such temperature differential is a hallmark of automatic dysfunction between the two limbs, credible and convincing.

Regarding the surveillance footage Respondent introduced, Mr. Scott Walden who testified he performed surveillance on Petitioner 20 times from October of 2016 through July of 2018, following Petitioner for roughly 160 hours (Tr. 83). Mr. Walden's reports and testimony indicated that at times he was following Petitioner and sometimes was following an "unidentified female, believed to be the claimant" (Rx. 15-20).

Mr. Walden noted instances where he made observations which made it in to his reports, but he did not have video surveillance (Tr. 110, 114).

There are several instances which show Petitioner ambulating with an inverted foot and a significantly altered gait:

- Respondent's Exhibit 12 shows a woman, possibly of Petitioner, walking with an inverted foot on May 23, 2012 at the 3:08 and 4:39 mark;

- Petitioner is seen in the April 16, 2013 video walking with a significant limp at the :30 second mark, at the 1:55 mark and at the 4:25 mark;

- Respondent's Exhibit 21 and 23 shows the woman, presumably Petitioner, walking with what looked like a considerable limp on April 14, 2018 at the 10:31 mark of the video (Rx 21) and on July 4, 2018 while walking upstairs at the 1:15 mark of the video (Rx 23).

Regarding Petitioner's credibility, Petitioner presented at the hearing as an exceedingly credible witness. Her presentation and overall demeanor left the Arbitrator with the impression that she was sincere and trustworthy. When the Arbitrator reviewed the medical records in this case, Petitioner's testimony was corroborated by such.

The Arbitrator notes Petitioner's worked for Respondent for 12 years without being disciplined or filing any type of claim against Respondent (Tr. 11 & 49).

As noted above, the Arbitrator finds that Petitioner has sustained her burden with respect to causation in this case.

Regarding issue (J), were medical services provided reasonable and necessary, the Arbitrator finds the following:

Having found Petitioner's current condition of ill-being is related to her work-injury on March 27, 2011, the Arbitrator finds all medical care provided to Petitioner regarding this accident has been necessary and reasonable.

The Arbitrator finds Respondent is liable for unpaid bills to IWP totaling $2,941.11. These bills shall be paid to Petitioner per the statutory medical fee schedule.

Regarding the issue (K), Is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

Based on a preponderance of the credible evidence contained in the record, the Arbitrator awards prospective medical care which is reasonable and necessary to relieve Petitioner of her pain consistent with the recommendations of Dr. Rock including a neuropsychological evaluation, and if deemed necessary, a trial spinal cord stimulator.

Regarding the issue (L), What temporary benefits are in dispute, the Arbitrator finds the following:

Petitioner testified she is seeking temporary total disability benefits for the dates April 8, 2011 through April 15, 2011 and May 22, 2011 through October 16, 2018. The medical records show she was either authorized off work on those dates or released to restricted work which Respondent would not accommodate. Respondent offered no witnesses to dispute those dates.

The Arbitrator finds Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 8, 2015 through April 15, 2011 and May 22, 2011 through October 16, 2018. This represents 387 and 4/7th weeks of disability at a rate of $255.91 totaling $99,183.29.

Respondent is due a credit for TTD already paid in the amount of $24,894.72.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSEMARIE GOODWIN,

20IWCC0586

Petitioner,

vs. NO: 17 WC 27097

CATERPILLAR LOGISTICS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission hereby corrects the Decision of the Arbitrator on page 1, paragraph 6 to state that Petitioner continued working through July 3, 2017. The Commission further corrects the Decision of the Arbitrator at page 4, paragraph 1 to state that Petitioner worked for Respondent through July 3, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 22, 2020 is hereby affirmed and adopted with the foregoing corrections. Petitioner failed to prove accident or causation for her bilateral hand condition; therefore, all benefits are denied.

20IWCC0586

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

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

DATED: OCT 2 - 2020
SJM/msb
o: 8/26/20
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

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

GOODWIN, ROSEMARIE Case# **17WC027097**
Employee/Petitioner

20IWCC0586

CATERPILLAR LOGISTICS SERVICES
Employer/Respondent

On 1/22/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2094 CATERPILLAR INC
DARCY K GIBSON
100 N E ADAMS ST
PEORIA, IL 61629-7310

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA

20 IWCC0586

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ROSEMARIE GOODWIN
Employee/Petitioner

v.

CATERPILLAR INC.
Employer/Respondent

Case # 17 WC 27097

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Peoria**, on **December 18, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

20IWCC0586

On the alleged date of accident, **June 24, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,716.80**; the average weekly wage was $**684.40**.

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

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

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

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

ORDER

Petitioner failed to prove accident or causation for her bilateral hand condition; therefore, all benefits are denied.

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

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

Signature of Arbitrator Gerald Granada

1/17/20
Date

JAN 22 2020

20IWCC0586

FINDINGS OF FACT

This case involves Petitioner Rosemarie Goodwin, who alleges injuries sustained while working for Respondent Caterpillar Inc. on June 24, 2017. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) causation; 3) TTD; 4) medical expenses; and 5) prospective medical care.

Petitioner testified she began working for Respondent on May 8, 2006 as a material handler. Her job title with Respondent never changed, though she moved to a couple different areas in the Morton, IL facility. Petitioner began her employment with Respondent in a section named System 76. In this job, she picked parts for orders that needed to be filled. She would use a cart and totes to gather parts of all sizes and build boxes to fill with parts or put bigger parts on pallets. She testified she was using her hands all day. Petitioner was in this job until April 1, 2010, when she went out on leave for an earlier workers compensation injury on her right elbow.

Petitioner returned to work from this leave on March 21, 2011. She had work restrictions at that time and therefore was moved out of the System 76 area. She began working in the repack area which involved retrieving and repackaging parts or containers that had been damaged. This work accommodated her restrictions and involved no overtime. Petitioner worked in this area until she went out on another leave on March 14, 2016.

Petitioner testified she had another work injury involving her left elbow on February 15, 2016. She was off work for treatment of this left elbow condition on March 14, 2016 and returned to work on June 19, 2017. Dr. Jeffery Garst, an orthopedic upper extremity surgeon, treated Petitioner for this condition from March 2016 through September 2017. (RX6) At Respondent's request, Petitioner was also seen for an IME by Dr. Mitchell Rotman, an orthopedic upper extremity surgeon, on May 1, 2017. (RX4) The workers compensation claim for Petitioner's left elbow injury was settled on February 12, 2019. (RX2)

Petitioner testified when she returned to work for Caterpillar on June 19, 2017, she began working in a third area, but could not remember the name of that area. She was doing work she was not familiar with but still involved picking parts and filling orders but with different equipment. Since she had not been in this area before, Petitioner testified she was required to train on the job when she first returned. She thought she remembered training for a couple hours.

Petitioner testified that during her return to work she was having trouble doing the work as she hadn't worked in quite some time. She stated she would drop parts and was having trouble with her hands. Petitioner initially testified that sometime after her return to work on June 19, 2017, she reported to her supervisor, DJ Brown, that she had symptoms in her hands and was taken to the facility medical department where she reported the condition to the nurse. Petitioner continued working through Friday, June 30, 2019. It was on that date, Petitioner reported she needed to go to the medical department to ice her left elbow. Her supervisor DJ Brown was not at work that day, and another supervisor, David Hamilton, was covering that area.

On cross examination, Petitioner testified she was not sure if she reported her hand condition to DJ Brown or David Hamilton, but she knew she went to the medical department for it. She testified she was not sure if she filled out an incident report for her hand condition and did not have a copy of an incident report regarding her hand. Petitioner also testified she did not remember reporting having a back injury nor filling out an incident report for a back injury. Petitioner later testified on redirect examination, that she remembered reporting a back injury but could not say whether she actually reported her hand condition to anyone.

Petitioner testified the handwritten job description she prepared for her attorney (PX2) was accurate for her job duties. On cross examination, Petitioner testified the hand written job description was only for the job duties before the repack area.

Petitioner testified that she had been having problems with numbness and tingling in her hands since 2013, after her first elbow surgery. On cross-examination, she testified that Respondent's IME, Dr. Rotman was the first doctor with whom she discussed the numbness and tingling in her hands on May, 1, 2017. At that time Dr. Rotman suggested Petitioner get nerve testing.

Petitioner returned to see her treating doctor, Dr. Garst, on July 24, 2017 with continued complaints of left elbow pain and also bilateral hand pain and numbness. Petitioner confirmed at this visit that the IME doctor previously told her to have the nerve testing for her hands. Dr. Garst ordered the testing and Petitioner was seen again by Dr. Garst on September 11, 2017. At this visit he opined the EMG/NCV showed carpal tunnel syndrome.

Upon referral by her attorney, Petitioner began treating with Dr. Blair Rhode on October 4, 2017. At this visit, Petitioner told Dr. Rhode her hand symptoms developed in 2013, but her treatment had been directed to her elbow and not her hands. Dr. Rhode noted Petitioner's hand condition was work related if Petitioner's historical timeline (symptom onset in 2013) and exposure from 2006-2013 was appropriate. Dr. Rhode recommended conservative treatment, administered an injection to the right wrist and issued light duty work restrictions.

Petitioner underwent physical therapy for her right hand per Dr. Rhode's recommendation. On November 15, 2017, Dr. Rhode noted Petitioner was no longer able to deal with her condition and ordered surgery. At that point, Petitioner was taken off work by Dr. Rhode. Petitioner's right hand carpal tunnel release was performed on January 30, 2018. Petitioner testified the surgery relieved her of the right hand symptoms. Petitioner has been seen at Dr. Rhode's office on a monthly basis since this surgery. On March 6, 2018, Dr. Rhode ordered a left carpal tunnel release.

As of the day of trial, Petitioner had not yet had the left-sided surgery and continues to be off work. Petitioner testified she still wants the left-sided surgery.

On cross examination, Petitioner testified Dr. Rhode had kept her off work since the right hand surgery because he knew she no longer worked for Respondent. Petitioner also testified she had not returned to work because she did not want to jeopardize her workers' compensation claim.

Dr. Mitchell Rotman, Respondent's IME, examined Petitioner on May 1, 2017, as a result of the previous left elbow injury. In his initial report dated May 1, 2017, his addendum report dated August 17, 2017, and in his deposition, Dr. Rotman noted repeatedly that Petitioner exhibited symptom magnification and there was a lack of objective evidence for any of her complaints. Dr. Rotman testified that in Petitioner's examination on May 1, 2017, her response to the two point discrimination test indicated she had no feeling in any of her fingers. Petitioner said she had numbness and tingling in her fingers and had no feeling in her fingers. Based on this, Dr. Rotman recommended Petitioner get nerve studies. Dr. Rotman testified Petitioner's hand condition could not be related to her two weeks of work in June 2017 because she had the numbness and tingling complaints before that time. In addition, the hand condition could not be related to the earlier injury of 2016 because there was no mention of any hand symptoms in any medical records prior to his exam on May 1, 2017. He further testified that neither the hand symptoms nor any need for nerve studies could be related to work because Petitioner first mentioned the symptoms while she was not working and she had not worked for over a year.

In his deposition, Dr. Blair Rhode testified, for his causation opinion, it is very important that Petitioner had hand symptoms in 2013, as reported to him. He noted this was because her dose of exposure was shrinking because she had been off work so much. Dr. Rhode testified his causation opinion was based on the handwritten job description Petitioner had filled out and her statement her hand symptoms began in 2013. It was his understanding Petitioner had hand symptoms in 2013 and they waxed and waned over the course becoming worse after her return to work. Dr. Rhode stated that the two weeks of work in 2017 would not be enough to aggravate a condition without the symptoms existing in 2013.

Testimony of David Hamilton

David Hamilton testified at trial that he took Petitioner to the Respondent's medical department for ice on June 30, 2017, and that while he was waiting for her, she reported to the nurse she had a back injury. While in medical, Petitioner filled out an Employee Incident Report stating she had piercing pain in her low back from pulling a hoist. She also reported to the nurse that her low back symptoms had been present since she returned to work on June 19, 2017. Petitioner did not mention any hand condition. (RX1) On June 30, 2017, after Petitioner reported a back injury, Mr. Hamilton began the normal process of conducting a safety review of the job Petitioner was doing at the time. A summary of this review is contained in an Action Item Matrix, which details the back injury reported on June 30, 2017, the action items required by the process and any results of actions taken. (RX3) Mr. Hamilton testified he would have done the same safety process if Petitioner had reported a hand injury and that Petitioner did not report a hand injury nor did she complain of hand symptoms to him.

Testimony of Dick Eugene Brown (aka DJ Brown)

DJ Brown was Petitioner's supervisor at the time of her return to work in June 2017. Mr. Brown testified that Petitioner spent a week training on new the job when she returned in June, 2017. During the training week, Petitioner would have gone from completely shadowing another employee for the first couple of days and gradually moved to doing the work herself by Friday. Mr. Brown testified Petitioner would have started actually doing some of the work Wednesday afternoon. He also testified Petitioner would need to go to the facility medical department to get ice for her left elbow during this time. When she needed ice, she would let Mr. Brown know and they would get her to the medical department. Mr. Brown also testified that Petitioner never reported a hand injury or hand complaints to him. He was not aware of Petitioner's alleged hand condition. He was aware of her elbow condition and allowed Petitioner to go to medical when asked to ice her elbow. During Petitioner's two week return to work in June 2017, Mr. Brown testified he would have been at work with Petitioner every day except for June 30, 2017. On that day, he was in Michigan for a job interview. Mr. Brown testified he was not aware of any problems Petitioner was having with her job duties from June 30, 2017 forward, nor was he aware she was dropping parts. Mr. Brown denied that Petitioner reported any complaints regarding her job to him. He testified he was aware of the safety process David Hamilton had initiated for Petitioner's reported low back injury.

20 IWCC0586

CONCLUSIONS OF LAW

WITH REGARD TO ISSUES (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT AND (F), IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE ALLEGED INJURY, THE ARBITRATOR MAKES THE FOLLOWING FINDINGS:

The Arbitrator finds that the Petitioner failed to meet her burden of proof on the issues of accident and causation. This finding is based on the testimony of the various witnesses and the medical evidence – both of which cast doubt on Petitioner's credibility with regard to her claims. Petitioner is alleging injuries to her hands due to repetitive trauma and alleges an accident date of June 24, 2017. However, the evidence does not support Petitioner's claim. The evidence show that Petitioner was off work for over a year due to a left elbow injury, before she returned to work for Respondent on June 19, 2017 and actively worked through June 30, 2017. The evidence further shows that the Petitioner did not actually perform her job duties for at least for the first 2.5 days after her return because of training. Therefore, Petitioner is alleging a repetitive trauma injury occurred in a window of 7.5 work days. She claims that she informed her supervisor that she was having problems with her hands some time in June, 2017. However, this claim is clearly rebutted by the testimony of both DJ Brown and David Hamilton – both of whom confirm that Petitioner complained of problem with her elbow or her back and sought attention with the Respondent's medical department for these complaints. Both supervisors confirm that Petitioner never reported any problems with her hands. Mr. Hamilton testified that as a matter of routine, he would have processed the necessary investigation and reports if Petitioner had informed him of any hand problems at work. But even putting aside the unrebutted testimony of Mr. Brown and Mr. Hamilton, the medical evidence casts further doubt on Petitioner's claims.

Petitioner testified her hand symptoms began in 2013 after her right elbow surgery. She is relying on the opinions of Dr. Rhode to establish an accident date in June 2017 and causation. Dr. Rhode's opinion hinges on whether Petitioner actually had hand symptoms in 2013 because he stated the short period of work in June 2017 would not be sufficient for an injury. The evidence doesn't support Petitioner's 2013 history of symptoms for many reasons. Petitioner was treating with Dr. Garst for prior worker injuries to her elbows, and there is no report of any hand problems during this treatment. The first medical evidence or report of symptoms regarding Petitioner's hands was to Dr. Rotman at her IME on May 1, 2017. Dr. Rotman opined that since Petitioner had the hand symptoms prior to returning to work in June 2017, the condition is not related to her work at that time. He also stated since Petitioner didn't have hand symptoms until May 1, 2017, after being off work for a year and three months, the condition would not be related to her work before the leave. Based on the facts at trial and the totality of the medical evidence, the Arbitrator finds persuasive the opinions and reports of Dr. Rotman with regard to the question of causation.

Therefore, the Arbitrator concludes that the Petitioner failed to prove that she sustained a work accident on June 24, 2017 or that her current condition is causally related to her employment.

Based on the Arbitrator's findings on the issues of accident and causation, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tambra Lindsey,

Petitioner,

vs.

No. 16 WC 25448

20IWCC0587

Schneider, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner, a 39-year-old loader, testified she injured her back while loading boxes on April 19, 2016. She was initially treated at St. Joseph Medical Center, where she complained of pain radiating down her low back to her buttock and into her left leg. She followed up with Dr. Hickombottom, who diagnosed her with a lumbar strain with spasms and ordered physical therapy. When that treatment proved unsuccessful in relieving Petitioner's symptoms, she sought care from spine specialist, Dr. Pelinkovic.

Dr. Pelinkovic ordered a lumbar MRI, which on July 28, 2016 revealed a broad-based disc protrusion at Petitioner's congenital 6th lumbar vertebrae. When Petitioner saw Dr. Pelinkovic on August 15, 2016, she was still experiencing back and buttock pain. Dr. Pelinkovic, upon noting the disc protrusion on Petitioner's MRI, referred her to a pain management physician.

Respondent did not authorize the pain management treatment, based upon the opinion of its Section 12 expert, Dr. Wehner, who opined Petitioner had reached MMI on July 18, 2016. That delayed Petitioner's treatment; initial appointments scheduled with pain management physician, Dr. Sayeed, were cancelled. Petitioner was finally able to see Dr. Sayeed on March 20, 2017. Dr. Sayeed's treatment included epidural steroid injections to Petitioner's low back.

Petitioner also returned to Dr. Pelinkovic. who prescribed another course of physical therapy. Following that therapy, Petitioner saw Dr. Pelinkovic a final time on July 7, 2017, at which date he released her from care at MMI.

The Arbitrator relied upon the opinions of Respondent's Section 12 experts, Dr. Wehner and Dr. Singh, in concluding Petitioner's low back condition was only causally related to her work accident through July 18, 2016. The Arbitrator awarded Petitioner 12-6/7 weeks of temporary total disability, from April 20, 2016 through July 18, 2016. The Arbitrator denied Petitioner's medical expenses incurred after July 18, 2016, other than the bill for her July 28, 2016 lumbar MRI.

The Commission views the evidence somewhat differently than the Arbitrator. In July 2016, Petitioner was still experiencing symptoms related to her accident. Due to her persistent pain, Dr. Pelinkovic ordered an MRI on July 8, 2016. When he next saw Petitioner on August 15, 2016, he noted the disc protrusion, and even contemplated a microdiscectomy. Instead, however, he referred Petitioner for pain management treatment, which Petitioner was unable to begin until March 2017. From that time until Dr. Pelinkovic released Petitioner at MMI on July 7, 2017, she underwent low back treatment which included physical therapy and lumbar injections. That treatment improved her condition. The Commission finds Petitioner's medical treatment through July 7, 2017, was causally related to her work accident.

In so concluding, the Commission finds the treating records of Dr. Pelinkovic more useful and persuasive than the opinions of the parties' Section 12 experts, in determining the date Petitioner attained MMI. Accordingly, the Commission modifies Petitioner's MMI date to July 7, 2017. The Commission also modifies the Arbitrator's award of medical expenses to include all those incurred by Petitioner for treatment of her low back condition through July 7, 2017.

Finally, the Commission finds Petitioner has proven she is entitled to temporary total disability benefits from April 20, 2016 through April 10, 2017, the dates she claimed on her Request for Hearing sheet at arbitration. During that period, Petitioner was authorized off work and/or given work restrictions which Respondent was unable to accommodate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified. Respondent shall pay Petitioner the sum of $330.01 per week commencing April 20, 2016 through April 10, 2017, totaling 50-6/7 weeks, that being the period of temporary total incapacity from work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical expenses is modified. Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred in treating her low back condition between April 19, 2016 and July 7, 2017, as provided by §8(a) and §8.2 of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 5 - 2020
o-08/20/2020
MP/mcp
68

Marc Parker

Marc Parker

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LINDSEY, TAMBRA
Employee/Petitioner

Case# **16WC025448**

SCHNEIDER INC
Employer/Respondent

20IWCC0587

On 9/11/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.26% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2687 · COWGILL & CERNUGEL LAW OFFICES
THOMAS E COWGILL
1000 ESSINGTON RD SUITE 108
JOLIET, IL 60435

0075 POWER & CRONIN LTD
RORY McCANN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

20IWCC0587

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TAMBRA LINDSEY
Employee/Petitioner

v.

SCHNEIDER, INC.
Employer/Respondent

Case # **16** WC **25448**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **August 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 19, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,910.23**; the average weekly wage was $**495.01**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**4,868.26** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**4,868.26**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$1,392.35,** as provided in Sections 8(a) and 8.2 of the Act.

Respondents shall pay Petitioner temporary total disability benefits of **$330.02**/week, for **12-6/7** weeks, commencing **April 20, 2016 through July 18, 2016,** pursuant to §8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$297.01**/week for **15** weeks, because the injuries sustained caused **3% loss of use of person as a whole,** as provided in Section **8(d)2** of the Act.

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

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

Signature of Arbitrator

9/10/18
Date

SEP 11 2018

Attachment to Arbitrator Decision
(16 WC 25448)

STATEMENT OF FACTS

20IWCC0587

Petitioner was hired by Respondent, Schneider, Inc., in December of 2015 as a picker and a loader. Petitioner testified that on the night of April 19, 2016, she was loading boxes at work. Petitioner stated she felt back pain after picking up the boxes. Petitioner provided that she reported the pain to her supervisor, continued working and when the pain increased, she called for a taxi that took her to the emergency room at Presence St. Joseph Medical Center in Joliet. At the Presence St. Joseph Medical Center Emergency Room, she was seen by Dr. Livak. According to the records submitted, Petitioner presented with back pain after lifting heavy boxes at work. Petitioner reported that her pain was moderate, exacerbated by movement and was diffusely spread throughout the lower back. Her neurological exam was grossly normal. Lumbar x-rays demonstrated moderate narrowing of the L5-L6 level. There was no acute abnormality. X-ray films of the thoracic spine were normal. Petitioner was discharged from the emergency room early the next morning with a diagnosis of back pain, prescribed medication and told to follow up with her primary care physician. (PX 2) Petitioner testified that she walked home from the emergency room, because she had left her car at the Schneider parking lot.

Petitioner testified that she was involved in a motor vehicle accident on April 22, 2016. Petitioner again presented to Presence St. Joseph Medical Center's Emergency Room, where she complained of back and left shoulder pain. X-rays of her shoulder was taken, which were unremarkable. Petitioner was discharged on April 23, 2016 at 3:42 a.m. She was prescribed medication and diagnosed with back and left shoulder pain.

That same day, April 23, 2016 at 12:32 p.m., Petitioner presented to the Edward Immediate Care in Bolingbrook, complaining of low back pain. Records show Petitioner "comes in for the evaluation of her low back pain and mid back pain which she had since yesterday after she was involved in MVA." She denied pain in her neck or shoulders or tingling and numbness in her legs, and indicated the discomfort was mostly in her left mid and lower back. The emergency room physician, Dr. Aziz, informed Petitioner that "this is all muscle pain since she had a sudden jerk during her MVA." Petitioner was discharged with a clinical impression of low back strain. (RX 4)

On April 25, 2016, Petitioner presented back to DuPage Medical Group Occupational Health, where she saw Dr. Hickombottom. According to the doctor's record, Petitioner presented with complaints of persistent pain in the lower back along with posterior, left shoulder pain. She reported her current pain level at 5 on a scale of 10. The doctor noted Petitioner worked loading boxes weighing in the range of 5-60 pounds. He reported that she lifted boxes from crates/flat beds and stack above head. She developed pain in the lower back and left shoulder that increased in severity on April 20, 2016. On examination, there was no pain on palpation over the thoracic spine. For the lumbar spine, he noted tenderness on palpation at L4-5 and L5-L6 with mild spasms on the left side. Neurological examination for the lumbar spine was essentially negative. The examination of her left shoulder demonstrated 4/5 motor strength on the left and the right. Petitioner denied any prior history of injury to the affected areas. Dr. Hickombottom diagnosed Petitioner with acute lumbar strain with spasms and left shoulder pain. He returned her to work with "restricted duty" and recommended she follow-up in one week. According to Dr. Hickombottom, "...the information received from the patient and physical exam performed today this injury does meet criteria to justify as a work-related injury." (PX 1, pp. 148-151)

Petitioner saw Dr. Hickombottom on May 2, 2016. She reported a pain level of 5 on a scale of 10 and his examination again revealed tenderness at L4-L5 and L5-L6, particularly in the adjacent paraspinal muscles bilaterally. The neurological testing with straight leg raising, Faber test, and motor strength testing were all essentially unremarkable. Her gait was deemed to be "normal with appropriate stress". Dr. Hickombottom

assessed lumbar strain with spasms and left shoulder sprain, supraspinatus. Her restricted duty work status remained and she was referred for physical therapy. The doctor also recorded that she should attain maximum medical improvement in four (4) weeks. (PX 1, pp.143-145)

Petitioner first presented for physical therapy at DuPage Medical Group on May 4, 2016. Her reported pain rating was 5 out of 10 at best and 7 out of 10 at worst. (PX 1, pp. 139-141) On May 11, 2016, Petitioner reported pain rating was 4 out of 10. She also reported pain while tying her shoes and cleaning her bathtub at home. on May 11, 2016. (PX 1, pp. 134-135) On May 17th, she was "slightly non-compliant," and reported her back was feeling better on May 19, 2016. (PX 1, pp. 129-133) Subsequent physical therapy notes indicate frequent guarding, crying and irritability demonstrated by Petitioner.

Petitioner returned to Dr. Hickombottom on May 23, 2016. Petitioner reported improvement after therapy. She again reported 5 out of 10 on her pain scale for both the lower back and the shoulder. Her neurological examination was again negative and the diagnosis of lumbar strain and left shoulder sprain remained the same. Dr. Hickombottom recommended 6 additional sessions of physical therapy and continued her restricted work status. (PX 1, pp. 124-126)

Petitioner returned to Dr. Hickombottom on June 7, 2016. She reported an increase of pain to 8 out of 10. The doctor retained the same work restrictions of no lifting over 10 to 15 pounds, and declared that her expected maximum medical improvement date was "undetermined at this time". He referred her to Dr. Pelinkovic, a spine specialist, for consult. Dr. Hickombottom discontinued physical therapy and recommended a home exercise program for strengthening and range of motion. (PX 1, pp. 111-114)

Two scheduled appointments with Dr. Pelinkovic were cancelled. Petitioner again saw Dr. Hickombottom on June 28, 2016. On examination, her presentation appeared to have improved. She described a pain level of 4 to 5 on scale of 10. Her gait was determined to be normal, as was her motor strength. The doctor imposed sedentary work restrictions of alternate sitting, standing and walking as tolerated. (PX 1, pp. 107-109)

On July 18, 2016, Petitioner presented to Dr. Pelinkovic. Petitioner gave a history of back pain after lifting 40-pound boxes at work. She reported a pain score of 4 out of 10 with pain in her lower back and left buttocks. She reported a sensation of "grasshoppers" in her back. Dr. Pelinkovic noted she had a non-antalgic, well-coordinated gait and she performed a normal heel walk and toe walk. Lower strength was normal, patella and Achilles reflexes were symmetrical bilaterally. There were no sensory deficits in either leg. X-rays obtained were read to show spondylosis at L4-5 and L5-S1 Dr. Pelinkovic's impression was lumbar strain. The doctor ordered an MRI of the lumbar spine and kept her off work. (PX 1, pp. 101-105)

At Respondent's request, Petitioner attended a Section 12 examination with Dr. Wehner on July 18, 2016 (RX 2). According to her report dated same, Dr. Wehner reviewed medical records and performed an examination. Dr. Wehner noted that during examination, Petitioner was observed to self-limit when bending to the mid knee area. Her strength was 5/5 and her straight leg raise test was negative. Dr. Wehner opined Petitioner sustained "...low back pain with a soft tissue injury based on the mechanism of injury, the lack of any radicular complaints and the lack of any clinical findings." Dr. Wehner specifically opined that a causal relationship existed stating, "[b]ased on subjective complaints of low back pain after a lifting episode, it would be consistent with a soft tissue injury and would be causally related." Dr. Wehner noted that Petitioner's subjective complaints expressed during the examination, including feeling something running across her back had no relationship to the injury. Dr. Wehner opined that Petitioner reached maximum medical improvement and any further subjective complaints could no longer be attributed to the April 19, 2016 work injury. Further, Petitioner was capable of returning to work full duty. (RX 2, Dep Ex. 2) Respondent terminated benefits consistent with this report.

Petitioner underwent an MRI at DuPage Medical Group on July 28, 2016. (PX 1, p. 92) On August 15, 2016, she returned to Dr. Pelinkovic. The doctor reviewed the MRI films indicating same demonstrated an "[i]solated small broad-based disc protrusion at L5-6; otherwise no frank lumbar disc extrusion, specific nerve root compression, or edematous neuro swelling." According to his office note, the doctor indicated she should "follow up after treatment with pain management" and "[t]here is also the option of undergoing a microdiscectomy at the L5/6 level." Oddly, the doctor also stated, "[Petitioner] may follow up on an as needed basis..." (PX 1, pp. 98-99)

Two appointments were scheduled for pain management on November 3, 2016 and December 7, 2016. Both of them were cancelled. (PX 1, pp. 96-97)

At Respondent's request, Dr. Wehner authored an addendum report on December 16, 2016. According to Dr. Wehner, she was requested to review Petitioner's MRI films from July 28, 2016 as well as records from Dr. Pelinkovic. After reviewing the MRI films, she noted same demonstrated significant disc degeneration at what was labeled L5-S1 with disc desiccation and disc space narrowing. She noted that there was some bulging – protrusion at this level in association with the degenerative changes. She also noted there was no compression of the thecal sac or nerve root on the axial images. Dr. Wehner opined that the degenerative changes were not caused by the accident or an acute event. She confirmed her prior opinions that Petitioner reached MMI and that no specific work injury caused her complaints. (RX 2, Dep. Ex 3)

Respondent also requested a record review report from Dr. Kern Singh, a spine specialist with Midwest Orthopedics at Rush. His report was authored December 22, 2016. Records and the MRI films were provided for his review. Dr. Singh provided that he reviewed the MRI films, indicating same demonstrated loss of disk signal intensity at L5-L6 with a central disk protrusion with no evidence of disk herniation, no evidence of central or foraminal stenosis and no evidence of nerve root compression. Dr. Singh opined Petitioner had a lumbar muscular strain that resolved and a L5-L6 central disk protrusion, pre-existing and degenerative in nature without neural impingement. The doctor specifically stated the lumbar strain was attributable to the work place accident. Dr. Singh felt Petitioner was not a surgical candidate, stating, "[t]he patient has non-anatomic pain. She has an L5-L6 disk protrusion without nerve root compression and a microscopy is not indicated in a situation in which there was no neural impingement without radiculopathy." Dr. Singh further opined that Petitioner was at maximum medical improvement and could return to work full duty without restrictions. (RX 1)

Petitioner next appeared for an appointment with Dr. Pelinkovic on March 13, 2017. Petitioner reported back pain and burning in posterior thighs. Also noted was that she "wants surgery but WC is delaying." Petitioner reported that her pain levels were 10 out of 10. Dr. Pelinkovic examined Petitioner and again referred her to pain management. (PX 1, pp. 93-95)

Petitioner did eventually follow up for pain management with Dr. Sayeed on March 20, 2017 (PX 1). At that encounter, she was first seen by Physician's Assistant Ryan Enger. Petitioner presented with complaints of left low back and gluteal pain that radiated to the posterior thigh to the knee. She rated her pain 7 out of 10. During examination she was able to normal heel walk and normal toe walk. It was noted that Petitioner did not appear to be in any acute distress. Bilateral lumbar range of motion was positive with flexion and extension. Dr. Sayeed reviewed the previously taken MRI indicating same demonstrated disc herniation at L5-6 with disc height loss. Dr. Sayeed offered and performed a lumbar epidural steroid injection for a diagnosis of lumbar radiculopathy. (PX 1, pp. 80- 92) Petitioner testified that the injection did not provide any relief.

Petitioner returned to the pain management of DuPage Medical Group, where she saw Physician's Assistant Enger on April 4, 2017. Petitioner reported that she had no relief from the injection and that it caused her headaches when she would lie down. PA Enger discussed repeating the injection procedure, but "she [was]

not interested in any treatment short of a definitive solution." Petitioner was "...return[ed] to spine to discuss options." (PX 1, pp.76-78)

Petitioner returned to Dr. Pelinkovic on April 10, 2017. His note of that date indicate Petitioner "...has mostly of left leg pain." Her pain rating was documented as 10 out of 10. The doctor diagnosed L5/6 disc protrusion and stated, "I would not recommend any surgery at this time point. There is a central protrusion but no instability." He indicated that she should follow up "on an as needed basis." She was also offered a return to physical therapy. (PX 1, pp. 72-75)

Petitioner began another course of physical therapy on April 19, 2017. Petitioner's physical therapy intake of April 21, 2017 indicates that she reported pain at 3/10 at best, 8/10 at worst, and 5/10 at the time of the interview (PX 1, 4/21/17) She reported that she was only able to walk between 30 minutes and one hour without pain, and any kind of lifting caused immediate pain. She reported that he pain was gradually worsening. According to the records submitted, Petitioner participated in therapy sessions for a total of twelve visits, culminating on June 2, 2017 when she complained that the physical therapy was making her worse, at which point she was discharged from therapy (PX 1, pp. 14-69)

Petitioner returned to Dr. Sayeed on June 14, 2017. A repeat injection was carried out that day. (PX 1, pp. 4-14) At the trial, Petitioner testified that this injection also did not give her any relief.

Petitioner returned to Dr. Pelinkovic on July 7, 2017. The doctor noted Petitioner complained of back discomfort and vibration feeling in her buttocks which increased when stepping on her left leg. The doctor stated her "...discomfort changed in character after the second injection." Petitioner rated her pain at 8 out of 10. Dr. Pelinkovic wrote, "I informed her that in my hands there is no surgical procedure [that] would relieve the symptoms stated above." He recommended a second opinion and stated "I do think that she is at MMI. She has residual pain secondary to her injury." The doctor indicated Petitioner could follow-up on an as needed basis and released her to return to restricted work. (PX 1, pp. 1-3)

At her attorney's request, Petitioner attended a Section 12 examination with Dr. Jeffery Coe, an occupational medicine, on October 3, 2017. Dr. Coe was later deposed on January 15, 2018. Dr. Coe testified that Petitioner presented with a history that on April 19, 2016, she lifted a box that weighed between 30 and 60 pounds, and while lifting it she felt a snap and pain in her lower back. (PX 3, p. 9) Dr. Coe confirmed with her the medical care she received, including with Dr. Hickombottom and with Dr. Pelinkovic. (PX 3, pp. 16-18) Dr. Coe noted Dr. Pelinkovic's July 18, 2016 notes wherein the doctor noted mild to moderate degenerative change in Petitioner's lower lumbar spine. He noted the interpretation of the MRI scan showing a disc protrusion at L5-L6 as well as Petitioner's referral for pain management. Dr. Coe chronicled the two epidural steroid injections Petitioner underwent with Dr. Sayeed and also noted that the medical records disclosed that Petitioner had pre-existent degenerative arthritis and a degenerative disc disease in the lumbar spine. Lastly, Dr. Coe provided that Petitioner told him that she had no past medical history with respect to lower back complaints prior to her April 19, 2016 work accident (PX 3, pp. 18-26)

Dr. Coe's physical examination included the observation that Petitioner walked with a slightly broad-based gait with her legs spread out widely and bending slightly forward. He testified that people do that to "...brace their back from movement..." He testified that she was painful over the left sacroiliac joint and over the left sided lower lumbar facet joints. She had myofacial lower lumbar trigger points, worse on the left than the right. Dr. Coe testified that Petitioner's examination revealed no neurologic abnormalities. Dr. Coe stated the examination was valid with no indication of symptom magnification (PX 3, pp. 28-33)

Dr. Coe opined that Petitioner suffered an aggravation of pre-existing degenerative disc disease, "...chronic multifactorial lower back pain..." which arose from the protruding disc at L5-L6 and also "...from the

areas of her back surrounding that portion in the back..." (PX 3, p. 34) He further opined that Petitioner's work activities on April 19, 2016 were a factor causing a breakdown at L5-6 and the multifactorial lower back pain. Dr. Coe testified that it would be impossible to determine whether the disc protrusion did or did not pre-exist the accident unless there was an MRI that pre-existed the accident. Dr. Coe stated, "...there is nothing on the MRI scan of July 18, 2016 that would allow you to make a determination as to time of that disc break down and disc protrusion." Dr. Coe stated, "[Petitioner had no significant problem with her back before this date of accident...and based on everything that the treating physicians recorded, those symptoms began with [Petitioner's] work activities on April 19, 2016." (PX 3, pp. 35-37)

Dr. Coe opined that Petitioner was not MMI on the basis that she considered herself still a patient of Dr. Pelinkovic. He stated that in absence of further medical interventions such as pain management, physical therapy or surgery, Petitioner was at maximum medical improvement. (PX 3, p. 38) The doctor opined that as of the date of examination, Petitioner should be subject to a sedentary work restriction, lifting no more than 10 pounds on an occasional basis. (PX 3, p. 41)

Respondent's Section 12 examiner, Dr. Wehner, testified via deposition in this matter. (RX 2) Dr. Wehner took a history from Petitioner and then performed an examination. According to Dr. Wehner, Petitioner related the circumstances of her April 19, 2016 work accident and the April 21, 2016 automobile accident. Dr. Wehner stated Petitioner reported level was seven (7) to eight (8) out of ten (10) in her low back area where she said it burns. The doctor also indicated Petitioner reported feeling like grasshoppers crawling across her back. (RX 2, pp.7-9) During the examination, Dr. Wehner recorded moderate pain with palpation of the lumbosacral area, left worst than right. Petitioner's gait and heal-toe maneuvers were normal. Dr. Wehner stated Petitioner self-limited herself in bending to the mid-knee area, and her extension was 20 degrees. Her hip range of motion and straight leg raising did not produce any pain. Dr. Wehner stated Petitioner's neurologic exam, i.e., straight leg raising reflexes, motor strength and sensations, were all normal. Dr. Wehner also indicated Petitioner complained of left shoulder pain subsequent to the automobile accident of April 21, 2016. (RX 2, pp. 10-11) Dr. Wehner testified that she diagnosed Petitioner with "low back pain consistent with a soft tissue injury based on a mechanism of injury, the lack of any radicular complaints, and the lack of any clinical findings." Dr. Wehner did not relate any shoulder complaints to the work accident because Petitioner expressed no shoulder symptoms until after the automobile accident of April 21, 2016. Dr. Wehner testified that the medical treatment Petitioner received for her back was causally related to the work accident. She also declared that as of the Section 12 examination, Petitioner was capable of returning to work full duty, assuming the necessity to lift boxes up to at least 50 pounds, as of the date of examination. (RX2, pp. 13-14)

Dr. Wehner testified that she authored an addendum report on December 16, 2016 after receiving the July 28, 2106 MRI report as well as two (2) notes from Dr. Pelinkovic. Dr. Wehner testified the MRI denstrated some disk degeneration at the lowest segments. She indicated that at the lowest disk, there was some disk desiccation and some height loss. There was a broad-based protrusion which she indicated was not pressing on the nerves. She also provided there was no disk herniation. (RX 2, pp. 15-16)

Dr. Wehner testified with respect to Dr. Pelinkovic's discussing the option of performing a discectomy at the L5-L6 level. In her testimony, Dr. Wehner indicated that she was not sure why the doctor would do surgical intervention on a disk protrusion. The doctor stated, "...the recommendation for surgery are based on subjective complaints. And when you are talking about excising a herniated disk, you are usually looking for somebody that has radicular symptoms or pain going down their leg. You are looking for clinical findings. The most beneficial one that would correlate with a good outcome would be positive straight leg raising, or reflex changes, or motor strength changes, and then a radiologic finding where there is a disk pressing on the nerve root displacing the nerve root. But a mild – but a protrusion that does not press on any nerve is not a surgical condition, in and of itself, meaning that if it doesn't have any other findings with it, you would never operate on that." (RX 2, pp. 17-

18) Dr. Wehner testified that Petitioner was capable of returning to work full duty and that Petitioner was no longer requiring casually related medical treatment after July 18, 2016. (RX 2, p.19)

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

Treatment prior to the date of Dr. Wehner's first Report of July 18, 2016 was not disputed by Respondent. Both, Dr. Wehner and Dr. Singh agreed with the diagnosis of "a lumbar muscular strain" which had resolved, leaving her able to return to work without restriction. Both of Respondent's physicians opined that the protruding disc at L5-L6 disclosed in the MRI of July 28, 2016 was a pre-existing degenerative condition that was not in any sense related to the accident, nor did the accident cause any condition of ill-being that required further medical care after July 28, 2016.

After a review of the records from DuPage Medial Group, the Arbitrator does not find much variation from the ultimate diagnosis opinions of Dr. Hickombottom and Dr. Pelinkovic when compared to Dr. Wehner and Dr. Singh. The consensus is that she suffered a lumbar strain. Although at different times additional diagnoses of sciatica and radiculopathy were considered, this was not objectified on MRI. The imaging demonstrates she has an extra spinal level (L6) and she had a small protrusion at L5-6.

Petitioner solicited an opinion from Dr. Coe. The Arbitrator does not find his opinions persuasive overall. Dr. Coe took a history from Petitioner that she suffered an injury of an acute nature, specifically, that she felt a snap at one specific moment while working on April 19, 2016. This is controverted by the medical records. The providers who initially took her history did not record a "snap." In fact, she clarified on May 4, 2016 to Therapist Galon that she "didn't feel sudden pain or trauma except she felt the back starting to get stiff and tight as she progressed" (PX 1). The records in total suggest she performed her normal job duties and gradually felt pain throughout the day. There does not appear to be an acute physical breakdown event, such that a "snap" occurred.

The Arbitrator does not find Petitioner to be an accurate or reliable historian and thus places far greater weight on the findings and opinions of Dr. Wehner, Dr. Singh, as well as her treating doctor, Dr. Pelinkovic. Petitioner adamantly maintained under oath that Dr. Pelinkovic was considering her for surgical recommendation, but his records do not reflect that. Repeatedly, he failed to confirm she was a surgical candidate (3/13/17, 4/10/17, 7/7/17). On April 10, 2017, Dr. Pelinkovic confirmed a diagnosis of L5/6 disc protrusion only. He stated, "there is a central protrusion but no instability," and "I would not recommend any surgery at this timepoint." On July 7, 2017, Dr. Pelinkovic's diagnosis is "residual pain secondary to her injury" and stated, "In my hands there is no surgical procedure [that] would relieve the symptoms stated above.

The Arbitrator notes the record contain multiple examples of Petitioner demonstrating anger or displeasure with her treating providers, including doctors and physical therapists. They also chronicle guarding and odd symptom reports, such as sensations of "jumping" in her leg and grasshoppers on her back. Dr. Wehner testified she's never seen a patient with a similar complaint (RX 2, p. 9) and it was hard to use that description to explain a person's back problem. The Arbitrator is persuaded by Dr. Wehners opinion that Petitioner's pain complaints are not verifiable with her subjective complaints, her clinical exam, the radiographic findings or the time course.

The Arbitrator is persuaded by the opinions rendered by both Dr. Wehner and Dr. Singh and as such finds that Petitioner suffered a lumbar strain during the course of her employment on April 19, 2016. Further, the Arbitrator finds that Petitioner temporarily aggravated Petitioner's pre-existing degenerative disc disease at L5-L6 and that the condition resolved by the time that Dr. Wehner issued her first report on July 18, 2016. The Arbitrator finds Petitioner reached maximum medical improvement on July 18, 2016. However, the Arbitrator does order Respondent to cover the lumbar MRI obtained on July 28, 2016 as that diagnostic was reasonable and

necessary to confirm Dr. Wehner's findings of MMI. All further benefits, including TTD and medical treatment thereafter are not causally related.

With respect to J.) Were the medical services provided to the Petitioner reasonable and necessary, the Arbitrator finds the following:

Respondent paid all medical expenses prior to the July 18, 2016 Section 12 examination of Dr. Wehner. Having found that any medical treatment, except the July 28, 2016 MRI study, received after said examination is not causally related to the accident herein, the Arbitrator denies Petitioner's request for medical expenses thereafter.

With respect to K.) What temporary benefits (TTD) are in dispute, the Arbitrator finds the following:

Incorporating the Arbitrator's findings in paragraph F.) above, the Arbitrator awards Petitioner 12-6/7 weeks of TTD commencing April 20, 2016 to July 18, 2016. Respondent is entitled to a credit of $4,868.26 for amounts already paid.

With respect to L.) What is the nature and extent of the injury, the Arbitrator finds the following:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

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

With regard to Section 8.1(b)(i) of the Act, the 8.1(a), the Arbitrator finds neither party presented an AMA Impairment Rating. Therefore, the Arbitrator gives no weight to this factor.

With regard to Section 8.1(b)(ii) of the Act, the occupation of the injured employee, the Arbitrator finds Petitioner was employed as a picker and a loader for Respondent. Petitioner has not presented clear evidence from her treating physician, Dr. Pelinkovic as to her work capacity and whether he believes any disability would relate to the accident. Dr. Wehner and Dr. Singh both are in agreement that Petitioner was capable of working full duty. Therefore, the Arbitrator gives less weight to this factor.

With regard to Section 8.1(b)(iii) of the Act, the age of the injured employee at the time of the injury, the Arbitrator finds Petitioner was 39 years old at the time of the accident. As Petitioner is a younger individual, she will live with disability for an extended period. As such, the Arbitrator gives greater weight to this factor.

With regard to Section 8.1(b)(iv) of the Act, the employee's future earning capacity, the Arbitrator finds that no evidence was submitted regarding Petitioner's future earning capacity. As such, the Arbitrator gives no weight to this factor.

With regard to Section 8.1(b)(v) of the Act, evidence of disability corroborated by the treating medical records. The Arbitrator notes that the medical consensus of Dr. Wehner and Dr. Singh that Petitioner suffered a strain, reached MMI on July 18, 2016 and is capable of full duty work without requiring formal medical care. The Arbitrator assigns greater weight to this factor.

Based on all the above, the Arbitrator finds that Petitioner sustained a loss to the extent of 3% of the person as a whole under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dayton Messerschmidt,

Petitioner,

20IWCC0588

vs.

NO: 12 WC 15998

Villa Di Roma/Illinois State Treasurer
As Ex-Officio of the Injured Workers'
Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 30, 2019, is hereby affirmed and adopted.

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

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

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the

20IWCC0588

benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 6 - 2020
o: 9/17/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MESSERSCHMIDT, DAYTON
Employee/Petitioner

Case# **12WC015998**

VILLA DI ROMA/ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

20IWCC0588

On 5/30/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.32% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0000 VILLA DI ROMA
1620 HARRISON AVE
ROCKFORD, IL 61104

0000 ALLIANCE INS AGENCY
PO BOX 7474
ROCKFORD, IL 61126

4971 ASSISTANT ATTORNEY GENERAL
DANIEL KALLIO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20IWCC0588

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Dayton Messerschmidt
Employee/Petitioner

v.

Villa Di Roma / Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **12 WC 15998**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty,** Arbitrator of the Commission, in the city of **Rockford**, on **May 10, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 8, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$201.50.**

On the date of accident, Petitioner was **17** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **201.50** / week for **2** weeks, from **December 9, 2011 through December 22, 2011**, as provided in Section 8(b) of the Act.

- The respondent shall pay $ **$4,995.55** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay the Petitioner the sum of **$201.50** / week for a period of **10.75** weeks, as provided in Section 8 (e) of the Act, because the injuries sustained caused **5% loss of use of the right leg.**

Injured Workers' Benefit Fund

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

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

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

Carolyn M. O'Neely

Signature of Arbitrator

5/28/19
Date

MAY 30 2019

FINDINGS OF FACT

The parties appeared for hearing on May 10, 2019 Petitioner was represented by counsel. Petitioner attempted to provide notice of the hearing date to Respondent, Villa Di Roma, by certified mail. (Px. 9). As Respondent did not have workers' compensation insurance coverage, the Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund. (Px. 5). Respondent Villa Di Roma was not present or represented at trial.

Petitioner testified that on December 8, 2011, he was 17 years old and employed by Villa Di Roma as a part time cleaner and cook. Petitioner testified that he had worked for Villa Di Roma for several months. He had been hired by Tony, the owner of Respondent and trained by Maria, Tony's daughter. Petitioner testified that he learned of the job through Maria. Petitioner testified that he cleaned, mopped, and washed dishes. He also cut cheeses and meat, and made dough for pizza. Petitioner indicated that Respondent is a restaurant, serving food and alcohol. There were 6-8 employees including cooks, waitresses, and delivery drivers. Petitioner testified that he worked part time 4 days per week starting at 10 a.m. or 11 a.m. to 4 p.m. and until 6 p.m. on Fridays. He testified that earned $7.75 per hour. Petitioner would clock in and out. He did not wear a particular uniform other than an apron and was required to wear black shoes. Petitioner was paid, in cash by Tony, every Friday.

On December 8, 2011, Petitioner arrived in the morning and was working with Maria. Maria asked Petitioner to mop the floor. While mopping, Petitioner slipped on water from the mop, twisting and popping his right knee. Petitioner thought he had broken his leg and yelled out. A waitress and another customer responded to Petitioner's yell and called an ambulance and Petitioner's mother.

Petitioner was transported by ambulance to OSF St. Anthony Hospital by the Rockford Fire Department. (Px. 1). The ambulance records note that he was mopping the floor when he slipped on the water and fell to the ground. The record noted that Petitioner described hearing his knee pop. The paramedic noted obvious deformity of the knee. (Px. 1). The ER records noted a right knee injury at work. A reduction was performed using extension, immobilizer was placed, and Petitioner was given crutches and told to ice and elevate his knee for the next three days. He was also advised to follow up with Dr. Hastings the following week. (Px. 1). No

Petitioner was seen by Dr. Hastings on December 12, 2011. His injury while working at Respondent was described. It was noted that he has dislocated the patella. Petitioner was advised to discard the crutches and to weight bear as tolerated using the immobilizer. Physical therapy was prescribed to improve motion and restore quad strength. Petitioner was told to attend PT for the next 10 days. (Px. 2). He was to follow up again thereafter in 12 days to discuss discontinuing the immobilizer. During his period of prescribed PT Petitioner was restricted to return to "sit down" work only. PX 2, p. 21, 27. Petitioner did not specifically testify whether he asked Respondent for "sit down" work. Dr. Hastings records further indicate that Petitioner was a "no show" for his appointment on December 23, 2011. PX 2, p. 22. Petitioner testified that he did not undergo the physical therapy when it was prescribed because he didn't have means to pay for it.

Petitioner was seen again by Dr. Hastings on January 9, 2012. At that time, he reported improvement in his knee pain. Petitioner was not wearing a brace and noted that he could walk and climb stairs without significant pain. He reported discomfort while kneeling. PX 2. On physical exam there was no effusion, no joint line tenderness, full active knee extension, flex to 115 degrees, and slight weakness on the right

with knee extension against resistance. PX 2, p. 22. Dr. Hastings noted that Petitioner sustained a patellar dislocation. He further noted, "Being young, he has responded well to essentially no treatment. ... he will continue to advance his activities as needed. I offered to send him to physical therapy under his Illinois Public Aid but we both agree he is doing well at this time. If he wishes to pursue therapy he will contact me." PX 2, p. 22. Petitioner did not seek additional care after his January 9, 2012 visit with Dr. Hastings. Petitioner testified that he was released to full duty on this date.

Petitioner testified that he returned to work for Respondent for a few weeks after being released from care. He was not paid while he was off work for 2 weeks. He returned to his regular job until Tony told him that he would not be paying for his medical bills. As such, Petitioner felt it was time to find another job.

Petitioner testified that he did not have problems with his right knee. He testified that he continues to experience pain in his knee at times. After being on his feet for extended periods of time, he has pain. Petitioner still wears a knee brace almost every day that he works. He has a sharp pain under the kneecap if he tries to run. Petitioner takes ibuprofen for knee pain. Petitioner currently works in automotive repair and will notice increased knee pain after a day of work.

Notice of the trial date was attempted on the Respondent. (Px. 9). Petitioner offered a certificate of noncompliance from the NCCI confirming that Respondent failed to have insurance. (Px. 5, 6). Finally, Petitioner offered exhibits 3 and 4 which were the original Application for Adjustment of Claims and the amended Application for Adjustment of Claims, adding the Injured Workers Benefit Fund is a party to the case. (Px. 3, 4). All issues were in dispute at the time of trial.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

The Arbitrator finds that the Petitioner and Respondent were operating under and subject to the Illinois Workers' Compensation Act on December 8, 2011. Petitioner testified that he was hired by Tony, the owner of Villa Di Roma, to work at the restaurant as a cleaner and cook.

Petitioner testified that his job as a cook and cleaner for Villa Di Roma involving cutting of food. The restaurant served alcohol beverages to customers. The provisions of the Act apply automatically to any business or enterprise serving food to the public for consumption on the premises wherein any employee as a substantial part of the employee's work uses handcutting instruments or slicing machines or other devices for the cutting of meat or other food or wherein any employee is in the hazard of being scalded or burned by hot grease, hot water, hot foods, or other hot fluids, substances, or objects. Petitioner worked in a restaurant serving food and drinks. Therefore, the work is subject to the Illinois Worker's Compensation Act consistent with 820 ILCS 305/3(14).

The Arbitrator finds Petitioner's testimony credible and finds automatic coverage under Section 3 of the Illinois Workers Compensation Act on December 8, 2011.

B. ☒ Was there an employee-employer relationship?

The Arbitrator finds that there was an employee-employer relationship between Petitioner and Villa Di Roma. Petitioner testified that he was hired by the owner to work as a cook and cleaner on a part-time basis. The Arbitrator finds that based on the unrebutted testimony, Petitioner generally worked 4 days per week for approximately 27 hours, working from 10 or 11 a.m. until 4 p.m. and until 6 p.m. on Fridays. Petitioner was paid an hourly rate of $7.75 per hour, in cash. He was paid every Friday, by the owner, Tony. All of this information went uncontradicted at trial. Further, the Arbitrator finds Petitioner credibly testified to his employment relationship with Respondent. Therefore, the Arbitrator finds that there was an employee-employer relationship between Petitioner and Villa Di Roma on December 8, 2011.

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent on December 8, 2011. Petitioner testified that on that day, while working at Villa Di Roma, he slipped on a wet floor while mopping. He was performing activities required by his employment. Petitioner's ambulance and emergency room records indicated that he fell while at work as well, resulting in a dislocated right patella. Petitioner was transported from Villa Di Roma by the Rockford Fire Department and his records consistently note the same injury described at hearing.

Petitioner's testimony regarding the accident was uncontradicted at trial and is clearly supported by the treatment records. His treatment was immediate and contemporaneous. As such, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Villa Di Roma on December 8, 2011.

D. ☒ What was the date of the accident?

The Arbitrator finds that the date of the accident was December 8, 2011. Petitioner was seen in the Emergency Room at OSF St. Anthony Hospital shortly after the injury. He was transported by ambulance to the hospital shortly after his injury occurred. The medical records support an injury date of December 8, 2011. As it conforms to proofs, the Arbitrator finds that Petitioner's accident occurred on December 8, 2011.

E. ☒ Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner provided timely notice of the accident to Respondent, Villa Di Roma. Petitioner testified that he yelled out when hurt. The owner's daughter, Maria, was working with him when he was injured. Petitioner was transported from Villa Di Roma, by ambulance. Shortly after returning to work, the owner, Tony, advised Petitioner that he would not be paying his medical bills. No evidence was provided to contradict Petitioner's testimony. Therefore, the Arbitrator finds that timely notice was given by Petitioner to Villa Di Roma.

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to the injury that occurred on December 8, 2011. On the date of injury, Petitioner was transported to and immediately seen at the emergency room for his right knee injury. His patella was reduced and he was given an immobilizer and crutches due to his dislocated patella. He was treated thereafter by Dr. Hastings and recommended physical therapy. Petitioner testified that he had not had any prior issues with his right knee before his injury at Villa Di Roma. Petitioner did not undergo the recommended physical therapy as he did not have funds to pay for it and Respondent refused to pay his medical bills. He testified to some ongoing pain with exertion, difficulty running, and the need to wear a brace on his right knee while working. Petitioner's conservative treatment following his injury is consistent with the fall that he described and his diagnosis. Therefore, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to his December 8, 2011 injury.

G. ☒ What were Petitioner's earnings?

The Arbitrator finds that Petitioner earned $201.50 per week for Villa Di Roma. Petitioner testified that he worked part time 4 days per week starting at 10 a.m. or 11 a.m. to 4 p.m. and until 6 p.m. on Fridays. He testified that earned $7.75 per hour. Accordingly, the Arbitrator finds that an average of 26 hours a week is appropriate. As such, the Arbitrator finds that Petitioner earned an average weekly wage of $201.50 for Villa Di Roma.

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

Petitioner testified that he was born on March 23, 1994 and was 17 years old at the time of his injury. Respondent offered no evidence to refute Petitioner's testimony. His medical records confirm his date of birth. Therefore, the Arbitrator finds that Petitioner was 17 years old at the time of his injury on December 8, 2011.

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

Petitioner testified that he was single, with no dependent children under the age of 18 at the time of his December 8, 2011 injury. The Respondent offered no evidence to refute Petitioner's testimony. Therefore, the Arbitrator finds that Petitioner was single and with no dependent children at the time of his December 8, 2011 injury.

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries he sustained on December 8, 2011. The Arbitrator finds that no evidence was presented to refute the reasonableness and necessity of the medical treatment received by Petitioner for his injuries. Therefore, the Arbitrator finds that the treatment Petitioner received at OSF St. Anthony Medical Center and Orthopedic Arthritis & Clinic (Dr. Hastings), as well as the ambulance charges with the City of Rockford, were reasonable, necessary and causally related to his injury.

Based on the Arbitrator's findings that the Petitioner suffered an injury that arose out of and in the course and scope of his employment for Respondent, Villa Di Roma, and that the treatment Petitioner received was reasonable, necessary, and causally related, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 8. Respondent is liable for the $4,198.50 at OSF St. Anthony Medical Center, $740.80 at City of Rockford, and $56.25 to Illinois Department of Public Aid (for services at Orthopaedic Arthritis & Clinic. As such, the Respondent shall pay for these unpaid medical bills totaling $4,995.55 pursuant to Sections 8 and 8.2 of the Act.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from December 9, 2011 through December 22, 2011 for a total of 2 weeks at the minimum TTD rate of $201.50 per week. Petitioner testified that he did not work for a few weeks following his injury. Specifically, the medical records indicate that on December 12, 2011, Dr. Hastings recommended physical therapy for 10 days and limited Petitioner to sit down work for 10 days while in therapy. However, Petitioner did not attend physical therapy between December 12 and December 22, 2011 testifying that he could not pay for the treatment and Respondent would not pay for his medical care. Thereafter, Petitioner missed a visit to Dr. Hastings on December 23, 2011 and did not return to Dr. Hastings until January 9, 2012 when no restrictions were given and Petitioner was returned to full duty work. The discrepancy as to whether Petitioner pursued "sit down" work with Respondent subsequent to December 12, 2011 is not lost on the Arbitrator. Nonetheless, given the physical therapy prescription the Arbitrator finds that Petitioner was temporarily and totally disabled for the period of 2 weeks commencing December 9, 2011 through December 22, 2011. Petitioner is not entitled to TTD thereafter in that the record is devoid of restrictions on Petitioner's abilities or any additional recommended treatment subsequent to December 22, 2011.

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

Having found that Petitioner's work injury of December 8, 2011, to have occurred in the course of his employment for Respondent, Villa Di Roma, and to be the cause of Petitioner's current condition of ill-being, the Arbitrator finds that Petitioner sustained a permanent loss of use the right leg. No AMA impairment rating was provided and no weight is given to that factor. With regard to Petitioner's age, occupation and economic impairment, the Arbitrator notes that Petitioner has not shown economic impairment resulting from his injury, that he currently works in automotive repair and has many years left in the work force. The Arbitrator gives these factors some weight. With regard to his evidence of disability, Petitioner testified to a lack of need for ongoing treatment since his release from care for his knee though he does continue to experience pain with exertion and kneeling. He testified to a sharp pain in his right knee if he attempts to run. He testified that he must wear his knee pads to work every day and that he takes ibuprofen for pain after a hard work day. As such, the Arbitrator orders the Respondent to pay Petitioner 10.75 weeks of permanent partial disability benefits pursuant to Section 8(e) of the Act at the Permanent Partial Disability rate of $201.50, finding that his injury resulted in 5% loss of use of the right leg.

M. N. Penalties and Credit to Respondent

Petitioner did not request penalties or fees in this matter and the issue was given no consideration by the Arbitrator. Respondent has made no payment for which credit could be given so the Arbitrator has given no consideration to the issue of credit to Respondent.

O. The Injured Workers' Benefit Fund is Liable.

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Petitioner submitted sufficient credible evidence that Respondent-Employer was not insured at the time of the injury. Such evidence consists of the National Council on Compensation Insurance Certificate. (PX6). Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer. (PX7).

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Green,
Petitioner,

vs. No. 17 WC 02494

City of Chicago, Dept. of Aviation,
Respondent.

20IWCC0589

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of accident, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

FINDINGS OF FACT

On Friday, January 6, 2017, Petitioner was employed as a motor pool driver for Respondent, sweeping around airports, driving tow trucks, and removing snow, as needed. On that date, he was lifting a trailer hitch when he injured his right arm and neck. He felt immediate tingling and pain and reported the accident to his supervisor, who provided paperwork and advised him to go to the emergency room. Petitioner testified that he left work and went home instead, because it was already 6:00 p.m., and it would likely take him a couple of hours to get home using public transportation.

Petitioner testified that he did report to the emergency room at Mercy Hospital the following morning, Saturday, January 7, 2017. He was not asked to complete, and did not refuse to take, a drug test. Petitioner only left the hospital after being released.

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The emergency room records show that Petitioner arrived at 11:19 and left at 14:45. There was no mention of a drug screen in the medical record nor did the hospital bill contain an itemization for a rejected test on the emergency room invoice. A Doppler test indicated that Petitioner had not had an aneurysm. Petitioner returned to work on Monday, January 9, 2017 and was advised to follow up at MercyWorks the next day.

On Tuesday, January 10, 2017, Petitioner went to MercyWorks. He reported to Dr. Anderson that he injured his neck and right arm lifting a trailer hitch. A mass on his right inner biceps was noted, and his symptoms were found to be consistent with cervical radiculopathy. An alcohol breathalyzer test was administered with negative results. Petitioner also testified that he took a drug test, but the results were inconclusive. Petitioner was advised to return to MercyWorks after xrays were completed to undergo an additional supervised drug test. Petitioner explained that after sitting for two hours in the x-ray waiting room, he was tired and sore. He also testified that the weather was bad and he was taking public transportation. He simply did not feel like returning to the clinic. Instead, Petitioner went home when he was finished with his x-rays.

A MercyWorks Occupational Medicine Clinic invoice for the date of service January 10, 2017 lists a charge for a breathalyzer test for alcohol and "Drug Screen, Did Not Complete, Refusal." RX2. The office note for January 10, 2017 contains the following:

> The patient never returned to the clinic after going for x-rays. The patient was supposed to return to the clinic to complete a drug screen. No further recommendations can be made because the patient failed to return to MercyWorks.

Petitioner returned the following day, Wednesday, January 11, 2017, and underwent a supervised drug test. The billing sheet shows a charge for "Drug Screen, Non-Nida 7-Panel." The test result for the January 11, 2017 test was positive for cocaine.

Petitioner testified that he had used cocaine the Sunday after his work accident, but he had not used cocaine before the accident.

CONCLUSIONS OF LAW

The Arbitrator did not specifically conclude whether Petitioner suffered an accident at work as claimed or provide any analysis of the issue of accident. Rather, the Arbitrator focused solely on whether the rebuttable presumption in Section 11 of the Act applied. The Arbitrator then found that the Petitioner refused to take a drug test on January 7, 2017 and that, pursuant to §11 of the Act, a rebuttable presumption arose that he was intoxicated and that said intoxication was the proximate cause of his injury. The Arbitrator further found that Petitioner failed to rebut the presumption citing his positive drug test taken five days after the accident and the absence of any evidence in the record tending to show he was not under the influence at the time of his accident. Relying on the rebuttable presumption provision in §11, the Arbitrator found that Petitioner's accident did not arise out of his employment with Respondent. In concluding that Petitioner refused a drug test on January 7, 2017, the Arbitrator relied upon a billing statement indicating a drug test refusal. The Commission views the evidence and analyzes the rebuttable presumption application differently.

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In order to obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Section 11 of the Act, which provides, *inter alia*:

> ***If at the time of the accidental injuries*** there was .08% or more by weight of alcohol in the employee's blood, breath, or urine ***or if there is any evidence of impairment*** due to the unlawful or unauthorized use of … (2) a controlled substance listed in the Illinois Controlled Substances Act, ***or if the employee refuses to submit to testing*** of blood, breath, or urine, ***then there shall be a rebuttable presumption*** that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. The employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries.

(Emphasis added.)

The alleged date of accident is January 6, 2017. Respondent contends that Petitioner's failure to obtain a drug screen within 24 hours as required by its policies establishes that he refused a drug test. However, the emergency room records and bills from January 7, 2010 do not indicate that Petitioner was offered, or refused, a drug test. The billing statement on which the Arbitrator relied to find that a rebuttable presumption of intoxication was established did, in fact, list a charge for a drug test/refusal. Nevertheless, the date of service for that bill was January 10, 2017, four days after the alleged accident at work.

Petitioner's testimony comports with the itemization of the Mercy medical bills. Not until January 10, 2017 does a charge appear for a drug screen. RX2. On that date, the billing statement showed a charge for a breathalyzer test for alcohol and "Drug Screen, Did Not Complete, Refusal." These charges were for Petitioner's treatment at the MercyWorks Occupational Medicine Clinic, not for the emergency room. The January 10, 2017 office note reflects that Petitioner did not return to the clinic for a drug screen after going for x-rays. The following day, the billing sheet shows a charge for "Drug Screen, Non-Nida 7-Panel."

While the events surrounding Petitioner's visit to MercyWorks on Tuesday, January 10, 2017 could be construed as a refusal, and Petitioner did test positive for cocaine on Wednesday, January 11th, the probative value of either of these events is limited given their remoteness from the alleged accident. No evidence suggests that Petitioner showed signs of impairment at or near the time of his alleged accident. The emergency room records are devoid of a drug screen order or any signs of impairment noted by the evaluating emergency room physicians or nurses within 24

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hours of his alleged accident. Moreover, we note that Respondent did not offer the testimony of Petitioner's supervisor that Petitioner showed signs of impairment on the day of his accident.

The Commission cannot conclude that a refused drug test four, or a positive cocaine test five, days after an alleged accident bears on Petitioner's condition at that time such that the rebuttable presumption of intoxication can be applied. Thus, after considering the entire record, the Commission finds that the Section 11 presumption should not have been applied in this case.

Finally, having found that the presumption does not apply, which is Respondent's only defense to the claim, the Commission turns to the issue of accident. The parties stipulated that the hearing was limited to the issue of accident and Respondent's intoxication defense. The sole issue before the Commission on review is accident. The record reveals that Petitioner was employed as a motor pool driver for Respondent on January 6, 2017. He was lifting a trailer hitch when he felt immediate tingling and pain. Petitioner's testimony regarding the mechanism of injury and the onset of symptoms while engaged in a work-related activity is uncontroverted. Moreover, the emergency room record from the following day confirms Petitioner's testimony about the mechanism of injury and onset of symptoms. Thus, the Commission finds that the evidence establishes that Petitioner was injured in the course of his employment and that the injury arose out of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 25, 2019 is hereby reversed.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980), but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 6 - 2020

o-08/20/20
mp/dak
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Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

GREEN, MICHAEL
Employee/Petitioner

Case# **17WC002494**

CITY OF CHICAGO DEPT OF AVIATION
Employer/Respondent

20IWCC0589

On 1/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1480 MARC J SHUMAN & ASSOC LTD
JOSEPH D WOOD
105 W ADAMS ST SUITE 2800
CHICAGO, IL 60603

1886 LEAHY EISENBERG & FRAENKAL LTD
SANTIAGO J ECHEVESTE
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MICHAEL GREEN
Employee/Petitioner

v.

CITY OF CHICAGO DEPT. OF AVIATION
Employer/Respondent

Case # 17 WC 2494

Consolidated cases: N/A

20IWCC0589

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **NOVEMBER 14, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

On the date of accident, Petitioner was **61** years of age, ***single*** with **1** dependent children.

By stipulation, all other issues are ***reserved.***

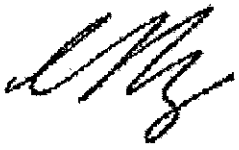
ORDER

Petitioner has failed to by a preponderance of the evidence that his accident arose out of and in the course of his employment for the reasons set forth in the findings of fact and conclusions of law.

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

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

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



Signature of Arbitrator

1-25-19
Date

ICArbDec19(b)

JAN 25 2019

FINDINGS OF FACT

Background

Michael Green ("Petitioner") alleged injuries arising out of and in the course of his employment with the City of Chicago ("Respondent") occurring on January 6, 2017. On November 14, 2018, the parties proceeded to arbitration on the issue of accident. Ax1. The parties stipulated on the record that the hearing was limited to the sole issue of accident and Respondent's intoxication defense. The parties expressly reserved all other issues. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified that he worked as a motor pool driver for department of aviation and his duties included operating equipment, snow removal, using a street sweeper around airports and using a towing mechanism. On the date of the accident, January 6, 2017, Petitioner alleged that around 6pm, he injured his right arm when he pulled up on a trailer hitch while working with a magnet at the airport. He felt an immediate tingling and pain up the right arm. He reported his incident immediately and was told by his supervisor to go to the emergency room. Petitioner instead went home for the night and went to the ER in the morning.

Petitioner recalled going to Mercy Works the next morning where he completed an x-ray and was there for 3 to 4 hours. He gave a similar history of injury and said that he eventually left. Petitioner testified that Mercy Works did not ask him to do a drug test and that he did not refuse it. When asked whether he refused testing, Petitioner testified that no one asked and that he left only after being released. T. at 18. Petitioner said he was told to follow up.

Records show that on Saturday January 7, 2017, Petitioner presented to the emergency room at Mercy Hospital. Rx5:1-2, 6-7. Time in was 11:19 and time out was 14:45. Doppler exam ruled out aneurysm. Billing records submitted into evidence without objection showed drug screening was not completed and the word "refusal" appeared next to the line item. Rx2. Petitioner testified he then took his follow up note to the Department of Aviation the following Monday and that the Department then gave him a follow up to MercyWorks on Pulaski. T. at 19.

On Tuesday January 10, 2017, Petitioner presented to MercyWorks. Rx5:14-16. Petitioner related he injured his right neck and arm on January 6 after trying to lift a trailer hitch for the back of the truck that he was driving. He felt a pinch under his right arm. The medical note indicated that Petitioner sought emergency medical attention. *Id.* at 14. A mass was noted on the right inner bicep. At that time, symptoms were consistent with cervical radiculopathy. He denied prior problems. Diagnosis was right cervical strain with radiculopathy. Under treatment and plan, it was noted that Petitioner never returned to the clinic after undergoing x-rays. He was supposed to return to the clinic to complete a drug screen. No for the recommendations could be made at that time because Petitioner failed to return to MercyWorks. *Id.* at 8. He was released to return to work full duty. *Id.* An alcohol breathalyzer test was completed on that date. Rx1:2. Diagnosis was right cervical strain with radiculopathy. Rx5. Petitioner testified that they did a drug test this day, but it was inconclusive, so he had to do his "piss" test in front of the doctor. T. at 20.

On Wednesday January 11, 2017, Petitioner returned to MercyWorks. Rx5:4, 17. Records indicated that Petitioner left the clinic because he just left. He did not offer a reason for leaving. He had the same complaint as the prior day. Diagnosis was unchanged. On this same date, the collection of the drug test was completed. Rx1. On Friday January 13, 2017, the final results indicated positive for cocaine and was verified

by the medical review officer. Rx1. On January 19, 2017, Petitioner returned to MercyWorks. Rx5:20-21. He hired a lawyer and was awaiting approval for physical therapy. Diagnosis was unchanged.

On Thursday February 2, 2017, Petitioner followed up with MercyWorks. Rx5:5, 12-13. Petitioner still had severe right neck pain, tingling in numbness down the right arm to the right hand. His claim was still under investigation. Diagnosis was unchanged. Prescription were refilled. On February 16, 2017, Petitioner presented to Midwest Anesthesia and Pain Specialists and gave a history of injuring his arm after lifting a trailer hitch at work. Px1. He denied drug use as noted in the hand-written intake form and in the dictated medical note. Petitioner continued to follow up and was eventually released to return to work without restriction on March 20, 2017. *Id.* On February 23, 2017, Petitioner failed to attend his follow up appointment with Mercy Works. Rx5. On March 23, 2017, EMG/NCV testing noted a similar history of injury. Px1. Impression was radiculitis affecting C5-T1 on the right.

On cross examination, Petitioner testified he resigned in September 2018. Petitioner agreed that after x-rays, Dr. Anderson instructed him to do a blood screen. T. 30. On questioning by the Arbitrator, Petitioner testified that his initial urine test came back wrong, and he was told verbally by a woman he would then need to take another urine test in front of the doctor. Petitioner said he then took that test and that is the phone call he received indicating that his test was positive. Petitioner testified he would have used cocaine the Sunday after his work accident but that he had not used cocaine before then.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only witness to testify at trial. The Arbitrator had an opportunity to observe his demeanor and the Arbitrator concludes that Petitioner was not credible in his testimony as to the version of events that transpired surrounding the drug and urine testing, whether he was aware he was to take any drug or urine testing, whether he voluntarily left his examination as well as the results of his testing. Petitioner's testimony was self-serving at times and conflicting when compared to other portions of his testimony as well as his medical record.

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

The Arbitrator incorporates the findings of facts as though fully set forth herein. At trial, the sole issue in dispute, by stipulation, is whether Petitioner's accident arose out of and in the course of her employment with Respondent. For the foregoing reasons, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that his accidental injuries arose out of and in the course of his employment with Respondent. Here, Respondent asserted an intoxication defense, which is governed by Section 11 of the Act. It provides, in relevant part, as follows:

> "No compensation shall be payable if (i) the employee's intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. . . if the employee refuses to submit to testing of blood, breath, or urine, then there shall be a rebuttable presumption that the employee was intoxicated *and* that the intoxication was the proximate cause of the employee's injury. . . [however] "the employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication

was not the sole proximate cause *or* proximate cause of the accidental injuries." 820 ILCS 305/11 (emphasis added).

The Arbitrator has carefully reviewed the entire record as well as the testimony. Admittedly, some of the questions and answers are confusing as no specific date is referenced when a question and/or answer was given. However, as applied to the chronology of events, the record shows that on Friday January 6, 2017, Petitioner alleged he injured his right arm. The next day, on Saturday January 7, 2017, he presented on an emergency basis to Mercy Works ER. There is conflicting evidence as to whether Petitioner was to return to MercyWorks for drug testing. Rx5:18. Billing from MercyWorks noted he refused such testing and Petitioner informed his provider that he simply left without giving any reason. Rx2. Petitioner testified that he did not actually refuse to take any urine test but just that he had left. On cross, was asked whether Dr. Anderson instructed him to return after x-rays to do a blood screen and Petitioner agreed. But this is not possible because Petitioner did not see Dr. Anderson in the emergency room that Saturday when undergoing what was believed to be x-rays. Rather, the record shows Petitioner saw Dr. Daniel Bartgen in the emergency room and a doppler exam – not x-rays – were completed. *Cf.* T. 30, Rx5:1-2. Nevertheless, Petitioner failed to complete drug testing on Saturday January 7, 2017 and therefore there is a rebuttal presumption that Petitioner was intoxicated and that his cocaine intoxication was the proximate cause of his injuries.

Having considered the record as whole the Arbitrator finds Petitioner failed to overcome this rebuttable presumption based upon his credibility, lack of medical or expert testimony and that he in fact tested positive for cocaine.

As to his credibility, Petitioner's testimony is not consistent with the medical record; Petitioner testified that he left only after being released but his medical record indicated that Petitioner simply left without any reason. *Cf.* T. at 18,30, Rx5:17. Petitioner's testimony is also internally inconsistent regarding why he left; Petitioner testified he left because he had been released but he also testified he left because he just left. *Cf.* T. at 18, 30. Petitioner also testified that his test was inconclusive and that he had to take a "piss" test. T. at 20. However, nothing in the record corroborates that any test was taken on January 10, 2017, or any other date, that was inconclusive. Petitioner's credibility is further questioned by his failure to disclose his cocaine use when he presented to Midwest Anesthesia & Pain Specialists on February 16, 2017. Px1:4. Petitioner did not reconcile this at trial. Petitioner's testimony that he ingested cocaine after his accident is unrebutted however, however, when considered along with the entire record, the Arbitrator does not find Petitioner credible and is not persuaded that Petitioner ingested cocaine after his accident.

As to the presence of drugs or alcohol in Petitioner's system, Petitioner also did not overcome the presumption when he in fact tested positive for cocaine for testing completed Wednesday January 11, 2017.

Finally, Petitioner failed to present any medical evidence or opinion that the cocaine in his system was not the proximate cause of his injuries or any witness testimony tending to show he was not under the influence. For example, Petitioner did not present any testimony or opinion from the medical review officer, in this case Dr. Anderson, and/or the alcohol technician who handled Petitioner's samples. See, Rx1. Petitioner did not present any other medical testimony or opinion as to how long cocaine remains in one's blood stream after ingestion, whether there was cocaine present in the blood stream at the time of the accident and/or whether the presence of cocaine was the proximate cause and/or sole proximate cause of Petitioner's accidental injuries. As to the alleged inconclusive results, Petitioner did not present any evidence that the alcohol and/or drug sample collection and testing was consistent with Ill. Admin. Code Title 50, Chp. 6, Section 9140.5-9140.80. Petitioner also presented no witness testimony that he did not appear intoxicated and/or under the influence at the time of his accident. In summary, Petitioner failed to overcome the applicable presumption.

There are several so-called intoxication cases but none where the rebuttable presumption has applied in the context of refusal to test. See, *Reynolds v. Porter Installations* 2012 Ill. Wrk. Comp. LEXIS 1512, 12 IWCC 1334; *McElroy v. Place Smart* 2013 Ill. Wrk. Comp. LEXIS 1186, 13 IWCC 1009; *Wolfson v. Solar Wind*, 2014 Ill. Wrk. Comp. LEXIS 518, 14 IWCC 438; *Ek v. Ryan Inc. Central*, 2015 Ill. Wrk. Comp. LEXIS 1296, 15 IWCC 667; *Pearce v. City of Chicago*, 2015 Ill. Wrk. Comp. LEXIS 1532, 16 IWCC 190; *Aleman v. Nation Pizza & Foods*, 2018 Ill. Wrk. Comp. LEXIS 18, 18 IWCC 2.

The Arbitrator finds that the instant case is analogous to *Catalon v. Roundy's d/b/a Mariano's*, 2015 Ill. Wrk. Comp. LEXIS 1549, 15 IWCC 959 (Dec. 2015), which most directly addressed the intoxication defense and the rebuttable presumption outlined in Section 11(3). There, the Commission affirmed a denial of benefits to a claimant who refused to submit to drug testing. After slipping and falling at work, the claimant presented for medical care where she refused to submit to drug testing. The claimant did not deny refusing to submit, stating that she had ingested marijuana several weeks before her work accident and was unsure what to do. The Arbitrator found that a rebuttable presumption of intoxication applied given the claimant's admitted refusal to submit to drug testing. In denying benefits, the Arbitrator noted the claimant agreed that cannabis could remain in her system and otherwise affect motor skills, coordination and perception. The Arbitrator found no corroborating evidence to buttress the claimant's assertion that she was not intoxicated at the time of her accident. Like the claimant in *Catalon*, Petitioner here too refused to submit to testing. Despite his denial that he refused, the Arbitrator questions his credibility in this regard. In addition, like the claimant in *Catalon*, Petitioner asserted that he was not intoxicated at the time of his work accident. However, for the reasons noted above, Petitioner failed to present any evidence corroborating this assertion.

Based on the foregoing and on the record as a whole, the Arbitrator concludes that Petitioner's accidental injuries arose from his intoxication due to his refusal to submit to testing, thereby triggering the rebuttable presumption that his was intoxicated and that his intoxication was the proximate cause of his injuries as contemplated in Section11(i). Petitioner failed to rebut this presumption. Further, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the credible evidence that his accident arose out of and in the course an employment risk but rather his personal risk of intoxication based upon his lack of credibility, his refusal to submit to testing and his failure to rebut the presumption of intoxication. All further claims for compensation are hereby denied.

Signature of Arbitrator

1-24-19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL STIRRATT,

Petitioner,

vs.

NO: 11 WC 14118

TRDA WOOD PRODUCTS, INC., d/b/a CHICAGOLAND WHOLESALE MULCH and REASONABLE TREE EXPERTS; PAYROLL DISTRIBUTION ACCOUNT 2 and ILLINOIS STATE TREASURER, as ex-officio custodian of the INJURED WORKERS' BENEFIT FUND,

20IWCC0590

Respondents.

DECISION AND OPINION ON REVIEW

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

In the Arbitrator's Decision, in addition to the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, the caption names three co-Respondents, representing the employer and the employer's two assumed "doing business as" names, however, omitting the name of the Petitioner's co-employer, Payroll Distribution Account 2. The Commission finds omission of the name of co-Respondent Payroll Distribution Account 2 was a scrivener's error for the reasons set forth below.

The Commission agrees with the Arbitrator that proper notice was served upon co-Respondent Payroll Distribution Account 2, and notes that the Arbitrator granted Petitioner's

20IWCC0590

motion to proceed *ex parte* with respect to co-Respondent Payroll Distribution Account 2, with all other parties represented by counsel. (ArbX4) The Commission also agrees with the Arbitrator's conclusion that pursuant to TRDA's Client Service Agreement with its payroll service, Payroll Distribution Account, both TRDA and Payroll Disbursement Account are defined as joint employers for workers' compensation claims between Petitioner and the Respondents on the date of accident. (ArbDec., p. 9) Thus, the Commission finds that Payroll Distribution Account 2 should be named as a co-Respondent and that all the Arbitrator's Findings and Conclusions of Law are binding on Payroll Distribution Account 2 as a joint employer of Petitioner. The Commission further finds that based upon the referenced Arbitrator's Findings and Conclusions of Law, the omission of Payroll Distribution Account 2 in the caption of the Arbitrator's Decision was a scrivener's error. The Commission, therefore, has restored the co-Respondent name, Payroll Distribution Account 2, to the caption of the this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 4, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $300.00 per week for 82-4/7 weeks, commencing April 2, 2011 through October 30, 2012, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's medical bills totaling $34,211.64 (PX7), per the fee schedule as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $300.00 per week for 75.25 weeks, because the injury sustained caused a 35% loss of use of the Petitioner's right leg, as provided in §8(e) of the Act.

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

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

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

20IWCC0590

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

DATED: OCT 6 - 2020
KAD/bsd
O081820
42

Kathryn A. Doerries

Kathryn A. Doerries

Thomas J. Tyrrell

Thomas J. Tyrrell

Maria Elena Portela

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STIRRATT, MICHAEL
Employee/Petitioner

Case# **11WC014118**

TRDA WOOD PRODUCTS INC D/B/A CHICAGOLAND WHOLESALE MULCH AND REASONABLE TREE EXPERTS AND INJURED WORKERS' BENEFIT FUND
Employer/Respondent

20IWCC0590

On 6/4/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

0307 ELFENBAUM EVERS & AMARILIO
RACHAEL SINNEN
900 W JACKSON BLVD SUITE 3E
CHICAGO, IL 60607

2687 KROCKEY CERNUGEL COWGILL ET AL
THOMAS E COWGILL
1000 ESSINGTON RD SUITE 108
JOLIET, IL 60435

5946 ASSISTANT ATTORNEY GENERAL
HELEN LOZANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20IWCC0590

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Stirratt
Employee/Petitioner

v.

Case # **11** WC **14118**

Consolidated cases: _____

TRDA Wood Products Inc., d/b/a Chicagoland Wholesale Mulch, and Reasonable Tree Experts; and Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Ottawa, Illinois**, on **March 21, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/01/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$20.00 an hour over the course of a 15-hour work week**; the average weekly wage was **$300.00**.

On the date of accident, Petitioner was 35 years of age, ***single*** with **4** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$400.00** for other benefits, for a total credit of **$400.00**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $300.00 per week for 82-4/7 weeks, commencing April 2, 2011 through October 30, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner's medical bills totaling $34,211.64 (Px 7) per the fee schedule provided in Section 8(a); 8.2 of the Act.

Respondent shall pay permanent partial disability benefits of $300.00 a week for 75.25 weeks, because the injury sustained caused the 35% loss of use of the Petitioner's right leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

6/1/18
Date

JUN 4 - 2018

FINDINGS OF FACT

Petitioner began working for TRDA Wood Products, Inc., d/b/a Chicagoland Wholesale Mulch and Reasonable Tree Experts [hereinafter "TRDA"] November 1, 2010 as a tree climber. TRDA is owned by Kurt Fife, an arborist. (Px 1, p. 9) TRDA operated as a tree service, trimming and removing trees for residential homes. (Px 1, p. 19) It also processed and sold mulch. (Px 1, pp. 6, 10)

Petitioner testified that he previously worked as a tree cutter before joining TRDA. Petitioner indicated he had no formal training and simply learned on the job. Petitioner stated that he did not belong to any associations for arborists, did not hold any certificates and was not licensed as an arborist. (Px 1, p. 20-22) TRDA's owner, Mr. Fife, was an arborist and has been a member of the National Arbor Association for 20 years.

Petitioner testified that his duties as a tree climber for TRDA required that he climb, trim and cut down trees and/or branches. His work also required him to help clean up and handle ground work which included cutting up logs and dragging brush and wood into the chipper to create mulch. (Px 1, pp. 9-10) Tim Romanowski worked for TRDA and testified at trial on its behalf. Mr. Romanowski was on payroll for TRDA and considered to be an employee by its standards. Mr. Romanowski testified that he worked on a "tree crew" as a "ground guy" removing the branches that were cut down, dragging them into the grinder and cleaning up. He has never been a tree climber. Mr. Romanowski confirmed that Petitioner helped at times with ground work.

Petitioner testified that in addition to his work as a tree climber, he also performed maintenance duties. Petitioner described changing blades on machines, greasing and oiling equipment and trucks, namely a bucket truck, a chipper truck and a dump truck. Petitioner stated these were company vehicles for TRDA with signage and a logo on the side of the vehicles for either Reasonable Tree Experts or Chicagoland Mulch. (Px 1, pp. 10-11, 14) Mr. Fife denied that Petitioner performed any work other than tree trimming stating, "I am not saying he never touched a machine or a grease gun, but we did not hire him to do that..." Mr. Fife explained that a grease gun would be needed for the chipper that cleaned up the tree debris. Mr. Romanowski testified that his only experience working with Petitioner was when they were on a tree crew together.

Petitioner testified that TRDA provided him with all the gear, equipment and/or supplies. His climbing gear included spikes, ropes, straps and a harness. TRDA also supplied the chainsaws. Petitioner stated he did not provide any of his own gear or equipment. Petitioner testified that he was not permitted to take anything home with him and TRDA handled repairs and replacement of any gear, equipment and/or supplies. (Px 1, p. 17) Mr. Fife testified that he believed on a couple occasions, Petitioner would took equipment and gear home for other jobs but later testified that "[t]his is seven years ago. I am 63 years old. I don't remember the absolute truth of that..." Petitioner testified that he turned to Mr. Fife to learn to use any unfamiliar equipment, namely a stump machine. (Px 1, p. 82)

Petitioner testified that in addition to the gear, equipment and supplies TRDA provided, he was given company shirts to wear to work. A red shirt reading Reasonable Tree Experts and a blue shirt reading Chicagoland Wholesale Mulch was provided to Petitioner to wear at work. (Px 1, pp. 17-19) Mr. Fife confirmed that Petitioner was given company shirts but testified they were optional.

Petitioner testified that to get to a customer's home, Petitioner would report to TRDA and then drive a company vehicle (bucket or dump truck) or Mr. Fife's pickup truck with the tree crew. He was not allowed to drive the

vehicles for personal reasons. (Px 1, pp. 18-19) Mr. Romanowski confirmed that Mr. Fife would decide the set time for when the tree crew was to meet at the shop.

Petitioner testified that once at a jobsite, Mr. Fife would tell him what trees to work on and would point out what branches Petitioner was to trim if needed. (Px 1, p. 33) Per Mr. Romanowski, once a tree crew arrived to a jobsite, "we assess the situation of the tree, and he [tree climber] climbs in a tree and pretty much says what goes." Mr. Romanowski explained that, for safety reasons, the tree climber directed the ground crew where the next branch would fall as he was the individual cutting the tree. Mr. Romanowski testified that whether a tree was being removed or trimmed was decided before the tree crew arrived to the jobsite. Mr. Fife handled the customer requests and would relay to the tree crew what type of job they were performing. The customer would also decide which trees were to be removed and/or trimmed.

Petitioner testified that in order to get up into a tree, he could use a climbing harness, spike up a tree and tie in. As an alternative, Petitioner could use a bucket truck. Petitioner testified that Mr. Fife would decide whether Petitioner was to use a bucket truck or a harness. (Px 1, pp. 22-23) Mr. Fife testified that the position of the tree on the yard dictated whether a bucket truck could be used. He also stated that Petitioner always used a harness and a buck strap. Mr. Romanowski testified that at times Petitioner did not use a climbing rope. Both Mr. Romanowski and Mr. Fife testified that they brought this to Petitioner's attention but that he refused to use it. Mr. Fife explained the climbing gear typically used with the use of a photograph as a demonstrative exhibit. (Rx 3)

Mr. Fife testified that he required Petitioner sign an agreement to confirm Petitioner's "consent to work on a part time basis with TRDA… as a subcontract laborer." (Px 1, Exh 3; Rx 1) Petitioner testified that he had to sign the agreement in order to work for TRDA but did not understand all the language such as his agreement to hold TRDA "harmless." (Px 1, p. 16) Petitioner also testified that Mr. Fife did not explain what insurance he was to obtain per the agreement. (Px 1, p. 16) Mr. Fife confirmed that he never asked Petitioner for proof any type of insurance policy.

Petitioner testified that he previously worked for other tree services, some where he was paid in cash and another where he was on a formal payroll. (Px 1, p. 65) Petitioner testified that at TRDA, he was paid $20.00 an hour and paid in cash. (Px 1, p. 12) This was confirmed by Mr. Fife who admitted that he did not keep any accounting of Petitioner's earnings. Petitioner testified that although he did not have a bank account at the time, he did claim the cash he earned on his income tax return. (Px 1, pp. 38-39) Petitioner was unsure if he still had copies of said tax returns. (Px 1, p. 41) Petitioner testified that although he did not work every workday, he estimated that he worked approximately 15-20 hours a week, sometimes working twice a week and other times working three to four times a week. (Px 1, pp. 12, 38, 80) Petitioner estimated that on average he worked three to five days a week, four to seven hours a day, consistently from November 2010 to April 2011. (Px 1, pp. 87-88) Mr. Fife confirmed that a particular job site would last 4 to 7 hours and that Petitioner would come in on average two days a week during the late fall and early spring. Mr. Fife claimed that Petitioner did not work for TRDA in December, January and February but admitted that they may have had some work. Mr. Romanowski testified that he typically went on unemployment during the winter season.

Petitioner testified that Mr. Fife dictated his hours and was strict about tardiness. (Px 1, p. 33) Mr. Romanowski confirmed that Mr. Fife would decide when the tree crew was to start the workday. Mr. Fife testified that if a climber worked for other companies and was unavailable the day of a job, then the job would have to be postponed. He further testified that he "believed that happened a few times" with Petitioner but was unable to provide any further details to corroborate that.

Petitioner testified that he neither provided a bid/estimate for a job nor negotiate the price with a customer for TRDA. Petitioner stated that he did not receive pay from a customer directly, his pay did not change depending

on the job and he never received a percentage of the price Mr. Fife negotiated with a customer. (Px 1, pp. 19-20) The same applied to Mr. Romanowski. Petitioner testified that he did not handle customer complaints and would refer any issues to Mr. Fife. (Px 1, pp. 20-21) Petitioner indicated that he did not have his own clients and was directed to a jobsite by Mr. Fife. (Px 1, p. 20) Mr. Fife testified that Petitioner could have negotiated a price with a customer directly but admitted that he did not tell Petitioner what the agreements were before performing the work. Mr. Romanowski confirmed that Mr. Fife would handle the price of the job and the tree crew doesn't know the price going into a job. Mr. Fife said that he believed Petitioner negotiated prices with customers "once or twice" but was not able to provide any specifics as to when and where such negotiations occurred. Additionally, Mr. Fife admitted that there would be no record of any price differences in the accounting books.

On April 1, 2011, Mr. Fife was at a customer's home with Petitioner and the rest of the tree crew including Mr. Romanowski. Per Mr. Romanowski, Mr. Fife "showed us what needed to be done and then we took care of it from there." Mr. Fife directed everybody where to go and showed the tree crew all of the trees that needed to be trimmed.

Petitioner testified he was up in a tree in the backyard working. When he untied his rope / disengaged his harness in order to come down, he lost his balance falling approximately 15 feet to the ground breaking his right ankle. (Px 1, pp. 23-25, 49) Petitioner explained that his buck strap was around his harness not in use at the time of his fall. (Px 1, p. 53) Mr. Romanowski came around to the backyard from the front of the house and had Petitioner call an ambulance to go to the emergency room.

In the days following the accident, Mr. Fife offered Petitioner $400.00 to sign a release of liability, which Petitioner accepted to help pay for medical expenses. (Px 1, pp. 25-27, Exh 4)

Petitioner testified that at the time of the work accident, he was in good health and fully capable of working without restrictions.

Petitioner immediately went to the emergency room at Provena Saint Joseph Medical Center via ambulance on April 1, 2011. Once admitted, Petitioner was evaluated by Dr. Urbanosky. Although Dr. Urbanosky's initial treatment note states that Petitioner was injured on his cousin's property, (Px 2) every witness agrees that Petitioner was at a customer's home and not at a cousin's house. Dr. Urbanosky assessed Petitioner for a "right ankle and tibia fracture with comminution and joint involvement as well as Lisfranc type food injury with possible instability." (Px 2, p. 7) A CT performed the next day on April 2, confirmed that the comminuted fracture of the distal tibia and fibula extended to the tibial plafond and the coronal component of the fracture extended into the medial malleolus. (Px 2, p. 53)

On April 3, 2011, Dr. Urbanosky performed a right fibula open reduction and internal fixation and further assessed Petitioner's foot instability. The operative report notes that due to the severity of the injury and the multiple metatarsal fracture, possible ORIF would be indicated in the future once the swelling improved. A ten-hole distal fibular plate was used over the distal fibula. (Px 2, p. 9, Px 6, p. 1) Post-operatively, Petitioner followed up with Dr. Urbanosky on April 6, 2011 at Hinsdale Orthopaedics who referred him to Dr. Vargo. Petitioner remained non-weightbearing. (Px 4, p. 77)

Approximately a week after surgery, on April 11, 2011, Petitioner presented to the emergency room of Silver Cross Hospital for increased pain. Petitioner provided that his splinted foot was pulled off the bed by a child and his foot hit the floor. Petitioner was administered Dilaudid, Dr. Urbanosky was contacted and Petitioner was instructed to follow up with his doctor. (Px 3, pp.23-25)

Petitioner saw Dr. Urbanosky's colleague, Dr. Vargo of Hinsdale Orthopaedics, on April 14, 2011. The doctor recorded a consistent work accident of falling out of tree as a tree cutter on April 1, 2011. Dr. Vargo also noted that surgical intervention for the tibia is now able to be performed as his swelling has improved. Dr. Vargo opined that surgery would likely require tibial plating and Lisfranc stabilization with open reduction and screw fixation of the Lisfranc complex as well as possible screw fixation of the medial column. Petitioner remained off work pending surgery as he was non-weight bearing. (Px 4, pp. 74-75)

Petitioner underwent his second surgery with Dr. Vargo on April 20, 2011 at Good Samaritan Hospital. Dr. Vargo performed an open reduction and internal fixation of the right tibia with plating and percutaneous screw fixation of the right loos frank complex. There were no complications during the procedure. (Px 6, p. 3)

On April 28, 2011, Petitioner returned to Dr. Vargo who noted a possible occult fracture of the lateral cuneiform that would be confirmed on the CT report. Petitioner remained off work and was non-weightbearing. Petitioner returned to Dr. Vargo on May 26th, June 23rd, and August 11th. Petitioner remained off work as he was not full weightbearing in his boot. (Px 4) He continued to wean himself off medication and wean himself off crutches. Petitioner testified that he was unable to complete the prescribed formal physical therapy and see a pain specialist due to lack of workers' compensation benefits. (Px 1, p. 29) On September 22, 2011, Petitioner was placed at the sedentary work level and was to wean himself off of the boot. (Px 4, p. 52) On December 8, 2011, Dr. Vargo noted the possibility of removing his hardware as Petitioner continued to have pain in the front of his ankle suggesting that a couple of the screws may be backing out. Dr. Vargo wanted to wait until Petitioner was nine months post-operative before deciding on a third surgery. (Px 4, p. 51)

On January 26, 2012, Dr. Vargo ordered surgery for hardware removal which was performed on February 28, 2012 at Salt Creek Surgery Center. Dr. Vargo removed the distal fibular plate and the screws were removed from the distal tibia with the exception of one screw that remained in the midfoot, a second screw that remained in the interfragmentary area in the distal fibula and a third screw that remained in the distal tibia comminuted fragment. (Px. 4, p. 47; Px 6, p. 6)

On March 8, 2012, Petitioner returned to Dr. Vargo following his third surgery. Petitioner remained in a boot at that time and was able to continue a sedentary work level. Petitioner returned to Dr. Vargo on July 12th to monitor the healing of his ankle. An FCE was ordered but not performed due to lack of workers' compensation benefits. Petitioner was placed at MMI by Dr. Vargo on October 25, 2012. Petitioner was to return to work without restrictions as of October 30, 2012. Dr. Vargo noted that Petitioner sustained "a complex severe injury that may progress to posttraumatic arthritis." (Px 4, p. 8)

Petitioner testified that he was off work from April 1, 2011 through October 25, 2012. (Px 1, pp. 29-30) Mr. Romanowski claimed that he saw Petitioner riding in a moving truck of another tree service company in late August or September but could not identify the company and did not speak to or acknowledge Petitioner.

At the time of his evidence deposition, Petitioner was serving a four-year sentence for theft and burglary at Vandalia Correctional Center. Petitioner also served a two-year sentence in 2014 for theft. Petitioner testified that he had difficulties securing work and resorted to theft. (Px. 1, pp. 31, 74-75)

Petitioner testified that he has not had any additional accidents or injury to his right ankle. He still has screws in his right ankle although the plate was removed. Petitioner walks on the edge of his right foot which is painful after standing too long. Petitioner is no longer able to jog or participate in his hobby of softball. He wears a brace and takes Tylenol for pain. (Px 1, pp. 30, 34)

Mr. Fife testified that his wife Cynthia handled financial matters in April 2011 and that he outsourced his payroll to Payroll Disbursement Account. He identified Arbitrator's Exhibit 4, Exhibit A, as the Client Service Agreement he had with Payroll Disbursement Account.

Section 3.4 of the Client Service Agreement states that the Payroll Disbursement Account was to obtain and pay for the cost of workers' compensation insurance and manage workers' compensation claim with respect to TRDA's "Assigned Employees." The section also states that Payroll Disbursement Account and TRDA shall be considered joint employers of "Assigned Employees" for purposes of workers' compensation. Further, TRDA was to be liable to Payroll Disbursement Account in the event of any misclassification of "Assigned Employees." (Ax 4, Exh. A, p. 1)

Mr. Fife testified that he had workers' compensation insurance and contacted the carrier when he learned Petitioner was filing a claim. Mr. Fife was unable to name his insurance carrier, unable to name the individual he spoke with and was unable to provide a copy of his policy. Mr. Fife also testified that he called Payroll Disbursement Account when Petitioner's workers' compensation claim was initially filed but has had no communication with them since.

A subpoena from the National Council on Compensation Insurance confirmed that there was no policy for workers' compensation for TRDA nor Payroll Disbursement Account effective April 1, 2011. (Ax 4, Exh. B)

Mr. Fife testified that the tree climbers he employs now are on payroll. Mr. Fife was unable to recall what payroll service he is currently using nor is he able to recall his current workers' compensation insurance carrier.

With respect to A.) Was Respondent-Employer TRDA, dba Chicagoland Wholesale Mulch and Reasonable Tree operating under and subject to the Illinois Workers' Compensation Act or Occupational Diseases Act, the Arbitrator finds as follows:

Petitioner testified that he began working for Respondent-Employer, TRDA, on November 1, 2010. He further testified that Respondent-Employer was a business engaged in a tree trimming service in Crest Hill, Illinois. His work as a tree trimmer involved climbing trees, cutting the trees down, cleaning, ground work, and equipment and truck maintenance. The ground work involved dragging brush, cutting up logs, and carting them to the vehicle. Petitioner sometimes dragged the tree branches to the chipper to turn the branches into mulch, which was then sold by Chicagoland Wholesale Mulch. Truck and equipment maintenance involved changing blades, oiling, and greasing the machines.

Based upon the unrebutted testimony, as well as the automatic coverage provisions of Section 3(8) of the Act, the Arbitrator finds that the evidence establishes that Respondent-Employer was operating under and subject to the Illinois Workers Compensation Act. Section 3(8) of the Act provides automatic coverage applies to, "[a]ny enterprise, in which sharp edge cutting tools, grinders or implements are used..." 820 Ill. Comp. Stat. Ann. 305/3.

With respect to B.) Was there was an Employee-Employer relationship, the Arbitrator finds as follows:

Under Illinois law, distinguishing an employer-employee relationship from that of an independent contractor is a fact-specific determination based on multiple factors. See *Roberson v. Industrial Comm'n*, 225 Ill.2d 159, 174-75 (2007). The "right to control the manner of the work" is generally the most important factor (*Roberson*, 225 Ill.2d at 176) and "whether the employer's general business encompasses the person's work" is also important (*Id.* at 175). In *Roberson,* our Supreme Court used this method to uphold a Commission decision finding a truck driver to be an employee, despite owning his own truck and having signed an agreement with the trucking

company labeling him an independent contractor. In doing so, it noted that Illinois Appellate Courts had previously found work arrangements of this type to constitute employment, in particular citing *Ware v. Industrial Comm'n*, 318 Ill. App. 3d (2000).

The court in *Ware* found the question of control of the work to be decisive, noting that the driver in that case "had no customers of his own," but served customers designated by the company; that the claimant's work as a freight hauler was central to the company's business was also key. *Ware*, 318 Ill. App. 3d at 1124-25. The question of who provided tools and materials was judged relevant although less decisive than control of the work (*Id.* at 1125), while "the label the parties apply to their relationship" and the absence of payroll tax deductions were accorded little weight. *Id.* at 1127. Further, a worker with a professional license or similar advanced skills is more likely to be seen as a contractor than a less skilled individual. *Id.*

The Arbitrator notes that there are issues of credibility on both sides. While Petitioner has a criminal history, the Arbitrator notes that Mr. Fife's testimony was dubious at times and his memory varied. It is important to note that Mr. Fife testified to having workers' compensation insurance in April 2011 and even speaking to a representative at one point. However, he was unable to recall the name of his past (or even current) insurance carrier. Further, records from the National Council on Compensation Insurance confirm that no workers' compensation insurance existed at the time of Petitioner's accident.

With regards to the relevant factors in determining whether an employee-employer relationship exists, the Arbitrator finds that Petitioner's work falls within the nature of TRDA's business. This is undisputed. A tree cutter is central to TRDA's business of providing tree trimming and tree removal services to its customers. Mr. Fife testified that TRDA would not be able to serve its customers without a tree cutter.

Like the claimant in *Ware*, Petitioner had no customers of his own and served TRDA's customers. Petitioner testified that he never received a percentage from the price that TRDA agreed on with its customer. His pay never changed beyond his hourly rate. Petitioner testified that he did not provide price estimates, bid on a job nor negotiate directly with a customer. While Mr. Fife testified that Petitioner could have negotiated with a customer directly, he admitted that he would not share with the tree crew (including Petitioner) the price he negotiated for a job with a customer. Mr. Romanowski confirmed this. Further, Mr. Fife was unable to specify when Petitioner had allegedly negotiated on his behalf if that even had occurred. As such, the Arbitrator does not give any weight to Mr. Fife's claim that Petitioner negotiated with customers directly.

It is undisputed that TRDA provided Petitioner with climbing gear and the equipment needed. TRDA provided Petitioner with the strap, harness, rope, and chainsaw needed to perform his work. Petitioner used company vehicles such as a bucket truck. All witnesses confirmed that the tree crew reported to the shop at the time Mr. Fife set and they used a company vehicle to get to a customer's home. All witnesses confirmed that TRDA provided the tree crew with company t-shirts to wear while working although Mr. Fife and Mr. Romanowski testified they were not required. Mr. Romanowski admitted however that they were worn most of the time.

The court in *Ware* determined that an individual with a professional license or similar advanced skills was more likely seen as a contractor than a less skilled individual. Here, the Arbitrator finds that Petitioner was an unskilled worker as he had no formal training or licenses and was a laborer handling other clean-up tasks, maintenance and yard work at the direction of TRDA. The Arbitrator notes that Mr. Fife denied that Petitioner ever performed maintenance work but his testimony in this regard is not consistent. Mr. Fife testified that Petitioner was not hired to perform maintenance work but also stated that he may have handled a grease gun. Petitioner was able to detail his maintenance work in the winter and even named a co-worker that he worked with (Emanuel Velazquez). Mr. Fife admitted that Mr. Velazquez worked in maintenance and upon further questioning denied ever seeing Petitioner do maintenance work. Mr. Romanowski did not contribute to this dispute as he only worked with Petitioner on a tree crew. The Arbitrator does not rely on Mr. Fife's memory on

this issue as Mr. Fife admitted he was not able to recall several details. As such, the Arbitrator finds that Petitioner did handle some maintenance work suggesting that Petitioner was an unskilled worker for TRDA versus a skilled arborist that TRDA contracted with.

Further, the Arbitrator applies little to no weight on the label the parties applied to their relationship. Petitioner was paid in cash and taxes were not deducted. The Arbitrator finds it odd that TRDA did not keep any written records of the amounts paid to Petitioner. Similarly, Petitioner was unsure if he still had a copy of his income tax return. Regardless, while Petitioner signed an agreement to work as an independent contractor, the Arbitrator accords no weight to this as was the case in *Roberson* where the claimant was found to be an employee despite signing an agreement labeling him as an independent contractor.

The crux of this case is whether TRDA controlled the manner of work. It is clear that Mr. Fife dictated that scope and nature of the work for the tree crew. TRDA's witnesses claimed that a tree cutter is in charge while up in a tree, because it is the tree cutter who tells the ground crew where to stand and what branches are coming down. However, Mr. Romanowski admitted that the "whole reason" for this is safety. It is only common sense that a tree cutter warn the ground crew what branches he is cutting and where that branch is to fall. The Arbitrator does not find this system to be evidence of control but a safety precaution. While Petitioner may decide the order of branches to be cut to ensure safety of the tree crew, it is evident that Petitioner does not manage nor assess what work is needed. Petitioner and TRDA's own witness, Mr. Romanowski, testified that (1) it was Mr. Fife who negotiated the price and job with a customer; (2) it was Mr. Fife who told the tree crew what the job entailed (trimming/clean up versus removal); (3) it was Mr. Fife who told the tree crew what time to report to the shop; and (4) it was Mr. Fife who pointed to the trees to be worked on. As Mr. Romanowski stated Mr. Fife "directed everybody where to go" and "showed us all of the trees that needed to be done."

Taken as a whole, the testimony corroborates Petitioner's claim of an employment relationship with TRDA. Pursuant to TRDA's Client Service Agreement with its payroll service, Payroll Disbursement Account, both TRDA and Payroll Disbursement Account are defined as joint employers for workers' compensation claims. As such, Arbitrator finds that an employer-employee relationship existed between Petitioner and Respondents on the date of accident.

With respect to C.) Did an accident occur that arose out of and in the course of Petitioner's employment with the Respondent, the Arbitrator finds as follows:

Petitioner testified unrebutted to an accident in which he fell out of a tree approximately 15 feet. His testimony clearly describes an accident that arose out of and in the course of his work for TRDA. Respondents presented no testimony or evidence to rebut this account of the accident.

Petitioner's testimony is corroborated by the medical records. The histories given and the objective findings are consistent with an acute injury on the date of accident.

The Arbitrator therefore finds that Petitioner sustained an accident arising out of and in the course of his employment on April 1, 2011.

With respect to D.) What was the date of the accident, the Arbitrator finds as follows:

See the above findings in paragraph "C" above.

With respect to E.) Was timely notice of the accident given to the Respondent, the Arbitrator finds as follows:

The unrebutted testimony established that Mr. Fife was given notice of the accident on April 1, 2011. Petitioner testified that Tim Romanowski told Mr. Fife about the injury, over speakerphone, in the presence of Petitioner immediately after the accident. Petitioner also testified that he visited Mr. Fife at the yard in Crest Hill the day after he was released from the hospital to seek money for pain medication. Additionally, Mr. Fife testified that he went to the hospital to see Petitioner the day after the accident. At that time, Petitioner told him that he was crossing over from one branch to another and slipped and fell and landed on a root.

Based upon the unrebutted testimony, the Arbitrator finds that Petitioner has established that Respondent-Employer had timely notice of the accident as defined by the Act.

With respect to F.) Whether Petitioner's present condition of ill-being is causally related to his injury, the Arbitrator finds as follows:

After hearing the testimony of the witnesses and reviewing the exhibits submitted, including the opinions of Petitioner's treating physician, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries sustained on April 1, 2011.

Causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994).

Prior to his work accident, Petitioner was in good health with no restrictions. After his fall, the medical records reflect Petitioner underwent three separate procedures: first, an open reduction and internal fixation to insert plate over the right distal fibula; second, an open reduction and internal fixation of the right tibia with plating and percutaneous screw fixation; and third, removal of the distal fibular plate with screws remaining in the midfoot, distal fibula and distal tibia. Petitioner remained on a boot and crutches following his procedures. He was unable to undergo physical therapy due to the lack of workers' compensation benefits but was ultimately returned to work without restrictions as of October 30, 2012. At his final visit, Dr. Vargo noted that Petitioner sustained "a complex severe injury that may progress to posttraumatic arthritis."

Respondents did not offer any medical opinions to dispute causation.

In view of the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally connected to his workplace injury of April 1, 2011.

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

Neither party was able to furnish written records of Petitioner's earnings or hours work. However, this does not defeat Petitioner's claim. Both Mr. Fife and Petitioner agree that Petitioner earned $20.00 an hour. Both agree that Petitioner did not work every day. Both agree that a job for the tree crew could take between four to seven hours.

Petitioner testified that he worked three to five times a week, an average of 15-20 hours total per week. Mr. Fife testified that Petitioner worked 4-7 hours per shift, and averaged about two days per week. Mr. Fife did not keep any records for how much he paid Petitioner, and it was not accounted for in the accounting books. Mr. Fife testified Petitioner did not use a time card but told him at the end of the day how many hours he work. Petitioner did not produce any physical evidence of his wages, i.e., he did not introduce check stubs, time sheets, bank statements, cancelled checks, or W-2s. Petitioner testified that he filed tax returns and claimed cash on his 2011 income taxes. However, he failed to produce a copy of his tax returns, which would have reflected his wages from Respondent-employer.

The parties dispute the hours worked from November 1, 2010 through the date of injury on April 1, 2011. The primary dispute is whether Petitioner worked in the winter. Mr. Fife claimed that Petitioner did not work for TRDA in December, January and February but then later admitted upon further questioning that they may have had some work. As Mr. Romanowski was limited to the tree crew, he filed for unemployment during the winter.

The Arbitrator does not find Mr. Fife's memory to be reliable on this matter. Based on the testimony presented at trial, the Arbitrator finds that Petitioner worked an average of 15 hours a week at $20.00 per hour from November 1, 2010 through April 1, 2011, corresponding to an average weekly wage of $300.00.

With respect to H.) What was Petitioner's age at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of Petitioner as well as the emergency room records, established that Petitioner's date of birth is September 20, 1975, making him 35 years of age on the date of accident.

Based upon the above, the Arbitrator finds that Petitioner was 35 years old on the date of accident.

With respect to I.) What was the Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of Petitioner established that he was married and had four children under the age of 18 on the date of the injury.

Based upon the above, the Arbitrator finds that Petitioner was married, and had 4 children under the age of 18 on the date of the accident.

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

Having found the requisite causal relationship, the Arbitrator therefore finds that Respondent is liable for the medical charges listed in Petitioner's Exhibit 7. Respondents are ordered to pay such charges, subject to the fee-schedule provisions of Section 8.2 of the Act.

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

Petitioner alleges that he is entitled to TTD benefits from April 11, 2011 to October 25, 2012. The unrebutted testimony established that, other than the $400 Petitioner received from Mr. Fife, Petitioner did not receive any workers' compensation benefits for lost time. Petitioner testified that he was off work due to the work-related injury from April 1, 2011 to October 25, 2012. Credible evidence establishes that Petitioner was receiving medical treatment for his injuries during this time. Medical records establish that Petitioner was placed at MMI on October 25, 2012. He was given a return to work full duty release, effective October 30, 2012. Petitioner testified that he has not worked since the date of accident.

Conforming to the proofs submitted, the Arbitrator finds that is Petitioner is entitled to TTD benefits from April 2, 2011 to October 30, 2012.

With regard to issue L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

The Arbitrator notes that inasmuch as this matter involves a work-related accident that occurred prior to the amendment of the Act (820 ILCS 305/8.1b), addressing the factors enumerated in said amendment is not appropriate.

As a result of the accident on April 1, 2011, Petitioner sustained a comminuted fracture of the distal tibia and fibula extended to the tibial plafond and the coronal component of the fracture extended into the medial malleolus. Petitioner underwent three surgical procedures consisting of 1.) a right fibula open reduction and internal fixation; 2.) an open reduction and internal fixation of the right tibia with plating and percutaneous screw fixation of the right loos frank complex, and 3.) removal of the distal fibular plate and screws removed from the distal tibia. There was one screw that remained in the midfoot, a second screw that remained in the interfragmentary area in the distal fibula and a third screw that remained in the distal tibia comminuted fragment. Petitioner was last seen by Dr. Vargo on October 25, 2012. At that time, Petitioner still had some achiness in the medial aspect of the ankle joint which the doctor felt was relative to a bit of impingement. X-rays taken that day demonstrated slight tibiotalar tilt. Dr. Vargo felt Petitioner had a complex severe injury that may progress to posttraumatic arthritis. Petitioner credibly testified that residual impairment is present, and already causes pain. Petitioner walks on the edge of his right foot which is painful after standing too long. Petitioner's injury has prevented him from his hobbies of jogging and softball.

Based on the above, the Arbitrator finds that sustained 35% loss of use to Petitioner's right leg under Section 8(e) of the Act.

With respect to N.) Is Respondent due any credit, the Arbitrator finds as follows:

The facts are undisputed that Petitioner accepted $400.00 from TRDA. While TRDA's effort to release itself from liability is irrelevant as to liability under the Act, the Arbitrator finds that Respondent, TRDA, is due a Section 8(j) credit of $400.00.

With respect to O.) Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, the Arbitrator finds as follows:

This matter was heard on March 21, 2018. Respondent-Employer TRDA, dba Chicagoland Wholesale Mulch and Reasonable Tree Experts was present and represented by counsel. It proceeded ex parte against Payroll Distribution Account-2. The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARLENE NORSYM,

Petitioner,

vs.

NO: 14 WC 31254

UNIVERSITY OF ILLINOIS AT CHICAGO,

20IWCC0591

Respondent.

DECISION AND OPINION ON REVIEW

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

Permanent Disability

Section 8.1b(b) of the Illinois Workers' Compensation Act provides the following:

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *820 ILCS 305/8.1b*

20IWCC0591

The Commission agrees with the Arbitrator's consideration of all five factors pursuant to §8.1b(b) in determining the award of permanent partial disability in this case. The Commission modifies the Arbitrator's decision solely with respect to the Arbitrator's §8.1b(b)(iii) analysis and the Arbitrator's §8.1b(b)(v) analysis. The Commission strikes the third sentence in the §8.1b(b)(iii) analysis beginning with the word "Petitioner's" and ending with the word "uncertain."

The Commission further strikes the Arbitrator's §8.1b(b)(v) analysis on page 19 of the Arbitrator's Decision and substitutes the following:

Evidence of disability corroborated by the treating medical records: Petitioner sustained a left displaced femoral neck fracture and underwent a left total hip arthroplasty on December 2, 2013. (PX3) Petitioner was released to return to work full duty. By May 20, 2014, Dr. Farid's office note documents that Petitioner was doing well and walking better with minimal symptoms. He felt that she was very functional but advised against running. Dr. Farid's impression was that the Petitioner's exam was stable and that Petitioner had no complications involving the left total hip arthroplasty after she had returned to work full-time. (PX4) One year after surgery, at her annual visit on December 16, 2014, the Petitioner asked Dr. Farid if she could go skiing. He made recommendations including to use a cane to avoid slipping on ice and snow. (PX4) On December 15, 2015, Petitioner reported to Dr. Farid that she was very active, walks 2-1/2 miles per day, was able to "chase her grandkids," to play with them, and that she was very functional. (PX4) On December 20 2016, Dr. Farid documented that Petitioner was doing very well with respect to her leg and hip, that she had no pain and was very functional. (PX4) The Commission places significant weight on this factor.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on July 17, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,331.20 per week for a period of seven weeks, commencing November 26, 2013, through January 13, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 86 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent partial loss of use of the left leg to the extent of 40% thereof.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services as listed in Petitioner's Exhibit No.1, pursuant to the medical fee schedule, of UIC Pathology, Dr. Farid at Lakefront Medical Associates, LLC, and University of Illinois Medical Center, as provided in §8(a) and §8.2 of the Act. Respondent also is responsible for conditional payments made by Medicare related to the left hip replacement. Respondent is also ordered to reimburse Petitioner for out of pocket expenses as listed in Petitioner's Exhibit 1 in the amount of $1,770.48, subject to the fee schedule.

20 IWCC0591

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $45,802.89 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as well as hold harmless from CIGNA who paid these services, as provided in §8(j) of the Act.

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

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

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

DATED: OCT 7 - 2020
KAD/bsd
O081820
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Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NORSYM, ARLENE
Employee/Petitioner

Case# **14WC031254**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20IWCC0591

On 7/17/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 SEIDMAN MARGULIS & FAIRMAN LLP
NANCY SHEPARD
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CHICAGO, IL 60603

0498 STATE OF ILLINOIS
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1737 W POLK ST-M/C940 SUITE B9
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0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 17 2018

Illinois Workers' Compensation Commission

20IWCC0591

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Arlene Norsym,
Employee/Petitioner

v.

University of Illinois at Chicago,
Employer/Respondent

Case # **14** WC **31254**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **5/23/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/25/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**158,284.36**; the average weekly wage was $**3043.93**.

On the date of accident, Petitioner was **68** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**45,802.89** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, as listed in Petitioner's Exhibit No. 1, pursuant to the medical fee schedule, of UIC Pathology, Dr. Farid at Lakfront Medical Association, and Univesity of Illinois Medical Center, as provided in Sections 8(a) and 8.2 of the Act. Respondent also is responsible for conditional payments made by Medicare. Respondent is also ordered to reimburse Petitioner for out of pocket expenses as listed in Petitioner's Exhibit 1 in the amount of $1770.48 subject to the fee schedule.

Respondent shall be given a credit of $45,802.89 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as well as hold harmless from CIGNA who paid for these services as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1331.20 per week for a period of 7 weeks, commencing 11/26/13 through 1/13/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $721.66 per week for 86 weeks, because Petitioner sustained the permanent partial loss of use of the left leg under Section 8(e)12 to the extent of 40% thereof.

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

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

Robert M. Harris

Robert M. Harris, Arbitrator

July 17, 2018
Date

JUL 17 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARLENE F. NORSYM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case Number(s) 14 WC 31254
	)	
UNIVERSITY OF ILLINOIS,	)	
	)	
Respondent.	)	

ADDENDUM TO MEMORANDUM OF ARBITRATION DECISION

STATEMENT OF FACTS

Arlene Norsym, Petitioner, was employed by Respondent, the University of Illinois at Chicago, on November 25, 2013. Petitioner's job title was Associate Chancellor and Vice President of the Alumni Association. (T. 8). Petitioner had worked for Respondent for over thirty years. (T. 8). Petitioner sustained an injury on that day as she was leaving work. (T. -9). Petitioner testified that she fell on the way to the parking garage where she parked her car after leaving her work office immediately after finishing her work for the day. (T. 9).

Petitioner testified she used the same parking garage every day and the garage where she parked was "assigned" to her. (T. 10). The garage parking was assigned to her by Respondent University of Illinois' parking office. (T. 10). This testimony was unrebutted. Petitioner testified that the Chancellor was her supervisor, and a person in the Alumni Association. (T. 74). Petitioner testified when dealing with parking garage situations, she would not deal with the Chancellor, but rather with the University Parking Service. (T. 74). Petitioner testified she paid for her parking but it was "reciprocal", meaning she could also use the parking lots on the other side. (T. 11). The parking charge was an "additional charge that the University absorbed." (T. 11). The monthly parking was a "12-

month position" and the charge as charge was deducted directly from her monthly employee payroll paycheck and automatically deposited to the bank. (T. 11). Petitioner testified the parking charge was a reduced parking rate. (T. 74). Petitioner testified she could have paid extra to have an assigned spot in the garage but did not do that (she did for a while in the past) and she could park anywhere in the parking garage. (T. 15, 57-58). Petitioner testified she generally parked in the same area daily in the same parking garage as she would get there early and pulled in close to where she came in. (T. 58). Petitioner would utilize her employee ID to scan into and out of the garage. (T. 58-59). Petitioner testified she had been parking in this same parking garage for eight to nine years prior to the accident. (T. 44). Petitioner testified there were other people in her department who parked in the same garage as her. (T. 75).

Petitioner testified the parking garage was on campus. (T. 12). This testimony was unrebutted. It was one of the largest garages, if not the largest. (T.14-15). Petitioner testified the parking garage also allowed visitor parking. (T. 12). Petitioner testified this was one of the largest garages on campus. **Petitioner testified Respondent (University of Illinois) owns this parking garage**. (T. 15). This testimony was neither challenged nor rebutted. Petitioner testified that her colleagues in her office also parked in this garage. (T. 16). Petitioner testified she could have used other parking garages but that **she was <u>assigned</u> to this parking garage as Respondent "generally would assign the closest to where you are, where your office is."** (T. 16). Petitioner advised that the Chancellor, her supervisor, did not use this garage but parked in a tiny lot right there. (T. 75).

Petitioner testified she was on her way to this assigned parking garage after work and she fell, breaking her leg. (T. 9). This parking garage was located at Taylor, Halsted and Polk

streets. (T. 15). Petitioner's office was located on Halsted, midway between Harrison and Polk. Petitioner testified that to get to her garage and parking spot she would walk through the student center east and walk one half block down Halsted to Polk Street. (T. 9-10). At Polk Street, she would cross Halsted. (T. 10). Petitioner would then cross the Halsted sidewalk to a "little, small cement walkway" and through the "quarter" (lot) being another small surface parking lot and then into the parking garage. (T. 17). The "quarter" surface lot was an uncovered lot for parking shorter periods of time for less money than the large garage. (T. 17-18). Petitioner testified that as an employee she could not utilize the quarter/surface lot because she would be there (at work) for too long. (T. 59-60).

The cement walkway or pathway went from Halsted Street sidewalk to the surface lot. (T. 19). Petitioner indicated that this pathway would leave the sidewalk and cut through to the parking lot. (T 19). Petitioner testified this walkway or pathway was created because over time people would walk through the grassy area from the sidewalk to the lot and so "rather than to try and keep it grassy," it was paved. (T. 20). This pathway was approximately twenty feet long. Petitioner indicated that once you cross the pathway, you are in/on the surface lot. The surface lot was approximately one-third of a block in size and then she would walk and go directly into the parking garage to her car. (T. 21)

Petitioner testified she entered the garage through an opening for both cars and pedestrians. Petitioner would walk along side where the cars drove in on a flat surface. (T. 58, 70). Petitioner testified there were many different entrances to the garage **and she chose the one that was the "shortest distance between [her] car and where [she] was."** (T. 23). **Petitioner indicated this was the same path she walked every day to her car.** (T. 23). Petitioner indicated the only change in this pattern would be if it was a nice day

outside she would not cut through the student center but she would go directly outside from her building and walk on Halsted for a while. (T. 44). Petitioner did acknowledge that there were other paths she could have taken. (T. 54, 55).

Petitioner testified she fell when she was crossing from the Halsted Street sidewalk to the surface lot on the pathway that cut through the grassy area leading to the parking garage. (T. 21-22). This pathway was about 20 feet long. Petitioner testified that other people parking in the garage also took this same pathway. (T. 24). Petitioner never reached the parking garage because she fell on the pathway leading to there. (T. 23). Petitioner testified this was the pathway she walked every day to get to her car parked in the garage. (T. 23). Petitioner testified she fell as a result of the day's weather. (T. 24). Petitioner indicated it was a "wintry mix" of snow/sleet/ice mix. (T. 47). Petitioner testified that as she was walking her foot went out from under her on the ice. (T. 24-25). Petitioner testified that maybe one half an inch to one inch of ice had accumulated and it was continuing "to drop." (T. 25). This testimony was unrebutted. Petitioner testified the sidewalk was clear when she had gone in to work that morning. (T. 47). This testimony was unrebutted.

Petitioner testified "the University Physical Plant" (that is, Respondent) salted and shoveled that pathway and she had seen them doing this. (T. 24). This testimony was unchallenged and unrebutted.

Petitioner testified she was not sure whether she was carrying a bag full of work when she was on her way to her car, although that was her "habit." (T. 45-46). Petitioner acknowledged snow was not anticipated that day so she did not think she had winter boots with her but could not specifically recall what shoes she was wearing when she was outside. (T. 46). Petitioner testified she would have been wearing "a professional looking shoe", a

shoe "appropriate" to her position. (T. 46). Petitioner did not think she had boots. (T. 46-47). Petitioner could not recall how long it had been snowing before she left the office but felt that the sidewalks on the west side of Halsted had already been shoveled. Petitioner could not recall if the other side had been shoveled. (T. 48). **Petitioner testified the wintry mix of precipitation (snow and sleet) had made the sidewalks slippery**. (T. 48). This testimony was un challenged and unrebutted. Petitioner believed that the sidewalk on the west side of Halsted had already been shoveled. (T. 48).

Respondent admitted into evidence five photographs purporting to be the areas discussed above. Respondent's Exhibit #1 is the "quarter lot." Petitioner testified it did show the pathway where she fell behind the sign facing away from the picture. (T. 50). Respondent's Exhibit #2 is a photo from the Halsted Street sidewalk looking at the quarter lot. (T. 51). The pathway that is the focus of Respondent's Exhibit #2 is not the pathway on which Petitioner fell. Petitioner fell on the pathway indicated farther back and to the left side of the picture. (T. 53-54; Rx. 2). Petitioner testified the sidewalk in focus of Respondent's Exhibit #2 is much longer than the one on which she fell. (T. 53). Respondent's Exhibit #4 is a photo of the large parking structure where Petitioner parked her car (T. 55). Petitioner testified you could barely see in this photo where she would have entered the garage. Petitioner indicated there was a metal retaining wall that openings had been cut in to facilitate people passing through. (T. 56). Respondent's Exhibit #4 is again the parking structure. (T. 56). This shows the entry Petitioner used but from a head on view. Petitioner testified there was a separate pedestrian opening near where the cars drive in. (T. 57).

Petitioner again testified she walked on the diagonal sidewalk and that's where she slipped and fell on ice or snow that had accumulated during the course of the day. (T. 54).

Petitioner further testified her practice was to walk across the quarter lot to get to the parking garage. (T. 54). Petitioner agreed there were other routes into this parking garage. (T. 54-55). Petitioner testified she chose to walk in the entrance she did because it was the shorter path to her car. (T. 57-58). Petitioner acknowledged the usual route she took from her office to go to her car was the closest or shortest route to her car. (T. 67). Petitioner agreed she parked her car where she wanted, but generally in the same closest area. (T. 57-58). Petitioner agreed the parking garage was open to the general public. (T. 58). Petitioner paid for parking and her card (allowing entrance to the parking garage) was magnetized. (T. 58-59). The quarter lot was a short-term lot also open to the public. (T. 59-60). Petitioner would not park in the quarter lot because it was short term and she paid for the regular lot where she parked. (T. 59).

Petitioner testified that when she fell she was in a lot of pain on the left side at the top of her leg. She had hoped it was a bruise and did not seek medical care right away. (T. 26). Petitioner testified she was able to walk back to her car after students assisted her up and carried her bag. (T. 27). Petitioner testified she often had a big bag with her that she carried to do more computer work once home. She testified that she could not recall specifically having the bag that day but that it was her habit to have the bag. (T. 45).

Petitioner testified, and the records reflect, she went to the emergency room at University of Illinois Medical Center three days later on November 28, 2013. (T. 26; Px. 2). Petitioner testified she went because she was unable to walk. (T. 26). At the emergency room, Petitioner gave a history of mechanical fall and landing on her left hip. She had no history of prior left hip pain. An x-ray demonstrated a displaced, partially impacted femoral

neck fracture. (Px. 2). Petitioner was admitted and transferred to Weiss Memorial Hospital, where she underwent a left total hip arthroplasty. (Px. 2, Px. 3).

Petitioner was released from the hospital on December 6, 2013 and she was transferred to a rehabilitation center at Lutheran Hospital. (T. 29) Petitioner was taken off work during this time. (T. 30). Petitioner followed up with her treating surgeon, Dr. Yasser Farid, on December 23, 2013. At that visit, Dr. Farid recommended Petitioner start physical therapy. Petitioner underwent physical therapy at Weiss Memorial. (Px. 3, Px. 4).

Petitioner followed up with Dr. Farid on January 14, 2014. Petitioner continued physical therapy and Dr. Farid released Petitioner to return to work part time, which she did. Petitioner followed up again on February 25, 2014. At that time, Dr. Farid documented Petitioner she could walk one mile with a cane and was unable to complete a full day of work. Dr. Farid advised Petitioner to remain as active as possible and limit her standing or sitting. (Px. 4).

Petitioner next followed up with Dr. Farid on May 20, 2014, who indicated Petitioner was doing well and walking better with minimal symptoms. Petitioner did have an increase in pain starting three weeks earlier that resulted in pain on the side of the left buttock that occurred with standing or running more than two hours, which was associated with left knee buckling. Dr. Farid documented Petitioner took ibuprofen at night and used a cane as needed. Dr. Farid felt Petitioner was very functional but advised against running. Dr. Farid felt Petitioner was more symptomatic due to trochanteric bursitis and recommended hydrotherapy and swimming. Dr. Farid advised Petitioner to follow up in six months and would consider a cortisone injection.

Petitioner had her one year follow up on December 16, 2014. At that time, Dr. Farid felt Petitioner was doing well. Dr. Farid advised Petitioner to use a cane for ice and snow and to continue to follow up once per year. Petitioner testified that she does return to Dr. Farid once per year for follow up and she has received no further treatment. (T. 35). Petitioner testified her primary care physician recommended she stop using ibuprofen and utilize Tylenol instead. Petitioner testified she usually takes Tylenol once or twice a week but tries not to and her usage depends on the weather and the day. Petitioner took the Tylenol prior to her workers' compensation hearing due to sitting for so long. (T. 35).

Petitioner testified she cannot be as active as she used to be and that she does like to be active. Petitioner testified she used to play a tennis and bike ride and had been looking forward to doing those things during retirement but now cannot do that as much. Petitioner testified she cannot run with her grandkids the way she would like. Petitioner testified it is embarrassing to go to the airport and be treated differently due to the artificial hip. Petitioner has trouble kneeling down in church but felt this was getting better. Petitioner testified she has trouble getting up and down while gardening. Petitioner testified she does have hip pain at times and it could be triggered by sitting too long or walking, or the weather. (T. 38).

Petitioner testified she continues to use a cane on occasion. Specifically, she will utilize the cane anytime there is ice, snow or sometimes rainy conditions. Petitioner will use it when in an unfamiliar place and she feels uncertain. Petitioner has a folding cane that fits in her bag. (T. 41).

Petitioner retired from Respondent on September 30, 2015 and no longer works. (T. 41). Petitioner testified she has not suffered an injury since her fall in 2013 to her left hip nor had she suffered an injury prior to that date to her left hip. (T. 42).

CONCLUSIONS OF LAW

The Arbitrator finds that Petitioner testified overall very credibly during the hearing regarding the general facts of her employment, her employer's premises, her injury, treatment, and current condition. The Arbitrator further finds and concludes, based on Petitioner's credibility, her testimony should be and is hereby adopted. The Arbitrator further emphasizes that much significant evidence was elicited in Petitioner's testimony which was both unchallenged and unrebutted, as noted above. As such, some of this testimony was sufficient, in and of itself, to meet her burden of proof.

Regarding disputed issue (C), "Did an Accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence she sustained an accidental injury arising out of and in the course her employment with Respondent on November 25, 2013, for the reasons set forth and explained below.

In a nutshell, the general proposition of law at issue in this case involves the proposition that when an accident that occurs on the employer's premises, even in an area shared by the general public, it is usually compensable, provided that "arising out of" (that

is, an "increased risk") has been proven. Based on multiple prior cases, the "increased risk" associated here was the snow and ice on the pathway of the employer's premises. **"Snow and ice" on an employer's premises has consistently been held to be an "increased risk" of employment.**

This case is not a "parking lot" case *per se*; that is, while a Respondent-owned "parking lot" is involved, Petitioner was injured on her way to that parking lot, while walking on a pathway covered with ice and snow, a pathway Respondent controlled and/or maintained and/or owned, a pathway also used also by the general public (as was the Respondent's parking garage).

A claimant bears the burden of showing that her injury arose out of and in the course of her employment with Respondent. *Sisbro Inc v. Industrial Comm'n*, 207 Ill.2d 193. "In the course of" employment refer to "the time, place and circumstances of the injury." Id. Petitioner was injured leaving her work place directly after finishing work. Petitioner testified she completed her work and left her office immediately thereafter to proceed to go to her car. (T. 9). This type of activity has been consistently found to be "in the course of" one's employment. That is, the accidental injury sustained by the employee occurred within the premises controlled or designated by the employer at a reasonable time before, during or after working. This theory contemplates an employee's entry and departure from the employer's workplace or premises within a reasonable time before and after the work duties end. The evidence indicates that "in the course of" is proven here; that is, Petitioner was injured within a reasonable time after work - and while still on her employer's premises.

Accordingly, the threshold and major disputed issue in this case is whether Petitioner's injury also "arose out of" her employment. If an injury has "its origin in some

risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accident injury", then it is considered to have arisen out of the employment. *Sisbro, Inc.* 207 Ill.2d at 203. "There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risk that are personal to the employee ... and (3) neutral risk that have no particular employment or personal characteristics, such as those when the public is commonly exposed." *Dukich v. Industrial Comm'n,* 2017 Il App (2d) 160351WC, 86 N.E. 3d 1161, 1168 (App. Dist. 2d 2017).

However, in this instance, such a "risk" analysis is not even necessary; as explained further below, the *Dukich* court held that, "**The presence of a 'hazardous condition' on the employer's premises renders the risk of injury a risk incidental to employment**; accordingly, **a claimant who is injured by such a hazardous condition may recover benefits *without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public***." *Dukich*, 86 N.E.3rd at 1173. As the court continued, "In other words, **such injuries are not analyzed under 'neutral risk' principles; rather they are deemed to be risks 'distinctly associated' with the employment**." *Ibid.* The "hazardous" condition" present here was the ice and snow on the walkway.

In *Dukich*, the Appellate Court indicated that "both our supreme court and our appellate courts have repeatedly held that **accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the**

claimant's injury was sustained as a result of the hazardous condition of the employer's premises." 86 N.E.3d at 1172.

The Court went on to list multiple cases where the "hazardous condition" cited "involve[d] injuries caused by the **natural accumulation of snow and/or ice** in a parking lot ***or other outdoor space owned or controlled by the employer***." *Id.* at 1173. The Court was making a distinction between wet conditions (that is, merely "rain") and snowy and/or icy conditions and determined that **the natural accumulation of snow and/or ice (in a parking lot or *other outdoor space* owned or controlled by the employer) have consistently been held to be *hazardous conditions.*** *Id.* at 1172-1173. That is precisely the case here.

In the current case, the Arbitrator finds and concludes Petitioner was traversing a paved pathway that Respondent maintained and regarding which can be reasonably inferred Respondent also controlled and owned, as this pathway was "on campus." The Arbitrator notes **no evidence** was offered to prove (or even suggest) that the pathway where Petitioner fell was not maintained or controlled or owned by Respondent. **The Arbitrator therefore finds that the pathway on which Petitioner fell – on which there was clearly a hazardous condition of snow and ice - was maintained by the University of Illinois (T. 24, and highly likely was also University of Illinois property) and, therefore, was an *extension of Respondent's employment premises.*** Petitioner testified to this and this testimony was both unchallenged and unrebutted. There was no evidence at all in the record disputing Petitioner's testimony. Further, Petitioner credibly testified – again without any rebuttal - the paved pathway on which she fell was put there for the sole purpose of allowing pedestrians or employees to traverse a grassy area to get to a Respondent-owned garage to

park cars; that is, the same parking garage where Petitioner parked her car for the last 8-9 years.

Therefore, the Arbitrator finds and concludes the accumulated ice and snow on this walkway, as well as the continuing accumulation of falling ice and snow during the course of Petitioner's work day and at the time she fell, was a specific hazardous condition - and therefore a specific, identified "increased risk" of employment - under the same circumstances discussed in *Mores-Harvey* and *Dukich*.

Additionally, Respondent, through its parking Service, assigned Petitioner the specific garage in which she parked her car, being the parking garage nearest her office. (T. 10, 16). Petitioner purchased her parking pass from Respondent's Parking Service. (T. 10-11, 15). While Petitioner was able to choose another lot/garage and chose any parking spot where she parked inside the garage, and the general public was also able to share parking in this same garage, **it was necessary for Petitioner nonetheless to traverse Respondent's property or property which it maintained (that is, travel on and across the paved walkway) to arrive at the assigned parking garage. Further, the fact that Petitioner chose to travel as her normal route via the closest path to get from her office to the parking garage indicates the reasonableness and propriety of her conduct (as opposed to, for instance, walking across the unpaved grass instead or walking along a longer and slower route to the parking garage).**

The Arbitrator gives little weight to the fact Petitioner could have entered through other doors of the parking structure. Petitioner chose to park closest to where she entered the parking garage and then chose the shortest pathway to that spot. Respondent clearly expected and could reasonably foresee employees traversing this same route since

Respondent's own parking service assigned the employees specific parking garages and Respondent provided (owned/maintained/controlled) the pathway to get there. Further, Respondent apparently cut holes in the metal railing at the garage's entrance for people to walk through to get to their cars, at the same entrance Petitioner used to enter the parking structure.

The fact that the general public also could utilize the same parking garage does not eliminate or alter the conclusion that **Petitioner was exposed to a hazardous condition on Respondent's premises (the pathway) which Respondent maintained (and likely owned) as a direct and foreseeable result of Respondent's assigned parking.** Courts in the past have awarded benefits under situations where employees sustained injuries when exposed to hazards or increased risks in shared parking lots. *See Mores-Harvey v. Industrial Comm'n,* 345 Ill.App.3d 1034 (2004). Although this injury did not occur in a shared "parking garage", the general legal principle applied is the same. This is explained as follows: "We acknowledge that both our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises." *Dukich v. Illinois Workers' Compensation Commission,* 86 N.E. 3rd 1161, 1172 (2nd Dist. 2017); "Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of employment." *Izydorski v. Mores-Harvey,* 345 Ill. App.3d 1034, 1037 (App. Ct. 3rd Dist. 2004). Where liability has been imposed, the injury occurred either as a direct result of a hazardous condition on the employer's premises or arose from some risk connected

with, or incidental to, the employment. Here, as in many earlier cases, a "hazardous condition" was present on the surface of the employer's premises (the pathway) - snow and ice - that caused Petitioner's injuries. The *Dukich* court further held that in each of the many cases cited therein involved injuries caused by the natural accumulation of *snow and ice* (emphasized in the original) in a parking lot or other outdoor space owned or controlled by the employer. That is the case we have here.

"The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public." *Dukich,* 86 N.E. 3d at 1173; citing also to *ADM* and *Mores-Harvey.* "In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment. *Ibid.*

Further, "whether a parking lot (or a pathway) is used primarily by employee or by the general public, the proper inquiry is whether the employer maintains and provides the lot (or pathway) for its employees' use. If this is the case, then the lot (pathway) constitutes a part of the employer's premises. The presence of a hazardous condition on the employer's premises (ice and snow) that causes a claimant's injury supports the finding of a compensable claim." *Izydorski v. Mores-Harvey*, 345 Ill. App.3d at 1041, See *Archer Daniels Midland Co.*, 437 N.E.2d 609 ("where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved of the award of compensation.")

Here, Petitioner parked her car in one of Respondent's parking garages and was, as she testified, "assigned" to this specific garage by Respondent's Parking Service, and she paid for parking privileges for this particular garage at a reduced, employee rate. Although Respondent did not specifically "restrict" where Petitioner could park her vehicle (she was free to park wherever she wanted, albeit without the advantage of the magnetized parking card) she was assigned by Respondent's Parking Service to park in the garage closest to her office and, in essence, Respondent exerted some control over Petitioner's actions by doing so. **In this way, Petitioner additionally faced risks to a greater extent than the general public - although this is not a conclusion necessary for Petitioner to prove.** In any event, the unrebutted evidence is that Respondent owned and/or controlled and/or maintained the premises (the walkway) on which Petitioner was injured, which had a hazard on it (snow and ice) which directly caused her injuries, and this is sufficient in itself to result in a compensable accident.

As the *More-Harvey* court indicated, "...because claimant's fall resulted from a hazardous condition on employer's premises...In other words, her fall resulted from an employment-related risk and not a neutral force." *Izydorski v. Mores-Harvey*, 345 Ill. App.3d at 1093-94.

Based on the above, the Arbitrator finds that Petitioner has proved by a preponderance of the credible evidence she sustained accidental injuries arising out of and in the coursed of her employment with Respondent on November 25, 2013.

Regarding disputed issue (F), "Is Petitioner's current condition of ill-being causally related to the injury", the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner's current condition of ill-being is causally related to the injuries sustained on November 25, 2013. There is no evidence in the record contradicting the fall itself and the subsequent course of treatment and related current condition of ill-being. The medical records clearly indicate Petitioner's injuries were the result of a mechanical fall. There was no intervening or superceding injury. There is no evidence in the record disputing, let alone, actually refuting, causation.

Regarding disputed issue (J), "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator finds and concludes as follows:

As the Arbitrator has found and concluded accident and causal connection in favor of Petitioner, the medical bills listed in Petitioner's Exhibit 1 are awarded pursuant to Sections 8(a) and 8.2 of the Act. There is no evidence in the record to dispute the reasonableness or necessity of Petitioner's incurred medical care and treatment. The reasonableness and necessity of her treatment is well-documented as found in her treating medical records and is self-evident, and such reasonableness and necessity is further supported by Petitioner's credible testimony. Further, Petitioner should be reimbursed her out of pocket expenses. Respondent is responsible for resolution of the conditional payments made by Medicare.

Respondent shall receive credit of $45,802.89 for payments made by any group health insurance carrier pursuant to Section 8(j) of the Act. Respondent will hold Petitioner harmless for any subrogation interest of CIGNA that exists as a result of payments made on her behalf for which they have received a credit. Respondent will also hold Petitioner harmless from any providers for whom they are receiving a credit for payments made.

Regarding disputed issue (K), "What temporary benefits are in dispute? TTD?", the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner has proven entitlement to temporary total disability benefits for the period inclusive of November 26, 2013 through January 13, 2014, a period of 7 weeks. The records of treating physician Dr. Farid indicated Petitioner was taken off work for this time period as a result of her injuries and she was returned to work on a part time basis following the January 13, 2014 visit. TTD ends at that point.

Regarding disputed issue (L), "What is the nature and extent of the injury?", the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner sustained the permanent partial loss of use of her left leg under Section 8(e)12 to the extent of 40% thereof (86 weeks).

The Arbitrator has analyzed the five factors as required pursuant to Section 8.1b of the Act.

i) **The reported level of impairment pursuant to subsection (a) of Section 8.1b**: Neither party submitted an impairment rating and, therefore, the Arbitrator gives this factor no weight.

ii) **The occupation of the injured employee**: Petitioner worked in an office type - executive/administrative position for over thirty years, which was a light duty position. The Arbitrator gives this factor some weight.

iii) **The age of the employee at the time of the injury**: Petitioner was 68 years old at the time of her injury. Petitioner was nearing the age of retirement and did in

fact retire two years later. Petitioner's advanced age makes the healing process difficult and uncertain. The Arbitrator gives this factor significant weight.

iv) **The employee's future earning capacity:** Petitioner's future earning capacity was not affected by this injury. The Arbitrator gives this factor significant weight.

v) **Evidence of disability:** Petitioner testified credibly as to how the residuals of this injury affect her in her everyday life. **Petitioner sustained a left displaced femoral neck fracture. Surgery was performed, being a left total hip arthroplasty.** This is a total hip replacement. Petitioner is unable to be as active as she once was and is required to use a cane in many situations. She testified as to the ongoing issues with standing, sitting and walking long distances. She does require medications for her discomfort at times. Dr. Farid advised Petitioner to avoid heavy impact activities. This factor is given significant weight.

Therefore, the Arbitrator finds and concludes Petitioner sustained the permanent partial loss of use of the left leg under Section 8(e)12 to the extent of 40% thereof (86 weeks).

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: July 17, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Letia Gossard,

Petitioner,

vs.

NO: 17 WC 4197

20IWCC0592

State of Illinois, Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2020, is hereby affirmed and adopted.

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

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

20 IWCC0592

Pursuant to section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

DATED: OCT 7 - 2020
o: 9/3/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GOSSARD, LETIA Case# **17WC004197**
Employee/Petitioner

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

20IWCC0592

On 1/13/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

6236 ASSISTANT ATTORNEY GENERAL
KAYLA KOYNE
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

JAN 13 2020

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

20IWCC0592

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Letia Gossard
Employee/Petitioner

v.

State of Illinois Department of Human Services
Employer/Respondent

Case # **17** WC **4197**

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Springfield**, on **November 21, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 23, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, per the stipulation of the parties, Petitioner earned **$56,068.04**; the average weekly wage was **$1,078.23**.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$0.**

Respondent is entitled to a credit for medical bills paid in the amount of **$ALL AMOUNTS PAID** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent is entitled to a credit for medical bills paid in the amount of **$ALL AMOUNTS PAID** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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

Melinda M. Price-Sullivan

Signature of Arbitrator

1/10/2020

Date

JAN 13 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Letia Gossard
Employee/Petitioner

Case # 17 WC 4197

v.

Consolidated cases: N/A

State of Illinois Department of Human Services
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she is currently employed by the State of Illinois as an executive secretary at the Department of Human Services ("DHS"). She testified that she has been employed with the State of Illinois for 29½ years and has worked at DHS since 2002. She testified that as of December 23, 2016, she had been working in the same position at DHS for a little over a year. She testified that she currently works for DHS, but began working for a different department on November 18, 2019. She testified that her job duties are essentially clerical duties, including maintaining databases, creating spreadsheets, creating templates for forms, typing letters, data entry, and some filing. She further described her job history with the State of Illinois as being generally clerical office jobs.

Petitioner testified that the week of December 23, 2016 was busy and that she was also getting ready to go on vacation. She testified that there were bids that needed to go out, so she had to type up bid announcements and get them stuffed and packed. She testified that on December 23, 2016, she did not notice anything at the beginning of the day, but that as the day went on she would stop and take breaks, but that it was to the point where she did not finish the project because she was feeling some tingling and then sharp pains. She testified that the symptoms she experienced were located in the hand/wrist area up through the arm on her left side. She testified that she is right-hand dominant. She also testified that she had experienced numbness and tingling before if she was over-typing, but not to that extent.

Petitioner testified that she did not seek treatment on December 23rd, but later went to Dr. Trapp (her lupus doctor) because she thought it was possibly something involving her joints. She testified that Dr. Trapp ruled out her lupus and referred her to Dr. Trudeau. She testified that that she filled out a Notice of Injury on January 31, 2017.

Petitioner testified that Dr. Trudeau performed an EMG on January 26, 2017. She testified that this was not the first time she had undergone an EMG, that she had had them previously, and that she had had similar symptoms in the past but not to the same extent. She testified that her prior EMGS did not show carpal tunnel syndrome. She testified that she was referred to Dr. Greatting, with whom she previously treated for her trigger thumbs which were unrelated to this claim. She testified that she reported to Dr. Greatting that her symptoms would occur during the day while working including keyboarding, using a mouse, updating large files, and filing.

Petitioner testified that she would spend about 20-25% of her job filing, but that it typically was not a daily job activity. She testified that typing is the majority of her job duties and is a daily activity. She testified that typing included e-mails, inputting timekeeping, bid announcements, maintaining the database on Access for the information for the blind managers, and generally anything that the managers may call up and want her to work on. She testified that she would have to take breaks from typing.

Petitioner testified that she first sought treatment with Dr. Greatting on January 30, 2017 and that he diagnosed her with left carpal tunnel syndrome. She testified that she thought Dr. Greatting said it was in her right hand as well, but that most of her treatment was concentrated on her left hand and that she experienced most of her symptoms in her left hand. She testified that Dr. Greatting performed carpal tunnel release surgery on her left hand, that the surgery went well, and that the only thing that she noticed was that on an extremely busy day she could tell the difference with the weakness. She testified that Dr. Greatting released her from his care regarding her carpal tunnel surgery on August 10, 2017, and that she continued to treat with Dr. Greatting afterwards for surgery on her unrelated trigger thumb. She also testified that Dr. Greatting sent her to hand therapy.

Regarding her current condition, when Petitioner was asked if there was anything specific she noticed about her condition today that was different than it was before her symptoms came on, Petitioner replied "not really." When asked specifically about symptoms when typing, Petitioner indicated that she may stop and perform her hand exercises. Petitioner further specified that her symptoms today did not inhibit her from doing any of her duties.

Regarding her prior workers compensation settlement contract which she signed on August 10, 2007, Petitioner testified that she was experiencing problems and thought that it was her left hand. She testified that it was actually her neck that was causing her symptoms, and that her prior EMG studies were negative for carpal tunnel. Petitioner further testified regarding two reasonable accommodation requests, dated April 15 and July 10. She testified that she requested a rising desk and assistance with moving files.

On cross examination, Petitioner testified that she first experienced symptoms in her left hand several years probably, even back to 2006. She testified that her symptoms included tingling and numbness. She testified that she uses both hands to type. Petitioner testified that she has experienced symptoms with normal daily activities as well as work activities. She testified that she smoked before her date of accident of December 23, 2016 and that she still smokes today. She further testified that she has had high blood pressure since she was 19 years old. She testified that she was diagnosed with lupus in 1992. She further testified that she has osteoarthritis, but was unsure if it was in her hands.

On redirect, Petitioner testified that while she has had symptoms going back to 2006, her symptoms changed in 2016 by including pain and burning. Petitioner testified that she experienced symptoms at night and that it would wake her up.

The Accident Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The report reflects that the alleged accident was reported on January 31, 2017 for an alleged date of accident of December 23, 2016. It was noted that the date and time of reporting was that of January 30, 2017, and that the supervisor was that of Raven Pulliam. It was noted that Petitioner was performing repetitive movement including grabbing, pulling, lifting, pushing, and holding files and paper, and that she was typing and stuffing envelopes on December 23, 2016 for 106 files and 106 envelopes. (PX1).

Various Job Pictures were entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The CMS Job Description was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The Position Description was that related to Executive Secretary I, which noted that the individual

performed paraprofessional and clerical support functions for the administrator of the Business Enterprise program for the Blind within the Bureau of Blind Services. (PX3).

The EMG Report of Dr. Trudeau dated January 26, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner reported that she had paresthesias up and down the left hand and even up the arm and was starting to get some similar difficulties on the right side. The records reflect that the testing was interpreted as revealing (1) median neuropathy at the left wrist (carpal tunnel syndrome), mild to moderately severe in electroneurophysiologic testing characterizations; (2) no current evidence of proximal median neuropathy (pronator syndrome); (3) no current evidence of ulnar nerve or radial nerve compromise; (4) no current evidence of other entrapment neuropathy; (5) no current evidence of cervical radiculopathy; (6) no current evidence of brachial plexopathy. (PX4).

The medical records of Springfield Clinic were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on January 30, 2017, at which time it was noted that she was seen concerning her left hand. It was noted that Petitioner had been previously treated by Dr. Greatting for a left trigger thumb and that it had resolved, and that she had more recently developed some pain and numbness and tingling in her left hand. It was noted that this would bother Petitioner at night and during the day with various activities, that she also noted some pain around the base of her thumb, that she had a history of lupus, and that she initially thought her symptoms may be related to that. It was noted that Petitioner saw Dr. Trapp concerning this, that he felt she may have a carpal tunnel syndrome, and that she was referred for an EMG with Dr. Trudeau. It was noted that Petitioner would have pain, numbness, and tingling in her hand which would wake her up at night, that the pain would also radiate up the arm, that she would get symptoms multiple times during the day where she would have to shake her hand or rub her hand to get the symptoms to go away, and that she had also noticed some pain around the base of her thumb. It was noted that Petitioner tried some splinting during the day and that it increased her pain, that she had increased symptoms while doing her work activities, and that her work activities included a significant amount of keyboarding and use of a mouse. It was noted that Petitioner would also have to update large files where she had to pull the files from file cabinets which were very full of folders, that she would then have to remove information from the folders and replace it with the new information, and then replace the files. It was noted that Petitioner would also have to do mailings where she would have to stuff multiple envelopes to do the mailings. It was noted that clinically Petitioner had left carpal tunnel syndrome and arthritis in her left thumb carpometacarpal joint secondary to lupus, that treatment options were discussed, and that her carpal tunnel symptoms were significant enough that it was elected to proceed with surgical treatment. It was noted that at the same time of the carpal tunnel release, Petitioner would undergo an injection into her left thumb carpometacarpal joint. (PX5).

The records of Springfield Clinic reflect that Petitioner underwent x-rays of the left thumb on January 30, 2017, which were interpreted as revealing arthritic changes. Petitioner underwent (1) left carpal tunnel release; (2) left thumb carpometacarpal joint injection on March 7, 2017 by Dr. Greatting for pre- and post-operative diagnoses of (1) left carpal tunnel syndrome; (2) left thumb carpometacarpal joint osteoarthritis. At the time of the March 27, 2017 visit, it was noted that Petitioner's incisions were well-healed, that she felt that her nocturnal symptoms were much improved over her pre-operative status, that she was still having some pain in the area of the incision, and that she still felt she had some weakness. It was also noted that Petitioner felt she had pain with use of her hand and would occasionally get some electric shock sensations in her wrist area up to her fingers. It was noted that Petitioner was reassured that the things she was experiencing were normal and that she was not even three weeks after surgery. It was noted that Petitioner was going to continue scar massage/desensitization as well as use of the Thera-Putty. It was further noted that Petitioner was going to return to work April 3rd with some restrictions, and that she was to return in one month. At the time of the May 4, 2017 visit, Petitioner stated that she felt that her numbness had improved but that she still had some weakness and tenderness. It was noted that Petitioner's incision was mildly tender and that she would also experience some shooting pains radiating up her forearm.

It was noted that Petitioner was to continue to work with the same work restrictions and was to return for re-evaluation on June 14th. It was further noted that Dr. Greatting felt that Petitioner's work activities, as he understood them, had been a significant factor in aggravating or accelerating the symptoms of her left carpal tunnel syndrome. (PX5).

The records of Springfield Clinic reflect that Petitioner was seen on June 29, 2017, at which time it was noted that she stated that the numbness and tingling in her hand was improved. It was noted that Petitioner had also had an injection of left thumb CMC joint. It was noted that since the last time she was seen Petitioner said that the tenderness in her incision was also significantly improved, that she did not feel the function of her hand was restored to 100%, that she felt she could do all of her normal activities, and that she also had developed some triggering of her right thumb. It was noted that Petitioner's carpal tunnel incision was very well healed and minimally tender, that she had good range of motion of her wrist and good strength of her abductor pollicis brevis, that she had a negative Tinel's over her carpal tunnel, and that she could work and use her left arm and hand without restrictions or limitations. It was noted that Petitioner still felt that she had some mild weakness which may persist, and that she would also get when she extended her wrists some shooting pains which would radiate up her arm. It was noted that there were very brief and episodic, and that they may also persist. It was noted that the A-1 pulley of the right thumb was now triggering with flexion and extension. It was noted that Petitioner's trigger thumb symptoms would be observed for now and that if she had increasing symptoms over time, she may require a corticosteroid injection or even surgical release of the right trigger thumb. (PX5).

The records of Springfield Clinic reflect that Petitioner was seen on August 10, 2017, at which time it was noted that she felt her strength was good but that she still had some mild weakness, and that the numbness and tingling had resolved. It was noted that Petitioner did have some thumb CMC joint arthritis with some tenderness and crepitation with grind test. It was noted that concerning her carpal tunnel syndrome Petitioner appeared to be doing well, that she could use her left arm and hand without restrictions or limitations, and that she was released from care and at maximum medical improvement. Petitioner was recommended to return as needed. The records reflect that on October 6, 2017, Petitioner underwent release of right trigger thumb by Dr. Greatting for a pre- and post-operative diagnosis of right trigger thumb. At the time of the October 19, 2017 visit, it was noted that Petitioner's incision was well healed and that the triggering had resolved. Petitioner was recommended to return as needed. (PX5).

The transcript of the deposition of Dr. Mark Greatting dated April 8, 2019 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Greatting testified that he first saw Petitioner regarding carpal tunnel on January 30, 2017. He testified that Petitioner presented complaining of numbness and tingling in her left hand, that it bothered her at night as well as during the day with various activities, that she was 51 years old, and that she also noted some pain around the base of her thumb. He testified that it was noted that Petitioner had a history of lupus, that she saw Dr. Trapp, and that Dr. Trapp referred her to Dr. Trudeau, who did an EMG/nerve conduction study. He testified that Petitioner said that she had pain, numbness, and tingling in her left hand which would wake her up at night, that it would radiate up her arm, that she said she would get symptoms multiple times during the day where she would have to shake her hand or rub her hand to get the symptoms to go away, and that she tried some splinting during the day which did not help and increased her pain. He further testified that Petitioner felt that she had increased symptoms while doing her work activities, that she indicated that her work included a significant amount of keyboarding and use of a mouse, that she would also have to update large files where she had to pull the files from file cabinets and said they were very full of folders, and that she would have to remove information from the folders, replace it with new information, and then replace the files. He testified that Petitioner also stated that she would also have to do mailings where she had to stuff multiple envelopes to do the mailings. (PX6).

Dr. Greatting testified that lupus was a systemic inflammatory condition and that it could lead to all kinds of systemic issues, including potentially carpal tunnel. He testified that carpal tunnel syndrome could be aggravated by certain activities, and that he thought that "office work such as typing" was one of the things that could aggravate carpal tunnel syndrome. (PX6).

Dr. Greatting testified that he reviewed the EMG of Dr. Trudeau, and that he indicated that it showed mild to moderately severe left carpal tunnel syndrome. He testified that he discussed treatment options with Petitioner, and that it bothered her enough that she wanted to go ahead with surgical release. He testified that carpal tunnel syndrome could occur in one hand and not the other. When asked whether that had any impact on the cause, Dr. Greatting responded that he did not think that it had any impact on the cause unless there was an injury to one side. He testified that he performed the carpal tunnel release on March 7, 2017 and that it was a pretty typical release. (PX6).

Dr. Greatting testified that he followed up with Petitioner on March 27th at which time her incision was well healed, that she felt that her symptoms were markedly improved, that she still had some pain in the area of the incision and still felt she had some weakness, and that she occasionally would get an electric shock sensation in her wrist up to her fingers with the use of her hand. He testified that when he saw Petitioner on May 4, 2017, she indicated that she felt the numbness in the hand was improved, but that she still had complaints of some weakness and tenderness. He testified that Petitioner was working at that point with some restrictions, that he told her to continue that, and that she was to return in a month to six weeks. He testified that when Petitioner returned on June 29, 2017, she indicated that the numbness was improved, that she said the tenderness was better than the last visit, and that she said she did not feel her function was 100% restored but that she said she could do all of her normal activities. He testified that Petitioner had also developed right trigger thumb which had nothing to do with the left carpal tunnel, and that she was released to return to work without restrictions. (PX6).

Dr. Greatting testified that the last time that he saw Petitioner for carpal tunnel was on August 10, 2017. When asked how Petitioner did post-operatively, Dr. Greatting responded that the numbness and tingling was resolved, that she felt her strength was good but that she still had some mild weakness, and that the incision was well healed. He testified that Petitioner was continuing to work without restrictions or limitations, and was released from care and at maximum medical improvement. He testified that the development of trigger thumb would not have any bearing on the development of carpal tunnel. (PX6).

When given a hypothetical as to Petitioner's job duties and asked whether her job duties could contribute to the development or aggravate the condition of carpal tunnel in her left hand, Dr. Greatting responded that Petitioner was right-handed and that writing would not be a factor, and that her activities did not cause her to develop carpal tunnel syndrome but that he thought these activities contributed to aggravation or acceleration of the symptoms. He agreed that the activities could have made her symptoms worse or accelerated the development of carpal tunnel syndrome, and that he said this with the knowledge that Petitioner suffered from lupus. (PX6).

Dr. Greatting agreed that it was possible that lupus could make Petitioner more susceptible to an aggravation or development of an inflammatory disease. He agreed that it may potentially take less activity for Petitioner to develop carpal tunnel that someone that did not suffer from lupus. When asked of Petitioner's overall outcome, Dr. Greatting responded that her symptoms resolved and that she still complained of some mild weakness, which he thought was pretty typical for a good result following carpal tunnel surgery. (PX6).

On cross examination, Dr. Greatting agreed that Petitioner had complained that her symptoms would worsen at night when she was asleep. He testified that it was very common for people with carpal tunnel syndrome to wake up at night with symptoms. When asked whether during any of her visits Petitioner discussed her job duties with him, Dr. Greatting responded that at the January 30, 2017 visit she

indicated that she did work activities that included a significant amount of keyboarding and use of a mouse, that she would also have to update large files where she had to pull the files from file cabinets which she said were very full of folders, that she would then have to remove information from the folders and replace it with new information and then replace the files back in the file cabinet, and that she said she would have to do mailings where she would stuff multiple envelopes to do the mailings. He denied that Petitioner stated exactly what she was keyboarding, such as memos, reports, or data entry. (PX6).

On cross examination, Dr. Greatting denied that Petitioner told him how many files she would go through in a day or that she did indicated how much time in her day would be spent filing. He testified that Petitioner seemed to indicate that they were large files so he assumed that meant most or all of them. He denied that Petitioner indicated how many minutes per day she was keyboarding, nor did she describe the computer that she used at work. He denied that Petitioner described the layout of the work area, nor did she demonstrate to him how she would hold her hands and arms at her desk while she was keyboarding. He denied that Petitioner ever mentioned or complained of any activities outside of work that caused pain or numbness in her wrist. (PX6).

On cross examination, Dr. Greatting testified that he did not indicate a specific date when Petitioner indicated to him when she first experienced symptoms. He denied that Petitioner ever mentioned to him that she had experienced left hand numbness and tingling in 2005. He further denied that Petitioner ever mentioned to him that she had a normal EMG at that time. He denied that Petitioner ever mentioned that she had mild disc "bunches" at level C4-5 and level C5-6. He testified that symptoms of pain and numbness and tingling in the hand would typically be caused either by a cervical spine issue or a compressed nerve in the affected extremity. (PX6).

On cross examination when asked whether when Petitioner first started treating with him she had any risk factors that would make her more likely to have or to develop carpal tunnel syndrome, Dr. Greatting responded Petitioner's sex, age, and lupus. He testified that people that were obese had a higher incidence of carpal tunnel syndrome, but that Petitioner was not obese. He further testified that he thought that there was a higher incidence of carpal tunnel syndrome in individuals with hypertension. He agreed that Petitioner had high blood pressure. He also testified that he thought that Petitioner had some thumb carpometacarpal joint arthritis, which was probably related to her lupus. (PX6).

On cross examination, Dr. Greatting testified that there was nothing in his notes that indicated any hobbies that Petitioner did frequently or regularly. He testified that Petitioner did not indicate whether she had a computer at home. He denied that Petitioner ever indicated whether she would type at home. (PX6).

On redirect, Dr. Greatting agreed that carpal tunnel syndrome could be a condition that developed over the course of years. He testified that Dr. Trudeau was very good at his job and that he consistently relied on his reports. He testified that in his report Dr. Trudeau indicated that he did not see any cervical radiculopathy. When asked if Petitioner's condition was coming from her cervical spine whether it would "show up there," Dr. Greatting responded that it was possible that it would but that cervical spine problems did not always present as positive on an EMG/nerve conduction study. He testified that he thought that Petitioner's condition was all related to carpal tunnel syndrome and not her cervical spine. (PX6).

The Illinois Form 45 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report reflects that the date of the report was that of January 31, 2017, that the date and time of accident was that of December 23, 2016, and that Petitioner stated that she had been filing all day with some heavy and large files, that she had discomfort in her left hand and all of her fingers except her pinky, and that the pain radiated up the left arm. (RX1).

The Supervisor's Report of Injury was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The report reflects that Raven Pulliam noted that Petitioner told her that she had a doctor's appointment that resulted in a diagnosis of carpal tunnel on January 30, 2017. (RX3).

The Initial WC Medical Report dated January 31, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The Wage Statement was entered into evidence at the time of arbitration as Respondent's Exhibit 5.

The IME Report of Dr. James Williams dated September 14, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The report reflects that Petitioner was seen for an IME on September 14, 2017, at which time it was noted that she was a 51-year-old right-hand dominant female who worked as an executive secretary for the State of Illinois, that her date of hire was 28 years prior, and that she had worked as an executive secretary for the last two years. It was noted that Petitioner stated that she worked for the Bureau of the Blind where she answered to a supervisor that was responsible for the blind filling vending machines at state facilities, that she denied any previous injuries to her right or left hands, that she stated her work hours were from 7:30 a.m. to 4:00 p.m. Monday through Friday, that she had a 1-hour lunch and two 15-minute breaks which she did not always take, and that she said her job duties involved sending out mass mailings to the blind for jobs. It was noted that Petitioner did typing of letters, that she would send in inventory and locations, that she would attend conferences, and that she would do filing and also took care of 100+ vendors. (RX6).

The report reflects that Dr. Williams asked Petitioner about her job, and that she said she opened mail, distributed mail, scanned papers and sent via e-mail, that she took care of vendors, that they needed to have insurance, that she did insurance/inventory annual reports on time, and that she would have to enter that and send it to each individual. It was noted that Petitioner took care of papers, that she would print out things, that she would submit itinerary, that she would file reports, that she said reports from KAB she did separate and sent to each region, that she said she did filing which was about 15% of the day, that she did writing which was about 10% of the day, filling out forms and doing timekeeping documents, and that she said 75% of the time she was typing. It was noted that Petitioner stated that she would answer the phone with her left hand, that she now had a headset, and that she had to put the phone on speaker. (RX6).

The report reflects that Petitioner stated that before surgery she was having difficulty buttoning shirts and fixing her hair, that she said her problem started when the files were packed tightly, that she was using her left hand, that she would be pulling the files and pulling out old info and putting in new info, and that after all day of filing on December 23, 2016 she was taking breaks. It was noted that Petitioner said that her symptoms on the right side were 0/10 at rest (same as the left), and with activity a 6-7/10 depending on the activity on the right and 3/10 on the left. It was noted that as to numbness and tingling, Petitioner complained about the index, middle, and ring fingers on the right which was intermittent, and that she complained of some occasional shooting pains on the left. It was also noted that Petitioner complained of weakness on the left as well as the right, that she complained of dropping things still on the left as well as the right, and that she wore splints at home on both sides. It was further noted that Petitioner showed Dr. Williams pictures of the file cabinets with bankers-type boxes with the mail envelopes which she was pulling on that particular day, from her cell phone, a picture she had personally taken. (RX6).

The report reflects that it appeared as though Petitioner during the examination did not give a full effort, although she did not appear to show any evidence of symptom magnification or malingering. When asked whether there was a causal relationship between Petitioner's current objective findings and the reported accident, it was noted that Dr. Williams opined that he did not believe that there was any relationship. It was noted that Petitioner did not complain, when he asked her about her typing, that she had at any time rested her wrists or forearms on the edge of the table, and that she did not state that to him, so he did not believe there was any causal relationship between her carpal tunnel of the left side and the

surgery which she underwent for carpal tunnel and trigger thumb with any of her work duties. It was noted that Dr. Williams believed that it would have been related to her systemic lupus erythematosus as was noted by Dr. Greatting in his letter where it said clinically Petitioner had left carpal tunnel syndrome and arthritis in her left thumb CMC joint secondary to lupus, nor did he believe pulling files on December 23, 2016 either caused or aggravated her carpal tunnel syndrome. (RX6).

The report further reflects that Dr. Williams believed that the medical treatment to date had been reasonable and necessary and that no additional medical treatment was necessary. It was noted that Dr. Williams opined that Petitioner was able to work full duty as she had been, and that she had reached maximum medical improvement at approximately six weeks following her surgery performed by Dr. Greatting. It was further noted that Dr. Williams did not believe that Petitioner's current symptoms related back to her previous cubital tunnel diagnosis with a date of December 7, 2005. When asked what, if any, affect did lupus have on Petitioner's current complaints, Dr. Williams responded that he believed that her lupus was the cause for her problems and not her work duties. (RX6).

The transcript of the deposition of Dr. James Williams dated August 15, 2019 was entered into evidence at the time of arbitration as Respondent's Exhibit 7. Dr. Williams testified that he is an orthopedic surgeon, that he holds a board certification through the American Board of Orthopedic Surgery, and that he also holds a Certificate of Added Qualification in hand and upper extremity surgery. (RX7).

Dr. Williams testified that he performed an IME on September 14, 2017. He testified that Petitioner stated that she started having symptoms on or about December 23, 2016, that she showed him a picture on her cell phone of files she had had to pull all day on that date, that she said she started getting symptoms, that she was taking breaks, and that she had complained of numbness and tingling in the index, middle and ring fingers on the right which was intermittent, and some occasional shooting pains on the left. He testified that Petitioner said that it was positional on both sides as to whether she laid on it or not whether she would get nighttime awakening, that she said she had had weakness on the left as well as the right, that she had been dropping things on the left as well as the right, and that she had tried splints on both sides. He testified that Petitioner stated that she was having difficulty prior to the surgery including buttoning buttons on her shirts and fixing her hair, and that she said he problems started when the files were packed too tightly. (RX7).

Dr. Williams testified that Petitioner stated that she had worked for the State of Illinois for approximately 28 years, that she had been an executive secretary for the last two years working for the Bureau of the Blind where she answered to a supervisor that was responsible for filling vending machines at State facilities, that she denied any prior injuries to her hands, that she said her work hours were from 7:30 to 4:00 p.m. with a one-hour lunch and two 15-minute breaks, and that she said she did not always take the breaks. He testified that Petitioner said that her job duties involved her sending out mass mailings to the blind for jobs, that she did typing of letters, that she would send in inventory and locations, that she would attend conferences, that she would do filing, and that she took care of 100+ vendors that filled those job duties. When asked whether Petitioner mentioned any hobbies to him, Dr. Williams responded that she said that she liked to draw. (RX7).

Dr. Williams testified that some common risk factors or co-morbidities that increased the chance of developing carpal tunnel syndrome included diabetes, high blood pressure, thyroid issues which were typically hypothyroidism, different types of inflammatory arthritis like lupus, rheumatoid arthritis, Sjogren's and gout, people with increased body mass above a 30 BMI, people with jobs which involved a lot of vibration or impact to their hands and wrists, and people with a prolonged smoking history which affected the vascularity of the nerve. He testified that Petitioner stated that she smoked about five cigarettes a day for approximately 25 years. He testified that Petitioner had lupus, and that he believed that her carpal tunnel syndrome was related to her lupus. He testified that he did not believe that Petitioner's work duties

were highly repetitive in nature nor did he feel that they were vibratory, nor did he feel that they involved any impact of her hands which would have either aggravated or caused her condition. (RX7).

Dr. Williams testified that he believed that the treatment Petitioner received prior to her examination with him was reasonable and necessary, and that as of the IME he did not believe that any further treatment was needed. He testified that he believed that as of the time of the IME Petitioner was able to perform her work duties as an executive secretary for the State of Illinois, and that he did not recommend any restrictions. He further testified that he believed that Petitioner was at maximum medical improvement as of the time of the IME. (RX7).

On cross examination, Dr. Williams agreed that carpal tunnel syndrome was a condition that could be multifactorial in its manifestation and that it could have multiple causes for its development. He testified that Petitioner's preexisting cervical condition was a co-existing factor that could have been giving her some of her symptomatology. He agreed that an EMG was a reasonable study to use to rule out a cervical condition having an impingement on the nerve. (RX7).

On cross examination, Dr. Williams agreed that Petitioner did not complain about typing to him when she was talking about her carpal tunnel condition. When asked if Petitioner had had complaints about typing whether that would have changed his opinion, Dr. Williams responded that when she spoke with him she did not speak of it, but that she said that she typed about 75% of the day. He testified that another thing that he looked at was that of ergonomic issues Petitioner may have had with typing, such as resting her wrists or forearms on the edge of a table or holding her hands in awkward positions, which she never stated to him were an issue. When asked if Petitioner had referenced ergonomic issues and whether that could have changed his opinion regarding causation, Dr. Williams responded that it was possible but that he could not make that statement because that was not something she complained to him about. (RX7).

The Settlement Contract Lump Sum Petition and Order for 06 WC 2205, 06 WC 15660, and 06 WC 2204 was entered into evidence at the time of arbitration as Respondent's Exhibit 9. It was noted that the body part affected that was that of left hand, left wrist, mind and neck, and that the cases were settled for 8% loss of a man-as-a-whole. (RX9).

The medical records of Springfield Clinic were entered into evidence at the time of arbitration as Respondent's Exhibit 10. The records reflect that Petitioner was referred to either Dr. Russell or Dr. Greatting for her carpal tunnel on July 23, 2004; that she was referred to Dr. Russell for carpal tunnel on July 30, 2004; and that it was noted that she needed an EMG first before being seen per the message note dated August 3, 2004. The records reflect that on August 12, 2004 Petitioner underwent an EMG/nerve conduction study at the referral of Dr. Western. It was noted that Petitioner for the past three years had noted left upper extremity pain, pain in the wrist, and tingling in the 4th and 5th fingers of the hand, and that she noted no symptoms on the right. It was also noted that Petitioner noted a decrease with grip on the left as compared to the right side. It was noted that the testing was interpreted as revealing an abnormal EMG-nerve conduction study of the left upper extremity suggestive of a mild ulnar neuropathy at the left elbow (cubital tunnel syndrome), that there was no evidence of carpal tunnel syndrome, and that there was no evidence of brachial plexopathy, cervical radiculopathy, or peripheral neuropathy. (RX10).

The records of Springfield Clinic reflect that Petitioner was seen on December 29, 2005 for an EMG/nerve conduction study, which were interpreted as revealing unremarkable nerve conduction study and EMG of the left arm and cervical paraspinal muscles; there was no electrophysiologic evidence for a neurogenic lesion including a left cervical radiculopathy, brachial plexopathy, or peripheral mononeuropathy. It was noted that Petitioner had a several-week history of left arm tingling pain with radiation to the arm and hand waking her up at night following a twisting movement at work. The records reflect that Petitioner underwent a neurological consultation on February 20, 2006, at which time it was noted that she complained of neck pain with radiation into the left shoulder and arm with associated

numbness in the left hand that began on or about December 7, 2005 while at work, that she routinely lifted office items and did complain of some "popping" in her neck on the day the pain started, and that it soon began radiating into the left arm, associated with numbness and tingling. It was noted that Petitioner denied a specific fall or overt injury, that she frequently used an office puncher, and that the pain had persisted and, in fact, had worsened a bit. The impression was noted to be that of (1) left interscapular and scapular myofascial pain, starting while at work; intermittent left arm complaints with an unrevealing EMG, of uncertain etiology with benign neurologic exam; a mild cervical radiculopathy is a possibility, though not of electrophysiologic significance in view of the negative EMG; this would appear to be related to her work in that it started while at work, despite a lack of a specific isolated injury; prognosis is favorable for full recovery, in view of it being primarily myofascial in nature; (2) chronic fatigue; (3) diagnosis of lupus; (4) degenerative spine disease; (5) complaint

s of left leg numbness as well as low back pain with benign exam. Petitioner was recommended trigger point injections, which were performed. Petitioner was also referred to physical therapy. (RX10).

The records of Springfield Clinic reflect that Petitioner was seen on July 19, 2010, at which time it was noted that she was seen with complaints of left forearm numbness, intermittent in occurrence, gradually worsening recently, and often aggravated by leaning on her elbows or her forearms. It was noted that Petitioner also complained of bilateral wrist aching and tingling in her hands and fingers, particularly when she leans on her arm a certain way. It was noted that Petitioner had a history of lupus and recalled that when she began having difficulty with her right elbow swelling and was favoring it, that that was when her left arm began having its most symptoms. It was noted that Petitioner was previously on an anti-inflammatory but had discontinued that. The impression was noted to be that of (1) history of myofascial neck pain; currently not problematic; (2) history of lupus, followed by Dr. Trapp; (3) left forearm numbness and tingling, aggravated by leaning on her elbow or forearm, suggestive of ulnar neuropathy; rule out cervical radiculopathy or other etiologies. Petitioner was recommended to undergo an EMG. At the time of the December 2, 2010 visit, it was noted that Petitioner was seen for shoulder pain. It was noted that Petitioner stated that it was her shoulder, but that on her pain diagram and what she described was more scapular pain and radicular-type symptoms in the left upper extremity. It was noted that Petitioner had seen Dr. Fortin in the past and had had multiple trigger point injections and other therapies to get this under control, and that when Dr. Western brought this up to her it seemed to stimulate her memory that she did have similar symptoms. It was noted that Petitioner treated herself with trigger point massage which seemed to help, that she had not had a whole lot of difficulties with this for the past year but that it seemed to be getting bad again, that it seemed to come and go, and that she could not pinpoint any aggravating issues. The assessment was noted to be that of cervical degenerative disk disease with left upper extremity radiculopathy and myofascial trigger points along the medial scapular border. Petitioner was recommended to undergo therapy and was recommended to return to Dr. Fortin if she found the trigger point injections had been very successful for her in the past. It was noted that further evaluation of Petitioner's cervical spine may be necessary if she was not able to get the upper extremity symptoms to resolve. (RX10).

The records of Springfield Clinic reflect that Petitioner underwent a Physical Therapy Evaluation on December 29, 2010, at which time it was noted that she reported that she had had physical therapy there in the past with a neck problem and work injury, that she stated that she felt like she was having increased numbness and decreased strength in her left arm and hand, and that she stated that she got a cool sensation in the left arm and felt that using her crutches or cane may aggravate it at times. It was noted that Petitioner stated that her left upper extremity symptoms came and went, and that she had trouble opening jars or wringing anything and felt that she had decreased grip. At the time of the March 2, 2012 visit with physician's assistant Burves, it was noted that Petitioner returned for follow-up of her left shoulder. It was noted that Petitioner was once again having pain over the lateral aspect of the arm, that she also had been having some numbness and tingling in the left upper extremity, and that she had had problems with this in the past and that a nerve study with Dr. Fortin back in 2010 was normal. It was noted that Petitioner's

shoulder was injected in November, that she did well with this, that most of her symptoms were improved with that, and that the last time she was seen she was not having much of the numbness and tingling complaints. The impression was noted to be that of continued problems with left shoulder rotator cuff tendinitis as well as numbness in the left upper extremity. It was noted that Petitioner definitely had a shoulder component to her complaints, but also had some numbness and tingling in the left upper extremity. It was noted that they were going to try a second injection and see how Petitioner did since she responded so well to it the first time. Petitioner was recommended to continue her home exercise program for rotator cuff strengthening and to return in six weeks for follow-up. (RX10).

The records of Springfield Clinic reflect that Petitioner was seen on October 31, 2012, at which time it was noted that she was seen for follow-up of neck and back pain. It was noted that Petitioner's pain had been ongoing for quite some time, that she had a neck injury in 2003, that she had lupus and fibromyalgia which at times caused her pain to flare, and that she had upper back and neck pain more so on the left side than the right. It was noted that Petitioner described this as a stabbing, burning, aching sensation, that she did do some stretches of her upper back which temporarily alleviated some of her pain, that she had rotator cuff pathology and saw Orthopedics, and that she had received cortisone injections in the past. It was noted that when Petitioner used her left arm for a prolonged period of time she had numbness in her forearm, that she admitted that her grip was somewhat weaker on the left hand than the right, and that her pain on that date was a 10/10. It was noted that Petitioner had pain medications, but wanted trigger point injections to decrease her current flare. The assessment was noted to be that of myalgias and cervical radiculopathy. Petitioner underwent trigger point injections. Petitioner was recommended to follow-up as needed. (RX10).

The records of Springfield Clinic reflect that Petitioner was seen on May 4, 2016, at which time it was noted that she was seen for her left thumb. It was noted that Petitioner had lupus, that she had had left thumb triggering for six months or longer, that the thumb now stayed in a locked or flexed position, and that she could extend it with her other hand but that this was very painful. It was noted that Petitioner had been trying to wear a splint for the thumb which may be helping her a little, that she had had no injury or trauma, and that she had no complaints of numbness and tingling. It was noted that Petitioner had a chronic severe left trigger thumb, that treatment options were discussed, and that she wished to proceed with surgical release. The Operative Report dated June 10, 2016 noted that Petitioner underwent left trigger thumb release for a pre- and post-operative diagnosis of left trigger thumb. At the time of the June 21, 2016 visit, it was noted that Petitioner's incision was well healed, that the sutures were removed, and that she had good range of motion of her thumb IP joint. It was noted that if Petitioner was having any significant problems in 4-6 weeks, she should call and return for follow-up. (RX10).

The records of Springfield Clinic reflect that Petitioner was seen on January 16, 2018, at which time it was noted that she complained of a "knot" on her left palm, as well as bilateral index finger changes and right-hand pain. It was noted that Petitioner had undergone a thumb trigger finger release by Dr. Greatting (right thumb) in October 2017, that she also had episodic shoulder pain related to impingement, that she had seen Orthopedics regarding this problem, that she had been noticing some changes in the joints of the hand described as feeling left second distal phalanx twisting in relation to the middle phalanx, and that there was also some bony enlargement of the DIP joints and PIP joints and that she had episodic discomfort. It was noted that Petitioner had been diagnosed with lupus in the past for which she had taken steroids, that she was now off all medications related to lupus, and that a recent ANA had been negative. The impression was noted to be that of (1) osteoarthritis of the hands; (2) history of lupus but no signs of active disease; recent ANA has been negative; (3) hypertension with recent adjustment of medications. It was noted that Petitioner may use Acetaminophen up to 3000 mg per day for hand pain, and that she was to avoid NSAIDs. Petitioner was recommended to return in one year. (RX10).

The Physician's Medical Review was entered into evidence at the time of arbitration as Respondent's Exhibit 12. The document reflects that Dr. Trapp indicated that Petitioner's disability was that of chronic illness/Lupus, that sitting too long caused impairment when walking and movement limitations, that sitting too long in a position while doing daily tasks as well as using hands/fingers in certain conditions disturbed the "OA" and worsened the ability to perform tasks, and that the reasonable accommodation suggested was that of a sit-to-stand desk riser and assistance while maneuvering files and trying to interfile. (RX12).

The CMS Physician's Statements and Request Form were entered into evidence at the time of arbitration as Respondent's Exhibit 13. The Reasonable Accommodation Request Responses dated April 15, 2019 and July 10, 2019 were entered into evidence at the time of arbitration as Respondent's Exhibit 14.

CONCLUSIONS OF LAW

With respect to disputed issues (C) and (F), given the commonality of facts and evidence relative to these issues, the Arbitrator addresses those concurrently.

The Arbitrator finds that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on December 23, 2016, and that her current condition of ill-being is causally related to her work activities.

having considered and reviewed the entirety of the medical testimony proffered by both Dr. Greatting and Dr. Williams in this matter, the Arbitrator finds the opinions of Dr. Williams to be more persuasive than those proffered by Dr. Greatting. While Dr. Greatting testified that there was a causal connection between Petitioner's work activities and her condition of ill-being in the left hand/wrist, the Arbitrator notes that Dr. Greatting appears to have had less understanding of Petitioner's job duties than Dr. Williams. On cross examination, Dr. Greatting denied that Petitioner told him how many files she would go through in a day or that she did indicated how much time in her day would be spent filing. Dr. Greatting testified that Petitioner seemed to indicate that they were large files so he assumed that meant most or all of them. Dr. Greatting denied that Petitioner indicated how many minutes per day she was keyboarding, nor did she describe the computer that she used at work. Dr. Greatting further denied that Petitioner described the layout of the work area, nor did she demonstrate to him how she would hold her hands and arms at her desk while she was keyboarding. (PX6). This particular testimony, when coupled with (1) Dr. Greatting's denial that Petitioner ever mentioned to him that she had experienced left hand numbness and tingling in 2005; (2) Dr. Greatting's denial that Petitioner ever mentioned to him that she had a normal EMG at that time; (3) Dr. Greatting's denial that Petitioner ever mentioned that she had mild disc "bunches" at level C4-5 and level C5-6; and (4) Dr. Greatting's testimony that symptoms of pain and numbness and tingling in the hand would typically be caused either by a cervical spine issue or a compressed nerve in the affected extremity, admittedly cause the Arbitrator to question the foundation upon which his causation opinion was based. (PX6).

The Arbitrator finds the opinions of Dr. Williams to be more persuasive than those of Dr. Greatting. In addition to having conducted a physical examination of Petitioner, Dr. Williams reviewed Petitioner's medical records, including her prior complaints dating back to 2004, as well as discussing her job duties with her. (RX6; RX7). The Arbitrator notes that the opinions of the doctors differed as to whether Petitioner's job duties were a factor in the development and/or aggravation of her condition. Dr. Williams testified that Petitioner had lupus, and that he believed that her carpal tunnel syndrome was related to her lupus. (RX7). Dr. Williams further testified that he did not believe that Petitioner's work duties were highly repetitive in nature nor did he feel that they were vibratory, nor did he feel that they involved any

impact of her hands which would have either aggravated or caused her condition. (RX7). Additionally, Dr. Williams noted that Petitioner did not complain that she had at any time rested her wrists or forearms on the edge of the table. (RX6; RX7). As a result thereof, the Arbitrator finds Dr. Williams to have had a better understanding of the physical requirements of Petitioner's job, and therefore gives his opinions greater weight than those proffered by Dr. Greatting.

Based upon the foregoing and the record as a whole, the Arbitrator finds that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on December 23, 2016, and that her current condition of ill-being is causally related to her work activities. All benefits are denied. The remaining issues of medical bills and the nature and extent of the injuries are moot, and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILIBALDO CERVANTES,

Petitioner,

vs.

MCCANN CONSTRUCTION and
INJURED WORKERS' BENEFIT FUND,
BY ILLINOIS STATE TREASURER, AS
EX-OFFICIO CUSTODIAN,

Respondent.

20IWCC0593

NO: 09 WC 30437

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Commission, herein, affirms the finding that Petitioner failed to prove an employer-employee relationship existed between the parties and in further support thereof states the following.

Determining whether an employer/employee relationship exists is a factual question based upon a number of considerations. See *Bauer v. Industrial Commission,* 51 Il1.2d 169, 282 N.E.2d 448 (1972). Without the existence of an employer/employee relationship, the injured worker will not be afforded the benefits provided by the Act.

Under the Act, the following factors have been considered to determine if an employment relationship existed at the time of the alleged injury: the right to control the manner in which the

work is being performed, the method of payment, the right to discharge, the skills required to perform the work, the ownership of tools, materials, and equipment used in the work, the relationship of the work performed to the employers purpose, and the deduction of withholding taxes. *Bauer v. Industrial Commission,* 51 Il1.2d 169, 282 N.E. 448 (1972); *Belloumini v. United States,* 64 F.3d 299 (U.S. Ct. of App., 7 Cir. 1995); *Kirk v. State of Illinois Dept. of Rehabilitation Services,* 98 IIC 1216 (Dec. 21, 1998); *Ware v. Industrial Commission,* 318 Ill.App.3d 1 117, 743 N.E.2d 579 (1st Dist. 2000); *Metzeger v. Area Erectors,* 99 IIC 487 (May 26, 1999), *Harter v. Sunset Cartage,* 07 LW.C.C. 1439.

Courts have consistently held that the employer's right to control the manner of the employee's work is the single most important determinative factor, even where the other factors may conflict. See *Bauer v. Industrial Commission,* 51 Il1.2d 169, 282 N.E. 448 (1972); *Belloumini v. United States,* 64 F.3d 299 (U.S. Ct. of App., 7 Cir. 1995); *Kirk v. State of Illinois Dept. of Rehabilitation Services,* 98 IIC 1216 (Dec. 21, 1998); *Ware v. Industrial Commission, 318* Ill.App.3d 1117, 743 N.E.2d 579 (1st Dist. 2000); *Metzeger v. Area Erectors,* 99 IIC 487 (May 26, 1999), *Harter v. Sunset Cartage,* 07 LW.C.C. 1439.

Here Petitioner was 'hired' as a laborer approximately two weeks before the date of the accident. (T. 16) Petitioner testified his job included cleaning up material and loading the scrap into a truck. Petitioner testified that he was performing tear off of siding and hauling roofing materials to the roof of the job site. (T. 18) However, Tony McCann, owner of McCann Construction, testified and disputed Petitioner's testimony. Mr. McCann testified Petitioner performed just cleanup work and did not perform tearing off work. (T. 68) Mr. McCann testified it was he who tore the siding off the house because he wanted it done in a certain way so as not to damage the house/window areas where they were working. (T. 67-68) Other than telling Petitioner to pick up scrap and load it into the truck, how Petitioner performed the cleanup work was solely up to Petitioner. (T. 77) Further, Mr. McCann testified he did not direct Petitioner how to do his job. (T. 76-77) Likewise, Petitioner would work at whatever pace he wanted, and could perform the job in whatever order he wanted to do it. (T. 77) Mr. McCann testified he would be working on something completely different while Petitioner was doing his job. (T. 77) The Commission finds Mr. McCann's testimony is more credible than Petitioner's testimony and supports the finding an employer-employee relationship did not exist.

The method of payment also supports a finding an employment relationship did not exist. Mr. McCann testified Petitioner was paid by the job rather than hourly. Petitioner was paid by a business check or with cash. (T. 21) Respondent and Petitioner both introduced into evidence a copy of a check for $400, dated July 10, 2009. (PX19, RX3) Respondent offered into evidence bank statements showing two cash withdrawals made on July 2, 2009, and July 10, 2009, for $300 each. (RX2) Petitioner testified he was paid $14 per hour and was given timecards to fill out for each week worked. (T. 22) Respondent testified he had never seen the timecards presented by Petitioner and the Petitioner was not an hourly employee. (T. 92-93) The Commission finds the purported timecards entered into evidence by Petitioner do not support Petitioner's testimony of being paid $14 per hour given the number of reported hours and corresponding payments for the work. Considering the inconsistency in Petitioner's testimony, the Commission finds Respondent's testimony more reliable and Petitioner was paid per job. This factor weighs in favor of Respondent.

20IWCC0593

The next factor, ownership of tools, materials or equipment also supports a finding an employment relationship did not exist. Mr. McCann testified Petitioner brought a hand pouch that Petitioner told him was his father's "or something like that". (T. 76) Mr. McCann testified Petitioner would "lift up his hatch back, take his tools out and get to work." (T. 76) Petitioner denied bringing his own tools and testified he used Respondent's tools, equipment and materials. The Commission finds the specific testimony of Mr. McCann more credible and finds this factor weighs in Respondent's favor.

The Commission further finds the nature of the work supports the finding no employment relationship existed. The nature of the work in this case was siding and gutter removal and replacement. Clean up of the old material is not integral to the business but rather a perfunctory task. The Commission finds significant that Mr. McCann testified that he previously went to a temporary agency to get that type of labor as the agency carried Workers' Compensation insurance and he did not carry coverage because he had no employees. This factor supports a finding an independent contractor relationship existed between the parties.

The Commission further finds that the deduction or withholding of taxes weighs in Respondent's favor. Petitioner and Mr. McCann both testified Petitioner was paid cash and once by check. There is no dispute that Respondent did not withhold or deduct taxes from Petitioner's pay. (T. 60) This evidence supports a finding that no employment relationship existed.

Based on the totality of evidence, the Commission affirms the Arbitrator's decision that Petitioner failed to prove an employer-employee relationship existed between the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 20, 2018 is hereby affirmed and adopted, but for the above noted changes.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 8 - 2020
o-8/18/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CERVANTES, WILIBALDO
Employee/Petitioner

Case# **09WC030437**

20IWCC0593

McCANN CONSTRUCTION AND INJURED WORKERS' BENEFIT FUND BY ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN
Employer/Respondent

On 8/20/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0924 BLOCK KLUKAS MANZELLA & SHELL
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20IWCC0593

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Wilibaldo Cervantes
Employee/Petitioner

Case # 09 WC 30437

v.

Consolidated cases: N/A

McCann Construction, and Injured Workers' Benefit Fund by Illinois State Treasurer as ex officio custodian
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Barbara N. Flores, Arbitrator of the Commission, in the city of New Lenox, on July 6, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On July 13, 2009, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned n/a; the average weekly wage was n/a.

On the date of accident, Petitioner was 28 years of age, *single* with 2 dependent children.

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

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

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

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has failed to establish that an employer-employee relationship existed at the time of the alleged accident at work or that he sustained a compensable accident at work as claimed. By extension, all remaining issues are rendered moot and all requested benefits and compensation are denied.

Injured Workers' Benefit Fund

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

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

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

Signature of Arbitrator

August 16, 2018
Date

AUG 20 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Wilibaldo Cervantes
Employee/Petitioner

Case # 09 WC 30437

v.

Consolidated cases: N/A

McCann Construction, **and Injured Workers' Benefit Fund**
by Illinois State Treasurer as ex officio custodian
Employer/Respondent

FINDINGS OF FACT

The parties appeared for a hearing on the above-captioned case. Petitioner named McCann Construction (Respondent) as well as the Illinois State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund (IWBF) as an additional respondent in this matter. Counsel for Petitioner, Respondent, and for the IWBF appeared at the hearing. Respondent and the IWBF dispute Petitioner's claims regarding employer/employee relationship, accident, notice, causal connection, earnings, age, marital status, dependency, unpaid medical bills, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1.

Background

On July 13, 2009, Petitioner testified that he was employed by Respondent, which he knew as McCann Construction. Petitioner testified that Tony McCann (Mr. McCann) offered him a job at $14 per hour. He had been employed for two weeks at the time of his alleged accident. Petitioner testified that he was not employed by any other employer. Petitioner testified that he did not run his own business in 2009 and he has never owned a company called Cervantes Handyman Services.

Petitioner testified that Respondent did not have any other employees. He never filled out an application or signed a contract. Petitioner testified that he and Mr. McCann entered into an oral agreement for work.

Petitioner testified that Mr. McCann would either pick him up from his home or they would meet at Mr. McCann's house and drive in Mr. McCann's box truck to the job site. He explained that he traveled with Mr. McCann in Mr. McCann's box truck, which contained Mr. McCann's tools and materials. Petitioner testified that he did not use his own tools or supplies to perform work. Rather, Petitioner testified that he used Mr. McCann's tools and supplies or he obtained them from a store. Petitioner testified that Mr. McCann instructed him on what to do at work.

Petitioner testified that Mr. McCann paid him $14.00 per hour by cash or check, and sometimes both. He testified that he got time cards from Mr. McCann who told him that he would pay him at the end of the week for his work. Petitioner testified that his handwriting is reflected on the cards in Petitioner's Exhibit 18.

Petitioner testified that Respondent did siding and roofs and gutters. Petitioner testified that he did siding and gutters and labor to take shingles up to roofs. Petitioner testified that he would remove old siding from homes, do clean up, perform installation and he would nail it to the house. Regarding gutters, he testified that he put

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

gutters around a garage. He explained that he would also carry shingles up to roofs.

July 13, 2009

On July 13, 2009, Petitioner testified that he arrived at the job site with Mr. McCann in Mr. McCann's box truck. Petitioner testified that this was a new job. No other employees worked for Respondent. After arriving at 8:00 a.m., Petitioner testified that Mr. McCann directed him on what to do. Petitioner testified that Mr. McCann told him to remove the siding and Mr. McCann was going to go up to the roof. Petitioner testified that no one else was present at the time of the injury. Petitioner testified that the house was big. Petitioner testified that during the walk through the job site he specifically pointed out a hazardous window well and asked Mr. McCann if it was safe to stand on the window well cover. According to Petitioner, Mr. McCann got on it and off, so Petitioner said "ok." Petitioner testified that he proceeded to rip the siding off the customer's home during which time Mr. McCann was on the roof.

Petitioner testified that he started on the corner of the house and got closer to the window well, which was approximately six feet deep. He stood on the window well with his left leg and his right foot on the earth. While pulling the siding off, Petitioner testified that his left leg fell into the window well, which gave way. Petitioner testified that the window well latches broke. He explained that the right side of his foot was bent and his knee twisted while he was going down the window well. Petitioner also testified that his right leg was coming down the aluminum retainer wall in the window well. Petitioner testified that he screamed in pain and was hurt after which the homeowner came running out.

A couple of minutes later, Petitioner testified that Mr. McCann pulled him out of the window well and told him to sit in the box truck. Petitioner testified that he sat in Mr. McCann's truck for approximately 1½ hours and then Mr. McCann told him to "man up" and go back to work. Petitioner then picked up scrap at Mr. McCann's direction. Petitioner testified that he tried to elevate his leg and it still hurt. He did not go anywhere else that day.

On July 14, 2009, Petitioner testified that his right knee was still swollen so he took Advil and iced his leg. He explained that Mr. McCann picked him up to go to work and that they returned to the same job site. Petitioner testified that he hauled up packets of shingles weighing 60 pounds or more up a ladder to the roof. He testified that he worked until about 4:30 p.m. Petitioner testified that he did not go anywhere else that day. Petitioner testified that his right knee "ballooned" and got worse. Petitioner testified that he took Advil.

On July 15, 2009, Petitioner testified that his knee was swollen and he was in such pain that he called Mr. McCann and told him that something was wrong with his right knee. Petitioner testified that he told Mr. McCann that he did not know what it was and he could not work, he was going to the doctor.

On cross-examination, Petitioner testified that he could not recall where he worked through 2009. Petitioner could not recall the exact company for which he worked before working for Mr. McCann. Petitioner testified that he was a full-time student at that time that he met Mr. McCann and he met Mr. McCann while in school.

On cross-examination, Petitioner testified that Mr. McCann offered him a job, he did not ask for work. Petitioner understood that Mr. McCann had a construction company. Petitioner denied that Mr. McCann hired him as a subcontractor to work for him. Petitioner did not fill out any W-4 forms or provide his social security number. Petitioner testified that Mr. McCann did not give him any tax forms. Petitioner denied telling Mr. McCann that he (Petitioner) had a handyman service. Petitioner testified that he worked for Mr. McCann for a

couple of weeks. Petitioner further denied that he was paid anything for scraping metal for Mr. McCann. He testified that he would take scrap metal from the job site to Mr. McCann's truck and Mr. McCann would go to the scrap yard on his (Mr. McCann's) own time. *See* RX1.

On cross-examination, Petitioner could not recall whether he went to Fazio insurance company to report an injury. Petitioner also testified that he did not ask the owner to sign anything for him and that he only asked the homeowner for permission to photograph the window well.

On cross-examination, Petitioner testified that Mr. McCann did not withhold taxes or give him days off. Petitioner testified that Mr. McCann did not have a set schedule, but Mr. McCann would call him the day before and tell him what he would do the following day. Petitioner denied driving to job sites on his own and he maintained that Mr. McCann picked him up. Petitioner testified that he began work when Mr. McCann picked him up as reflected in Petitioner's Exhibit 18.

On cross-examination, Petitioner could not recall what classes he was in during the week of the accident. Petitioner testified that he did not go to class on the night of the accident. Petitioner testified that he would not have gone to class if he had to stand up, but if he could have gone if he had his crutches or he could sit in an English class.

Petitioner testified that he called Mr. McCann and told him that he was hurt. Petitioner testified that Mr. McCann accused him of loosening the screws in the window well and that a neighbor saw it. Petitioner testified that Mr. McCann said that Petitioner did not work for him, that Mr. McCann was "standoffish" and acted as though he had not met him.

Medical Treatment

The medical records reflect that Petitioner presented at the emergency room at Provena Saint Joseph Medical Center on July 15, 2009 at approximately 10:44 a.m. PX2-PX3. He reported that he "FELL INTO WINDOW WELL MONDAY WHILE WORKING-COVER GAVE IN C/O RIGHT KNEE PAIN AND SWELLING STATES EDEMA LESS TODAY NO OBVIOUS DEFORMITY[.]" *Id.* A right knee x-ray was performed. *Id.* The radiologist noted a "[v]ery small triangular shaped bony density or fragment is seen lying along the medial aspect of the medial tibial plateau. I question this could represent a very tiny avulsion fracture. Otherwise unremarkable views of the right knee." PX4. Petitioner denied any prior right knee injuries and was diagnosed with a closed fracture of the tibia, proximal end, and MCL sprain of the right knee. PX2-PX3. He was given Vicodin, a knee immobilizer, crutches, and referred to an orthopedic surgeon, Dr. Trksak. *Id.*

On July 16, 2009, Petitioner saw Paul Trksak, M.D. (Dr. Trksak) at Hinsdale Orthopaedic Associates. PX5. Petitioner reported, in pertinent part, that he "sustained an injury to his right knee when he fell into a window well on July 13, 2009. He states he was pulling siding off of the side of a house. He states he stepped on the cover of the window well and it gave way. He states his left leg fell through the window while his right leg was still on the ground outside the window well, and he describes the injury as a hyperflexion and valgus-type of stress to his right knee. He states his foot became caught behind him, against the side of the window well. He states he stopped working for about an hour and applied ice to his knee. He tried to come back to work the next day but continued to have discomfort, and by yesterday morning, he was unable to work." *Id.* Dr. Trksak noted a moderate effusion on physical examination as well as tenderness and a positive McMurray's test. *Id.* He diagnosed Petitioner with a grade II, right MCL sprain and ordered an MRI to rule out a meniscal tear. *Id.* Dr. Trksak placed Petitioner off work and opined that " … his current condition was caused by the injury that he

suffered at work." *Id.*

On July 22, 2009, Petitioner underwent the recommended right knee MRI, which the interpreting radiologist noted to show an intermediate-to-high-grade right MCL tear with significant surrounding edema, a low to intermediate partial proximate ACL tear, bony contusions of the posterolateral tibial plateau and medial aspect of the medial tibial plateau, a discoid lateral meniscus without meniscal tear, and a strain of the medial patellofemoral ligament. PX6.

On July 24, 2009, Dr. Trksak reviewed Petitioner's MRI noting evidence of an MCL tear with significant surrounding edema. PX5. Dr. Trksak was concerned about an ACL tear, but noted that Petitioner was not presently a surgical candidate. *Id.* He kept Petitioner off work and recommended conservative treatment. *Id.*

On August 5, 2009, Petitioner began a physical therapy program at Premier Physical Therapy. PX7. In mid-October, Petitioner began five-day work hardening as prescribed by Dr. Trksak. *Id.* Petitioner continued to receive treatment with Premier Physical Therapy until December 18, 2009, after undergoing 72 office visits. *Id.*

In the interim, from August 5, 2009 through December 18, 2009, Petitioner had regular follow up appointments with Dr. Trksak. PX5. Petitioner remained off work during this period. *Id.* On December 18, 2009, Petitioner reported to Dr. Trksak that he felt "90% better" and that he wanted to return to work. PX5. Dr. Trksak released Petitioner to return to work full duty effective December 21, 2009 and he scheduled a follow up visit in six weeks. *Id.*

On January 29, 2010, Petitioner returned to Dr. Trksak with no new complaints after returning to work and was " ... able to function reasonable well ..." PX5. Petitioner testified that he did not return to work for Respondent after his injury. Dr. Trksak's records do not reflect Petitioner's employer at the time or the type of work to which he returned. *Id.*

On March 26, 2010, Petitioner reported some persistent discomfort in the medial aspect of his right knee with the ability to function reasonably well, despite having trouble kneeling or hyperflexing his knee. PX5. Dr. Trksak opined that he was "always [] somewhat concerned about a small tear of the medial meniscus" given Petitioner's persistent symptoms and considered a repeat MRI. *Id.*

On July 2, 2010, Petitioner had his final appointment with Dr. Trksak. PX5. He reported some persistent discomfort in his right knee and rated his pain as 1.5 out of 10. *Id.* Dr. Trksak ordered a repeat right knee MRI. *Id.*

Tony McCann

Tony McCann (Mr. McCann) testified that he is currently employed at Mars, Inc. and he has worked there for approximately seven years. Mr. McCann testified that he was an electrician and he has a lot of construction trade training. Previously, Mr. McCann had his own company McCann Construction that he operated for approximately 10-15 years. The business performed work relating to the installation and repair of siding, gutters, and facia. Mr. McCann testified that the corporation was dissolved. The Office of the Illinois Secretary of State reflects that "McCann Siding, Soffitt, Fascia and Gutters Contractor, Inc." was involuntarily dissolved on February 1, 2005. RX5.

When Mr. McCann did need employees, he testified that he would go to Labor Ready, a staffing company, to

obtain staffing help. He explained that he hired employees through a staffing agency because they had workers' compensation insurance. Mr. McCann testified that later, while operating as unincorporated company, he did not have any employees. He explained that the market took a turn and there was no work so he had to do the work by himself; he could not pay employees.

Mr. McCann testified that he was taking a welding class and met Petitioner in the first of three welding classes. He explained that Petitioner kept asking him if he needed help. Mr. McCann testified that Petitioner gave him a business card with a real estate company, but on the back of the card it reflected Petitioner's handyman services.

Mr. McCann testified that he did take on Petitioner as a subcontractor on three occasions. The first job was in Tinley Park to tear down siding and paint porch rails at a residence. Petitioner was to paint and clean up the debris. Mr. McCann testified that he did not allow Petitioner to tear down the siding because he did not want any damage to the house, which had coach lights and other features.

The second job was in Orland Park for a siding job and he discussed paying Petitioner $200-$300. Mr. McCann testified that he may have picked up Petitioner maybe on one occasion, but otherwise, Petitioner drove to the job sites in his red hatchback Mustang. Mr. McCann also testified that Petitioner brought a hand pouch with his tools that he said were his father's tools. Mr. McCann did not direct Petitioner how to remove debris. There was no painting at this job site and Petitioner did not take down any siding. Mr. McCann testified that this job was completed as of July 10, 2009 and he paid Petitioner via check. RX2.

The third job was in Huntley. Mr. McCann testified that Petitioner was hired to paint and clean up scrap. Mr. McCann tore down siding and installed it. He also testified that there was roofing work, but it was subcontracted out to a roofing company who delivered material by crane. Mr. McCann testified that Petitioner drove to the job site on at least one occasion and he brought his own tools. He explained that there was no real direction given to Petitioner as the painting work was rather self-explanatory. Mr. McCann did not bring any painting materials or tools for the painting work. He did walk around the property and he did not notice anything unusual about the house. Mr. McCann testified that there were window wells, but they were all covered and in place.

Mr. McCann testified that he told Petitioner that he did not have workers' compensation insurance. He denied telling Petitioner that he would be hired as an employee or that he would be paid $14 per hour. Mr. McCann testified that Respondent, which was unincorporated, did not have any employees. He testified that he gave a W-4 to Petitioner, but Petitioner never returned it to him. Mr. McCann also testified that he told Petitioner he would pay him based on each job and that Petitioner would get a certain cut of the amount that Mr. McCann received for the job. Mr. McCann recalled paying Petitioner about $300 for the first job, which was paid in cash. He recalled going to an ATM to withdraw cash because Petitioner did not want to receive his payment via check. Mr. McCann testified that Petitioner asked for cash payments because he wanted to avoid paying child support.

On the alleged date of accident, Mr. McCann testified that he was tearing down siding. He never saw Petitioner crawl down a window well. Petitioner never reported any injury. Mr. McCann never saw Petitioner in the box truck icing his knee. Mr. McCann testified that the window wells were clipped down and reinforced with plastic. *See* RX6 (photograph of window well taken after the alleged accident). Mr. McCann testified that the other person in the photograph with him was the roofing person working on the house that week.

Mr. McCann testified that the following day, July 14, 2009, Petitioner did not have any difficulty performing his

work and Petitioner did not report any injury occurring on the prior day. Petitioner was only performing scrapping work on this day.

Mr. McCann testified that the next day, July 15, 2009, Petitioner drove to the job site and did painting work. Mr. McCann recalled that Petitioner spilled paint in the grass and testified that the homeowner yelled at Mr. McCann. After cleaning up the spilled paint, Petitioner spilled the whole can a second time. Mr. McCann testified that he and Petitioner later went to the scrap yard in Elgin. Mr. McCann testified that he would split the scrap money of approximately $800-$1200 with Petitioner. Mr. McCann testified that he had worked on seven other houses on the block. He testified that he paid Petitioner cash. He did not observe Petitioner have any difficulty on this date.

Mr. McCann testified that he used a contractor job worksheet to keep track of his taxes and the work that was performed. RX1. Generally, this form would be filled out by the subcontractor, but Mr. McCann testified that he filled out this sheet, instead of Petitioner, because he never saw Petitioner again. Petitioner only worked during three days.

Regarding Petitioner's Exhibit 18, Mr. McCann testified that he has never seen this form before and that Respondent did not use these forms. Mr. McCann testified that Petitioner did not work for Respondent on all of the stated days and times. *See* PX18. Mr. McCann testified that there were gaps in time between job numbers one, two and three due to weather and the work that needed to be performed.

Mr. McCann testified that he learned on July 16, 2018 that someone came in to file an insurance claim through Michael Fazio, the owner of Fazio Insurance. Mr. McCann denied that Petitioner ever called him to report any injury or that Petitioner called him after the alleged date of accident.

Additional Information

Petitioner testified that he did not sustain any injury before or after July 13, 2009. He testified that he had no prior right knee injuries. To his knowledge, Petitioner testified that Respondent has not paid any of his bills.

Petitioner testified that after the injury he returned to the home to document the window well. Petitioner testified that there was a crack in the window well, which he did not know at the time (that he fell).

Regarding his current condition of ill-being, Petitioner testified that his right knee is good, but he feels aching with weather.

Petitioner did not recall how much he earned while working for Respondent. He currently works at Ecolab as of February 6, 2018 and he earns $21.69 per hour.

In 2009, Petitioner testified that he was not married and he had children Eva Cervantes (date of birth June 23, 1998) and Raquel (date of birth March 24, 2001).

On re-direct examination, Petitioner testified that he never put himself out to be a real estate agent or a professional painter. Petitioner testified that he never performed painting work for Mr. McCann. He denied having tools from his father, who is a landscaper. He testified that he never agreed to receive half of the proceeds of scrapping aluminum. He denied asking to be paid in cash to avoid paying child support. Petitioner testified that he tried to called Mr. McCann multiple times and he never picked up the call. Petitioner denied

knowing of or going to Fazio insurance to file a claim.

Petitioner submitted certification from the Illinois Workers' Compensation Commission dated November 30, 2010 confirming that there were no records of policy information showing proof of workers' compensation insurance on the date of July 13, 2009 for Respondent. PX16.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are hereby made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (A), whether Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds the following:

The Illinois Workers' Compensation Act ("Act") defines those businesses that are considered "employers" and, thus, come under its jurisdiction. Under Section 3, various types of businesses automatically come under the Act's jurisdiction due to their business activities. Subsection 1 provides coverage for business engaged in "[t]he erection, maintaining, removing, remodeling, altering or demolishing of any structure." Subsection 2 provides coverage for businesses engaged in "[c]onstruction, excavating or electrical work." 820 ILCS 305/3 (LEXIS 2011).

Respondent testified that his unincorporated business involved the installation and repair of siding, gutters, and facia. Petitioner testified that the work being performed on the alleged date of accident also involved removal and installation of siding. Thus, the Arbitrator finds that Respondent's business involved the type of work considered by the Act and was operating as an employer on the claimed date of accident.

In support of the Arbitrator's decision relating to Issue (B), whether there was an employee-employer relationship on the claimed dates of accident, the Arbitrator finds the following:

The existence of an employer-employee relationship between Petitioner and Respondent is a prerequisite to determining further compensability of his claim. The Illinois Supreme Court has articulated various factors to be considered in determining whether a claimant is an employee under the Act including: "whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment." *Roberson v. Industrial Commission*, 225 Ill.2d 159, 175 (2007) (*citing Wenholdt v. Industrial Commission*, 95 Ill. 2d 76, 81 (1983), *quoting Morgan Cab Co. v. Industrial Commission*, 60 Ill. 2d 92, 97 (1975)). Determination of the existence of an employer-employee relationship rests on the totality of the circumstances in each case; however, the "right to control the manner in which work is performed is the most important consideration, among others, in determining whether an employer/employee relationship existed." *Roberson*, 225 Ill.2d at 175.

After careful consideration of the record as a whole, the Arbitrator finds that no employer-employee relationship existed as claimed. In so concluding, the Arbitrator does not find Petitioner's testimony, generally, or his specific testimony that Respondent hired him as an hourly employee to be credible.

There is some evidence in the record corroborating Petitioner's testimony. Petitioner's own reports to medical providers reflect his assertion that he was injured at work, and not elsewhere, with no prior history of right knee treatment or pathology. The diagnostic and objective medical examinations conducted in the emergency room and shortly after the alleged accident by Dr. Trksak also reflect that Petitioner had some measure of pathology to the right knee shortly after the alleged accident. As of his presentation to the emergency room on July 15, 2009, Petitioner's x-rays showed a very small avulsion fracture and edema. As of his MRI on July 22, 2009, Petitioner had an intermediate-to-high-grade right MCL tear with significant surrounding edema and a low to intermediate partial proximate ACL tear. However, this is the extent of the evidence that corroborates Petitioner's testimony.

Petitioner claims that his right knee pathology stemmed solely from a fall into a window well as a result of a broken plastic window well cover. Specifically, Petitioner testified that the window well cover latches broke causing him to fall *into* the window well itself such that his knee was twisted while going down the aluminum retainer wall. Petitioner went so far as to explain that, after he screamed, Mr. McCann and the homeowner came to him and Mr. McCann pulled him out of the window well. Mr. McCann denied as much and the homeowner did not testify at the hearing.

Petitioner and Mr. McCann, the only two witnesses to testify at the hearing, provided conflicting testimony extending through every issue at the hearing including whether Petitioner was hired as an employee, paid per hour or per job, provided with timecards, provided with tools and supplies, reported an injury at work, etc. The only evidence in the record that corroborates or controverts the testimony of either witness are the photographs provided by Petitioner and Mr. McCann.

The photographs adduced at the hearing were taken by Petitioner and Mr. McCann of the same window well cover and its condition at some point after the alleged accident. No evidence was offered that the defective cover was repaired or in a better condition than it was at the time of Petitioner's alleged accident. Three close-up photographs taken by Petitioner and Respondent show a crack in the cover. PX20; RX6. The crack in the cover is not complete; that is, it only extends several inches, at best, one fourth of the width of the cover. *Id.* The only photographs of the entire window well cover were offered by Respondent. RX6. These photographs reflect that the cover extended over the lip of the metal window well retaining wall by approximately one inch. *Id.*

If Petitioner's right knee twisted and went into the window well as claimed such that his right foot was coming down the aluminum retainer wall, the crack in the window well must have extended beyond the short crack reflected in the photographs or, more likely, have completely split the cover in half to allow Petitioner's twisted knee and/or foot to extend down into the window well. Petitioner's testimony, and the corroborating histories noted by physicians, are wholly implausible given the condition of the window well cover documented by both Petitioner and Mr. McCann shortly after the alleged accident.

There are other inconsistencies in Petitioner's testimony that are troublesome. Petitioner initially testified that while walking around the home with Mr. McCann he specifically pointed out a hazardous window well and asked Mr. McCann if it was safe to stand on the window well cover. Later, in contradictory testimony, Petitioner testified that he did not know that the window well cover through which he fell was broken until after his injury when he returned to the home to document its condition noting that it was cracked.

Petitioner also testified that he was hired on an hourly basis to be paid $14.00 per hour. According to his

purported time cards while employed by Respondent, Petitioner would have been entitled to $710.50 for 50.75 hours of work from June 28, 2009 through July 4, 2009, $630.00 for 45 hours of work from July 5, 2009 through July 11, 2009, and $294.00 for the 9.5 hours of work he performed on Monday, July 13, 2009 and 11.5 hours of work he performed on Tuesday, July 14, 2009. However, both Petitioner and Mr. McCann offered a copy of a check dated July 10, 2009 for $400, which does not correspond to the entirety of work, or some plausible division of the money owed to Petitioner, for work that he performed during any period. Petitioner testified that he was paid sometimes in cash, and Mr. McCann offered bank statements reflecting two cash withdrawals that he made on July 2, 2009 and July 10, 2009 for $300 each. Mr. McCann testified that he did not hire Petitioner to work on an hourly basis, rather he hired Petitioner to work per job. The foregoing evidence relating to Petitioner's income—which would have required Mr. McCann to make additional payments to Petitioner that included change or four dollars—corroborates Mr. McCann's testimony rather than Petitioner's testimony.

Petitioner also testified that his fall was violent enough to cause him to scream in pain after which the homeowner came running out, his knee "ballooned" and he had to sit in Mr. McCann's truck for two hours to recuperate before returning to work. Again, the homeowner did not testify at the hearing. Mr. McCann specifically denied that Petitioner was working on a window well, that he fell into a window well, or that he exhibited any pain after the alleged unwitnessed accident. According to Petitioner, Mr. McCann pulled him out of the window well and told him to sit in the box truck where he remained for approximately 1½ hours in severe pain. Then Mr. McCann told him to "man up" and go back to work at which time Petitioner then picked up scrap. Mr. McCann specifically denied the foregoing and he maintained that Petitioner did not report any injury to him whatsoever. To the contrary, Mr. McCann testified that he performed the siding work himself and that a professional roofer was engaged for the work on the roof. If Petitioner's testimony, and the time cards that he submitted into evidence are to be believed, Petitioner not only worked 9½ hours on the date of his accident—when he was in such pain that he screamed after which his knee "ballooned" and he sat in a truck for 1½ hours to recover—but he then returned to work the following day for even longer totaling 11½ hours before he finally succumbed to the extreme pain and sought emergency medical treatment the third morning on July 15, 2009. Again, an examination of Petitioner's testimony in light of the record as a whole undermines his credibility.

Based on all of the foregoing, the Arbitrator finds that Petitioner has failed to establish by a preponderance of credible evidence that any employee-employer relationship existed on the claimed date of accident. Thus, all remaining issues are rendered moot and all requested compensation and benefits are denied.

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent as claimed and the date of such accident, the Arbitrator finds the following:

As explained in detail above, the Arbitrator finds that Petitioner has failed to establish by a preponderance of credible evidence that any employee-employer relationship existed on the claimed date of accident rendering all further issues moot. In reaching this conclusion, the Arbitrator found that Petitioner's testimony lacked credibility by examining the plausibility of the mechanism of injury as alleged. If Petitioner fell into the window well as alleged, it is implausible that it was due to the defect reflected in the photographs submitted by both Petitioner and Mr. McCann. This small crack would not have allowed Petitioner's twisted knee and/or foot to extend down into the window well as claimed. Thus, the Arbitrator finds that Petitioner has failed to establish by a preponderance of credible evidence that he sustained a compensable accident while working for Respondent as claimed on July 13, 2009. Thus, all remaining issues are rendered moot and all requested compensation and benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VERNICE JOHNSON,

Petitioner,

vs. NO: 14 WC 30331

TOWER AUTOMOTIVE,

Respondent.

20IWCC0594

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of "Other: Arbitrator Cellini's Denial of Petition to Reinstate", and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner filed an Application for Adjustment of Claim, case 14 WC 30331 on September 11, 2014, for injuries related to an alleged work-related accident of March 10, 2014. Petitioner was represented at that time by the law firm of Levin and Ribeck. The law firm of Dworkin and Maciariello filed an Appearance as co-counsel for Petitioner.

The matter was assigned to Arbitrator Steffen in Chicago and on November 13, 2017, the case appeared on her status call and was 'above the line'. No one appeared on behalf of Petitioner and the case was dismissed for want of prosecution.

After the dismissal, Arbitrator Steffen was transferred to another docket and Arbitrator Cellini was reassigned to the Chicago docket formerly assigned to Arbitrator Steffen. Petitioner's attorney timely filed a Motion to Reinstate on December 19, 2017, and the matter was set for hearing before Arbitrator Cellini on January 18, 2018.

20IWCC0594

On January 18, 2018, Arbitrator Ciecko, who was covering Arbitrator Cellini's call, continued the matter to April 17, 2018, Arbitrator Steffen's status call date at her new docket site in Kane County, because she was the Arbitrator who dismissed the case. (T.6, 8/13/18)

On March 13, 2018, Petitioner's attorney became aware that Petitioner had retained new counsel who intended to substitute in as Petitioner's counsel on the matter.

At the April 17, 2018, status call, Arbitrator Steffen set the Motion to Reinstate for hearing on April 25, 2018. On that date, Petitioner's attorney did not appear. Arbitrator Steffen refused to grant Respondent's request to deny the reinstatement and instead the Motion to Reinstate was withdrawn by Arbitrator Steffen. (T.6-7, 8/13/18)

On May 4, 2018, Petitioner's attorney filed a Motion for Fees and the matter was assigned to Commissioner Lamborn. Commissioner Lamborn realized that the wrong motion had been filed as it should have been a Motion to Reinstate. Commissioner Lamborn further indicated the Motion for Fees was moot as new counsel had not yet substituted in and the case had been dismissed. Commissioner Lamborn recommended counsel file motions before Arbitrator Steffen and Arbitrator Cellini. (T.7-8, 8/13/18)

On July 19, 2018, Petitioner's attorney filed a Motion to Reinstate which was heard by Arbitrator Steffen on August 13, 2018. Arbitrator Steffen found that since no one appeared on behalf of Petitioner to present the Motion to Reinstate in April 2018, she considered the motion withdrawn. No Motion to Reinstate was timely filed thereafter and thus, the matter continues to be dismissed. (T. 21, 8/13/18)

On August 15, 2018, Petitioner's new counsel, Katz, Friedman, Eagle, Eisenstein, Johnson, and Bareck filed a Substitution of Attorneys. (T. 13)

On August 22, 2018, this matter came before Arbitrator Cellini for a hearing on two Motions to Reinstate, the first, filed by Petitioner's former attorney, Dworkin and Maciariello, filed on July 19, 2018, and the second filed by Katz, Friedman, filed on August 22, 2018. Arbitrator Cellini found these to be timely filed motions. After a hearing on the matter, Arbitrator Cellini denied the Petitions for Reinstatement noting Arbitrator Steffen was the Arbitrator who originally dismissed the claim on November 13, 2017, and the intention of Rule 9020.90 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission, is to allow for the same Arbitrator who ruled on the dismissal to also rule on any Motions to Reinstate. (T.19-21, 8/22/18)

On August 23, 2018, Petitioner, through her former attorney Dworkin and Maciariello, filed a Petition for Review of decisions of the Arbitrators filed August 13, 2018, and August 22, 2018, citing exceptions to the issues of "Arbitrator Jurisdiction" and "Reinstatement of Claim".

On August 29, 2018, Petitioner, through her current attorney of record, Katz, Friedman, filed a Petition for Review of the decision of Arbitrator Cellini, filed on August 22, 2018, taking exception to the issue, "Other: Arbitrator Cellini's denial of the Petition to Reinstate".

20IWCC0594

Section 9020.90, entitled Petitions to Reinstate, provides, in pertinent part:

a) When a cause has been dismissed from the Arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a Petition to Reinstate the cause onto the Arbitration call. Notices of dismissal shall be sent to the parties.

b) Petitions to Reinstate must be in writing. The Petition shall set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. The Petition must also set forth the date on which Petitioner will appear before the Arbitrator to present the Petition. A copy of the Petition must be served on the other side at the time of filing with the Commission in accordance with the requirements of Section 9020.70. The Respondent may file a response to the Petition.

c) Petitions to Reinstate shall be docketed and heard by the same Arbitrator to whom the case is assigned. Both parties must appear at the time and place set for hearing. Parties will be permitted to present evidence in support of, or in opposition to, the Petition. The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by the Petitioner, the objections of the Respondent, and the precedents set forth in Commission decisions. A record shall be made of a hearing on any contested Petition. *Ill. Admin. Code Title 50*, §9020.90 (2016)...

Pursuant to Section 9020.90(c), Arbitrator Steffen was the proper Arbitrator to hear the Petitions to Reinstate because she was the Arbitrator who initially dismissed the case. Therefore, Arbitrator Cellini did not have jurisdiction to hear the Petitions to Reinstate. Moreover, Arbitrator Steffen had previously denied Petitioner's Petition to Reinstate on August 13, 2018. Arbitrator Steffen found that since no one appeared on behalf of Petitioner to present the Petition to Reinstate in April 2018, she considered the motion withdrawn. No Petition to Reinstate was timely filed thereafter and, therefore, the matter continued to be dismissed. (T. 21, 8/13/18) The Petitioner attempted to resurrect the case before Arbitrator Cellini and he correctly denied the Petitions.

Based on the foregoing, the Commission affirms Arbitrator Cellini's denial of the Petitions to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed by Arbitrator Cellini on August 22, 2018, is hereby affirmed and adopted.

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

20IWCC0594

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 8 - 2020
o-8/18/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

STATE OF ILLINOIS)

)

COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

VERNICE JOHNSON
Employee/Petitioner

v.

TOWER AUTOMOTIVE
Employer/Respondent

Case # **14** WC **30331**

20IWCC0594

The ***petitioner*** filed a petition or motion for **Reinstatement of case** on **July 19, 2018 and August 22, 2018** , and properly served all parties. The matter came before me on **August 22, 2018** in the city of **Chicago**.

After hearing the parties' arguments and due deliberations, I hereby ***deny*** the petition.

A record of the hearing ***was*** made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitions for Reinstatement filed by attorneys Shifley (7/19/18) and Mose (8/22/18) were timely filed. The original Petition for Reinstatement filed by attorney Shifley on 12/19/17 was timely filed based on the dismissal of the case by Arbitrator Steffen on 11/13/17. The Petition was not specifically ruled on due to the procedure of the matter until initially being ruled on by Arbitrator Steffen on 8/13/18. While attorney Mose's Petition was filed on the hearing date, the matter had already been set by then for hearing and all parties had notice of this.

On the merits, the Arbitrator denies the Petitions on behalf of Petitioner for Reinstatement. Arbitrator Steffen is the Arbitrator who originally dismissed the claim on 11/13/17. Despite Arbitrator Cellini not taking over the call officially until January 1, 2018, the matter was transferred to Arbitrator Cellini prior to that date while the case had already been dismissed. While Commission Rule 9020.90 states that Petitions for Reinstatements should be heard by the assigned arbitrator, this Arbitrator finds that the Rule did not contemplate the reassignment process of the Commission which requires Arbitrators to rotate every two years, did not contemplate the Commission's internal mechanisms for transferring cases at the time of the two year rotations, and that the intention of the Rule is to allow for the same arbitrator who ruled on the dismissal to also rule on any Petitions to Reinstate.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Signature of arbitrator

August 22, 2018
Date

AUG 23 2018

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Byrdak,

Petitioner,

vs. NO: 15 WC 27912

Installation Specialists, Inc.,

20IWCC0595

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2018, is hereby affirmed and adopted, and Petitioner's claim for compensation is hereby denied.

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

DATED: OCT 9 - 2020
TJT: pmo
o 8/18/20
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BYRDAK, ANDREW
Employee/Petitioner

Case# **15WC027912**

16WC030630

INSTALLATION SPECIALISTS INC/CONTRACT INSTALLATION
Employer/Respondent

20IWCC0595

On 4/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0532 HOLECEK & ASSOCIATES
CARTER ESTERLING
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

20IWCC0595

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andrew Byrdak
Employee/Petitioner

v.

Installation Specialists Inc./Contract Installation
Employer/Respondent

Case # **15** WC **27912**

Consolidated cases: 16 WC 30630

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **January 10, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 1, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$76,481.60**; the average weekly wage was **$1,470.80**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **1** dependent children.

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

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

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

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

ORDER

Respondent Installation Specialists Inc. shall not be ordered to authorize or pay for the lumbar surgery as recommended by Dr. Earman, as Petitioner failed to establish by a preponderance of the evidence that the alleged work accident of October 1, 2012 occurred.

Respondent Installation Specialists Inc. shall not be ordered to authorize or pay for the lumbar surgery as recommended by Dr. Earman, as Petitioner failed to establish by a preponderance of the evidence that he provided timely notice to the employer of the alleged October 1, 2012 work accident.

Respondent shall not be ordered to authorize or pay for the lumbar surgery as recommended by Dr. Earman pursuant to Section 8(a) of the Act, because Petitioner failed to establish by a preponderance of the evidence that the alleged need for surgery is causally related to an alleged work injury occurring on October 1, 2012.

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

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

Signature of Arbitrator

04-19-19
Date

APR 22 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREW BYRDAK,	)	20IWCC0595
Petitioner,	)	
	)	
v.	)	**15 WC 27912**
	)	**16 WC 30630**
	)	
Installation Specialists, Inc.	)	
&	)	
Contract Installation,	)	
Respondents.	)	
	)	

I. STATEMENT OF FACTS

Petitioner, Andrew Byrdak, testified that he was hired by Respondent ISI Installation in 2007. (Tx 8). He testified that he began having "problems with my back" in 2009, at which time he began medical treatment with Dr. Sampat. (Tx 9). The earliest medical treatment note in the trial record dates from September 22, 2010, at which time Petitioner was seen by Dr. Sulo of Loyola Medicine. (Resp. ISI Ex. 5). The history recorded by Dr. Sulo reflected that "since late fall of 2009 he's been having bilateral low back pain that comes and goes every day." Petitioner referenced having lifted heavy panels at work in 2009, and having back pain when driving a vehicle. (Resp. ISI Ex. 5). An x-ray of the lumbar spine on this date indicated "mild degenerative disc and degenerative joint disease L4-5." (Resp. ISI Ex. 5).

At arbitration Petitioner testified that he had been told he had a bulging disc prior to October 1, 2012, and that he was taking medication for this condition prior to that date. (Tx 10). Petitioner testified that on October 1, 2012 he was unloading a semi-trailer containing a product called "high wall," which is a large glass panel used in interior office spaces. (Tx 12-13).

Petitioner testified that he was helping to push a 12 foot x 53 foot skid containing glass panels out of the vehicle on that date when "I felt that bulging disk turn into kind of it felt like toothpaste in my back." (Tx 13). Petitioner testified that he provided notice of this accident to Jimmy Sgrignoli, who he described as "the foreman running that job." (Tx 14). Petitioner testified that he provided notice to Mr. Sgrignoli in a conversation "approximately two weeks after, maybe in the middle of October." (Tx 14). Petitioner testified that "later on, Al Herrmann walked in" as this conversation with Mr. Sgrignoli was taking place. (Tx 14-15). Petitioner testified that he had advised Mr. Sgrignoli in mid-October 2012 that he had been injured while moving a skid. (Tx 15). Petitioner described Mr. Herrmann as the superintendent of ISI, and testified that he "briefly mentioned" a work accident to Mr. Herrmann on the same day he spoke with Mr. Sgrignoli. (Tx 15-16). Petitioner testified that Mr. Herrmann "asked me to send him an email." (Tx 16, 18). Petitioner testified that he did not send an email, and that he spoke with Mr. Sgrignoli and Mr. Herrmann once apiece regarding a work accident. (Tx 18). Petitioner implied that he had not sent the email to Mr. Herrmann because "we were afraid to lose our jobs." (Tx 18).

Petitioner was seen by Dr. Sampat of Parkview Orthopedics on October 1, 2012. (Tx 18, Resp. ISI Ex 5). Petitioner filled out a Patient Registration Form on this date, indicating that his symptoms began "2009 late." (Resp. ISI Ex 5). The history noted by Dr. Sampat on October 1, 2012 was of low back pain into the right lower extremity "since 2009 after a work injury." (Resp. ISI Ex. 5). There was no history of work accident occurring on the date of this medical visit, which was Petitioner's initial visit with Dr. Sampat, although the Patient Encounter Form references a history of having bent over to pick up a skid at work on an unspecified date in 2009. (Resp. ISI Ex. 5). Petitioner acknowledged on cross examination that the Patient Information Sheet he completed on October 1, 2012 stated that his condition was "possibly" related to an injury, with a date of injury of "late 2009?" noted by Petitioner. (Tx 41-41, Resp. ISI Ex. 5). The Patient Information Sheet also indicates that a work injury report was not filed by Petitioner with his employer. (Resp. ISI Ex. 5). Petitioner was referred for an MRI of the lumbar spine, which was completed on 10/4/12. (Resp. ISI Ex. 5). The impression of this MRI, per the radiologist, was of "left paracentral disk protrusion and annular tear at L5-S1 again seen with mild compression of the ventral thecal sac." (Resp. ISI Ex. 5).

On cross-examination, Petitioner admitted that in filling out Dr. Sampat's Patient Information Sheet on October 1, 2012 he did not state "yes" in response to the question of whether his condition was related to an injury. (Tx 41-42). He confirmed that in filling out this sheet, which again he was filling out on the date he was allegedly injured in the course of employment with ISI, he indicated "late 2009" as his date of injury. (Tx 42). Petitioner agreed that Dr. Sampat's treatment note from the alleged date of accident did not include any history of injury occurring on that same date. (Tx. 42-44). Petitioner testified that, with regard to the September 8, 2016 accident, his pain levels were increased, and that this pain was described as "stabbing" and "knife-like." (Tx. 45). Petitioner confirmed that the Application for Adjustment of Claim filed against Installation Specialists Inc., which reflected an injury allegedly occurring on October 1, 2012 while "lifting and moving large glass windows," was signed by him on September 2, 2015. (Tx. 47). Asked why he waited nearly three years to pursue any workers' compensation claim against ISI, Petitioner stated only that "It wasn't going away." (Tx.47).

Petitioner testified that his employment with ISI ended in January 2013, and that he began working for Contract Installation in 2014. (Tx 21). Petitioner testified that he performed "heavy labor" for this employer. (Tx 22). Petitioner testified that while working for Contract Installation on September 8, 2016, he was helping a co-worker and the general contractor move a fire file weighing approximately 1,000 lbs. when he suffered a low back injury. (Tx 23-24). Petitioner testified that this caused "acute pain" and that his pain was "much worse" than prior to this accident. (Tx 24). Petitioner also testified that his pain is "more acute" presently than it was prior to October 1, 2012. (Tx. 50-51).

Petitioner testified as to ongoing conservative care between 2009 and present, and that he had an initial consultation with Dr. Earman on October 31, 2017. (Tx. 27). Dr. Earman was deposed in June 2018. (Resp. CI Ex. 5). Dr. Earman testified that his understanding of the mechanism of alleged accident in 2012 was of lifting or pushing a rack of glass inside a truck. (Resp. CI Ex. 5, p. 23). Dr. Earman testified that Petitioner "was off work in 2012 for a year," which is inconstant with Petitioner's own testimony. (Resp. CI Ex. 5, p. 26). Dr. Earman's opinion is that Petitioner requires a "possible" lumbar fusion surgery to address an L5-S1 disc condition, but only after a discography is performed. (Resp. CI Ex. 5) (Dr. Earman Dep. p.34). He testified that it was his opinion that the alleged 2012 accident "first caused the tear in the

posterior annulus, which did at least get somewhat stable, but continued to be symptomatic only to be aggravated by the second injury." (Resp. CI Ex. 5, p. 17). Dr. Earman added that the 2016 lumbar MRI findings reflected "some increasing changes" as compared to the 2012 lumbar MRI findings. (Resp. CI Ex. 5, p. 28-29). Dr. Earman stated on re-cross examination that Petitioner's low back condition was both objectively and subjectively worsened after the September 8, 2016 accident, as compared with his condition prior to that date. (Resp. CI Ex. 5, p.42). Petitioner also testified that he required no lost time while in the employ of ISI, although he did take at least 5 days off work subsequent to his 2016 work accident. (Tx. 69-70).

Petitioner was seen for purposes of a section 12 examination or IME arranged by Respondent Contract Installation on March 2, 2017, with Dr. Bernstein also being deposed prior to arbitration. (Resp. CI Ex. 1). Dr. Bernstein testified that he did not know the date of the alleged 2012 accident, did not know the weight of items allegedly being moved or carried at that time, and that Petitioner continued to work in a full-duty capacity after the alleged 2012 accident, until the September 8, 2016 accident while working for Contract Installation. (Resp. CI Ex. 1, p. 13). Dr. Bernstein testified that this successful continuance of full duty work would "imply" a recovery from any alleged injury in 2012. (Resp. CI Ex. 1, p. 14). Dr. Bernstein testified that his examination was normal other than for a positive straight leg raising test on the right side, and that the September 8, 2016 accident may have aggravated the L5-S1 disk. (Resp. CI Ex. 1, p. 16-17). Dr. Bernstein confirmed, as the medical history reflects, that there was no surgical recommendation prior to September 8, 2016. (Resp. CI Ex. 1, p. 18).

Respondent ISI Installation Services offered testimony from three witnesses pertaining to the accident and notice disputes. The first witness called was John Sprenzel; Mr. Sprenzel testified that he is the owner of Installation Specialists, which is in the business of installing office furniture. (Tx 73). Mr. Sprenzel testified that ISI employees are provided with a safety manual and "are instructed to inform the foreman on the job site should there be an injury. The foreman's first responsibility is to seek medical attention." (Tx. 74). He testified further that his policy upon receipt of notice of a work accident would be to request that an accident report be prepared by the supervisor and the injured worker. (Tx 74-75). Mr. Spenzel stated that his policy is to personally report any work injury to his insurer via his insurance agent. (Tx 75).

John Sprenzel testified further that he was first notified of a claim for work injury by Andrew Byrdak via receipt of the Application for Adjustment of Claim. (Tx 77-78). This Application was filed on September 2, 2015, and Mr. Sprenzel testified that his receipt of this subsequent to that date was the first time he was made aware of any claim for work injury by Mr. Byrdak. (Tx 78, Resp. ISI Ex. 6). He testified that he provided notice to his insurer of a work injury on September 18, 2015. (Tx 78-79, Resp. ISI Ex. 3). Mr. Sprenzel testified with regard to a work order for Installation Specialists. (Tx 80-81, Resp. ISI Ex. 2). He stated that this document reflected that the work to be performed on October 1, 2012 was "labor to off-load truck, install L-shaped bank of bookcases with common tops." (Tx 80, Resp. ISI Ex. 2). Mr. Sprenzel stated that these items would have been wood or metal, but could not have been made of glass. (Tx 81). Per the work order, this work was on behalf of Loyola University, and was scheduled to begin at 7:00 a.m. on October 1, 2012 and conclude by 12:00 p.m. that same date. (Resp. ISI Ex. 2). John Sprenzel also testified with regard to an employee hours report, which reflected that Petitioner did work on the October 1, 2012 installation at Loyola. (Tx 81, Resp. ISI Ex. 1). Mr. Sprenzel testified that, per the report, the other employees on this job were Jim Mack and Robert Luckett. (Tx 81-82, Resp. ISI Ex. 1).

Mr. Sprenzel confirmed that Petitioner did work for ISI on October 1, 2012. (Tx 76-77). He testified that Petitioner's employment was ended as of January 23, 2013 due to a layoff. (Tx 77). He testified that in 45 years of business, he has never terminated an employee for pursuing workers' compensation benefits. (Tx 82). Mr. Sprenzel stated that, after receiving notice of an alleged work accident in September 2015, he went through his records in an attempt to find any written documentation pertaining to a work accident involving Andrew Byrdak. (Tx 79-80). He testified that he was not able to find any such documentation. (Tx 80).

James Sgrignoli testified that he has worked for ISI for 24 years, and works currently as a foreman and lead installer. (Tx 83-84). He testified that he has been a foreman for "about 20 years." (Tx 84). With regard to accident reporting procedures at ISI, Mr. Sgrignoli testified that if notified of a work injury, a foreman would be expected to ask the employee for relevant information, and then notify Mr. Sprenzel or the office manager. (Tx 84). Mr. Sgrignoli testified that he did not recall any report of work injury given to him by Andrew Byrdak, and that the first time he was aware of Mr. Byrdak claiming to have notified him of this was in December

2018, just prior to the hearing in this case. (Tx 84-85). Mr. Sgrignoli also testified as to the work order pertaining to the October 1, 2012 job for Loyola. (Tx 86, Resp. ISI Ex. 2). He testified also that the bookcases to be installed that date would have been made of metal or wood, but not glass. (Tx 85-86, Resp. ISI Ex. 2). Mr. Sgrignoli was asked on cross-examination whether his recollection of the events of October 2012 had diminished between 2012 and when he was notified of this claim in December 2018, and testified that it had not. (Tx 85). He was asked on cross-examination whether he recalled working with Mr. Byrdak on a different job site in October 2012, and testified that he did not recall this. (Tx 86-87).

Alan Herrmann testified that he had been employed as the superintendent and safety director for ISI, and had worked there for 31 years prior to retiring at the end of 2018. (Tx 87-88). He testified that he was in this same position in October 2012. (Tx 88). Mr. Herrmann testified that if notified of a work injury, the process he would follow would be to write up an injury report summary and then to follow up with the injured worker as to next steps if they did not contact him first. (Tx 89). Mr. Herrmann testified that he had no recollection of any work injury report from Andrew Byrdak on or after October 1, 2012. (Tx 89). He testified further that he was not aware of Petitioner's claim to have notified him of a work injury until 2018. (Tx 89).

Petitioner declined to offer rebuttal testimony in response to the testimony and evidence introduced by Respondent Installation Specialists.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent Installation Specialists?

It is well settled that the Workers' Compensation Act establishes a no-fault system of law pertaining to work injuries, and is intended to be remedial in nature. *City of Chicago v. Industrial Commission,* 291 Ill. 23, 125 N.E. 705, 706 (1919). Nonetheless, the burden of proving all elements of a workers' compensation claim rests upon the employee, and the employee must prove these elements by a preponderance of the evidence. *Martin v. Industrial Commission*, 91 Ill.2d 288, 437 N.E.2d 650, 63 Ill.Dec 1 (1982). Central to any compensable

claim for workers' compensation benefits is the credible testimony of the injured worker, and any supporting witnesses. In the present case, Petitioner's testimony as to having moved heavy skids of glass A-frame panels on the alleged October 1, 2012 accident date was directly rebutted by the testimony of John Sprenzel and Jim Sgrignoli of Installation Specialists, who testified that the items being delivered by Petitioner's crew on that date could not have been made of glass, and were not in fact glass panels such as described in Petitioner's testimony, but rather L-shaped bookcases. Although the work order for the work performed on October 1, 2012 reflected that two co-workers had also been on the job with Petitioner, no supporting witnesses were presented by Petitioner. Petitioner also did not attempt to rebut the testimony offered by Mrs. Herrmann, Sgrignoli, and Sprenzel.

It should also be noted that, per the work order, the work to be done on October 1, 2012 was scheduled to begin at 7:00 a.m. and conclude no later than noon that same day. Petitioner was seen for the first time by Dr. Sampat on that same day, filling out several forms and providing a history of his symptoms to Dr. Sampat. None of these forms reflect any history of work accident occurring on October 1, 2012, and the history recorded by Dr. Sampat also reflects no history of work accident on October 1, 2012. There is in fact no history of work accident occurring on October 1, 2012 to be found anywhere else in Petitioner's medical history prior to his initiation of care with Dr. Earman, which occurred after the September 2016 accident.

It is well established that it is the Commission's purview to judge the credibility of witnesses, to decide questions of fact and to draw reasonable inferences. *Johnson Outboards v. Industrial Commission*, 77 Ill.2d 67, 394 N.W.2d 1176, 31 Ill.Dec. 799, 801 (1979). It is specifically within the province of the Workers' Compensation Commission to determine the credibility of a Petitioner as a witness. *Spector Freight System v. Industrial Commission*, 93 Ill.2d 507, 445 N.E.2d 280, 67 Ill.Dec. 795, 800 (1983). The trial record reflects ample evidence that casts doubt upon Petitioner's credibility regarding his October 1, 2012 claim, including the credible testimony of witnesses John Sprenzel and Jim Sgrignoli, which was supported by written documentation pertaining to the work performed on October 1, 2012. Accordingly, the Arbitrator hereby finds that Petitioner has failed to meet his burden of establishing that an accident occurred in the course and scope of his employment with Installation Specialists on October 1, 2012.

D. What was the date of accident?

As noted above, it is found that no compensable work accident occurred while Petitioner was in the employ of Installation Specialists Inc. on October 1, 2012. It is undisputed that a compensable work accident did occur on September 8, 2016 while Petitioner was in the employ of Contract Installation.

E. Was timely notice of the accident given to Respondent?

The mere fact that an employer knows of a malady or condition of ill-being does not mean that the employer has notice of a work accident. *Fenix & Scisson Construction Co. v. Industrial Commission*, 27 Ill.2d 354, 189 N.E.2d 268 (1963). The Act's notice provision can be complied with by providing the employer in possession of known facts related to the alleged accident within 45 days. *Gano Electric Contracting v. Industrial Commission*, 260 Ill.App.3d 92, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994). If no such notice is given, the claim is barred. *Id.* In this case, Petitioner is not found to have given even inaccurate or defective notice. Rather, his testimony as to having notified supervisors Al Herrmann and Jim Sgrignoli was credibly rebutted by both witnesses, whose testimony was supported by documentary evidence. Respondent Installation Specialists offered ample and compelling evidence that there was no notice of work accident of any kind provided by Petitioner until the Application for Adjustment of Claim was received at some point in September 2015, nearly three years after the employment relationship had ceased. The reasonable conclusion upon review of all evidence offered on this issue is that Petitioner simply provided no notice whatsoever. The Arbitrator therefore finds that Petitioner failed to meet his burden of establishing by a preponderance of the evidence that he provided timely notice to Respondent Installation Specialists, Inc.

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

It is of course Petitioner's burden to establish by a preponderance of the evidence each element of his or her claim, including that his alleged condition of ill-being at the time of hearing

is related to a work accident. It is up to the Commission as the finder of fact to weigh and interpret trial evidence. The resolution of whether there is a causal connection between a Petitioner's injuries and the employment is uniquely with the province of the Commission. *Donagalski v. Industrial Commission*, 97 Ill.2d 228, 454 N.E.2d 295, 73 Ill.Dec. 435, 438 (1983); *Skidis v. Industrial Commission,* 309 Ill.App.3d 720, 722 N.E.2d 1163, 243 Ill.Dec. 94, 98 (5th Dist. 1999). In this case testimony was offered by treating surgeon Dr. Earman and examining physician Dr. Bernstein. Dr. Earman testified that Petitioner's low back condition was both objectively and subjectively worse after September 8, 2016 than it had been previously. In his testimony pertaining to the alleged October 1, 2012 accident, it is clear that Dr. Earman was relying upon the statements of Petitioner for his understanding of this event. With Petitioner's description of this alleged accident having been credibly disputed by the Respondent, Dr. Earman's opinions as to October 1, 2012 have no probative value. Likewise, Dr. Bernstein, testifying on behalf of Contract Installation, testified that he had no understanding of the alleged October 1, 2012 accident, and that Petitioner's ability to work full-duty between October 1, 2012 and September 8, 2016 implied that he had recovered from any alleged injury. Consequently the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that his low back condition is causally related to an alleged work accident on October 1, 2012.

J. Is Respondent liable for past medical expenses?

Having failed to establish by a preponderance of the evidence that he suffered a compensable work accident on October 1, 2012, and having failed to establish that his condition after that date was causally related to a work injury occurring on October 1, 2012, the Arbitrator finds that Respondent Installation Specialists is not liable for any past medical expenses submitted by Petitioner.

O. Is Petitioner entitled to prospective medical care?

In light of the foregoing, and based upon a careful consideration of the testimony, medical treatment records, and documentary evidence, the Arbitrator hereby finds that Petitioner is not entitled to prospective medical care in the form of lumbar fusion surgery at the expense of Respondent Installation Specialists, Inc.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Byrdak,

Petitioner,

vs.

NO: 16 WC 30630

20IWCC0596

Contract Installation LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission notes that while it agrees with the Arbitrator's finding of no causation, and the denial of compensation with respect to this claim, it disagrees with the Arbitrator's analysis and/or basis for his decision in this regard.

The Arbitrator found that "... the petitioner failed to prove an intervening accident on September 8, 2016 and thus Respondent Contract Installations is not liable for any medical services or benefits as it pertains to the corresponding claim under the Illinois Workers' Compensation Act." (Arb.Dec.[Addendum], p.10).

The Commission notes that the present case does not involve a question of intervening accident. Instead, the dispositive issue is simply whether or not Petitioner proved by a preponderance of the credible evidence that his current condition of ill-being concerning his lumbar spine, and need for treatment, is causally related to the undisputed accident on 9/8/16. More to the point, we are asked to decide whether or not the 9/8/16 accident aggravated Petitioner's pre-existing lower back condition.

Along these lines, the Commission finds that Petitioner failed to sustain his burden of

20IWCC0596

proof based on the opinion of Dr. Bernstein and the fact the record fails to show Mr. Byrdak's lumbar disc condition materially changed following the incident. Specifically, Dr. Bernstein noted that he found no structural change between the 2/8/16 and 12/19/16 lumbar MRIs, noting that "I felt that the scans were the same, that there was no evidence of advancement of the condition or any structural change, like a disk herniation or a nerve root compression." (RX[Contact Installation]2, p.11). Instead, Dr. Bernstein opined that Petitioner suffered a "... temporary aggravation because this patient had symptoms that were substantial to the effect that he was being treated prior to this incident. The types of complaints that he made were similar to complaints that he made previously. I felt that he had a level of function that would allow him to return to his prior work without restriction, which is where he was before the incident. So I considered it a temporary aggravation." (Id., p.11). The Commission finds the opinion of Dr. Earman on the subject to be less than persuasive, particularly his claim that the diagnostic studies evidenced a progression of Petitioner's condition following the 9/8/16 incident, especially in light of the fact that he had difficulty recalling how many of the MRIs (performed on 10/4/12, 2/8/16, 12/19/16 and 12/11/17) he had reviewed and even which ones. (PX6, pp.29,32,36,42-43).

Furthermore, the evidence shows that Petitioner continued to work following the 9/8/16 incident, and continued to seek relief of his symptoms through pain management and the use of narcotic pain medication, as he had been doing during the period leading up to the accident in question.

Therefore, the Commission finds that Petitioner failed to prove that a causal relationship existed between the accident on 9/8/16 and his current condition of ill-being with respect to his lumbar spine. Accordingly, his claim for compensation is hereby denied.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 4/22/19 is affirmed and adopted with changes as stated herein, and Petitioner's claim for compensation is hereby denied.

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

DATED: OCT 9 - 2020
o: 8/18/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

BYRDAK, ANDREW
Employee/Petitioner

Case# **16WC030630**

15WC027912

CONTRACT INSTALLATION LLC
Employer/Respondent

20IWCC0596

On 4/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

1120 BRADY CONNOLLY & MASUDA PC
JEFFREY R GIBELLINA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

20IWCC0596

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ANDREW BYRDAK
Employee/Petitioner
v.
CONTRACT INSTALLATIONS, LLC
Employer/Respondent

Case # **16** WC **30630**
15 WC 27912

Setting: Chicago

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **January 10, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0596

FINDINGS

On the date of accident, **9/8/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$87,540.44**; the average weekly wage was **$1,683.47**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **1** dependent children.

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

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

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

ORDER

The Arbitrator finds no causation between the September 8, 2016 accident and the petitioner's current condition of ill-being involving the lumbar spine.

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

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

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

Signature of Arbitrator

04-19-19
Date

ICArbDec19(b)

APR 22 2019

RIDER TO ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

Andrew Byrdak v. Contract Installations
Case No. 16 WC 30630

STATEMENT OF FACTS

Prior to September 8, 2016 accident

In 2007, the petitioner started working for *ISI Installations* (respondent in companion comp case: 15 WC 27912; DOA 10/1/12) and began having issues with his low back while working there in 2009. *Trial Trans.* 8, 48-49.

On September 22, 2010, the petitioner presented to Dr. Robert Sulo at Loyola Hospital; the corresponding office visit note related that "since the late fall 2009 he's been having bilateral low back pain that comes and goes every day." *Resp. Ex. 9*, p. 45. He stated that it started after lifting some heavy panels at work. *Id.* He added that the back pain is aggravated by "any type of movement of the low back." *Id.* At times, he says he has shooting pain in the right buttocks. *Id.* He stated that he tried to protect his back, but it continues to bother him. *Id.* Per the report, the petitioner was using Norco 5/325 one tablet every 4 hours or 2 tablets every 6 hours as needed. *Id.* The petitioner was to start physical therapy for his low back. *Id.*

On July 28, 2011, the petitioner returned to Dr. Robert Sulo at Loyola, stating that his back was "doing about the same." He had seen an orthopedic back surgeon who was going to have him undergo physical therapy, which he had not started yet. *Resp. Ex. 9*, p. 39.

On October 1, 2012, the petitioner presented to Dr. Chintan Sampat at Parkview Orthopedic Group. *Resp. Ex. 10*, p. 4. The petitioner stated that he had the low back pain that radiates along the right buttock, posterolateral thigh, down to the level of the knee since a work accident in 2009. *Id.* He stated that he worked as a carpenter and installed office furniture, which exacerbated his symptoms. *Id.* He complained of 80% low back pain and 20% lower extremity pain. *Id.* He took Norco for pain relief. *Id.* Dr. Sampat noted that an MRI scan from 2011 of the lumbar spine showed L5-S1 degenerative disc disease without any central or foraminal stenosis. *Id.* The diagnosis was L5-S1 degenerative disc disease with right lower extremity radiculopathy. *Id.* Dr. Sampat recommended an updated MRI of the lumbar spine to see if there had been any

interval changes from the previous scan as far as neurological compression. *Id.* A prescription for Norco 5 mg was dispensed. *Id.* A body pain chart showed that the petitioner had pain in his right buttock and down the back of his right thigh. *Id.* at 11.

On October 4, 2012, the petitioner underwent an MRI of the lumbar spine at Open Advanced MRI that showed, per the radiologist, left paracentral disc protrusion and annular tear at L5-S1 with mild compression of the ventral thecal sac. *Resp. Ex. 10*, p. 12.

The petitioner returned to Dr. Sampat on November 12, 2012 stating that he still had low back pain that radiated down the right proximal buttock and posterolateral thigh. *Resp. Ex. 10*, p. 14. He added that 3 months of physical therapy did not help. *Id.* Dr. Sampat's diagnosis was L5-S1 degenerative disc disease. *Id.* Dr. Sampat reviewed the MRI of the lumbar spine, which revealed "significant annular tear" and decreased disc height at L5-S1, consistent with degenerative disc disease. *Id.* Dr. Sampat recommended an epidural steroid injection. *Id.*

On January 24, 2013, the petitioner presented to his primary care physician at Loyola, Dr. Robert Sulo, stating that he was "still having back problems." *Resp. Ex. 9*, p. 27.

On February 11, 2013, the petitioner presented to pain management specialist Dr. Neema Bayran at Parkview Orthopedic Group for evaluation, per a referral by Dr. Sampat. *Resp. Ex. 10*, p. 16. The petitioner complained of pain mostly on the right side of his lower back. *Id.* He rated his pain at a 8/10. *Id.* He stated that the pain started about 3 years ago. *Id.* He underwent physical therapy with no significant relief. *Id.* He was taking Norco for pain. *Id.* He had no epidural steroid injections in the past. *Id.* The plan was to proceed with bilateral selective nerve root blocks at L5-S1. *Id.* The petitioner was to continue taking Norco. *Id.*

On February 13, 2013, at Parkview Orthopedic Group, the petitioner underwent his first of seven bilateral lumbar transforaminal epidural steroid injections at L5-S1 performed by Dr. Bayran. *Resp. Ex. 10*, p. 19.

On April 22, 2013, the petitioner returned to Dr. Bayran at Parkview Orthopedic Group for follow-up after epidural steroid injections into the lumbar spine on February 13, 2013. *Resp. Ex. 10*, p. 21. The petitioner reported significant relief initially after the injection, however, the pain

had gradually returned. *Id.* He continued to take Norco for pain. The plan was to undergo another round of injections. *Id.*

On April 24, 2013, at Parkview Orthopedic Group, the petitioner underwent a second lumbar transforaminal epidural steroid injection at L5-S1 bilaterally performed by Dr. Bayran. *Resp. Ex. 10*, p. 22.

On May 20, 2013, the petitioner returned to Dr. Bayran at Parkview Orthopedic Group for follow-up after his second lumbar transforaminal epidural steroid injection at L5-S1. *Resp. Ex. 10*, p. 25. The petitioner stated that he experienced about 95% relief of pain since the injection. *Id.* He added that pain still happened occasionally with standing for too long. *Id.* He continued to take Norco for pain. *Id.* The petitioner was to return on an as-needed basis.

In 2014, the petitioner began working for Contract Installations moving commercial furniture. *Trial Trans. 21.*

On September 19, 2014, the petitioner was seen by Dr. Ikenna Okpareke, pain management specialist at Pain Centers of Chicago, per a referral by Dr. Bayran at Parkview Orthopedic Group. *Resp. Ex. 10*, p. 30. The petitioner related that he had received epidural steroid injections by Dr. Bayran the year prior. *Id.* After the same, he lost his job and, as a result, was referred to Dr. Okpareke as he accepts Medicaid. *Id.* The petitioner brought in a Walgreens receipt for #20 Norco 5/325 received on August 8, 2014. Dr. Okapareke recommended an additional bilateral L5-S1 transforaminal epidural steroid injection. The petitioner was to continue taking Norco.

On October 16, 2014, at Presence St. Joseph Medical Center, the petitioner underwent his third bilateral L5-S1 transforaminal epidural steroid injection performed by Dr. Okpareke. *Resp. Ex. 10*, p. 33.

On December 4, 2014, the petitioner followed up with Dr. Maen Martini at Pain Centers of Chicago stating that he experienced relief after the third injection for about 2 weeks. *Resp. Ex. 10*, p. 36. His pain started to come back with back spasms. *Id.* The petitioner was to increase his dosage of Norco and repeat epidural steroid injection. *Id.*

On January 23, 2015, the petitioner underwent his fourth bilateral L5-S1 transforaminal epidural steroid injection. *Resp. Ex. 10*, p. 37.

On February 18, 2015, the petitioner returned to Dr. Okpareke who recommended, due to continued low back complaints that he undergo yet another L5-S1 transforaminal epidural steroid injection. *Resp. Ex. 10*, p. 41.

On February 25, 2015, the petitioner underwent his fifth bilateral L5-S1 lumbar transforaminal epidural steroid injection performed by Dr. Okpareke. *Resp. Ex. 10*, p. 42.

On April 9, 2015, the petitioner returned to Dr. Martini at Pain Centers of Chicago stating that the last epidural steroid injection did not help as before. *Resp. Ex. 10*, p. 43. He added that Norco has been working well. *Id.*

On May 26, 2015, the petitioner underwent his sixth bilateral L5-S1 lumbar transforaminal epidural steroid injection performed by Dr. Okpareke. *Resp. Ex. 10*, p. 45.

On August 25, 2015, the petitioner returned to Pain Centers of Chicago and was seen by Dr. Keith Schmidt stating that he received no relief from the injection on May 26, 2015. *Resp. Ex. 10*, p. 46. The petitioner was requesting more pain medications. *Id.* The petitioner also stated that he was getting depressed with lack of pain relief. *Id.* He asked about neurosurgical intervention. *Id.* The petitioner had stopped working as a carpenter and was going back to school for a managerial position. *Id.* His pain that day was an 8/10. *Id.* The plan was to increase Norco to 4 tabs per day as needed for pain, continue Flexeril and Zanaflex, functional capacity evaluation for work restriction, nutrition consultation for obesity, and PT exercises. *Id.* at 47.

On November 5, 2015, the petitioner returned to Dr. Schmidt for L5-S1 degenerative disc disease, annular tear, and bilateral lumbar radiculopathy. *Resp. Ex. 10*, p. 48. The petitioner expressed concern about the possibility of being on narcotics for the rest of his life. *Id.* He added that he did not complete his functional capacity evaluation as he just went back to work as a carpenter. *Id.*

On December 16, 2015, the petitioner returned to Dr. Okpareke stating that he continued to work as a carpenter, which aggravated his pain. *Resp. Ex. 10*, p. 51. He added that the Norco was not effective. *Id.* His last intervention was a bilateral transforaminal injection that offered no relief. *Id.* The petitioner was to switch from Norco to Percocet and undergo another MRI of the lumbar spine to determine appropriate treatment moving forward. *Id.*

On February 8, 2016, the petitioner underwent another MRI the lumbar spine at Naperville Imaging Center. *Resp. Ex. 10*, p. 54.

On February 12, 2016, the petitioner followed up with Dr. Okpareke. *Resp. Ex. 10*, p. 56. The petitioner stated that he had switched to Percocet recently as Norco was not helping. *Id.* He later called stating that the Percocet was not helping so he switched to Oxycodone. *Id.* However, he stated that relief lasted only 4 hours, so he has been using the medication every 4 hours during the day. *Id.* His pain that day was a 7/10. *Id.* The petitioner received a refill of oxycodone for 2 months. *Id.*

On March 31, 2016, the petitioner returned to Dr. Keith Schmidt at Pain Centers of Chicago relating that he was interested in adjusting his pain medications for better control. *Resp. Ex. 10*, p. 61. He stated that he only had about one hour of relief with oxycodone. *Id.* He continued to work long days as a laborer. *Id.* His pain that day was a 7/10. *Id.* The plan was to start OxyContin and schedule another bilateral L5-S1 transforaminal epidural steroid injection. *Id.* He was also encouraged to engage in PT exercises and weight loss. *Id.*

On April 21, 2016, the petitioner underwent his *seventh* bilateral L5-S1 lumbar transforaminal epidural steroid injection performed by Dr. Schmidt. *Resp. Ex. 10*, p. 62.

On May 20, 2016, the petitioner returned to Dr. Schmidt. *Resp. Ex. 10*, p. 63. The petitioner related that he received minimal pain relief for 1.5 weeks after his seventh bilateral lumbar transforaminal epidural steroid injection on April 21, 2016. *Id.* The petitioner also related that his medications had not been helping with pain relief. *Id.* He added that he had built a tolerance to them. *Id.* His pain that day was an 8/10. *Id.* The plan was to undergo bilateral L5-S1 lumbar facet injections. *Id.* at 65.

On July 25, 2016, 45 days before the alleged September 8, 2016 accident, the petitioner underwent his *eighth* lumbar spine injection in the form of a bilateral lumbar facet joint steroid injection at L5-S1 performed by Dr. Schmidt at Pain Centers of Chicago. *Resp. Ex. 10*, p. 66.

On August 26, 2016, 13 days before the alleged September 8, 2016 accident, the petitioner followed up with Dr. Schmidt after undergoing the bilateral lumbar facet injection. *Resp. Ex. 10*, p. 67. He stated that he had adequate pain relief for one month but that "it didn't correct the

problem." *Id.* The petitioner said that he cannot do without his OxyContin as he would not be able to control his pain despite experiencing headaches. *Id.* His pain that day was an 8/10. *Id.* At that time, Dr. Schmidt recommended a bilateral L5-S1 RFTC (radiofrequency thermocoagulation) under sedation. *Id.* Dr. Schmidt also refilled OxyContin and oxycodone for 2 more months. *Id.*

On September 8, 2016, the petitioner stated that he injured his low back moving "fire file" cabinets while in the employ of Contract Installations. *Trial Trans.* 23.

After the September 8, 2016 accident

On September 30, 2016, *22 days after* the alleged September 8, 2016, the petitioner returned to Dr. Schmidt at Pain Centers of Chicago. *Resp. Ex. 10*, p. 71. The petitioner stated that on "9/9/16" he had to move very large fire file cabinets at work on a construction site, each weighing 1,000 pounds, with three other people at which point he hurt his low back on the right side. *Id.* He rated his pain at a 7/10. *Id.* He stated that he was off work for a few days, but had since returned in a light duty capacity. *Id.* The petitioner was provided a refill for OxyContin and oxycodone with plans to still proceed with the bilateral L5-S1 RFTC. *Id.*

On November 10, 2016, the petitioner presented to Presence St. Joseph Medical Center Neuroscience Institute and was seen by Dr. Beejal Amin. *Resp. Ex. 6.* The petitioner related that the he had low back pain that initially started in 2012, while sliding a skid of glass and that his symptoms had "gradually improved" over the last several years. *Id.* However, on September 8, 2016 he developed acute onset of worsening low back pain as a result of moving fire file cabinets. *Id.* He rated his pain at a 7/10 with intermittent pain radiating into his right buttock and right posterior thigh. *Id.* He was taking oxycodone ER 20 and Oxycodone 10 mg as needed for pain control. *Id.* He added that his most recent spinal injection was in July and provided "limited relief." *Id.* He continued to work as a carpenter for Contract Installations. *Id.* Dr. Amin reviewed an MRI from February 2016 that showed evidence of degenerative disc disease and annular tear at L5-S1. *Id.* He did not see evidence of severe central or foraminal or nerve root compression at the L5-S1 level. *Id.* The plan was to obtain an updated MRI of the lumbar spine as the February 2016 films predated the alleged to September 2016 accident. *Id.*

On December 2, 2016, the petitioner followed up with Dr. Keith Schmidt relating that he was still interested in proceeding with the radiofrequency ablation procedure on the lumbar spine.

Resp. Ex. 10, p. 82. He was provided a prescription for refill of OxyContin, oxycodone and cyclobenzaprine. *Id.*

On December 19, 2016, the petitioner underwent an MRI the lumbar spine at Presence St. Joseph Medical Center that revealed, per the radiologist, multiple disc bulges present throughout the mid-to-lower lumbar spine as well as mild reactive endplate changes at the lumbosacral junction. *Resp. Ex. 8*, p. 21.

On January 9, 2017, the petitioner returned to Dr. Amin at the Neuroscience Institute at Presence St. Joseph Medical Center. *Resp. Ex. 6*. Dr. Amin personally reviewed the MRI scans of the lumbar spine from December 2016 and found no evidence of significant stenosis or disc herniation present in the lumbar spine. *Id.* There was evidence of degenerative disc disease at level L5-S1. *Id.* Dr. Amin stated that he could not identify a structural pathology on the MRI images to explain his right lower extremity pain. *Id.* He recommended physical therapy twice a week for 6 weeks for low back and core strengthening exercises as well as an EMG. *Id.* (The petitioner never underwent additional PT or the EMG.) Dr. Amin expressly recommended *against* surgical intervention. *Id.*

On March 2, 2017, the petition underwent an independent medical examination performed by Dr. Avi Bernstein at The Spine Center located at Parkside Center at Lutheran General Hospital. See Resp. Ex. 1. The petitioner stated, per the resulting report, that since the 2012 accident he had "persistent continuous treatment through the years." *Id.* Dr. Bernstein reviewed an MRI scan from February 8, 2016 - prior to the alleged September 8, 2016 accident - as well as an MRI from December 19, 2016 both demonstrating "degenerative changes at L5-S1 associated with high intensity zone." *Id.* Dr. Bernstein noted that additional medical records documented complaints of bilateral low back pain dating back to late fall of 2009. *Id.* Dr. Bernstein opined that the petitioner had chronic complaints of low back pain related to degenerative condition of lumbar spine at L5-S1 level. *Id.* He added that the petitioner's symptoms are expected to "wax and wane" as a result of the condition. *Id.* He had a benign physical examination and the radiographic studies demonstrated degenerative disc at L5-S1 level without distinct disc herniation or nerve root compression. *Id.* Dr. Bernstein did concede that the petitioner may have exacerbated (clarified his use of "aggravated" in deposition as in fact an exacerbation – see *Resp. Ex. 2*) his chronic low back condition, but that he was at maximum medical improvement at that time. *Id.* The petitioner was

returned to full duty as a result of any condition related to the alleged September 8, 2016 accident. *Id.* Dr. Bernstein reiterated that in comparing the petitioner's radiographic studies, there was "no evidence of a structural change between his February 2016 and his December 19, 2016 MRI scan of the lumbar spine." *Id.* Dr. Bernstein also conducted a disability impairment rating on March 2, 2017 and concluded that the petitioner has a whole person impairment of 2%. *Resp. Ex. 1.*

On October 31, 2017, petitioner first presented to treater Dr. William Earman, orthopedic surgeon at Palos Hospital. *Resp. Ex. 5*, p. 13. The petitioner stated that he had "rather consistent and persistent back pain since 2012" at which point he sustained an injury moving office furniture - "went to push it was very heavy and he was moving some glass originally and had an increasing amount of back pain." *Id.* The petitioner never referenced the alleged September 8, 2016 accident within the evaluation. *Id.* Dr. Earman reviewed MRI scans of the lumbar spine from 2012 and 2016 which both revealed significant degenerative disc changes at "L4-5" (Dr. Earman stated during his deposition that all references to L4-5 in his initial evaluation should have read L5-S1). *Id.* at 14. Dr. Earman recommended that the petitioner undergo an updated MRI of the lumbar spine to see if there had been further progression of the problem. *Id.* He concluded that the problem may ultimately be considered painful disc disease and that the petitioner would benefit from interbody fusion at L5-S1. *Id.*

On December 26, 2017, the petitioner presented to Presence St. Joseph Medical Center to undergo bilateral L4-5 dorsal medial branch nerve radiofrequency ablation as recommend by Dr. Schmidt on August 26, 2013 (prior to the accident). *Resp. Ex. 11*, p. 234.

The petitioner returned to Dr. Earman on January 26, 2018 to go over the results of the updated MRI of the lumbar spine; the notes again do not reference a 2016 accident. *Resp. Ex. 5*, p. 18.

The petitioner returned to Dr. Earman on March 16, 2018 for follow-up on lumbar spine condition. *Resp. Ex. 5*, p. 35. Within Dr. Earman's evaluation, he stated the following:

> *Patient had a thorough course of treatment without response with posterior facet ablation the patient has had multiple epidural steroid injections as MRI shows progressive changes in the posterior aspect of the disc consistent with a chronic annular injury and persistent back pain with disc disease. I believe this is probably his generator and have*

discussed with him the need for potential surgery removing the disc doing a fusion at the L5-S1 because of persistent recalcitrant pain. Patient had an extensive workup progressive changes with degenerative change across the area of the disc and two injuries 2012 2016 both of which had exacerbated and were diagnosed with posterior annular tears. I believe this is continued progress from those injuries.

Resp. Ex. 5, *p. 36.*

On March 25, 2018, orthopedic surgeon and treater Dr. William Earman drafted a narrative per request of petitioner's attorney concluding that "patient's history physical and review of the medical records from the 2012 and 2016 of [sic] exacerbated the back pain which has been going on continuously since the 2012 episode. I believe that these episodes aggravated and extended the injury to the L5-S1 disc to the current time with the [sic] patient is having chronic and long-term low back pain which is not been remittent despite extensive conservative therapy and time." *Resp. Ex. 3.*

The petitioner continued to see Dr. Earman, at least through July 2018, and in each of the office visit notes, he recommended an interbody fusion at L5-S1. See *Resp. Ex. 5.*

On October 19, 2018, the petitioner followed up with Dr. Okpareke at Pain Centers of Chicago stating that there were no immediate plans for back surgery. *Resp. Ex. 14.* He indicated that he wanted to lose some weight before considering the same. *Id.* His pain was an 8/10 that day. *Id.* Dr. Okpareke recommended the petitioner consider "weaning down on his opiate load." *Id.* Dr. Okpareke reminded him that he was on very high dosing for chronic benign pain. *Id.* The petitioner was using 100 mg of oxycodone a day which was greater than 90 mg equivalent of morphine that was recommended as the upper limit by the FDA, per Dr. Okpareke. *Id.* Dr. Okpareke noted that the petitioner was not receptive to suggestions of weaning down as he stated Dr. Earman told him to "keep things the same until his surgery." *Id.* He further noted that the petitioner stated that his back was "really bad" and was in fact "bone-on-bone;" Dr. Okpareke stated that the December 2016 MRI of the lumbar spine "did not appear to be very bad." *Id.*

Findings of Law:

With regard to the issue of (F) as to causation, the Arbitrator makes the following findings of law:

The Arbitrator finds that the petitioner failed to prove an intervening accident on September 8, 2016 and thus Respondent Contract Installations is not liable for any medical services or benefits as it pertains to the corresponding claim under the Illinois Workers' Compensation Act.

To obtain compensation under the Illinois Workers' Compensation Act, an employee must establish by a preponderance of the evidence a causal connection between a work-related injury and the employee's condition of ill-being. *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 786 (2005). Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. *Id.* at 786. An independent intervening cause has been held to be one which breaks the chain of causation between a work-related injury and an ensuing disability or injury. *Int'l Harvester Co. v. Indus. Com.*, 46 Ill. 2d 238, 245-46 (1970). For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must *completely* break the causal chain between the original work-related injury and the ensuing condition. *Glob. Prods. v. Workers' Comp. Comm'n*, 392 Ill. App. 3d 408, 411-12 (1993) (emphasis added). The initial employment need only remain a cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v. Industrial Comm'n*, 361 Ill. App. 3d 673, (2005). So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. See *International Harvester*. That the other event, whether work-related or not, may have aggravated the employee's condition is irrelevant. *Vogel,* 354 Ill. App. 3d 786-88. When an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 87 (1995).

The Appellate Court in *National Freight* references four factors to apply in considering whether an intervening accident severs causation between the initial accident and the petitioner's current condition of ill-being. *Nat'l Freight Indus. v. Ill. Workers' Comp. Comm'n*, 993 N.E. 2d 473 (2013). First, whether the petitioner's symptoms changed following the intervening accident. *Id.* Second, whether the intervening accident caused in change in pathology. *Id.* Third, whether the

intervening accident caused a change in future treatment including surgical intervention. *Id.* Fourth, whether the intervening accident caused a change in work status. *Id.*

To preface, the arbitrator notes that intervening accident analysis applies in the case at hand as the record references an accident involving the low back in the fall of 2009 as well as on or around October 1, 2012.

As to the first factor (change in symptoms), the arbitrator finds that the petitioner's symptoms pertaining to the L5-S1 degenerative process did not materially change on September 8, 2016. The medical records clearly document that the petitioner was undergoing consistent treatment for unrelenting pain in the lumbar spine at L5-S1 from at least 2010 leading up to the September 8, 2016 accident. In fact, the petitioner's condition has been deteriorating since 2010 as he has been taking narcotics, by and large, since that time (*Trial Trans* 63) and has undergone *seven* bilateral epidural steroid injections at L5-S1 (most recently on April 21, 2016 –less than five months before the September 8, 2016 accident) and one bilateral lumbar facet injection at L5-S1 on July 25, 2016 (45 days before the accident). See *Resp. Ex. 10*. Furthermore, the petitioner followed up with Dr. Keith Schmidt on August 26, 2016, 13 days prior to the alleged September 8, 2016 accident, at which time Dr. Schmidt recommended bilateral L5-S1 RFTC (radiofrequency thermocoagulation) and continued use of narcotics for pain control due to ongoing pain complaints. *Resp. Ex. 10*, p. 67. The petitioner's pain level at that office visit was an 8/10. *Id.* When the petitioner first followed up with Dr. Keith Schmidt on September 30, 2016 - *22 days after the accident* - he rated his pain at a 7/10. There are no treatment records relating the petitioner sought immediate treatment after the September 8, 2016 accident. The treatment records also document that before and after the September 8, 2016 accident he was having similar low back discomfort with radiating pain to his right buttock and right posterolateral thigh. See *Resp. Ex. 6 & 10.*

With regard to the second factor (change in pathology), the arbitrator finds there is no objective evidence in support of a material change in pathology after the September 8, 2016 accident. On January 9, 2017, the petitioner returned to Dr. Beejal Amin at the Neuroscience Institute at Presence St. Joseph Medical Center after undergoing an MRI of the lumbar spine in December 2016. *Resp. Ex. 6*. Dr. Amin personally reviewed the MRI scans of the lumbar spine

from December 2016 and found no evidence of significant stenosis or disc herniation present in the lumbar spine. *Id.* Dr. Amin did note evidence of degenerative disc disease at level L5-S1 as seen on MRI films predating the accident. *Id.* Dr. Amin stated that he could not identify a structural pathology on the MRI images to explain his right lower extremity pain. *Id.* Dr. Amin expressly recommended *against* surgical intervention. *Id.* Dr. Bernstein, within his March 2, 2017 independent medical evaluation report, agreed in finding that the petitioner had a benign physical examination and the radiographic studies demonstrated degenerative disc at L5-S1 level without distinct disc herniation or nerve root compression. *Resp. Ex. 1.* Dr. Bernstein reiterated, in referencing his review of MRI films before and after the September 8, 2016 accident, that there was "no evidence of a structural change between his February 2016 and his December 19, 2016 MRI scan of the lumbar spine." *Id.*

As to the third factor (change in treatment plan), the arbitrator finds there was no change in treatment plan immediately before and after the September 8, 2016 accident. Within the first treatment record after the accident on September 30, 2016, treater Dr. Schmidt continued to recommend RFTC at L5-S1 and narcotics as he had in his August 26, 2016 note (13 days before the accident). See *Resp. Ex. 10.* The petitioner eventually underwent the RFTC procedure on December 26, 2017. *Resp. Ex. 11*, p. 234. Moreover, the interbody fusion was initially recommended by Dr. Earman on January 26, 2018 representing almost a year and a half after the September 8, 2016 accident (and one month after the RFTC procedure). *Resp. Ex. 5*, p. 18. Finally, at his deposition, Dr. Earman backed away from the surgical recommendation, testifying that he had only stated Petitioner may require a "possible fusion in the future." (Id. p.34) Dr. Earman is equivocal about his own surgery recommendation.

Concerning the fourth factor (change in work status), the arbitrator finds that the petitioner's work status was not affected by the September 8, 2016 accident. The petitioner returned to work a few days after the September 8, 2016 accident and continued working as a carpenter at Contract Installations for a year until September 2017. *Trial trans* 58 (see also *Resp. Ex. 13 [work schedule]*). In September 2017, the petitioner left Contract Installations to go work at "Skender Construction." *Trial Trans.* 28-29. No lost time is being claimed.

Thus, applying the four factors in *National Freight*, the arbitrator finds that the September 8, 2016 incident did not represent an intervening accident.

As an aside, if one were we apply the recent *Par Electric* case reasoning to the current facts, it would result in creating exclusive liability to the first employer, but the facts supporting an accident are extremely weak in that matter.

Credibility of Petitioner

During direct examination at trial, the petitioner stated that he saw Dr. Keith Schmidt on September 9, 2016 – one day after the accident. *Trial Trans.* 24-25. The treatment records directly refute the claim as they show that he first followed up with Dr. Schmidt on September 30, 2016 (again, 22 days after the September 8, 2016 accident). See *Pet Ex. 2* (medical records from Pain Centers of Chicago).

However, the Arbitrator makes no specific ruling on Petitioner's credibility but notes that his cases are unique in that they involve a potential lumbar fusion recommendation with no recorded lost time, no attempted physical therapy, no follow through with an EMG recommendation, and no FCE. Petitioner declined to follow up on any of these directions from his treaters. Further, Petitioner had the opportunity to be evaluated by Dr. Edward Goldberg and has not done so. (Bernstein Dep. T. p.7) In contrast, the record shows that the Petitioner underwent multiple injections and has been taking narcotic medications for years.

Credibility of IME physician Dr. Avi Bernstein
versus treater Dr. William Earman

Dr. Earman testified on direct during his June 11, 2018 deposition that he reviewed MRI films of the lumbar spine from December 11, 2017. *Resp. Ex. 4*, 74. However, as to films predating the accident, during cross-examination at the same performed by ISI's attorney, Dr. Earman stated that he did not recall whether he also reviewed the February 8, 2016 MRI films of the lumbar spine (before accident) or films from December 19, 2016 (after the accident). *Id.* at 8. Again, during cross-examination by Contract Installations' attorney, Dr. Earman clearly stated on two separate occasions that he did <u>not</u> know which MRI he reviewed from 2016 - the films from February 8, 2016 or December 19, 2016. *Id.* at 9, 10. Dr. Earman then went on to testify on re-cross by ISI's attorney that the petitioner's low back condition had objectively worsened after the September 8, 2016 accident citing to MRI results despite now knowing whether he reviewed MRI films <u>before</u>

the accident. *Id.* at 12. Further, Dr. Earman stated that the 2016 accident worsen Petitioner's disc condition because of four reasons. First, Petitioner's symptoms became much worse. Second, Petitioner now needed narcotic medication. Third, Petitioner is not able work and now has severe lifestyle restrictions at home. (Id. p.28) However, the record does not reflect these factors to be accurate. Under scrutiny, the medical records do not show worsening symptomatology. Petitioner has been on narcotic medication for years, there is no lost time claimed and Petitioner failed to testify about severe lifestyle restrictions at home.

Dr. Bernstein states in his IME report from March 2, 2018 that he reviewed MRI films of the lumbar spine from February 8, 2016 (before accident) and December 19, 2016 (after accident), both showing degenerative changes at L5-S1 associated with high intensity zone. (Resp. Ex. 1) He concludes his report by reiterating that he found no "structural change" between the two studies. *Id.* Furthermore, treater Dr. Amin, within his January 9, 2017 office visit note, states that he personally reviewed MRI scans of the lumbar spine from December 2016 and found no evidence of significant stenosis or disc herniation. *Resp. Ex. 6.* Like Dr. Bernstein, he did find evidence of degenerative disc disease at L5-S1. *Id.* He added that he could not identify any structural pathology on the MRI images to explain any right lower extremity pain. *Id.* He concluded by explicitly recommending *against* surgery. *Id.*

Thus, the arbitrator adopts the opinions of Drs. Bernstein and Amin (treater) finding them more credible than treater Dr. Earman.

While it may be true that Dr. Bernstein initially stated the September 8, 2016 accident "likely suffered an aggravation," he later stated he would consider it a "temporary aggravation" and Petitioner could return to work with no restrictions. (Dep. Trans. p.10-11) Further, he stated that surgery would only be necessary if Petitioner could no longer live with the pain (Id. p.19) As stated earlier, the record does not support a definitive prescription by Dr. Earman for a fusion surgery. Additionally, Petitioner has lost no time from work, he never followed up on his doctor's recommendations for physical therapy, an EMG, or an FCE. Petitioner has not gone to see Dr. Ed Goldberg as recommended. In conclusion, neither Petitioner's treatment history or the record as whole supports a claim of being "no longer able to live with the pain."

With regard to the issue of (J), past medical treatment, and (K), prospective medical treatment, the Arbitrator makes the following findings of law:

The arbitrator finds the respondent Contract Installations is not liable for any past or future medical treatment as it pertains to the September 8, 2016 accident.

IN CONCLUSION, the arbitrator finds no causation connection between the September 8, 2016 accident while in the employ of Contract Installations and the petitioner's current condition of ill-being involving the lumbar spine. Thus, the petitioner is not entitled to an award under the Illinois Workers' Compensation Act for his September 8, 2016 accident.

###

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Miller,

Petitioner,

20IWCC0597

vs. NO: 18WC 033527

R Olson Construction Co,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 25, 2019 is hereby affirmed and adopted.

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

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

20IWCC0597

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020

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MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

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

MILLER, STEVEN
Employee/Petitioner

Case# **18WC033527**

R OLSON CONSTRUCTION CO
Employer/Respondent

20IWCC0597

On 2/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

4412 ACCIDENT FUND
GRACE DiGERLANDO
PO BOX 40785
LANSING, MI 48901

20IWCC0597

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

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

Steven Miller,
Employee/Petitioner

v.

R. Olson Construction Co.,
Employer/Respondent

Case # **18** WC **33527**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **01/03/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0597

FINDINGS

On **10/26/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**94,120.00**; the average weekly wage was $**1,810.00**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

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

ORDER

Denial of Claim:

Petitioner has failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent on October 26, 2018; therefore, his claim for compensation is denied.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

February 22, 2019
Date

FEB 25 2019

STEVEN MILLER v. R. OLSON CONSTRUCTION, CO.
CASE NUMBER: 18 WC 33527

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT:

On January 3, 2019, this matter was tried pursuant to Section 19(b) of the Act before Arbitrator Harris at the IWCC in Chicago.

Petitioner testified that on October 26, 2018 he was employed by R. Olson Construction ("Respondent") as a concrete finisher. Petitioner testified he was a member of Local 502 and he had been a concrete finisher for approximately 30 years. As a finisher, Petitioner testified he would grade, level and finish concrete and that he generally worked on commercial job sites. Petitioner testified his business agent would call or text him the day before a job. Petitioner testified he had never worked for Respondent prior to October 26, 2018. (TX 9-11)

On October 26, 2018, Petitioner testified he was working downtown on what was to be the start of a high-rise building. Petitioner testified he began working at 8 a.m. and that he did not know anyone on that job site. Petitioner did not have to report to anyone before he began his workday and that no name was provided to him. Petitioner just showed up and started working, which was not typically what he would do. On the date in question, Petitioner testified he was working next to other concrete finishers. (TX 12-15)

Petitioner testified he took the picture depicted in exhibit 4A and the picture exhibited the ground floor concrete prep. Petitioner took that picture at 8:00 a.m. or 8:30 a.m. before the concrete pour. Petitioner testified the green material depicted in the picture was rebar. Petitioner testified the concrete was then poured in the area where the rebar was and that he worked in that area after the concrete was poured. Petitioner had to walk through the concrete, which was wet and rocky, after it was poured. (PX 4A; TX 15-20)

Petitioner testified he took the picture depicted in exhibit 4B at approximately 12:00 p.m. or 1:00 p.m. In that picture, most of the concrete had been poured, but there was still more to go. Shortly after he began working on October 26th, they poured a layer of concrete. After the pour, Petitioner stood in the concrete, "screeding" (leveling) the concrete. Petitioner was required to wear rubber boots and the boots he wore were his own personal boots. Petitioner would wear the same boots to every job site until they got punctured. (PX 4B; TX 21-27)

Petitioner testified Exhibit 7 was his right rubber boot that he wore on the job site on October 26, 2018. He testified that there was concrete material from the job all over the boot. Petitioner testified that when he left for work that morning, he checked his boots to make sure he was wearing the right "personal protection equipment." Petitioner testified that his boot did not have a puncture in it when he checked that morning. Petitioner testified he checked the boot at approximately 10:30 a.m. on October 26th because he felt a wet warmness in the bottom of his heel and that was when he noticed the puncture in the boot. (PX 7; TX 27-32)

Petitioner testified he continued to work after he noticed the puncture in his boot. At the end of his workday, Petitioner testified he attempted to locate the safety officer to tell him about his foot.

Petitioner testified he was not familiar with Respondent's safety officer because Petitioner did not know anybody from the company. Petitioner testified that at the end of his shift on October 26, 2018, Petitioner walked to the safety office and knocked on the door, but nobody was there. Petitioner testified he went to the safety office to report his injury and to look for the wash area. (TX 32-35) Petitioner testified everyone knew that the concrete had chemicals in it and that if they did not "get it off our skin right away it probably will do damage." (TX 34-35)

Petitioner testified that when he did not find a safety person at the office, he went home. As he was driving, he felt discomfort and pain in his right foot. Petitioner lived in Lowell, Indiana, so it was approximately a two-hour ride home. Petitioner arrived home at approximately 7:30 p.m. and he told his wife what happened. Petitioner testified his wife removed his boot and sock and that he then took pictures of his right heel area. Petitioner testified his wife who took the pictures, not him. (TX 35-41)

Petitioner testified he first sought treatment for his foot with Dr. Barry Ring. Petitioner chose to treat with Dr. Ring because he had seen him in the past. Petitioner testified he first contacted Dr. Ring's office to schedule an appointment on October 29, 2018. Petitioner testified he first saw Dr. Ring on October 31, 2018. Petitioner continued to follow up with Dr. Ring, who authorized him off of work and referred him to a specialist, Dr. Jarrett Moon. Petitioner testified he first saw Dr. Moon on or about December 12, 2018 and the treatment he received had helped some and his foot was getting better. (TX 41-47)

Petitioner testified that he had never injured his right foot prior to October 26, 2018. Since, that time, he testified he has experienced a lot of pain and discomfort in the right foot. Petitioner's right heel was examined at the time of trial and there was noted to be a discolored area with a wound that appeared to be open, but healing. His attorney measured the discolored area along the outside of the foot to be approximately 2" long and 1.5" across. The petitioner testified that he was wearing slippers instead of regular shoes at trial because he could not put on a shoe or a boot. He testified that he used Silvadene cream on his foot 3 to 4 times per day. (TX 47-54)

Based upon the Arbitrator's questioning, it was confirmed Petitioner provided notice of his alleged accident to Respondent when he telephoned its CFO on November 7, 2018. On cross-examination, Petitioner testified his primary care physician was Dr. Jillian Carter. Petitioner testified he did not see Dr. Carter for his injury because there were no appointments available. Petitioner testified he received therapy at Dr. Ring's office with an individual other than Dr. Ring. Petitioner did not know if Chiropractor Brian Cassani provided his therapy. Petitioner testified that during treatment, his foot was moved and massaged, ice and cream were applied, and a Tens unit was utilized. He attended therapy once every 14 days. Petitioner testified he did not know what type of physician Dr. Ring was, but that Dr. Moon was a podiatrist. Petitioner was treating with both Dr. Ring and Dr. Moon consecutively. (TX 57-61)

On cross-examination, Petitioner testified Jimmy Styka was his Union's business agent and Styka would call him for jobs. Petitioner testified he did not recall texting with Styka on October 30th and he did not recall texting Styka that he could not work because he was away at his cabin hunting. Petitioner was shown Respondent's Exhibit #4 (i.e. text document with Steve Miller's name on it, but no name of who was responding to the text) for identification. Petitioner testified he did not recognize the document and he did not recall any text communications with Styka. Petitioner testified he did not go to his cabin that weekend and he did not recall having any communications with Styka post October 26th until December 24th. Petitioner testified he was expected to return to the job site at

Power subsequent to October 26th and he would only know that if Styka asked him to report for work because he received his daily job assignments from Styka. Petitioner testified he never heard from Styka again until December 24th, so he did not know if he was supposed to return to work for Respondent. (TX 61-68)

When asked by the Arbitrator if he worked every day in the normal course of his work life, Petitioner testified "most of the time we worked." (TX 68) Upon further questioning from the Arbitrator relative to whether someone advised him to show up at the job site on October 26, Petitioner testified "if you look at that text, he told me to be there that morning, to go to that job." When asked if someone contacted him very early on the morning of October 26th, Petitioner confirmed. Petitioner testified that no one ever contacted him to work after October 26th because they knew he got hurt. (TX 69)

On cross-examination, Petitioner testified he was now not sure if he received the text communication in question from Styka. Petitioner then testified he could have received that text. When asked if he communicated to Mr. Styka that he could not work because he went to his cabin hunting, the petitioner testified that he did not have a cabin. (TX 68-71)

Petitioner testified he knew he was supposed to report an injury immediately and there was protocol in place for people in his line of work in the event there was an injury. Petitioner testified he did not know that he was injured until he was on his way home on October 26th. He then testified that he went to the safety office to report an injury and wash concrete off of himself on October 26th. The petitioner testified that he had suffered from concrete burns before and that he would usually rinse the same off with vinegar and water at the safety office. (TX 71-72)

Petitioner testified he did not know if he had a foreman on site on October 26th and that he was never told a foreman's name. He went to work on October 26th and just started working without knowing anyone's name. When asked how he knew what to do, where to go or how to do it, Petitioner testified he knew because he was a professional cement mason. The foreman was not there to tell him what to do or how to start his job. (TX 73-74)

Petitioner testified he met with John Pearson on October 26th, but the meeting was not in the morning. He believed Pearson gave "us our paperwork for our W-2s." (TX 74) Petitioner filled out his paperwork and attended a safety meeting with Power, the general contractor, on the morning of October 26th at 8:00 a.m. It was not common practice to wear leather boots under his rubber work boots and that he never wore leather boots. Petitioner testified he was not informed that Power required their concrete workers to wear leather boots under their rubber boots. (TX 74-79)

Petitioner testified that he first provided notice of his injury to the respondent on November 7th when he telephoned Ms. Jill Zak. He testified that he did not recall advising Ms. Zak that he saw his primary care physician on October 31st nor did he recall advising Ms. Zak that he was going to see Dr. Ring upon the referral of an attorney. When asked if he went to Power's safety office or the respondent's safety office at the end of his shift on October 26th, the petitioner testified hat he did not believe the respondent had a safety office, so he went to Power's office. Again, he testified that he did not contact anyone from the respondent company to report an injury until November 7th. (TX 79- 82)

On re-direct examination, Petitioner testified that when he was attempting to go to the safety office at the end of the workday, he knew that something had happened to his right foot. He testified that at the safety office there was a wash area and he wanted to wash his foot off. The petitioner testified

that the safety office was supposed to have sterilized water and an area where they were able to wash chemicals off. He testified that he went to the safety office in an attempt to get the chemical from the concrete off of his right foot. Petitioner testified the wash area he was referring to was not typically inside a safety office and that he looked for an area to clean himself outside of the office, but there wasn't one. (TX 82-84)

On re-cross examination, Petitioner testified that when he attempted to find the wash area on October 26th, he was aware that he may have sustained a chemical burn to his right foot. He then testified that he had never suffered from a chemical burn before, but he believed he had one on October 26, 2018 and he testified that if you "wash it off, it goes away." (TX 85-86)

Testimony of Nicole Miller

Nicole Miller testified she is Petitioner's wife and that exhibits 5A and 5B were pictures that she had taken with her phone on October 26, 2018. She testified the pictures exhibited Petitioner's right foot/heel area after he had showered on that date. On cross examination, Miller testified that the black dots around Petitioner's heel were concrete that was stuck in Petitioner's foot. She believed the dark spot in the middle was blood. Miller testified there were no dates on the photographs and that she no longer had the phone that she utilized to take the photographs. (PX 5A and 5B; TX 88-93)

Testimony of John Pearson

John Pearson testified on behalf of Respondent. Pearson testified he had been employed by Respondent since 2000. He testified he was a laborer for Respondent from 2000 to 2006 and then superintendent for Respondent from 2006 to present. As superintendent for Respondent, Pearson's testified job duties entailed being the manager on the job site, handling manpower requirements, material ordering, quality control and safety. Pearson was in charge of hiring and firing. (TX 96-97)

Pearson testified Respondent was a concrete subcontractor and that they only performed commercial projects. Respondent performed almost all of the operations associated with concrete on any given building. Pearson testified he was working as superintendent for Respondent at the project at 1550 N. Clark, in Chicago on October 26, 2018. The project was an 11 story residential building with parking below and that Power Construction was the general contractor on site. (TX 97-98)

Pearson testified he was on site at approximately 7:30 a.m. on October 26, 2018 and that he left at approximately 6:00 pm. He was familiar with Petitioner because Petitioner worked for Respondent as a finisher on October 26th. Pearson testified that to the best of his knowledge, that was the only day Petitioner had worked for Respondent and he was only hired to work one day. He believed Petitioner worked a 9.5 hour day on October 26, 2018. (TX 98-99)

Pearson testified he met with Petitioner on October 26th and he believed that they met in the morning. At that meeting, Pearson provided Petitioner with hiring information, information about company policy, and information required for Petitioner to get paid. The information provided included accident reporting information. Respondent's policy for accident or injury reporting was that any injury was to be reported immediately to the foreman that the employee was working underneath. Pearson testified the foreman would then contact him (or whatever site superintendent the foreman was working under) and report the injury. (TX 99-100)

On October 26, 2018, Pearson was the site superintendent over Petitioner's foreman. If Petitioner had reported an injury on October 26, 2018, Pearson testified the report of the same would have gone to him. Pearson testified that no such incident was reported to him on October 26, 2018. Pearson testified he spoke with Petitioner in his field office when he provided him with the hiring packet and he also saw Petitioner during the day as he was working around the site all day; however, he believed the only interaction that he had with Petitioner was in his field office. (TX 100-102)

Pearson testified Roger Hopkinson was Petitioner's foreman on October 26, 2018. Pearson had conversations with Hopkinson throughout the day and that Hopkinson never informed him Petitioner had injured himself. Pearson first learned Petitioner was alleging a work-related accident when he was notified of the same by Ms. Jill Zak, Respondent's CFO on November 7th. (TX 102-103)

Pearson testified there were 9 finishers and 7 laborers working with the petitioner on October 26, 2018. The area to be cast with concrete on that day was 9000 square feet and the finishers would be working in that entire area. (TX 106-107)

Pearson testified he never received an injury report from any worker acknowledging an injury sustained by Petitioner on October 26, 2018. Petitioner worked his entire shift on October 26th. (TX 107-109)

Pearson testified Power Construction held a site safety orientation meeting on October 26, 2018. He testified that concrete finishers reporting out of the hall were expected to bring a trowel and a float and they were expected to report to the site with a hard hat and leather boots. Pearson testified they would often bring their own safety glasses, gloves and rubber boots. A typical worker who was not in the concrete and was walking around the job site was required to wear leather work boots for foot protection. Pearson testified that anybody working in the concrete, finishers and laborers, would typically have a pair of rubber boots that they pulled over their leather boots to protect from concrete. The aforementioned was required by Power and he believed by OSHA. (TX 109-111)

Pearson testified that in his capacity as superintendent he had come into contact with people who had suffered from concrete burns. If someone with a concrete burn approached him, he would clean the area with water and, oftentimes, he would pour vinegar to neutralize the burn. Pearson testified he saw the pictures of Petitioner's foot and, in his experience, concrete burns tended to be more pinkish, like fresh skin or a fresh would. He would describe it "like underneath a blister." Pearson had not come across a concrete burn with a blackish tint as shown in the pictures. (PX 5A and 5B; TX 111-112)

Pearson testified he had been trained in first aid, blood borne pathogens, CPR, rescue breathing OSHA 30 and OSHA 10 hours. The OSHA training courses briefly covered chemical burns. He testified he carried certificates for his training and that he acquired said training because he was required to do so by the respondent. Pearson testified he was on site to administer first-aid, if necessary, when somebody reported an injury. (PX 113-114)

Pearson was familiar with Petitioner's business agent, Styka. He reached out to Styka on November 7, 2018 as that was the day he found out about Petitioner's alleged injury. Pearson testified he would call Styka to request a quantity of finishers for a day. So, on any given pour, Pearson testified he was required to have a certain number of men for manpower. He testified that, generally, he could take

care of half of the quantity required, so if, for example, a job required 10 men, Pearson would often contact Styka and request 3 to 5 finishers out of the hall. Pearson testified he never called Styka to request that Petitioner come back to work after October 26, 2018. (TX 114-115)

Pearson testified Respondent would accommodate light duty work for any worker injured on their job site. Respondent would accommodate any light duty requirements imposed by a doctor, including sedentary restrictions. Respondent had a driving program where they would pick someone up and provide them with transportation, if they were unable to drive to the job site to work. (TX 115-116)

On cross-examination, Pearson testified he was not a member of a union as he was a superintendent, which was a non-union position. Pearson was a union member when he was a laborer from 2000-2006. Pearson was on the job site at 1550 N. Clark the entire day on October 26, 2018. Pearson oftentimes did not stay in one place at the site, but, rather, walked around. Throughout the day, Pearson would be in different places throughout the job site. Pearson had a field office on site and there were times during the day that he was in the field office. There were also times throughout the day that he would be standing next to some of his workers. (TX 117-120)

Pearson testified that on October 26, 2018, he provided Petitioner with information regarding how to properly report a work accident to Respondent. It was Respondent's expectation that Petitioner perform the finishing operations required for the day, that he attend any site orientation meetings and that he fill out the required paperwork for the respondent. He did not know if OSHA required that finishers wear rubber boots on top of leather boots. Pearson testified that if he were aware of a finisher not wearing leather boots under their rubber boots, he would not allow it. (TX 121-124)

Pearson testified Petitioner was only hired for one day of work and there was no expectation that he would continue to work for the respondent beyond that one day. He testified that the concrete pour and the concrete finishing was typically a one-day job. Pearson testified that he wore leather boots on the job site and, if he were going to be in concrete for an extended period of time, he would put on a pair of rubber boots. (TX 125-127)

Pearson testified that after the concrete pour on October 26, 2018, the concrete would be cured in a matter of hours. There was water mixed with the concrete and it had somewhat of a "wet-ish" texture after it was first poured. There was rebar around the area where the concrete was poured because it was embedded into the concrete to provide strength. Occasionally, the rebar had to be cut and that the areas where it was cut could be sharp. (TX 127-128)

Pearson testified that he was not standing next to the petitioner all day. His concrete finishers were required to work in the areas that the concrete had been poured. Pearson testified there were field offices with first aid on the site and that the safety area was where the field office was. If Petitioner went to the field office at the end of his work day, it was possible that nobody was there; however, he testified there were safety personnel on site. (TX 129-131)

Pearson testified that, to his knowledge, Petitioner had not worked for Respondent prior to October 26, 2018. It was possible Petitioner knew some of the other workers on that job site, but Pearson did not know Petitioner. Roger Hopkinson was his flat work foreman and Petitioner would have been working under Hopkinson on October 26th. He did not introduce Petitioner to Hopkinson and it was possible Petitioner did not know who Hopkinson was. Pearson testified an injury was to be reported to the foreman who would then report the injury to him. (TX 131-132)

Pearson testified he was aware, to some degree, of the chemical make up of the concrete was being poured. There were chemicals that were mixed in with the concrete and the chemicals were used for a number of different reasons. He was aware that the chemicals in the concrete they were pouring could cause concrete burns. (TX 132-135)

On examination by the Arbitrator, Pearson testified that the area where the 9 finishers and 7 laborers were working was 9000 square feet or roughly 200 by 150 by 60. If he was standing anywhere within that 9000 square feet, he could see the workers working. Pearson testified he did not see Petitioner walk out of the gate at the end of his shift. (TX 136-137)

On re-direct examination, Pearson testified there was a pump operator, 7 laborers, and 9 finishers in that 9000 square foot area. Typically, there were also plumbers and electricians from other companies in the area to monitor their material. Pearson testified the laborers and finishers in the area were Respondent's employees. The concrete finishers on the job knew who the other finishers were and the only finishers on that job were from Respondent. (TX 137-138)

Pearson testified Petitioner would know what to do when he arrived on the job site by talking to the foreman and the crew members. Petitioner would not know where to go or what to begin with without first speaking to his foreman. At the site orientation, safety and accident reporting were reviewed. He was not aware of any of Respondent's finishers failing to wear leather boots under their rubber boots. Pearson testified he had never seen rebar puncture a leather boot and he had never seen a concrete burn on a foot. (TX 139-140)

Pearson testified that when the concrete cured, it was a chemical process by which the moisture of the water in the concrete reacts with the pour and the cement and hardens, so eventually the water goes down and the concrete becomes hard and strong. Within a number of hours, the foot would stop sinking into the concrete. Typically two hours was enough time for the foot to not sink in any more than maybe half an inch. The concrete, at that point, was smooth on top and that was when the troweling operations began in order to put the final finish on. The concrete was solid at that point and you could put equipment on it. (TX 140-141)

On re-direct examination, Pearson testified the field office was not locked on October 26, 2018 and he did not lock the door when he left the office. If Petitioner had attempted to open the field office door on October 26th, he would have been able to go inside. Pearson had employees that would go in and utilize the first aid equipment in the office when he was not there. (TX 141-142)

On re-cross examination, Pearson testified that when the concrete is first cast a foot would sink until it hit something that stopped it. Concrete would not stop somebody from sinking within the first half hour. Pearson testified that exhibit 7, Petitioner's rubber boot, was not the type of boot that one of his concrete finishers would typically wear. He observed the area on the boot where there was a puncture and he testified the puncture was approximately one inch above the bottom of the boot. Pearson testified that if Petitioner's foot was in concrete that was freshly poured, the boot could go in more than an inch. (PX 7; TX 143-144)

On re-cross examination, Pearson testified he had concrete wash in the first aid kit and that there was also a hose at the base of the stairs leading up to the office trailers. There was vinegar for burns, equipment to dress lacerations, eye wash, concrete wash, etc. in the first aid kit. The first aid kit was kept in his field office on the wall. (TX 146-147)

On re-direct examination, Pearson testified exhibit 7 was not the type of boot typically worn by his concrete finishers because it was not the type of boot that would do as good of a job protecting your foot as a leather boot would. The standard on any construction site anywhere was leather work boots. In his twenty years of experience, Pearson testified that the rubber boots he had come across were a cover for over leather boots and the leather boots would be left on all day. The rubber boot would be worn over the leather boot during the pour. Once a worker got out of the pour, they were out of the concrete, they washed their rubber boots off and then the finishers would work out of their leather boots. Petitioner's rubber boot was not rinsed off and was full of concrete. Finishers typically did not go home with boots in that condition. (PX 7; TX 147-149)

On re-cross examination, Pearson testified the rubber boot in question should not be worn on the job site. On re-direct examination, he testified the finishers should wear a different type of rubber boot on the job site. He testified that the boot should have a bigger sole with a wider mouth to fit a boot into it or a 5 buckle boot, so they could put the foot in and buckle the rubber boot over the leather boot. (PX 7; TX 149-150)

MEDICAL FACTS

On November 7, 2018, Petitioner was evaluated by Chiropractor Brian Cassani at Advanced Chiropractic Care due to complaints of right foot pain that began on October 26, 2018. The notes indicate this was a "Workers Compensation" patient, but Dr. Cassani's notes make no mention of any specific accident history. Petitioner was assessed with a burn at the posterior and lateral heel. Subsequently, Petitioner continued to receive chiropractic treatment with Chiropractor Cassani through December 26, 2018. (PX 2)

On November 7, 2018, Petitioner was evaluated by Dr. Barry Ring also at Advanced Pain Care. The notes indicate this was a "Workers Compensation" patient. The history was "...accident at work involving the rt foot/ankle on 10/26/18." There was no specific trauma or accident described. Complaints were "burning type pain" of the right foot. Petitioner's pain began on October 26, 2018. It was noted Petitioner's activity and pain were improved with medication and treatment. Current medications were noted to be Norco and Zohydro ER. Dr. Ring noted that Petitioner's swelling was pretty significant and was still inhibiting Petitioner's ability to work and walk. Reportedly, the wound did not look infected and it was noted that CT scan would be ordered to ensure there were no foreign bodies inside of the foot. Petitioner was advised to attend therapy two times per week to ensure he did not have disuse atrophy. Petitioner was advised to not drive while on medications and he was authorized off of work. (PX 2) There is an "Itemized Statement" for Dr. Ring for a date of service of November 7, 2018 for $441.00. (PX 2) There was no "previous balance" indicated. There is no record of an office visit prior to November 7, 2018 – including none for a claimed visit on October 31, 2018.

On November 14, 2018, Petitioner was evaluated by Alicia Belcher at Advanced Pain & Rehab MD. Petitioner reported an overall 45% improvement. Therapy was prescribed and Petitioner was authorized off of work. Additionally, Norco, Silvadene cream and Zodydro ER were prescribed. "Comments = Today: 10/26/18 at work rebar punctured boot and concrete got into boot. Burned right foot. Eshcar tissue noted no signs of infection." (PX 2)

On December 12, 2018, Petitioner was evaluated by Dr. Jared Moon, a podiatric physician with Community Healthcare System. (PX 3) The History recorded was, "History of chemical burn to his

right lateral heel area. Injury occurred at work on 10/26/2018." Further history noted was, "Describes injury as wearing boots and walking on concrete at some point his boot was punctured and acid from the concrete mix came in contact with the skin." Petitioner was noted to have a history of a chemical burn to his right lateral heel area and had since had issues with delayed healing of the wound. Dr. Moon noted Petitioner was utilizing Silvadene but had never been on antibiotics. Petitioner had significant pain from the same when he bore weight on his foot. After evaluating Petitioner, Dr. Moon noted his wound appeared stable with no signs of infection or cellulitis. He was advised to continue with daily dressing changes with Silvadene to the wound. Petitioner was authorized off of work and encouraged to quit smoking. (PX 3) Although the Plan indicated Petitioner was to return for follow-up in 2 weeks, the records admitted into evidence do not contain any *clinic notes* for a subsequent visit. There is an *off-work note* written on a prescription dated January 2, 2019. (PX 6). That is the most recent record admitted into evidence.

Subsequently, Petitioner continued to follow up with Belcher through December 26, 2018. Therapy and medications continued to be prescribed and Petitioner remained authorized off of work. By December 26, 2018, Ms. Belcher noted Petitioner was 50% improved and that his wound had decreased in size to approximately a quarter size. Reportedly, the redness decreased dramatically and there were normal signs of healing. (PX 2)

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING ISSUE (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AND CONCLUDES THE FOLLOWING:

After a comprehensive review of the record, the Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment while working for Respondent on October 26, 2018. In that regard, the Arbitrator finds Petitioner is not credible.

An injury is compensable under the Illinois Workers' Compensation Act only if it arises out of and in the course of employment. *Pangos v. Industrial Commission,* 171 Ill.App.3d 112, 524 N.E.2d 1018 (1988). The burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Commission,* 115 Ill.2d 524, 505 N.E.2d 1026 (1987). The burden is also on the employee to prove that his injuries are causally related to the employment. *Newgard v. Industrial Commission,* 58 Ill.2d 164, 317 N.E.2d 524 (1974).

The Arbitrator notes that liability cannot be premised upon imagination, speculation, or conjecture, but must arise from facts established by a preponderance of the evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n,* 265 Ill.App.3d 681, 685 (1st Dist. 1994). Furthermore, it is the function of the Commission to judge the credibility of witnesses, draw reasonable inferences from the testimony, and determine the weight the evidence is to be given. *Caterpillar Tractor Co. v. Industrial Comm'n,* 124 Ill.App.3d 650, 653 (4th Dist. 1984). The mere existence of testimony does not require its acceptance. *Bernard v. Industrial Commission,* 25 Ill.2d 254, 184 N.E.2d 864 (1962) The Arbitrator notes that compensation has been denied by the Commission and affirmed by the Courts in numerous instances when the claimant's credibility was suspect and the contemporaneous medical histories conflicted with and/or failed to corroborate the claimant's testimony. See *Elliott v. Industrial Commission,* 303 Ill.App.3d 185,

707 N.E.2d 228 (1999); *McRae v. Industrial Commission*, 285 Ill.App.3d 448, 674 N.E.2d 512 (1996); *Banks v. Industrial Commission*, 134 Ill.App.3d 312, 480 N.E.2d 139; *Luby v. Industrial Commission*, 82 Ill.2d 353, 412 N.E.2d 439 (1980). Furthermore, when an Arbitrator finds that a petitioner has lied on a particular issue, the arbitrator may then find the petitioner is not credible as to other issues. *Parro v. Industrial Commission*, 167 Ill.2d 385, 657 N.E.2d 882 (1995).

In this case the Arbitrator finds that Petitioner's testimony was not credible, was contradicted by other credible evidence, and at times defied common sense. His version and explanation of the events, both before and after the alleged accident, are not credible. The Arbitrator also notes that this accident was admittedly not witnessed, even though many workers were around Petitioner working all day.

Petitioner alleges that, on October 26, 2018, at approximately 10:30 a.m. he felt a "wet warmness" at the bottom of his right heel. This feeling caused Petitioner to check his work boot, which is when he claims he first noticed a hole or tear in his right boot. The evidence reflects Petitioner thought something was wrong at that time; yet, inexplicably, despite this alarming discovery, **Petitioner testified he continued to work his entire shift, approximately an additional 7 hours, and did nothing regarding this discovery.**

Even though Petitioner was aware this wet concrete was a danger, he waited **approximately an additional 7 hours** until he finished his shift to go to the safety office to report his injury **and** to look for a wash area - because everyone knew that concrete had chemicals in it and if they did not "get it off our skin right away, it probably will do damage." Petitioner admitted he knew to rinse the concrete off with vinegar and water to make it wash away, **yet he waited seven hours to make that attempt to wash the concrete away.** Petitioner testified he believed he had suffered from just such a chemical burn and that is why **he wanted to both wash it off and report his injury**. Yet despite having that knowledge, Petitioner presents a disingenuous history that he **knowingly delayed washing off the wounded, affected area** until he arrived at home, about 9 hours later. This is not credible.

Petitioner asserts he did not find a safety officer at the end of his shift and therefore he simply went home. However, that does not explain why he did not take action to clean his foot and boot, which the Arbitrator believes he could have done, based on the following:

Pearson credibly testified the field office was not locked on October 26, 2018 and he did not lock the door when he left the office. If Petitioner had attempted to open the field office door on October 26th, he would have been able to go inside. Pearson had employees that would go in and utilize the first aid equipment in the office when he was not there. (TX 141-142) Pearson also testified he had concrete wash in the first aid kit and that there was also a hose at the base of the stairs leading up to the office trailers. There was vinegar for burns, equipment to dress lacerations, eye wash, concrete wash, etc. in the first aid kit. The first aid kit was kept in his field office on the wall. (TX 146-147) This testimony makes sense, as first aid would and should be readily available to employees. The Arbitrator finds no credible reason why Petitioner did not take advantage of this availability.

The Arbitrator infers Petitioner could have asked any of the other workers on the scene for assistance or information yet he failed to do so), a scenario that is simply not credible. **None of this makes sense and presents instead an incredible version of the events.**

Further, Petitioner inexplicably did not report his injury until November 7, 2018 (i.e., 12 days after its occurrence). While this is technically not a "Notice" issues, it does reflect upon Petitioner's credibility, especially as he knew that all accidents were to be reported immediately, yet he failed to do so, or at least try to report it sooner. Again, Petitioner could have tried to report his injury sooner that day (he had hours to do so) or at least tell one of the other workers on the scene or even make a phone call (yet failed to do so). This also is not credible.

Further, given the realization of the nature of his injury, it is inexplicable why Petitioner did not seek medical care sooner, such as visiting an emergency room or a clinic.

Further, although Petitioner inexplicably testified more than once (actually insisted) that he received treatment with Dr. Ring on October 31st, the medical records in evidence fail to corroborate this testimony and instead **only** show evidence that Petitioner first received treatment on November 7th. **There was no evidence presented to persuade this Arbitrator that these medical records were in any way mistaken**. This is significant because it again negatively reflects on Petitioner's credibility. Why Petitioner insisted he visited Dr. Ring on October 31 in opposition to the treating medical records is a mystery. The records themselves indicate that November 7 would be the first (and correct) date of treatment: Dr. Rings' "Itemized Statement" printed on December 28, 2018 reflects the first date of service on November 7,with corresponding office visit notes form Dr. Ring dated November 7, 2018 (when Petitioner also saw chiropractor Brian Cassini – **not prior to this date.)** This November 7, 2018 record also indicates it was the first office visit because of its comprehensive and detailed nature, that is, **it is clearly the type of report only generated after an initial evaluation and examination.** If Dr. Ring was missing payment for a prior office visit, one would expect a bill to have been generated, if not an office visit record. **The Arbitrator also notes that the two other providers at this same clinic (Cassini and Belcher) both have "Itemized Statements" that indicate several treatment dates – and none before November 7.** The Arbitrator finds the medical records are credible and he has been presented no reason to doubt their accuracy, regardless of Petitioner's testimony to the contrary.

The Arbitrator also notes Petitioner was fully aware of company rules that that he was to report an injury immediately and that there was a protocol in place for reporting such injuries. Pearson, Respondent's superintendent, testified he was on the same job site as Petitioner from 7:30 a.m. until 6:00 p.m. on October 26, 2018. Pearson met with Petitioner and provided him with hiring information, which included accident reporting information, and Petitioner also attended Power Construction's safety meeting on the morning of October 26, 2018 and, by his own admission, Petitioner attended this meeting. The Arbitrator finds that Petitioner did not provide any plausible reason for failing to report his injury at the time of its occurrence (or even a day or two or three after) despite his receipt of accident reporting materials, his attendance at the safety meeting on October 26th and his acknowledgement that accidents were to be reported immediately.

Specifically, the Arbitrator notes Petitioner was working with a working foreman, a superintendent, 8 other finishers and 7 laborers all working for Respondent in the same vicinity as Petitioner. Despite this, Petitioner completed his entire shift yet failed to find anyone to whom he could seek assistance, clean his boot or report the accident his injury. This defies commons sense and is not credible. Pearson specifically testified he provided Petitioner with a packet of information on the morning of the date of alleged accident which included accident reporting information. This required Petitioner to report an accident immediately to his foreman, who, in turn, would report the accident to the superintendent, who was Pearson (TX 100-101). Pearson testified he was never advised of any

accident that day. (TX 102). Pearson testified he saw Petitioner during the work day and he saw the foreman, Hopkinson, who did not report any injury (TX 102). This defies commons sense and reason.

Pearson testified he was trained in first aid and was available to administer that on site, if necessary. Pearson testified that as a superintendent, he had come into contact with chemical burns before, but had never seen one that looked like Petitioner's burn. Pearson testified that if someone approached him with a chemical burn, he would pour vinegar on the same to neutralize the chemicals. Petitioner did not approach Pearson for treatment of his burn and Petitioner incredibly testified he did not even attempt to wash the burn until the end of his shift. Again, the Arbitrator finds Petitioner's testimony and allegation of injury to be unbelievable given the fact that Petitioner clearly was aware that concrete burns should be treated immediately or they would do damage.

The Arbitrator finds it highly suspect - and convenient - that Petitioner's wife purportedly photographed his burn on the date of its occurrence at home that evening and that Petitioner preserved the damaged boot with concrete on it (as if having the foresight and anticipating the use of both as evidence in litigation). However, while the boot was duly authenticated, the Arbitrator finds and concludes the photos admitted into evidence without objection which were purportedly taken on Petitioner's wife's cell phone present credibility issues; they are undated, and the trial testimony reveals the cell phone no longer is in Petitioner's possession (which would have removed any doubts as to their credibility). The Arbitrator also finds it questionable and suspect that Petitioner takes photos of every job site where he works.

The Arbitrator further notes Petitioner's testimony was not credible throughout the trial. When questioned about texting with Mr. Styka, his business agent on October 30th regarding his ability to work, Petitioner denied the occurrence of any such text messaging, but later admitted that the same may have occurred. Petitioner then testified he did not have any communication with Styka between October 26th and December 24th. Petitioner testified he had never heard from Styka, so he did not know if he was to return to work for Respondent. **Later, Petitioner testified no one asked him to return to work post October 26th because "everyone knew he was injured"; but this cannot be true for any days prior to November 7,** as Petitioner acknowledged he gave Respondent notice of an alleged injury only on November 7, 2018 – and the parties stipulated Respondent received notice on that date, and not earlier. Therefore, no credible explanation was offered as to why Petitioner was not contacted for work between October 26 and November 7, since there would have been no reason not to ask him since no one knew he was injured until November 7. The Arbitrator notes Styka was the individual who provided Petitioner with his daily job assignments. Per Petitioner, he generally worked everyday, but he testified Styka did not contact him for two months post his alleged injury. Petitioner did not testify he informed Styka of his injury, but, merely testified Styka did not contact him at all between October 26th and December 24th of 2018. Again, the Arbitrator finds Petitioner's testimony to lack credibility and not make sense.

Regarding credibility, Petitioner failed to report an incident or to obtain medical treatment for 12 days despite having knowledge of the dangerous effects of concrete chemical burns and feeling and seeing the effects of the injury on the very same day it occurred (e.g., his photos); yet, even though the injury was so serious on that same day, prompting Petitioner to take photos of the injury and save the boot, he failed to report the injury until November 7 – coincidentally the same day he visited Dr. Ring at Advanced Pain Care for his initial treatment. **The failure to earlier report this injury was never credibly explained away.**

Additionally, the initial medical reports from Dr. Ring and Chiropractor Cassani dated November 7, 2018, **fail to document any *specific* work injury, that is, no mechanism of injury is provided.** It is only on November 14, 2018, when Petitioner first sees Dr. Belcher, 19 days post alleged injury, when any medical **records first present a *specific* work injury, that is, a mechanism of injury is provided ("10/26/18 at work rebarb punctured boot and concrete got into boot. Burned right foot.")**

The Arbitrator notes it is Petitioner's burden to provide credible and convincing evidence to support his claims and allegations. Petitioner was clearly cognizant of the requirement that injuries are to be reported immediately when they occur. Petitioner was also clearly cognizant of the fact that failure to immediately treat a chemical burn would have dangerous health effects. Yet Petitioner was unable to provide a convincing explanation for why he did not report this claimed injury on the date that it occurred - or even within several days after that - or to provide a convincing explanation for why he did not immediately wash the concrete from his right heel and seek medical care. Petitioner was also unable to provide a convincing explanation as to why his claimed medical report of an initial visit on October 31, 2016, if any exists, is missing from Dr. Ring's records, and, why Dr. Ring's and Dr. Cassani's reports of November 7, 2018 are silent as to the occurrence of any work injury.

In summary, the Arbitrator finds it incredulous that: (1) Petitioner was aware that he had dangerous chemicals from concrete on his exposed heel; (2) that he was aware of the alleged burn on the date of its alleged occurrence; (3) that he knew he had to remove the chemical off his skin right away or it would do damage, yet he waited until he arrived home to do so, after about 9 hours after the exposure, after a two hour drive; (4) that he continued working the entirety of his remaining work shift, about another 7 hours, despite his awareness of both the potential harm involved and his responsibility to immediately report an injury; that he failed to advise anyone on the job site of his injury or seek their help or information; (6) and despite all of this, he (a) failed to report an injury (until November 7, the date on which he first receives medical treatment) and (b) failed to obtain treatment for 12 full days; . Further, as detailed below, the Arbitrator finds the photos of his foot in exhibits 5a and 5b to lack credibility. All of this defies commons sense and is not credible.

The Arbitrator finds Petitioner's testimony lacking credibility and sense. Under the aforementioned circumstances, the Arbitrator can only find that Petitioner failed to meet his burden of proof. Thus, the Arbitrator finds Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent on October 26, 2018.

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO ISSUE (F), IS PETITIONER'S CURRENT CONDITION OF ILL BEING CAUSALLY RELATED TO THE INJURY, (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED REASONABLE AND NECESSARY, AND (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS THE FOLLOWING:

As the Arbitrator finds and concludes Petitioner did not sustain an accident arising out of and in the course his employment on October 26, 2018, the issue of causal connection is moot. The Arbitrator further notes however that Petitioner offered no expert medical opinion in support of causation. Based upon the above, Petitioner has further failed to prove his medical treatment was reasonable and

necessary and causally related and in so finding denies payment of Dr. Ring's invoice of $603.86. Further based on the above, Arbitrator denies Petitioner's request for prospective medical care.

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO ISSUE (L), WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE OWING, THE ARBITRATOR FINDS THE FOLLOWING:

Based on the Arbitrator's finding that Petitioner failed to prove accident and causation, the issue of TTD is moot.

Based on the Arbitrator's finding Petitioner failed to prove he sustained an accident arising out of and in the course his employment with Respondent on October 26, 2018, his claim for compensation is denied.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: February 22, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Hespen,

Petitioner,

20 IWCC0598

vs.

NO: 17 WC 017736

SGS North America Inc,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 23, 2019 is hereby affirmed and adopted.

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

20IWCC0598

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $31,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020

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MEP/ypv
049

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

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

HESPEN, STEVEN
Employee/Petitioner

Case# **17WC017736**

20IWCC0598

SGS NORTH AMERICA INC
Employer/Respondent

On 4/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1120 BRADY CONNOLLY & MASUDA PC
SURBHI SERASWAT GOYAL
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

20IWCC0598

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Steven Hespen
Employee/Petitioner

Case # **17** WC **17736**

v.

SGS North America, Inc.
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS 20IWCC0598

On the date of accident, **February 24, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,944.50**; the average weekly wage was $**930.56**.

On the date of accident, Petitioner was **23** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**35,116.89** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**35,116.89**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits in the amount of **$620.37**/week for **106-5/7** weeks, for the period of **February 25, 2017 through March 13, 2019**, which is the period of temporary total disability for which compensation is due.

Respondent shall pay the further sum of $**225.00** for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bills of Rezin Orthopedics and Sports Medicine. The medical bills are awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule.

Respondent shall authorize and provide payment, subject to the Medical Fee Schedule, for the medical treatment, including the surgery, recommended by Petitioner's treating physician, Dr. Ali

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

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

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

Arbitrator Anthony C. Erbacci

April 16, 2019
Date

APR 23 2019

FACTS:

Petitioner testified that he was employed by Respondent as an unloader, switchman, engineer and QMI on February 24, 2017. Petitioner testified that he is 6'4" tall. Petitioner lifted and carried up to 300 pounds. Petitioner testified that he hooked and unhooked the cars 30 to 60 times per day. He climbed underneath rail cars. The car is about 3 feet off the ground.

Petitioner testified that prior to February 24, 2017 he had not received any medical treatment for his back. He testified that he felt fine and had no problems with his back prior to February 24, 2017.

As Petitioner was hooking up the rail car on February 24, 2017, he hit his back on the pipe. Petitioner was bending and squatting under the car. He then moved to unlock the valve and his back gave out. Petitioner testified that he felt immediate pain in his low back and weakness and pain down his legs. Petitioner did not finish work. Petitioner went home and his father drove him to the hospital.

Tim Mills, Respondent's safety coordinator, completed an accident report. (RX 4). Petitioner signed the report because it was partially accurate. He testified that Mr. Mills told him that he would change the report. Petitioner testified that the report was partially incomplete because it did not include the lifting of the hose or that his leg gave out after the incident. Mr. Mills did not testify.

Petitioner was initially examined at Morris Hospital on February 25, 2017. The medical records document that Petitioner felt pain for three days, which increased with lifting at work. Petitioner complained of pain in his low back that shoots into his legs. Petitioner testified that he did not agree with the history provided to Morris Hospital. He testified that he had worked for 20 hours prior to the examination and was tired. He thought there was a misunderstanding with the doctor.

Petitioner began treatment with Dr. Ali. Petitioner documented on the intake form that he experienced weakness in his legs. Dr. Ali documented pain in the back and the legs and recommended an MRI study. Petitioner underwent the MRI study on March 21, 2017 at South Suburban Open MRI of Orland. The MRI revealed degenerative spondylosis; posterior annual tears of the L3-L4 and L4-L5 discs, which may produce pain; moderate spinal canal stenosis at L3-L4 with a broad based disc protrusion; L4-L5 mild to moderate spinal canal stenosis with compression of the lateral recess and bilateral disc bulge associated with focal central disc fragment extrusion dissecting caudally. Petitioner then participated in physical therapy at Athletico. Throughout the physical therapy, Petitioner complained of pain in the back and shooting pain into his lower extremities and the front of his knees.

On May 2, 2017, Dr. Ali documented back pain with worsening radicular pain following the L4 distribution. Dr. Ali recommended an injection and discussed an L3-L5 decompression. Dr. Ali performed a bilateral L5 injection on June 8, 2017. Petitioner underwent another injection on July 13, 2017.

On August 31, 2017, Petitioner had lower extremity and low back pain. Dr. Ali recommended a repeat MRI study and CT. Petitioner underwent the MRI study at Deerpath MRI on September 19, 2017. That MRI revealed moderate L3-L5 spinal canal stenosis with moderate-severe narrowing of the subarticular zone displacing and impinging upon the L4 nerve root with a moderate central disc

extrusion and mild caudal migration with central annual fissure; mild L4-L5 spinal canal stenosis with contact of the descending L5 nerve root with small-moderate disc extrusion with mild caudal migration and central annual fissure; minimal grade 1 anterolistheis of the L5. The CT was performed at Morris on September 19, 2017, and revealed mild multi-level spondylosis with mild central stenosis at L3-L4 and L4-L5 with disc bulges and central disc protrusions. The medical records from Morris contain an email from the adjuster authorizing payment for the CT scan.

Petitioner was last examined by Dr. Ali on March 22, 2018. Petitioner continued to experience pain in his low back with radicular symptoms in the L4 v. L5 distribution. Dr. Ali recommended a laminectomy from L3-L5. Dr. Ali documented that the pain was work-related since Petitioner did not have a history of low back pain or radicular symptoms prior to the accident. Petitioner remained on work restrictions. Petitioner wanted to undergo the surgery.

The evidence deposition of Dr. Ali was taken on September 17, 2018. Dr. Ali testified that Petitioner's diagnosis was low back pain, L3-L4 disc herniation, L4-L5 disc herniation, L5 spondylolysis and L5-S1 spondylolisthesis. The basis for diagnosis was the x-rays, MRI findings, physical examination and history. Dr. Ali testified that Petitioner aggravated his back on February 24, 2017. The basis for his opinion was the lack of prior complaints, treatment or back issues prior to the accident. Dr. Ali testified that the stooping and twisting underneath the rail car caused the disc herniations. Dr. Ali testified that the prior medical treatment was reasonable and necessary. He recommended a L3-L5 laminectomy with possible discectomies and a possible L5-S1 fusion in the future for the spondylolysis and spondylolisthesis and he opined that the L3-L5 laminectomy was related to the accident of February 24, 2017. He testified that the L5-S1 spondylolisthesis may have been aggravated as a result of the accident of February 24, 2017. Dr. Ali testified that he only recommends surgery where there is evidence on an MRI of nerve compression and with a good response to the injections. Dr. Ali recommended restrictions of no lifting more than 25 pounds, continuous standing or sitting for greater than 30 minutes and repeated bending, squatting, twisting or climbing.

Dr. Ali did not agree that Petitioner's symptoms were temporary since they did not resolve in 6 to 12 weeks. Dr. Ali testified that in this case, the herniations did not resolve on its own since Petitioner continues to be symptomatic more than six months after the accident and the repeat MRI continued to show disc herniations. Dr. Ali disagreed that Petitioner was not a surgical candidate. The basis for his disagreement was that Petitioner failed conservative treatment, had radicular symptoms with pain in his legs and had disc herniations with stenosis on the MRIs. He noted that Petitioner's radicular symptoms followed the nerve root distribution. Dr. Ali stated that he is more qualified than Dr. Lami to comment on his findings and care that was provided by him. He noted that Petitioner has radicular pain and recommended the surgery to address the lower extremity radicular pain.

Dr. Ali ordered the CT to evaluate the L5 level. Dr. Ali testified that he ordered the CT scan to confirm that the L5 spondylolysis was present and to confirm the chronicity of the L5 spondylolysis and check for bone spurs. He noted that Dr. Lami failed to note the L5 spondylolysis in his report.

The evidence deposition of Dr. Lami was completed on December 21, 2018. Dr. Lami reviewed the MRI study of March 20, 2017 and September 19, 2017 and agreed with the radiologists readings. Dr. Lami set forth a diagnosis of low back pain with bilateral radicular symptoms. Dr. Lami

testified that the condition was an aggravation of a preexisting condition. Dr. Lami stated that the aggravation was temporary and that all of the findings on the MRI were preexisting. Dr. Lami testified that if a person had an acute disc herniation would cause immediate leg pain to the front of his thigh. He also stated that the pain predated the accident. Dr. Lami agreed that Petitioner could not work in a heavy job; however, the restrictions were due to Petitioner's personal health and degenerative condition. Petitioner required temporary work restrictions as a result of the accident. Dr. Lami stated that the CT scan was not necessary.

Dr. Lami noted that Petitioner likely had pain in his back prior to the accident and the accident caused increased pain on top of the chronic pain. Dr. Lami acknowledged that the findings on the MRI of March 20, 2017 could have been asymptomatic and aggravated as a result of work. Dr. Lami acknowledged that the mechanism of accident could have aggravated the condition. Dr. Lami acknowledged that Petitioner did report some pain in his legs. Dr. Lami testified that Petitioner reached MMI in July 2017; however, he admitted that Petitioner continued to complain of symptoms and his symptoms never resolved during the course of his medical treatment. Dr. Lami admitted that the second MRI revealed compression at the L3-L4 and L4-L5 level.

Dr. Lami testified that he would consider surgery if there was only back pain. He would need objective findings on the MRI, corresponding complaints and radicular symptoms down the leg and that the lower extremity problems are what needs to be addressed. Dr. Lami testified that not much trauma is required to herniate a disc.

Petitioner experiences pain in his low back, pain in his legs and weakness in his legs. Petitioner testified that he experiences shooting pain into his legs. Petitioner testified that prior to February 24, 2017 he never experienced these symptoms.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator concludes that Petitioner's current condition of ill-being in connection with his back, including the L3-L4 and L4-L5 disc herniations with stenosis, was causally connected to the work-related accident of February 24, 2017. The causation of the L5-S1 spondylolisthesis is deferred based on the testimony of Dr. Ali to see whether Petitioner's symptoms resolve following surgery. The Arbitrator relies on Petitioner's credible and unrebutted testimony, the medical records, diagnostic studies and medical opinions of Dr. Ali.

To recover under the Act, an employee must show that there is a causal connection between the claimant's employment and the injury. In *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665 (2003), the Illinois Supreme Court held that "even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* The accident "need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." *Id.* (emphasis in original).

Petitioner established medical causation of his low back through the medical records and opinions of Dr. Ali. Dr. Ali specifically stated that the L3-L4 and L4-L5 disc herniations are related to the work injury of February 24, 2017. Dr. Ali testified that the stooping and twisting underneath the rail car caused the disc herniations. The basis for his opinion as the lack of prior medical treatment, diagnostic studies and the history of the accident.

The Arbitrator further concludes that Petitioner has established that his current condition of ill-being as it relates to the back is casually connected to the work-related accident of February 24, 2017 through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Com'n*, 176 Ill.App.3d 317, 530 N.E.2d 617 (4th Dist. 1988). The court applied the chain of events analysis to pre-existing conditions. *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192, 79 N.E.3d 833 (4th Dist. 2017).

In the instant case, Petitioner testified that prior to February 24, 2017 he had not sustained any accidents or injuries involving his back. Petitioner was performing his job duties without restrictions prior to February 24, 2017. The Arbitrator notes that Petitioner's job is very heavy and physically demanding and Petitioner was working without restrictions prior to the accident of February 24, 2017.

The medical records from Morris Hospital documented a history that Petitioner's pain began three days prior and the heavy lifting at work made Petitioner's symptoms worse. Petitioner testified that he did not provide that history to Morris Hospital. Petitioner was in pain and tired. He testified that he had worked for 20 hours prior to going to the hospital. Since he was tired, he believed that there was a misunderstanding with the doctor or the doctor wrote down the history incorrectly. The Arbitrator finds Petitioner's testimony to be credible. It is significant that no other medical records document a history of prior back pain, no medical records documenting back pain were admitted into evidence and Petitioner was working without restrictions prior to February 24, 2017. Even if Petitioner was experiencing low back pain prior to February 24, 2017, it is clear that accident worsened Petitioner's back condition, causing him to seek medical treatment and not be able to return to work.

Immediately following the work-related accident of February 24, 2017, Petitioner began a course of medical care for the back and symptoms that continues to the present date. Accordingly, the Arbitrator finds that the work-related accident of February 24, 2017 caused Petitioner's current condition of ill-being as it relates to his back through the chain of events analysis.

The Arbitrator considered the opinions of Dr. Lami and accorded them little weight. The Arbitrator finds the report of Dr. Lami to be contrary to the objective evidence, including the diagnostic studies, and the medical records. Dr. Lami testified that the condition was a temporary aggravation of a preexisting condition. Dr. Lami testified that Petitioner reached MMI in July 2017; however, he admitted that Petitioner continued to complain of symptoms and his symptoms never resolved during the course of his medical treatment. Dr. Lami testified that Petitioner could not return to work at a heavy level and temporary restrictions were required as a result of the work accident. Dr. Lami acknowledged that the findings on the MRI of March 20, 2017 could have been asymptomatic and could have been aggravated as a result of work. Further, the accident could have caused a herniated disc in the back. Accordingly, Dr. Lami agreed that the accident was a competent cause of

Petitioner's back condition and Petitioner's back condition never returned to baseline or allowed him to return to work.

Dr. Lami noted that Petitioner likely had pain in his back prior to the accident and the accident caused increased pain on top of the chronic pain. However, no medical records were admitted to establish that Petitioner had received treatment prior to the work-related accident of February 24, 2017. Moreover, Dr. Lami relies on the history provided in the medical records from Morris Hospital. The Arbitrator previously found that Petitioner credibly explained that the history provided to Morris Hospital was inaccurate. Accordingly, Dr. Lami's opinions are not based on the actual facts of the case. Even if Petitioner was experiencing pain in his back prior to February 24, 2017, the accident clearly worsened the pain, causing Petitioner to be unable to work and seek medical treatment. Petitioner did not return to his baseline, so Dr. Lami's opinion that Petitioner's aggravation was temporary is not supported by the medical records.

Dr. Lami testified that an acute disc herniation would cause immediate leg pain to the front of his thigh. He noted that the pain would be immediate and significant. This is consistent with Petitioner's testimony, that he experienced immediate and significant pain, which caused him to leave work early and seek medical treatment. Accordingly, Dr. Lami's opinions are not based on the facts of the case.

Dr. Ali disagreed with the report of Dr. Lami. He noted that the herniated discs were acute. He also disagreed that the herniation only caused a temporary aggravation. Dr. Ali noted that there was no evidence of a previous injury to the spine or history of spine care, so the condition was not related to a degenerative condition. Dr. Ali testified that in this case, the herniations did not resolve on its own since Petitioner continues to be symptomatic more than six months after the accident and the MRI continued to show disc herniations. Accordingly, the Arbitrator relies on the opinions of Dr. Ali in finding that Petitioner's back condition is causally connected to the work-related accident.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator concludes that the medical services provided to Petitioner were reasonable and necessary and Respondent is liable for payment of the medical bill from Rezin Orthopedics and Sports Medicine in the amount $225. Respondent's only defense to payment of the medical expenses was medical causation. Having found that Petitioner's current condition of ill-being is causally connected to the work-related accident of February 24, 2017, the Arbitrator concludes that Respondent is liable for payment of the bill subject to adjustments consistent with the provisions of the Medical Fee Schedule.

Respondent argues that the CT scan performed at Morris Hospital on September 19, 2017 did not constitute reasonable and necessary medical treatment. The CT scan was authorized by Respondent in writing. Dr. Ali testified that he ordered the CT scan to confirm that the L5 spondylolysis was present and to confirm the chronicity of the L5 spondylolysis and check for bone spurs. He noted that Dr. Lami failed to note the L5 spondylolysis. Dr. Lami disagreed with the

recommendation since it did not change Dr. Ali's treatment recommendations. The Arbitrator finds it reasonable that a physician seek all available information regarding an injury and therefore, finds the CT scan constituted necessary medical treatment.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator concludes that Petitioner is entitled to payment for the medical treatment recommended by his treating physician, Dr. Ali, including the L3-L5 laminectomy with bilateral L4 and L5 foraminotomies and possible discectomies. The Arbitrator concludes that the treatment recommendation constitutes reasonable and necessary medical care. In support of this finding, the Arbitrator relies on Petitioner's credible and unrebutted testimony, the diagnostic studies, the medical records admitted at hearing and the medical opinions of Dr. Ali.

Dr. Ali recommended an L3-L4 and L4-L5 laminectomy with discectomy. Dr. Ali testified that he only recommends surgery where there is evidence on an MRI of nerve compression and with a good response to the injections. Dr. Ali testified that Petitioner's symptoms and complaints were consistent with the disc herniations. He stated that the pain was coming from the disc herniations based on the MRI studies, injections and radicular pain. Dr. Ali testified that he chose to operative on the L3-L4 and L4-L5 level because there was objective compression at those levels, subjective complaints that were consistent with the objective findings, including radicular complaints, and Petitioner's response to the injections. Based on the testimony of Dr. Ali, the Arbitrator finds that the surgery recommended by Dr. Ali constitutes reasonable and necessary medical treatment.

Dr. Lami stated that he would not perform back surgery for back pain. However, he acknowledged that Petitioner reported pain in his legs. Dr. Ali testified that he would be in the best position to comment regarding the nerve distributions in his levels and that Petitioner's lower extremity pain followed the nerve root distribution. Dr. Lami's interpretation of Dr. Ali's reports is not consistent with the facts of the case.

Dr. Lami testified that he would recommended surgery if there were objective findings on the MRI, corresponding complaints and radicular symptoms down the leg and that the lower extremity problems are what needs to be addressed. Dr. Lami admitted that the MRIs revealed nerve compression at the L3-L4 and L4-L5 levels. Dr. Ali also testified that the MRI objectively supported the surgery. Thus, there was objective evidence supporting surgery at the L3-L4 and L4-L5 level.

Next, Dr. Lami required radicular complaints. Dr. Lami testified that Petitioner's complaints are in his back and intermittent lower extremity pain is not sufficient to justify surgery. It is significant that Petitioner complained of pain and weakness in his legs since February 24, 2017. Dr. Ali testified that Petitioner's complaints followed the correct nerve root distribution. The physical therapy records also document radicular complaints in the anterior thighs to front and back of both knees. Dr. Lami's assertion that Petitioner did not have significant lower extremity complaints was contrary to the medical records.

Further, Dr. Lami would require that the surgery address the lower extremity complaints. Dr. Ali testified that the surgery to address the lower extremity complaints. Further, Dr. Lami minimizes

and ignores Petitioner's ongoing radicular complaints. Accordingly, Petitioner met Dr. Lami's requirements for surgery. Dr. Lami's failure to recommend surgery is contrary to the medical evidence. Based on Petitioner's objective MRI findings and ongoing complaints, the Arbitrator accords more weight to the treatment recommendations of Dr. Ali.

Based on the medical records and opinions of Dr. Ali and the diagnostic studies, the Arbitrator finds that the surgery recommended for the Petitioner by Dr. Ali constitutes reasonable and necessary medical care which is causally related to the injury of February 24, 2017.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits from February 25, 2017 through March 13, 2019. The Arbitrator relies on the credible and unrebutted testimony of Petitioner, the medical records and the medical opinions of Dr. Ali. Respondent's defense is medical causation. Having found that Petitioner's current condition of ill-being in connection with his back was causally connected to the work-related accident of February 24, 2017, the Arbitrator awards payment of temporary total disability benefits from February 25, 2017 through March 13, 2019.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jami Peurala,

Petitioner,

vs. NO: 16 WC 35076

Whole Foods Market,

20IWCC0599

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission modifies the Arbitrator's conclusion that Petitioner has not yet reached maximum medical improvement ("MMI"). The Commission finds Petitioner reached MMI on November 16, 2017. The Commission also modifies the temporary total disability ("TTD") benefits awarded by the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Facts

In the interest of efficiency, the Commission primarily relies on the detailed recitation of facts in the Decision of the Arbitrator. Petitioner began working for Respondent as a bakery counter salesperson in September 2009. Petitioner's job involved some lifting and repetitive fine motor skills using both hands. Her job duties included packaging items that were baked each night, including croissants, cookies, and pastries. The trays filled with baked goods were stacked on drying racks that were approximately six feet tall. Petitioner had to reach overhead to reach some of the racks. She placed the baked items in plastic containers resembling clam shells. Petitioner testified that she had to close each container by pressing down on four points with her thumbs. Certain items were packaged in paper bags that Petitioner had to fold and "crimp" closed. Petitioner would also make tortillas three days a week which involved rolling balls of dough into circles.

Petitioner testified that prior to working for Respondent, she sought no treatment relating

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to her bilateral hands or arms. Petitioner testified that she first began to notice symptoms in her hands and right elbow during her first year of employment with Respondent. While her symptoms were an ongoing issue, she did not seek active treatment for her complaints until the end of 2015. On August 11, 2015, Petitioner visited Dr. Wechter, her primary care physician, and complained of bilateral hand pain. (PX 1). Dr. Wechter wrote, "she is concerned about tinnitus, and very slight tremor of rt hand, and arthritis in base of thumb bilaterally which may be aggravated by her work, discussed options." *Id.* Petitioner testified that while she believed her complaints were related to her job duties, she did not seek treatment following this office visit because she initially believed resting would alleviate her pain. (Tr. at 42). Dr. Heller first examined Petitioner on December 22, 2015. (PX 2). Petitioner complained of bilateral thumb and hand pain present for several weeks. He diagnosed bilateral thumb CMC joint inflammation and early arthrosis. Dr. Heller performed injections into the CMC joints of both thumbs. Petitioner was to follow up as needed and was cleared to return to work full duty as of December 28, 2015. She called and spoke with Dr. Heller's nurse on December 28, 2015, and reported less inflammation; however, her pain did not improve. Petitioner reported an inability to grip or squeeze anything including a pen to write. She complained of increased pain with use as the day progressed and also complained of intermittent sharp pains she described as a jolt through the thumb. A week later, Petitioner returned to Dr. Heller and reported the injection helped most on the left. Dr. Heller did not believe Petitioner was a surgical candidate and continued to keep Petitioner off work.

March 2016 x-rays of the left hand revealed mild medial subluxation at the first metacarpal phalangeal joint, which might have been degenerative in nature or sequela of trauma. (PX 1). Petitioner returned to Dr. Wechter on April 13, 2016, with complaints of bilateral hand pain. The doctor noted Petitioner had been off work for four months due to bilateral hand pain. Petitioner reported the cortisone injections performed by Dr. Heller had not helped. Dr. Wechter referred Petitioner to rheumatology for "persistent pain due to bilateral [CMC] arthritis." *Id.* The rheumatologist determined there were no symptoms or signs of a systemic inflammatory disease. Petitioner was given Naproxen, lidocaine cream, and a carpal brace with a thumb spica. She was to avoid repetitive motions with her thumbs.

On June 17, 2016, Petitioner returned to Dr. Wechter's office in order to have her FMLA paperwork completed. A nurse practitioner in the office examined Petitioner. Petitioner reported having bilateral thumb pain for the past seven months and being off work for five months due to the pain. Petitioner reported returning to work in May 2016 for three weeks but was unable to continue working due to worsening pain. Petitioner reported thumb pain at 8/10 and described it as a constant ache with intermittent sharp pain that at times shot up her arm. She reported the following repetitive movements at work aggravated her pain: "scooping ice cream, twisting [t]ying plastic bag, manual locking plastic clam shell packaging, folding/secure paper end croissant bags, cutting and cellophane wrapping pound cake and co[r]n bread…" She also reported difficulty with household chores including folding clothes, washing dishes, and any chores involving gripping movements.

Dr. Fernandez first examined Petitioner on August 30, 2016. (PX 5). Petitioner reported doing a lot of pinching and fine motor skills with her thumbs in her job. She complained of occasional numbness and tingling and a tremor in both hands. She also had occasional nocturnal paresthesias. Dr. Fernandez diagnosed bilateral thumb CMC joint arthritis, left thumb

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metacarpophalangeal joint arthritis and subluxation, and probable bilateral carpal tunnel syndrome. He prescribed an EMG and placed her at a sedentary work restriction. The October 5, 2016, EMG/NCV had the following impression: 1) mild right ulnar entrapment neuropathy at the elbow with characteristics of demyelination; and 2) no evidence of left ulnar entrapment neuropathy, bilateral median entrapment neuropathy, or bilateral cervical radiculopathy. *Id.* On October 19, 2016, Dr. Fernandez performed the following surgical procedures: 1) right thumb trapezial excision with CMC joint soft tissue interposition arthroplasty; 2) right thumb/wrist tendon transfer, flexor carpi radialis tendon to thumb metacarpal base/abductor pollicis longus tendon; and 3) right elbow ulnar nerve release. (PX 3). The postoperative diagnoses were severe right thumb CMC joint degeneration and right elbow cubital tunnel syndrome. Petitioner attended physical therapy following the surgery. On April 19, 2017, Dr. Fernandez performed the following procedures: 1) left thumb/wrist tendon transfer, flexor carpi radialis tendon-to-thumb abductor pollicis longus tendon, dorsal CMC joint; 2) left thumb trapezial excision with soft tissue interposition arthroplasty at CMC joint; 3) left thumb radial collateral ligament repair with local tissue; and 4) left thumb metacarpal joint pinning. *Id.* The postoperative diagnoses were left thumb severe bone-on-bone CMC joint degeneration with dorsal subluxation, and left thumb metacarpal joint instability. On June 19, 2017, Dr. Fernandez removed the left hand/thumb deep hardware.

On November 16, 2017, Petitioner returned to Dr. Fernandez for a final examination. (PX 8). Dr. Fernandez noted that Petitioner continued to complain of bilateral hand pain following her surgeries. The doctor prescribed permanent bilateral hand restrictions including a lifting restriction of 5-10 pounds and limited pinching and grabbing. Dr. Fernandez placed Petitioner at MMI. Petitioner has sought no additional medical treatment since this November 2017 office visit.

Petitioner testified that she has remained off work pursuant to her doctors' orders since June 17, 2016. Petitioner testified that after receiving the permanent restrictions from Dr. Fernandez in November 2017, she began looking for a new job. (Tr. at 28). She testified, "So I've been applying for hostessing, customer service, catering sales, event planning, just trying to reach as many contacts as possible to find full-time work." *Id.* Petitioner's job search efforts have been unsuccessful, and she remains unemployed. She testified that she continues to experience symptoms in her right hand including a severe tremor that she developed following her surgery. Petitioner testified that she also continues to experience occasional numbness in her right middle, right ring, and right pinky fingers. Petitioner complained of continued pain in her left thumb joint and demonstrated to the Arbitrator that her left hand has trouble performing actions that involve pinching and rotating her wrist. She continues to have trouble opening and closing Ziploc bags and lacks dexterity and coordination in her hands. Petitioner testified that she continues to have trouble performing activities of daily living such as washing dishes, opening and closing jars, buttoning her coat, removing trays from the oven, using tweezers, and applying makeup. She testified that her right elbow is sensitive when she rests it on the arm of a chair.

Expert Opinions

Dr. John Fernandez — Treating Physician

At Petitioner's request, Dr. Fernandez wrote a narrative report on March 31, 2017. (PX 5). Dr. Fernandez noted that Petitioner reported performing a job where she engages in frequent or

repetitive tasks including physical tasks involving pinching and gripping with the thumbs. Based on the information he had, he concluded Petitioner's work duties had at least an aggravating effect on her underlying conditions. Dr. Fernandez wrote,

> "To say that her work has not even had an aggravating effect is to state that she would have otherwise just randomly developed these conditions without any other exposures. While it is true that these conditions can occur idiopathically, they do not typically occur idiopathically in combinations like this. Typically when we see combinations of these types of conditions they are related to some type of an extrinsic cause."

Id.

Dr. Fernandez also testified via evidence deposition on behalf of Petitioner on October 6, 2017. (PX 7). He is a board-certified orthopedic surgeon specializing in the upper extremity and hand microsurgery. He testified that Petitioner's bilateral thumb condition and right elbow condition were at least aggravated, if not caused, by her work duties for Respondent. Dr. Fernandez testified that while CMC joint arthritis and cubital tunnel syndrome can often occur idiopathically, there are also certain types of activities or jobs or injuries which can cause or aggravate these conditions beyond their normal natural history.

Dr. Craig Phillips — Respondent Section 12 Examiner

Dr. Phillips examined Petitioner at Respondent's request on September 12, 2017. (RX 1 at Exh. 2). After examining Petitioner, Dr. Phillips believed there was evidence highly suggestive of inflammatory arthropathy. He opined that Petitioner's complaints were related to her underlying condition of arthritis and inflammatory arthropathy and were neither related to nor aggravated by her work duties. He wrote, "Any activity whether of daily living or other that requires any pinching, grabbing, pushing or pulling or any grasp with the hands can cause an arthritic joint to become symptomatic. This is the natural progression of arthritis." *Id.* Dr. Phillips concluded Petitioner's work duties did not change the natural outcome of the underlying disease process. He further opined that Petitioner's right cubital tunnel syndrome diagnosis is unrelated to her work duties. Dr. Phillips agreed that Petitioner's treatment was reasonable and necessary, but opined it was unrelated to her work. He did not believe Petitioner required any work restrictions relating to the alleged work injury.

Dr. Phillips testified via evidence deposition on behalf of Respondent on February 20, 2018. (RX 1). He is a board-certified orthopedic surgeon specializing in the hand and upper extremities. He testified that while work duties such as pinching and grasping might make Petitioner's hand symptomatic, he believed that studies have unequivocally shown that those types of work activities do not accelerate the degenerative process. He testified,

> "But in her case, I think the joint was shot, it was arthritic, it was worn out, and it was worn out from a degenerative genetic reason. And I think her symptoms began when the joints eventually

> became—was beyond what she could tolerate. So when she did any activities, brushing her hair, driving, working, pinching, that joint becomes symptomatic. And so I think that's what happened. So the fact that it didn't happen for 55 or 60 years is very common, and that's what one would expect with these conditions."

(RX 1 at 38). Dr. Phillips testified that Petitioner's work activities did cause her symptoms to worsen.

Dr. Richard Shin — Respondent Section 12 Examiner

Dr. Shin examined Petitioner at Respondent's request on February 17, 2017. (RX 2). He opined that Petitioner's symptoms were likely secondary to persistent left thumb CMC and MP joint osteoarthritis. He wrote that Petitioner's right thumb CMC joint osteoarthritis and right cubital tunnel syndrome had significantly improved, and she had asymptomatic bilateral volar wrist ganglions. Dr. Shin wrote, "These diagnoses are unlikely caused by nor aggravated by her work activities at the bakery department of Whole Foods Market...Since thumb CMC joint osteoarthritis is the most common arthritic condition effecting women in their fifth and sixth decades, its development cannot be attributed to any specific work activities." *Id.* Dr. Shin further opined that thumb MP joint osteoarthritis is relatively prevalent in the population and can be accelerated by the presence of thumb CMC joint osteoarthritis. Finally, the doctor opined that the etiology of cubital tunnel syndrome is usually idiopathic and is not caused or aggravated by typical use of the upper extremities.

Conclusions of Law

Petitioner bears the burden of proving each element of her case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). When a claimant suffers from a preexisting condition, the claimant must show that a work-related accidental injury aggravated or accelerated the preexisting condition "...such that the [claimant's] current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Id.* at 204. The Commission agrees with the Arbitrator's conclusion that Petitioner sustained an accident that arose out of and in the course of her employment due to repetitive trauma on June 16, 2016. The Commission also agrees with the Arbitrator's conclusion that Petitioner's current condition of ill-being regarding her right elbow and bilateral hands is causally related to the work accident. The Commission also agrees with the Arbitrator's conclusions that Petitioner's medical treatment was reasonable, necessary, and related to the work accident and that Respondent is liable for associated medical expenses through November 16, 2017. However, after carefully weighing the totality of the evidence, the Commission modifies the TTD benefits awarded by the Arbitrator.

In order to establish an entitlement to TTD benefits, Petitioner must demonstrate not only that she did not work, but also that she was unable to work. *See Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752 (2003). The dispositive test is whether the claimant's condition has stabilized, because a claimant is entitled to TTD benefits when a "disabling condition is temporary and has not reached a permanent condition." *Freeman United Coal v. Industrial*

Comm'n, 318 Ill. App. 3d 170, 176 (2000) (internal citations omitted). "Once an injured claimant has reached maximum medical improvement, the condition is no longer temporary and entitlement to TTD benefits ceases..." *Id.* at 178. After considering the evidence, the Arbitrator determined Petitioner has not yet achieved MMI and thus met her burden of proving she was temporarily totally disabled from June 17, 2016, through April 23, 2018. However, the Commission interprets the evidence differently.

Illinois courts consider several factors when determining whether a claimant has reached MMI, including: 1) a release to return to work; 2) medical testimony concerning the claimant's injury; 3) the extent of the injury; and 4) whether the injury has stabilized. *Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752, 760 (2003). After carefully considering the totality of the credible evidence, the Commission finds Petitioner reached MMI on November 16, 2017. This is the date Petitioner last sought medical treatment for her work-related injuries. Although the November 16, 2017, office visit note is not in evidence, the work restriction note completed by Dr. Fernandez's office on that date reveals that the doctor placed Petitioner at MMI that day. Dr. Fernandez also released Petitioner to return to work with significant permanent restrictions regarding Petitioner's lifting, pinching, and grabbing capabilities. Petitioner did not return to Dr. Fernandez or seek treatment for her work-related conditions from any doctor during the five months between that final office visit and the initial date of hearing. Likewise, there is no evidence of any pending requests for additional treatment for the work-related conditions. Thus, the Commission modifies the Decision of the Arbitrator and finds Petitioner reached MMI on November 16, 2017. As Petitioner's condition stabilized on that date, her entitlement to TTD benefits ended that same day. Based on the foregoing, the Commission finds Petitioner proved by a preponderance of the evidence that she is entitled to TTD benefits only from June 17, 2016, through November 16, 2017.

While Petitioner's entitlement to TTD benefits terminated on November 16, 2017, the Commission must consider whether Petitioner proved an entitlement to any further compensation benefits. After weighing the credible evidence, the Commission finds Petitioner met her burden of proving she is entitled to a period of maintenance benefits. Pursuant to Section 8(a) of the Act, an employee must pay for treatment, instruction, and training necessary for the "physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental hereto." Vocational rehabilitation may include things such as counseling for job searches, supervised job search programs, and vocational retraining programs. Illinois courts have determined that a claimant's self-directed job search may also constitute vocational rehabilitation. *See Euclid Bev. v. Ill. Workers' Comp. Comm'n*, 2019 IL App (2d) 180090WC at ¶ 30.

Petitioner did not submit job search logs showing the details of her self-directed job search. However, the Commission finds Petitioner testified credibly that she immediately began looking for and applying for jobs after Dr. Fernandez placed her at MMI and prescribed permanent work restrictions on November 16, 2017. Petitioner credibly testified that she has been looking for a job since that date. (Tr. at 28). She testified credibly that during the period between November 17, 2017, and April 23, 2018, (the initial date of hearing) she applied for a variety jobs involving hostessing, customer service, catering sales, and event planning. *Id.* Based on the foregoing, the Commission finds Petitioner met her burden of proving she conducted an acceptable self-directed job search. Therefore, the Commission finds Petitioner is entitled to maintenance benefits from

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November 17, 2017, through April 23, 2018.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 6, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $**307.28**/week for **74** weeks, commencing **June 17, 2016,** through **November 16, 2017**, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner maintenance benefits of $**307.28**/week for **22-4/7** weeks, commencing **November 17, 2017,** through **April 23, 2018**, as provided in Section 8(a) of the Act.

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

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

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

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

DATED: OCT 14 2020

o: 8/18/20
TJT/jds
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Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

PEURALA, JAMI
Employee/Petitioner

Case# **16WC035076**

WHOLE FOODS MARKET
Employer/Respondent

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On 5/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0365 BRIAN J McMANUS & ASSOCIATES
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
RICH LENKOV
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jami Peurala
Employee/Petitioner

v.

Whole Foods Market
Employer/Respondent

Case # **16 WC 35076**

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

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, former Arbitrator of the Commission, in the city of **Chicago**, on **April 23, 2018 and June 4, 2018**. Arbitrator Andros retired from the Commission before issuing a decision. On April 30, 2019, the Commission assigned the case to Arbitrator Mason to review the transcripts, evidence and parties' submissions and issue a decision. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **June 16, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation, via an aggravation theory, as to her claimed bilateral thumb and right elbow conditions of ill-being.

In the year preceding the injury, Petitioner earned $**23,968.36**; the average weekly wage was $**460.93**.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**8,465.93** under Section 8(j) of the Act, per the parties' stipulation.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $307.28/week for 96 4/7 weeks, commencing 6/17/16 through 4/23/18, as provided in Section 8(b) of the Act.

Medical Expenses
Respondent shall pay the medical expenses in PX 7 (with the exception of the $367.00 bill relating to Petitioner's November 30, 2017 visit to Dr. Fleisher), subject to the fee schedule. The parties agree Respondent is entitled to Section 8(j) credit for the $8,465.93 in medical expenses paid by Petitioner's group carrier. Arb Exh 1. PX 7. T. 4/23/18, p. 26. Respondent shall hold Petitioner harmless against said payments.

Penalties/Fees

For the reasons set forth in the attached decision, the Arbitrator declines to find Respondent liable for penalties and fees.

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

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

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

Molly C Mason

Signature of Arbitrator

5/6/19
Date

ICArbDec19(b)

MAY 6 - 2019

Jami Peurala v. Whole Foods Market Group, Inc.
16 WC 35076

20 IWCC0599

Procedural Background

Former Arbitrator Andros conducted a hearing in this case on April 23, 2018. Petitioner and Laura Stenz, a Respondent store team leader, testified at this hearing. Proofs were closed on June 4, 2018. Former Arbitrator Andros retired from the Commission before issuing a decision. On April 30, 2019, the Commission assigned the case to Arbitrator Mason for the purpose of reviewing the transcripts and proposed findings and issuing a decision.

Summary of Disputed Issues

Petitioner, a bakery worker, claims bilateral thumb and right elbow conditions secondary to repetitive trauma. Her Application alleges a manifestation date of June 16, 2016. The disputed issues include accident, causal connection, medical expenses, temporary total disability, Section 8(j) credit and penalties/fees. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she began working as a bakery counter salesperson for Respondent in September 2009. T. 4/23/18, pp. 7-8. Before being hired by Respondent, she worked as a bartender for the White Sox at U. S. Cellular Field. Prior to that, she was the catering sales manager at the United Center. The jobs she performed between 1992 and September 2009 involved bartending and waitressing. T. 4/23/18, pp. 7-8.

Petitioner denied having any hand or arm problems or seeking any hand or arm treatment before she began working at Respondent. T. 4/23/18, p. 21.

Petitioner testified she worked eight hours a day, five days a week at Respondent. T. 4/23/19, p. 11. Each morning she packaged croissants, cookies and pastries that had been baked the night before. These items were on trays that were stacked on top of one another on racks. The racks were approximately six feet tall, with the top "just slightly over" Petitioner's head. Each rack had 10 or 24 slots. Petitioner testified she unloaded 10 to 15 filled racks each morning. She would remove one tray at a time, starting at the top, and begin packaging the items. She had to place cookies in plastic "clam shell" containers that then had to be locked down. She used her thumbs to press down four "locks" on each "clam shell." With respect to the cookies, she filled and locked close to one hundred "clam shell" containers each workday. T. 4/23/18, p. 13. The croissants came in two sizes, large and small. The bigger croissants were placed in larger "clam shells" that had a double locking mechanism. She placed six croissants in each "clam shell." She filled ten to fifteen of the larger "clam shells" per workday. T. 4/23/18, p. 13. She placed the smaller croissants in windowed paper bags that "had to be folded and crimped closed." She filled at least fifteen such bags each workday. T. 4/23/18, p. 14.

Petitioner testified her job at Respondent also involved making tortillas three days a week "for several years." Each morning she would retrieve trays of raw tortilla dough from a refrigerator. Each tray had sixty balls of dough on it. She would place the tray on a counter, roll each ball into a circle, drop the circles into a "hopper," wait for them to bake, stack the baked circles in piles of ten and return the empty trays to an empty rack. T. 4/23/15, p. 14.

Petitioner testified she also bagged loaves of bread each workday. Respondent sold four varieties of bread. She probably dealt with ten to fifteen loaves of each variety each workday. A customer would approach the counter and order a loaf. If the customer wanted the loaf sliced, she would put the loaf in the slicer, remove it from the slicer, place it in a plastic bag and use a "twist tie" to close the bag. Each day was different in terms of how many loaves she sold. T. 4/23/18, p. 16. She fastened "twist ties" to bags about one hundred times per day. T. 4/23/18, pp. 17-18.

Petitioner testified she also sliced cakes and pies and packaged the slices each workday. She sliced about eighty cakes and five to six pies per workday. She used a knife to do this. She placed each slice of cake in a small "clam shell" that had two locking mechanisms. Each slice of pie went in a wedged "clam shell" that had to be crimped or double locked. T. 4/23/18, pp. 20-21.

Petitioner testified she spent "zero" time each workday performing tasks that did not involve using her hands and arms. T. 4/23/18, p. 18.

Petitioner testified she initially sought treatment from Dr. Wechter, her primary care physician. Records in PX 1 reflect that Petitioner saw Dr. Wechter on August 11, 2015. The doctor noted she expressed concern about a "very slight tremor of R hand and arthritis in base of thumb bilaterally which may be aggravated by her work." The note contains no description of Petitioner's job duties. The doctor renewed a Meloxicam prescription. PX 1.

Petitioner testified she then saw Dr. Heller at Dr. Wechter's referral. T. 4/23/18, p. 21. Dr. Heller is affiliated with Midland Orthopedic-Wabash. His note of December 21, 2015 reflects that Petitioner complained of "bilateral hand and thumb pain that has been present for several weeks." The doctor described Petitioner as left-handed. He noted that she "works in a supermarket," denied any specific trauma and "has had previous right wrist volar ganglion excision." A "medical history" form in the doctor's chart reflects that Petitioner described her hands as the "involved body parts" and attributed her symptoms to "repetitive trauma." Petitioner also indicated her symptoms had bothered her for "several years" and could sometimes be relieved by anti-inflammatories or "stopping work." She also indicated she had a questionable history of arthritis and had undergone a ganglion cyst excision.

On examination, Dr. Heller noted mild swelling over both thumb CMC joints, positive grind testing for pain, a left wrist volar ganglion cyst, slight hyperextension laxity at the MP joints in both thumbs, no triggering or locking, a negative Finkelstein's maneuver, no evidence of carpal tunnel syndrome and no other intrinsic atrophy.

Dr. Heller performed real time fluoroscopic imaging. He interpreted the images as showing some "very early degenerative changes but no significant arthritic deformity of either thumb or basilar joint." He diagnosed bilateral thumb CMC joint inflammation and early arthrosis. He administered injections into the CMC joints of both thumbs. He did not recommend excision of the cyst because it was "not clinically significant at this point." He released Petitioner to regular duty as of December 28, 2015. PX 2.

A "phone note" in Dr. Heller's records reflects that Petitioner called a nurse on December 23, 2015. Petitioner reported dramatic improvement of her right thumb symptoms secondary to the injection but described the thumb on her dominant left hand as "still sore and now clicking with ROM." She also reported that she "had to stop working about 10 days before she saw [Dr. Heller] because the

pain was so bad she was unable to function." The nurse explained that it might take a little longer for the injected steroid to have an effect on Petitioner's dominant hand. She recommended that Petitioner apply ice, take Ibuprofen and call back after Christmas. PX 2.

Another "phone note" in Dr. Heller's records reflects that Petitioner called back on December 28, 2015 and spoke with the same nurse. Petitioner reported that she had less inflammation but that the left-sided pain was the same and her symptoms were "recurring now on the right side." Petitioner reported being unable to grip or squeeze anything and experiencing increased pain as each day progressed. She informed the nurse she was supposed to resume working the following day, indicating she packaged all the baked goods at a Respondent store, but had already called in and told them she was not able to work. Petitioner also reported that she had been told no light duty was available. She indicated she needed to have an "off work" slip faxed to Respondent. The nurse scheduled her to see Dr. Heller on January 4, 2016 and directed her to stay off work and continue with the Ibuprofen and ice in the interim. PX 2.

Petitioner saw Dr. Heller again on January 4, 2016. She reported that the injections helped more on the left than the right and that she was still experiencing pain at the base of her right thumb as well as occasional left thumb soreness. She also reported having difficulty performing heavy repetitive gripping or grasping or opening jars.

On re-examination, Dr. Heller noted no evidence of deQuervain's, positive CMC grind testing for pain and mild crepitus in the right thumb, negative CMC grind testing in the left thumb, no triggering or locking of either thumb and normal wrist motion. He diagnosed bilateral thumb CMC arthritis. He advised icing, rest and Ibuprofen, indicating he wanted to hold off on additional injections. He directed Petitioner to return to him in one month if her right thumb remained symptomatic. He indicated he did not yet view Petitioner as a surgical candidate. PX 2.

Another "phone note" in PX 2 reflects that Petitioner spoke with Dr. Heller's nurse again on January 6, 2016, and reported "fighting" with UNUM concerning a short-term disability claim. The nurse reported faxing forms to UNUM and speaking with an individual who approved short-term disability benefits through February 1, 2016. PX 2.

A left hand X-ray performed on March 15, 2016 showed mild medial subluxation at the first metacarpal phalangeal joint, with the radiologist indicating this could be degenerative or a sequela of trauma. He noted no acute fracture. PX 1.

Petitioner returned to Dr. Wechter on April 13, 2016 and indicated she had been off work for four months due to bilateral hand pain. Petitioner reported deriving little benefit from the injections Dr. Heller administered. She also reported little benefit from acupuncture treatment. The doctor referred her to a rheumatologist "for persistent pain due to bilateral CMC arthritis." PX 1.

Petitioner saw Dr. Gopal at Advocate's rheumatology clinic on May 2, 2016. Dr. Gopal noted a referral from Dr. Wechter "for the evaluation of bilateral thumb pain." He recorded the following history:

> "She has pain over the first CMC region on both sides, present for the last few years, worsening over the last 4-5 months. She works In a bakery, which involves a lot of fine movements, bagging the

products, and helping with baking. This involves a lot of repetitive movements. She has been with the same job for the last 7 years."

The doctor noted that Petitioner's pain worsened with activity and minimally improved with rest. He also noted she was deriving minimal relief from taking occasional non-steroidal anti-inflammatory medication. On upper extremity examination, he noted tenderness at the first CMC joint bilaterally, right more than left, grind testing that was slightly more tender on the right than the left, no tenderness along the extensor tendons, no features of deQuervain's, a slight decrease in the thenar muscle mass on the right and mild osteoarthritic changes at the DIP. He noted that a right hand X-ray had been read as normal and that a left hand MRI showed no inflammatory arthritis.

Dr. Gopal diagnosed osteoarthritis of the carpometacarpal joints of both thumbs. He saw no symptoms or signs of a systemic inflammatory disease. He recommended that Petitioner rest, apply ice to the affected region and "avoid repetitive motions of the region." He prescribed Naproxen and a Lidocaine cream. He indicated a carpal brace with a thumb spica might help temporarily. He recommended that Petitioner follow up with Dr. Wechter. PX 1.

Petitioner returned to Dr. Wechter on June 17, 2016 and reported having attempted to return to work. Petitioner indicated she worked three weeks, beginning in late May, experienced pain that was "worse than it had ever been" and reported to human resources that she could no longer perform her job.

Dr. Wechter noted that Petitioner rated her thumb pain at 8/10. He also noted that Petitioner described her pain as shooting up her arm and being aggravated by "repetitive movement at work such as scooping ice cream, twisting/tying plastic bags, manually locking "clam shell" packaging, folding/securing paper croissant bags and cutting and cellophane wrapping pound cake and corn bread." He also noted that Petitioner was having difficulty performing routine household chores such as folding clothes and washing dishes. He indicated that Petitioner also complained of intermittent tremors in her right thumb. On right hand examination, he noted tenderness in the CMC joints and pain along the tendon sheath. On left wrist examination, he noted positive Finkelstein's as well as tenderness in the CMC joints. He dispensed bilateral thumb spica splints and recommended that Petitioner apply warm/cold packs, perform home exercises and "decrease repetitive activities." PX 1.

Petitioner testified she began missing work from Respondent in December 2015, with Drs. Wechter and Heller keeping her off work. She testified she resumed working in May 2017 [sic]. She returned to the bakery department on a full-time basis, performing duties similar to those she had performed in the past. T. 4/23/18, p. 22.

Petitioner testified that, on June 16, 2017 [sic], she experienced a great deal of pain in both hands again. She went to Respondent's human resources office and reported that she was in a great deal of pain and unable to perform her job. She was "sent home." She has been off work since June 16, 2016 at her treating physicians' direction. T. 4/23/18, p. 23.

Petitioner testified she also saw a chiropractor, Dr. Lee, at Dr. Wechter's direction. Records in PX 4 reflect that Petitioner first saw Dr. Lee on January 19, 2016 and complained of 5-10 pain in both thumbs secondary to "working with hands all day wrapping baked goods" in Respondent's bakery. Petitioner indicated that the pain "can radiate up UE." On examination, Dr. Lee noted that the left thumb was deviated into flexion and adduction. He also noted thenar pad tenderness and extreme

tenderness at the base of the first metacarpal bilaterally. He also noted some hypertonicity in the medial epicondyles bilaterally. He saw Petitioner on several occasions thereafter, through February 19, 2016, and wrote to UNUM periodically, recommending she continue care and remain off work. PX 4.

Petitioner testified that none of the care provided by Dr. Wechter, Dr. Heller or Dr. Lee relieved her symptoms. T. 4/23/18, pp. 22-23. She sought out a second opinion from Dr. Fernandez. She first saw Dr. Fernandez in August 2017 [sic]. T. 4/23/18, p. 24. He performed four surgeries on her and released her to work, subject to permanent 5-10 pound lifting restrictions, as of November 16, 2017. T. 4/23/18, pp. 24-25, 28. PX 8.

Records in PX 5 reflect that Petitioner first saw Dr. Fernandez on August 30, 2016. The doctor's note of that date documents complaints of bilateral thumb pain, right worse than left, as well as occasional numbness, tingling and tremors in both hands. The doctor described Petitioner as having worked in Respondent's bakery for 7 ½ years, "doing a lot of work in regard to pinching and fine motor skills with the thumbs." He noted that Petitioner had undergone injections and had been off work from December 2015 until May 2016, at which point she attempted to resume working before going off work again.

On examination, Dr. Fernandez noted negative Tinel's and Phalen's at the level of the wrist, no atrophy or intrinsic muscle weakness, deformity of the CMC joints in both thumbs, prominence of the left MP joint, indicative of subluxation, tenderness to palpation over both CMC joints with positive grind and relocation tests and a full range of hand, wrist and elbow motion.

Dr. Fernandez obtained multiple X-rays of both hands. He interpreted the films as showing bilateral thumb CMC joint arthritis with MP joint subluxation, left greater than right, with age-appropriate small joint space narrowing "indicative of osteoarthritis."

Dr. Fernandez diagnosed bilateral thumb CMC arthritis, active, left thumb metacarpophalangeal joint arthritis and subluxation, active, and probable bilateral carpal tunnel syndrome, active. He discussed performing basilar joint arthroplasty surgery, noting interest on Petitioner's part. He recommended an EMG, indicating Petitioner might require carpal tunnel surgery in the future. He found Petitioner to be "currently disabled with regard to use of her hand for normal work activities." He indicated Petitioner could perform sedentary duties and "work as a teacher but little more than that." He recommended a metasplint and Neoprene sleeve. He recommended that Petitioner return to him after undergoing the EMG. He noted that he discussed with Petitioner "that we cannot say that her arthritis is work-related." PX 5.

Dr. Fernandez wrote to Petitioner on September 7, 2016, informing her that the proposed basilar joint arthroplasty surgery would be addressed "in stages ....one hand at a time." He anticipated that Petitioner would be able to resume unrestricted work within about 6 to 9 months. PX 5.

Dr. Fetzer performed bilateral upper extremity EMG/NCV testing on October 5, 2016. He described the results as abnormal, noting electrodiagnostic evidence of mild right ulnar entrapment neuropathy at the elbow. He found no evidence of left ulnar entrapment neuropathy, carpal tunnel syndrome or cervical radiculopathy. PX 5.

On October 19, 2016, Dr. Fernandez operated on Petitioner's right thumb and right elbow at Oak Park Hospital, performing a right thumb trapezial excision with CMC arthroplasty, a right

thumb/wrist tendon transfer and a right elbow ulnar nerve release. In his operative report, he indicated that, while Petitioner's original symptoms seemed to be consistent with carpal tunnel, they evolved into more ulnar nerve symptoms that were confirmed on EMG, prompting him to perform an ulnar nerve release. He noted pre-operative findings of positive Tinel's at the elbow and positive elbow flexion testing. PX 3, 5.

At the first post-operative visit, on November 3, 2016, Petitioner reported some relief of finger numbness and tingling but persistent numbness and aching into the ulnar aspect of the small finger, as well as some numbness around the elbow incision. The doctor obtained multiple X-rays of the right hand and wrist. He described the films as showing excellent suspension of the first metacarpal. He dispensed an elbow sleeve and recommended that Petitioner have a thumb spica splint fabricated. PX 5.

On December 1, 2016, Dr. Fernandez issued a note indicating Petitioner was recovering from right-sided surgery and also incapacitated due to an identical diagnosis of left thumb CMC arthritis. PX 5.

Petitioner continued seeing Dr. Fernandez thereafter, with the doctor prescribing a "comfort cool" right thumb splint, an elbow flexion blocking splint and pad, along with occupational therapy, on December 1, 2016. Petitioner began attending occupational therapy on December 6, 2016. PX 5.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Shin, a hand surgeon, on February 17, 2017. In his report of the same date, Dr. Shin indicated he reviewed an Employer's First Report of Injury and records from Midwest Orthopaedics in connection with the examination. He noted that Petitioner had worked in Respondent's bakery department for seven years, until December 11, 2015, and had attempted to return to work for three weeks starting in May 2016. He noted the treatment rendered to date, indicating that Petitioner was scheduled to undergo surgery on March 6, 2017. He described Petitioner's past medical history as non-contributory.

On examination, Dr. Shin noted a healed surgical incision over the right thumb CMC joint area and right volar wrist, an ulnar deviation deformity at the left thumb MP joint and cystic "fullness" over the volar and radial aspects of both wrists. He noted tenderness to palpation over the left thumb CMC and MP joints and moderate instability of the left thumb MP joint with pinching activities. Grind testing was negative on the right and positive on the left. Finkelstein's testing was negative bilaterally.

Dr. Shin described Petitioner's current symptoms as "likely secondary to persistent left thumb CMC and MP joint osteoarthritis." He described the right thumb and right cubital tunnel symptoms as "significantly improved."

Dr. Shin opined that Petitioner's diagnoses are "unlikely caused or aggravated by her work activities at the bakery department of" Respondent. He also found the diagnoses unrelated to an incident date of December 11, 2015 or the first report of injury dated December 2, 2016. He stated that, since thumb CMC joint osteoarthritis is "the most common arthritic condition affecting women in their fifth and sixth decades, its development cannot be attributed to any specific work activities." He noted that Petitioner's complaints were not due to one incident and instead gradually worsened over a period of years. He also stated that thumb MP joint osteoarthritis is "also relevantly prevalent" in the same population and can be accelerated by thumb CMC joint osteoarthritis. He described the etiology of

cubital tunnel syndrome as "typically idiopathic" and not caused or aggravated by typical use of upper extremities.

Dr. Shin indicated he agreed with the diagnoses. He characterized the recommended left CMC joint arthroplasty as "reasonable and medically necessary" but indicated he would "consider simultaneous left CMC joint arthroplasty and MP joint arthrodesis or left thumb MP joint arthrodesis immediately" after Petitioner recovered from the CMC joint arthroplasty. He characterized the treatment to date, including the October 19, 2016 surgery, as unrelated to the incident date of December 11, 2015 and the first report of injury dated December 2, 2016.

Dr. Shin found Petitioner capable of modified work, with unrestricted right hand usage and left hand usage as tolerated. He estimated that Petitioner would be capable of unrestricted duty sixteen weeks after the recommended left thumb procedures. RX 2.

In March 2017, Dr. Fernandez issued an undated "addendum" to Petitioner's counsel. In this report, he noted additional information (concerning the "clam shell" containers and twist ties) he had obtained from counsel concerning Petitioner's specific duties at Respondent. He concluded that Petitioner had been "exposed to [a] somewhat unusual job, not only in the sense that she engages in repeat or frequent tasks but very physical tasks involving the thumbs for pinching and gripping with the thumbs." He also noted Petitioner had performed this job for over seven years. He described the repeated elbow flexion Petitioner performed as a risk factor for cubital tunnel. He went on to state: "To say that her work has not even had an aggravating effect is to state that she would have otherwise just randomly developed these conditions without any other exposures." PX 5.

On April 19, 2017, Dr. Fernandez operated again, performing a left wrist/thumb tendon transfer, a left thumb trapezial excision with soft tissue interposition arthroplasty, a left thumb radial collateral ligament repair and a left thumb metacarpal joint pinning. In his operative report, he noted "profound arthritis of the carpometacarpal joint with dorsal subluxation and bone-on-bone findings." He also noted "early degenerative findings" at the metacarpal joint with significant instability. PX 3.

Dr. Fernandez performed another procedure on June 19, 2017, removing a previously implanted pin from Petitioner's left hand (PX 3), with Petitioner undergoing additional occupational therapy thereafter.

Dr. Fernandez testified by way of evidence deposition on October 6, 2017. PX 6. Dr. Fernandez testified he obtained his medical license in 1990. He is a fellowship-trained hand and upper extremity surgeon and board certified orthopedic surgeon. He is the director of microsurgery at Rush. He has been affiliated with Midwest Orthopaedics since 1998. PX 6, pp. 6-7. Fernandez Dep Exh 1.

Dr. Fernandez testified he sees about 150 patients per week and performs over 1300 surgeries per year. His medical license has never been suspended or revoked. He is affiliated with Northshore Medical Centers and Oak Park Hospital as well as Rush. PX 6, p. 8.

Dr. Fernandez testified he began treating Petitioner on August 30, 2016. Petitioner initially complained primarily of both thumbs and numbness and tingling in her hands. She attributed her symptoms to work activities. As of that date, his examination findings were consistent with degeneration involving both thumbs, as well as the basilar or CMC joint, and the MP joint, particularly on the left. He recommended an EMG and conservative care consisting of splinting and restrictions. PX

6, pp. 9-10. On October 19, 2016, he performed right-sided surgery, including a right thumb basilar joint arthroplasty and a right elbow ulnar nerve release. Petitioner underwent therapy postoperatively. He later performed left-sided surgery, including a left thumb basilar joint arthroplasty and a left thumb metacarpal joint radial collateral ligament reconstruction. PX 6, p. 10.

Dr. Fernandez testified he last saw Petitioner the day before the deposition. He had previously kept Petitioner off work but yesterday imposed restrictions from significant force and repetition. PX 6, p. 10. Petitioner is still symptomatic so additional surgery is possible. PX 6, pp. 10-11. The left side is currently affecting Petitioner more so a left thumb fusion has been discussed. Petitioner has similar right-sided complaints but he is treating those conservatively for now. PX 6, p. 11.

Dr. Fernandez identified PX 5 as a collection of the records he has generated to date. PX 6, pp. 11-12. The records include intake sheets that Petitioner completed. PX 6, p. 12.

Dr. Fernandez testified he previously addressed causation in a report dated March 31, 2017 and his treatment note of October 5, 2017. Within a reasonable degree of certainty, Petitioner's bilateral thumb and right elbow conditions were "at the very least aggravated, if not caused, by her work activities at" Respondent. PX 6, p. 13. Having seen Petitioner yesterday, he can independently recall some of her work activities. He extracted a description of those activities from Dr. Phillips' report, which he thought was "very well done in terms of the history and the description of the activities." PX 6, pp. 13-14. Petitioner reported working in Respondent's bakery department for over 7 ½ years. Her duties included significant pinching activities of both hands and thumbs, manipulating plastic packages that needed to be pinched, locked and closed at all corners, slicing loaves of bread, using twist ties and other activities. Dr. Fernandez testified he also saw a less detailed description of Petitioner's activities provided by Dr. Shin. PX 6, pp. 14-15.

Dr. Fernandez testified that, at the present time, Petitioner is able to perform light duty "within a force of 10 pounds, give or take 5 pounds." He also imposed restrictions as to pinching, gripping and grasping. PX 6, p. 16.

After looking at PX 7, a collection of bills, Dr. Fernandez testified that the bill for his services does not include the charges associated with the most recent surgery of April 19, 2017. He characterized all of the care he has rendered as customary, reasonable and causally related to Petitioner's job activities. PX 6, pp. 17-18.

After reviewing Dr. Phillips' report, Dr. Fernandez testified he is "very friendly" with Dr. Phillips. Dr. Phillips is the brother of one of his partners. He has a lot of respect for Dr. Phillips. PX 6, pp. 18-19. He and Dr. Phillips seem to agree as to Petitioner's diagnoses. Their disagreement relates primarily to causation. He bases his own causation opinion on the fact that Petitioner had no prior history of similar problems, in terms of the thumbs and degeneration, and "gave a compelling and fairly detailed history in terms of the activities and how they affected her onset and worsening of pain." The activities Petitioner described could or would contribute to or aggravate her condition beyond natural history or manifestation. The conditions of thumb CMC arthritis and cubital tunnel syndrome can and do often occur idiopathically but there are certain activities or jobs or injuries that can cause or aggravate the conditions well beyond their natural history. PX 6, p. 20. The type of arthritis Petitioner has, particularly the involvement of the metacarpal joints, was more likely than not aggravated by her work activities. PX 6, pp. 20-21.

Dr. Fernandez had an independent recollection of the injections administered by Dr. Heller but did not recall the treatment provided by Dr. Wechter. He then reviewed Dr. Wechter's note of August 11, 2015, which documents complaints of bilateral thumb pain which might be aggravated by work. The records he reviewed are consistent with his own causation opinions. PX 6, p. 22.

Under cross-examination, Dr. Fernandez testified Petitioner was 61 years old when he first saw her. She reported having had bilateral thumb pain for about one year. He acknowledged he does not know exactly when this pain started. PX 6, p. 25. The job activities Petitioner described were numerous. Her workday did not consist of one activity performed over and over. PX 6, pp. 25-26. He acknowledges that many people cook, clean and bake in their everyday lives, outside of work. PX 6, p. 26. He diagnosed Petitioner with arthritis in the CMC and MP joints. The CMC joint is at the base of the thumb, where the thumb connects to the wrist. The MP joint of the thumb is where the thumb connects to the palm, in the area of the web space. Surgery was part of the discussion he had with Petitioner at the initial visit. PX 6, pp. 26-27. Arthritis is a fairly common diagnosis, particularly in older patients. It is especially common in women in their 50s and 60s. There is no one cause of arthritis. It can be genetic or idiopathic. PX 6, p. 27. In his March 2017 report, he described Petitioner's job duties as somewhat unique. It was in that report that he first voiced a causation opinion. He draws a distinction between "manifestation" and "aggravation." If a bicycle messenger becomes out of breath while biking and is later diagnosed with lung cancer, the biking did not cause the cancer but it did cause the symptoms to manifest. Aggravation, on the other hand, is the worsening of a condition beyond its natural history. In his view, Petitioner's conditions were aggravated by her work activities beyond what would have normally happened had she not been exposed to those activities. PX 6, pp. 29-30. Initially, Petitioner's symptoms came on with work. As time went on, her pain became fairly constant with all activities. PX 6, pp. 30-31. Dr. Phillips described Petitioner as having pain when drying her hair or driving. PX 6, p. 31. The "buzz words" of "pinch, grab, twist and pull" could describe non-work as well as work activities. PX 6, p. 31. It is more likely than not that Petitioner had some underlying arthritis but, in his opinion, this was not symptomatic until she performed the work activities that aggravated the condition. PX 6, p. 32. His causation opinion would not likely change if Petitioner had some degree of pain in her thumbs several years prior to August 2016. PX 6, pp. 32-33. He originally believed Petitioner might have carpal tunnel syndrome but, following the EMG, it appeared she in fact had cubital tunnel syndrome, which can sometimes mimic carpal tunnel syndrome. Petitioner's cubital tunnel is only in her right arm. PX 6, p. 33. The use of tobacco products can be a risk factor in the development of arthritis. PX 6, p. 33. If you can accurately say there is a higher incidence of arthritis in smokers, you can accurately say that smoking can be an accelerating agent. PX 6, p. 34. If he learned that Petitioner has smoked for 40 years, his causation opinion would not change. That would "just introduce another factor." Family history could potentially be another factor for some patients. The fact that multiple factors could be at play does not change his opinion that work was also a reasonable and competent factor. He prefers the term "exacerbation" over "temporary aggravation" because, to him, aggravation is something that changes the natural history of a condition. PX 6, p. 35. He disagrees with Dr. Phillips' and Dr. Shin's statement that the most common cause of cubital tunnel is an idiopathic one. A big minority, maybe a third, of cubital tunnel cases are idiopathic but a third are post-traumatic or arthritis-related while another third are due to repetitious or external factors. PX 6, p. 36. There was no acute injury in Petitioner's case. Her case falls in the one-third that are due to repetitious activities. Most hand surgeons believe that repeated flexion and extension of the elbows, even in arcs short of 90 degrees, is a competent cause of cubital tunnel. Beyond 90 degrees, it is its own risk factor. PX 6, pp. 37-38. If a person flexed from 0 to 30 repetitively, that would be unusual and "more mitigative." There are not many people who flex only from 0 to 30. Petitioner's job would go from extension to about 90 degrees. PX 6, pp. 38-39. He charged $625 for his March 31, 2017 report. He is charging $2000 for his deposition time. His causation

opinion would not change if he had a more extensive history of Petitioner's non-work activities. That would be similar to the smoking analysis. The only way his opinion would not change is if Petitioner was not performing the work activities he believes she performed. If Petitioner performed such activities only occasionally, that would be "very, very different." PX 6, p. 41.

On redirect, Dr. Fernandez testified he might reconsider his causation opinion if Petitioner's hand and arm symptoms predated 2009, the year Petitioner started working for Respondent. He knows Petitioner underwent ganglion cyst removal in the remote past, 20 years ago, but that is unrelated to the thumb conditions he treated. From a technical standpoint, Petitioner could hypothetically have performed equivalent pinching and grasping at home after work but that would not affect his opinion. Such home activities would simply constitute another causative factor. If she had a side job baking cookies, that could be another aggravating factor. PX 6, pp. 42-43. He would not expect a person such as Petitioner to be performing equivalent activities at home. The association with smoking is dose dependent. PX 6, pp. 44-45.

Under re-cross, Dr. Fernandez testified it is not his opinion that any repetitive motion involving the hands could aggravate hand arthritis. If Petitioner sat at home all day clicking the remote control, and if that activity was sufficiently forceful, that could aggravate arthritis. PX 6, p. 46.

Petitioner testified she received disability benefits from UNUM while she was off work. She testified that Respondent did not contribute to the disability insurance premium. T. 4/23/18, p. 25. UNUM is seeking reimbursement from her. She submitted her medical bills to her group carrier. Respondent paid 80% of the cost of her group coverage. T. 4/23/18, p. 27.

Petitioner testified that, on November 15, 2017, Dr. Fernandez released her to work subject to restrictions concerning lifting, pinching and grabbing. She has been looking for work since that time. She has applied for hostess, customer service, catering and event planning jobs in an effort to find full-time employment but has not been successful. T. 4/23/18, pp. 28-29.

A bill in PX 7 reflects Petitioner saw Dr. Fleisher at Rush on November 30, 2017, with the doctor charging $367.00 for a "new patient" visit. Petitioner did not testify to this visit or offer any correlating records into evidence.

Dr. Phillips testified by way of evidence deposition on February 20, 2018. RX 1. Dr. Phillips is an orthopedic surgeon affiliated with the Illinois Bone & Joint Institute. He attended medical school in South Africa. He started an orthopedic residency there and finished it at the University of Chicago. He later underwent fellowship training in hand and upper extremity surgery. He obtained board certification in orthopedic surgery in 2002 and has since been recertified. RX 1, pp. 4-6. He performs about 600 surgeries a year. He conducts two to three IMEs per week. Phillips Dep Exh 1.

Dr. Phillips testified that, on right hand and wrist examination, he noted a healed scar from the arthroplasty, normal finger motion, no triggering swelling over the dorsal aspect of the MP aspect of her index and middle fingers, laxity of the radial collateral ligaments, painless wrist flexion and extension to 75 degrees, negative provocative tests for instability and arthritis and good thumb motion. "Basically... she had recovered from her CMC arthroplasty well." RX 1, pp. 18-19. With respect to the right elbow, he noted negative Tinel's, a healed incision, normal elbow motion and negative elbow flexion testing. On left hand examination, he noted healed incisions over the snuffbox and dorsoradial aspect of the MP joint, full digital motion, no tenosynovitis, no triggering, swelling and tenderness over the dorsal aspect

of the thumb MP joint, laxity of the radial collateral ligament and a mild deformity with ulnar deviation of the proximal phalanx. Her right hand grip strength was 32 and 26 pounds in position 3. On the left, it was 20 and 25. Petitioner is left-handed but was only five months out from left-sided surgery as of his examination. RX 1, p. 21.

Dr. Phillips testified he obtained X-rays of both wrists and the right hand. The right hand films showed arthritic changes in the IP and MP joints of the thumb. The left wrist images showed diffuse arthritic changes, periarticular osteopenia involving the MP joints of the index, middle, ring and small fingers, mild arthritic changes in the right index and middle MP joints and arthritis in the IP joint of the thumb. RX 1, pp. 22-23. Essentially, Petitioner was "doing well" following surgery, with some of the findings suggesting an underlying inflammatory arthropathy. RX 1, pp. 23-24.

Dr. Phillips testified he does not believe Petitioner's work exacerbated or caused her hand or thumb arthritis. He is not aware of any study showing that work activities cause arthritis at the base of the thumb. This type of arthritis is five times more common in women. It typically starts in the mid to late 40s and worsens. There is "no question" that hand usage might cause symptoms to worsen but "there is no study that shows activities will cause the actual infrastructure to change." "Pinching, gripping, heavy activities do not change the infrastructure of the basilar joint of the thumb." RX 1, pp. 24-26. He agrees with Dr. Shin and disagrees with Dr. Fernandez's aggravation theory. In Petitioner's case, "it's probably a relationship of genetics and probably – there might be some inflammatory component as well, which hasn't been worked up." RX 1, pp. 26-27.

Dr. Phillips testified that, "for cubital tunnel to be work-related, you need to be performing a significant portion of your activities with the elbow flexed beyond 90 – 80 to 90 – degrees for the nerve that lives behind the elbow to become irritated." He asked Petitioner to re-enact her activities while she was in his office and "her elbow wasn't flexed much beyond 60 or 70 degrees." He feels the cubital tunnel was "more idiopathic in nature." Additionally, the operative report showed that Petitioner had stenosis, which is genetic. He found it intriguing that, when Dr. Fernandez first saw Petitioner, he felt she had carpal, not cubital, tunnel syndrome. He did not mention which fingers were numb in his first note. RX 1, pp. 27-28.

Dr. Phillips described the treatment to date as reasonable and necessary but unrelated to any work accident or work activities. RX 1, pp. 28-29. As of his examination, he felt that Petitioner did not require any work restrictions. He considered Petitioner to be at maximum medical improvement with respect to her right hand and elbow but still recovering from the left thumb surgery. If Petitioner's left thumb remained symptomatic, she could undergo an injection or potentially a fusion, if the injection did not help. The fusion would not be related to Petitioner's work activities. He also recommended that Petitioner see a rheumatologist to determine whether she needs systemic treatment. RX 1, p. 30. The pinching and grasping Petitioner performed at work could have made her hands symptomatic. RX 1, p. 30. Petitioner could potentially experience pain while working. RX 1, p. 30. There is no question that studies have shown that work activities of the sort Petitioner performed do not accelerate the degenerative process. The base of the thumbs was the primary symptom generator but Petitioner also had MP joint symptoms in her left thumb. Dr. Fernandez attempted to repair the radial collateral ligament. This is interesting because this ligament has no activity when a person pinches, grasps or keys. RX 1, p. 31. Dr. Fernandez might have misspoken. RX 1, p. 32.

Under cross-examination, Dr. Phillips testified he has not seen any records reflecting Petitioner underwent thumb or elbow treatment before 2009. He knows Dr. Fernandez and would not describe

him as nationally renowned. He does not think Dr. Fernandez has any area of expertise. RX 1, pp. 33-34. He would characterize Petitioner's job as repetitive. RX 1, p. 34. He can agree that Petitioner began a fairly extensive course of care after she began performing repetitive duties for Respondent in 2009. RX 1, pp. 34-35. He accepts Petitioner's statement that her hands and arms hurt more while she was working. There was nothing about his examination of Petitioner that suggested symptom magnification. RX 1, p. 35. If a person performs an activity that increases her pain, that can lead to the need for care. RX 1, p. 36. It is primarily people over 50 who develop arthritis. Drs. Fernandez and Heller agree Petitioner has a degenerative and genetic condition. Petitioner 'may have an inflammatory component as well." None of that was caused by her work activities. Moreover, it is interesting that Petitioner worked for a year before becoming symptomatic. Why would it take a year for Petitioner to become symptomatic? The fact Petitioner did not become symptomatic until age 55 or 60 was to be expected. RX 1, p. 38. Wrist motion is irrelevant to cubital tunnel syndrome. Just any elbow flexion will not cause cubital tunnel. Based on the literature, the flexion has to be 80 to 90 degrees before the nerve gets stretched. RX 1, p. 40. If Petitioner repetitively flexed her elbows beyond 90, during 60% of her workday, the flexion could have played a role. Rx 1, pp. 40-41. Petitioner did not demonstrate this to him at the time of his examination. RX 1, p. 41.

On redirect, Dr. Phillips testified that any person in her 50s or 60s who has arthritis and starts a job requiring grasping and pinching would likely become more symptomatic. RX 1, p. 43. However, the activities would not change the natural course of the arthritis. He is basing his understanding of Petitioner's job activities on her demonstration. RX 1, p. 43.

Under re-cross, Dr. Phillips reiterated that the increase in pain would cause patients to seek care. RX 1, pp. 42-43.

Petitioner testified she never received any workers' compensation benefits. Workers' compensation did not pay any of her medical bills. T. 4/23/18, pp. 28-29. She underwent two examinations at Respondent's request. T. 4/23/18, p. 29.

Petitioner testified her right hand "has developed a pretty severe tremor since the surgery." Her right middle, ring and small fingers "are occasionally still numb after the ulnar nerve release." She has difficulty washing dishes and moving a pot from the stove to the sink. She has problems with dexterity that make it difficult to turn a key or a doorknob. She also has difficulty opening and closing Ziploc bags and operating zippers. T. 4/23/18, pp. 29-30. Her left thumb joint is deformed and painful. She underwent two left thumb joint surgeries. It is difficult for her to use her left hand to open or close a jar or Ziploc bag, remove a tray from an oven, button a coat, use tweezers or apply cosmetics. Her right elbow is sensitive. If she rests her elbow on the arm of a chair she feels pain. T. 4/23/18, pp. 31-32.

Under cross-examination, Petitioner testified she first began noticing symptoms in the first year or so after she began working for Respondent. Her bilateral hand and right elbow symptoms first manifested in 2009. Her Application alleges an accident date of June 16, 2016 but "it was an ongoing issue." She stopped working in December 2015 due to bilateral hand pain. T. 4/23/18, pp. 35, 37. She never had hand or right elbow problems before she started working for Respondent. In 2009 or 2010, she reported her symptoms to Shirley Miceli, her department supervisor, after Miceli returned from being off work. She specifically complained of hand pain while closing the "clam shell" containers. She did not call Miceli to testify on her behalf. T. 4/23/18, p. 38. She did not undergo treatment for her symptoms until 2015. T. 4/23/18, p. 39. In August 2015, she saw Dr. Wechter for a problem unrelated

to her hands but mentioned her hand problems to him. She believes she and he discussed the issue of whether the problems were work-related. T. 4/23/18, pp. 40, 42. She did not seek treatment at that point because she believed rest would alleviate her symptoms. She has tremors in both hands. The tremor started "pretty recently." To her, this means it started within the last ten years. The right hand tremor started after she began working at Respondent and worsened thereafter. T. 4/23/18, p. 43. At Respondent, she underwent training relating to the issue of reporting work injuries. Respondent requires its employees to report injuries to their supervisors. She signed a document indicating she understood this requirement. T. 4/23/18, p. 44. The trays varied in weight. She does not know the exact weights. T. 4/23/18, p. 45. It requires force to close all four corners of the "clam shell" containers. She does not know how many pounds of force are involved. You can close a "clam shell" by using your index finger to hold it and applying force with your thumbs. T. 4/23/18, p. 46. She knows that the same "par" [dough] was baked each day to create four types of bread. "Hollow" was baked three times weekly to create two other types. She would have to check with sales to determine how many customers requested sliced and bagged bread each day. She cannot say exactly how many requested this. When she returned to work, after being off, she worked from May 2017 [sic] until June 15, 2017 [sic]. T. 4/23/18, pp. 48, 50.

On redirect, Petitioner testified she called Dr. Wechter from work in December 2015, at which point he referred her to Dr. Heller. T. 4/23/18, p. 51.

Laura Stenz testified on behalf of Respondent. Stenz testified she has worked for Respondent since February 2011. She has worked at five different locations. In October 2016, she began working as a store team leader, or "STL", at Respondent's store in the south Loop. This is the store where Petitioner worked. Stenz testified she was not the "STL" at that store while Petitioner worked there. T. 4/23/18, pp. 54-55.

Stenz testified she is familiar with the duties of a bakery counter salesperson. As an "STL", she has to be aware of the all of the duties performed in the store. She provides a job description to each new hire. T. 4/23/18, p. 55. On occasion, she has worked in the bakery, performing the duties of a counter salesperson. She is familiar with the process of baking cookies. At the present time, the employees in her store bake cookies for 18-packs every two to three days. They produce 40 packs every two to three days. The cookies have an expiration date. Cookies are baked again when they expire or are sold. She does not know whether the same schedule was followed during the time Petitioner worked in the store. T. 4/23/18, pp. 57-58. During the time she has worked for Respondent, the bakery requirements have changed. Those requirements also vary from store to store. T. 4/23/18, p. 58.

Stenz identified RX 6 as an accurate description of the bakery employee job. [The Arbitrator notes that RX 6 describes the "physical working conditions" of the job as including hand usage, including single grasping, fine manipulation and pushing and pulling as well as reaching. She identified RX 5 as a "functional and environmental evaluation" of the job. [The Arbitrator notes that RX 5 describes the job as involving minimal power grasping with both hands, occasional fine manipulation with both hands (with this manipulation becoming frequent with respect to pastry decoration) and frequent simple grasping with both hands. Occasional is defined as "up to 3 hours" and frequent is described as "3-6 hours".] If a bakery employee works a typical 8-hour shift, he or she gets a half-hour unpaid lunch and two 15-minute paid breaks. T. 4/23/18, p. 60.

Under cross-examination, Stenz testified that she did not work at the south Loop store during the period Petitioner worked there. She does not know how much baking was done at that store before

October 2016. T. 4/23/18, p. 62. Her familiarity is with the procedures followed from October 2016 to the present. T. 4/23/18, p. 62.

Arbitrator's Credibility Assessment

The arbitrator authoring this decision did not participate in either hearing and thus had no opportunity to personally observe Petitioner's or Stenz's demeanor. On review of the transcript of April 23, 2018, the Arbitrator finds that Petitioner's testimony concerning her schedule, work activities and the materials involved in her work was detailed and essentially unrebutted by Stenz, who acknowledged her tenure at Respondent's south Loop store did not overlap with Petitioner's. Stenz acknowledged she only occasionally worked in the bakery department. She addressed only the cookie containers and did not contradict Petitioner's testimony that customer demand and production can vary from store to store. Nor did she suggest that the "clam shell" cookie containers were easy to lock. Petitioner, in contrast, worked in the same department at the same store for about seven years. While her job did not involve the tabulation of sales receipts, as she acknowledged, she provided a valid basis for the estimates she gave, in terms of the numbers of containers and twist ties she typically handled or applied each day. The Arbitrator further finds that RX 5 and RX 6 do not undermine Petitioner's credibility concerning the frequency with which she performed various tasks.

None of the physicians who treated Petitioner noted symptom magnification. Dr. Fernandez, who treated Petitioner over an extended period, characterized her description of her work activities as 'compelling." The Arbitrator agrees. Neither of Respondent's examiners noted unusual pain behavior. They agreed with Dr. Fernandez's diagnoses and treatment. In fact, they contemplated the need for additional care.

Overall, the Arbitrator found Dr. Fernandez's causation-related opinions more persuasive than those voiced by Respondent's examiners. Dr. Fernandez's explanation of the distinction between "manifestation" and "aggravation" was cogent and consistent with Illinois law. See, e.g., Schroeder v. IWCC, 2017 Ill. App. LEXIS 350 (4th Dist. 2017), in which the Appellate Court emphasized that, "if [the chain-of-events principle] only applied where a claimant is in a condition of absolute good health, that holding would contradict years of Illinois precedent concerning pre-existing conditions." In Illinois, it has long been held that an employer takes its employees as it finds them. A claimant need only establish that his work was a cause of his condition. He need not establish that it was the only cause, or even a primary cause. He is also not required to eliminate all other possible contributing causes. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193 (2003).

Dr. Shin, Respondent's first examiner, based his opinions on a "specific trauma" hypothetical, referencing a first report of injury that is not in evidence. He did not address the issue of whether Petitioner's work activities could have aggravated her underlying arthritis. Dr. Phillips, the second examiner, seemed to assume that Petitioner had an underlying systemic condition such as rheumatoid arthritis. He recommended a rheumatology consultation, apparently unaware that Dr. Gopal, a rheumatologist, ruled out an inflammatory systemic condition on May 2, 2016. Significantly, Dr. Gopal recommended that Petitioner avoid repetitive activities. PX 1. Dr. Phillips conceded that work activities can cause hand symptoms and that increased activities can cause the symptoms to worsen. RX 1, pp. 25-27. He also conceded that Petitioner's job activities were repetitive in nature. RX 1, p. 34. He implied that Dr. Fernandez believed Petitioner's job duties caused her thumb structure to change over time, citing studies that apparently ruled out such changes, but that is not what Dr. Fernandez testified to. Dr. Fernandez opined that Petitioner's work activities aggravated her underlying arthritis and caused

it to progress beyond its anticipated natural history. PX 6, p. 20. Dr. Phillips' opinion that Petitioner can perform full duty flies in the face of his admission that repetitive work could cause her symptoms to worsen. It is also inconsistent with his finding that Petitioner is not at maximum medical improvement with respect to her left thumb condition and could require more care, including a fusion.

Arbitrator's Conclusions of Law

Did Petitioner establish repetitive trauma injuries manifesting on June 16, 2016? Did Petitioner establish a causal connection between her work activities and her bilateral thumb and right elbow conditions of ill-being?

Based on the foregoing credibility assessment, the Arbitrator finds that Petitioner met her burden of proof on the issues of repetitive trauma and causal connection. The Arbitrator views June 16, 2016 as an appropriate manifestation date, based on the standards of "fairness and flexibility" enunciated by the Supreme Court in Durand v. Industrial Commission, 224 Ill.2d 53 (2007). While Petitioner testified to developing symptoms within a short period after beginning to work for Respondent in 2009, she continued working for years thereafter "without significant medical complications or lost working time." As the Appellate Court held in Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43, 48 (1989), "an employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint." Petitioner went so far as to attempt to return to her job in late May 2016, with that three-week attempt resulting in symptoms that were "worse than they had ever been," as she informed Dr. Wechter. PX 1. Respondent stipulated to notice in this case (Arb Exh 1) and cannot claim that its investigation was hampered.

In finding causation as to the right elbow condition, the Arbitrator acknowledges that Dr. Wechter's and Dr. Heller's initial records do not mention any elbow complaints. The Arbitrator notes, however, that when Dr. Lee first saw Petitioner, on January 19, 2016, he indicated her pain "could radiate up UE." He also noted hypertonicity of the medial epicondyle bilaterally. PX 4. When Petitioner saw Dr. Wechter on June 17, 2016, immediately after the three-week period during which she attempted to resume working, she again reported that her pain was shooting up her arm. PX 1. When Dr. Fernandez operated on Petitioner's right elbow, on October 19, 2016, following an EMG that was positive for right cubital tunnel, he noted in his operative report that, while some of Petitioner's initial symptoms appeared consistent with carpal tunnel syndrome, they later "evolved into more ulnar nerve symptoms," prompting him to perform an ulnar nerve release. The Arbitrator also notes Dr. Phillips' concession that activities requiring elbow flexion can cause cubital tunnel, assuming the flexion is to 80 to 90 degrees. The in-office demonstration he relied on in concluding that Petitioner did not flex her elbows to this degree placed Petitioner at a "desk." Phillips Dep Exh 2, p. 4 of 14. Petitioner did not testify to working at a desk but regardless the flexion Dr. Phillips noted (60 to 70 degrees) was very close to the flexion he described as a causative factor and well within the range identified by Dr. Fernandez.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims various medical expenses along with reimbursement of out of pocket payments. PX 8 contains the claimed bills along with a detailed list of the payments made by Petitioner and her group carrier. There is only one bill in PX 8 that the Arbitrator declines to award, assuming Petitioner is claiming it. It is not specifically referenced in the list. That is a $367.00 bill relating to Petitioner's visit to a Dr. Jori Fleisher on November 30, 2017. Petitioner did not testify to seeing this

physician and did not offer any records concerning an office visit of November 30, 2017. The Arbitrator otherwise finds the treatment underlying the remaining claimed bills to be causally related as well as reasonable and necessary. The Arbitrator again notes that neither of Respondent's examiners criticized any aspect of Petitioner's medical treatment.

Respondent is entitled to Section 8(j) credit in the amount of $8,465.93 for medical payments made by the group carrier, per the parties' stipulation. Arb Exh 1. Respondent shall hold Petitioner harmless against said payments.

Is Petitioner entitled to temporary total disability benefits? Is Petitioner entitled to prospective care?

Petitioner claims she was temporarily totally disabled from June 17, 2016 (the day after her three-week attempt to resume working) through the hearing of April 23, 2018. Respondent disputes this claim based on its accident and causation defenses. Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. There is no dispute as to the reasonableness and necessity of Petitioner's care, which extended through mid-November 2017. Both of Respondent's examiners contemplated the need for a future left thumb fusion. Petitioner is subject to significant work restrictions. There is no evidence indicating Respondent offered Petitioner work within these restrictions. Petitioner credibly testified she has applied for multiple jobs since November 16, 2017 but has been unsuccessful in finding alternative employment. T. 4/23/18, p. 28. Based on the projections of Respondent's examiners, the Arbitrator finds Petitioner's left thumb condition to be unstable. Interstate Scaffolding v. IWCC, 236 Ill.2d 32 (2010) The Arbitrator awards Petitioner temporary total disability benefits from June 17, 2016 through April 23, 2018.

Is Respondent liable for penalties and fees?

Petitioner did not offer into evidence any penalties/fees petition or "written demand for payment of benefits," as contemplated by Section 19(l). Respondent offered into evidence three responses to penalties/fees petitions filed on May 16, 2017, December 7, 2017 and March 15, 2018. RX 10-12. Attached to these responses are the Section 12 examination reports generated by Drs. Shin and Phillips.

The Arbitrator has elected to rely on Petitioner's treating surgeon, Dr. Fernandez, rather than Dr. Shin or Dr. Phillips, but does not conclude that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in relying on those examiners. The Arbitrator declines to find Respondent liable for penalties or fees.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD MARQUARDT,

Petitioner,

vs. NO: 16WC 34838

20IWCC0600

BRAHLER OIL & LUBE INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2019, is hereby affirmed and adopted.

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

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

20IWCC0600

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020
o090320
MP/jrc
068

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

MARQUARDT, RICHARD
Employee/Petitioner

Case# **16WC034838**

16WC035441
19WC009626

BRAHLER OIL & LUBE INC
Employer/Respondent

20IWCC0600

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0332 LIVINGSTONE MUELLER ET AL
KENNETH BIMA
620 E EDWARD ST
SPRINGFIELD, IL 62705

20 IWCC0600

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Richard Marquardt,
Employee/Petitioner

v.

Brahler Oil & Lube Inc.,
Employer/Respondent

Case # **16** WC **34838**

Consolidated cases: **16 WC 35441, 19 WC 9626**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **June 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 20IWCC0600

On the date of accident, **March 12, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,519.72**; the average weekly wage was $**425.99**.

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

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

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

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

ORDER

Petitioner failed to prove by a preponderance of the credible evidence that his current condition of ill-being is casually related to the accident of 3/12/2016. Petitioner's claims for benefits are therefore denied. Determination of other disputed issues is moot.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

December 20, 2019
Date

DEC 20 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD MARQUARDT,

Petitioner,

vs. NO: 16WC 35441

20IWCC0601

BRAHLER OIL & LUBE INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2019, is hereby affirmed and adopted.

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

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

20IWCC0601

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020
o090320
MP/jrc
068

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

MARQUARDT, RICHARD
Employee/Petitioner

Case# **16WC035441**

16WC034838
19WC009626

BRAHLER OIL AND LUBE INC
Employer/Respondent

20IWCC0601

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Richard Marquardt
Employee/Petitioner

v.

Brahler Oil & Lube Inc.
Employer/Respondent

Case # **16** WC **35441**

Consolidated cases: **16 WC 34838, 19 WC 9626**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **June 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 20IWCC0601

On the date of accident, **October 23, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,519.72**; the average weekly wage was $**425.99**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Petitioner failed to prove by a preponderance of the credible evidence that his current condition of ill-being is casually related to the accident of 10/23/2015. Petitioner's claims for benefits are therefore denied. Determination of other disputed issues is moot.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

December 20, 2019
Date

DEC 20 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD MARQUARDT,

Petitioner,

vs.

NO: 19WC 9626

BRAHLER OIL & LUBE INC.,

20IWCC0602

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2019, is hereby affirmed and adopted.

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

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

20IWCC0602

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020
o090320
MP/jrc
068

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

MARQUARDT, RICHARD
Employee/Petitioner

Case# **19WC009626**

16WC034838
16WC035441

BRAHLER OIL AND LUBE INC
Employer/Respondent

20IWCC0602

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0332 LIVINGSTONE MUELLER ET AL
KENNETH BIMA
620 E EDWARD ST
SPRINGFIELD, IL 62705

20 IWCC0602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Richard Marquardt,
Employee/Petitioner

v.

Brahler Oil and Lube, Inc.,
Employer/Respondent

Case # **19** WC **9626**

Consolidated cases: **16 WC 34838**
16 WC 35441

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **6/28/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 20IWCC0602

On the date of accident, **4/25/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**22,151.48**; the average weekly wage was $**425.99**.

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

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

ORDER

Petitioner failed to prove by a preponderance of the credible evidence that his current condition of ill-being is casually related to the accident of 4/25/2016. Petitioner's claims for benefits are therefore denied. Determination of other disputed issues is moot.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

December 20, 2019
Date

ICArbDec19(b)

DEC 20 2019

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

NOTE: The Arbitrator notes that after the Arbitration hearing held on June 28, 2019 Arbitrator Hemenway no longer held her position as an Arbitrator. The parties subsequently stipulated to allow another Arbitrator to issue these Decisions, and Arbitrator Harris was re-assigned the cases for this purpose.

Petitioner started working for the Respondent on 5/28/2015. He worked as a lube technician. Petitioner testified that prior to working for Respondent, he was not employed but rather stayed at home and took care of three of his grandchildren.

First Accident: 10/25/2015

Petitioner testified that on 10/25/2015 he was standing up from a kneeling position in a bay when he was unaware that a car was passing through the bay and caused an oil pan to strike the top of his head, causing his head to be forced backwards. Petitioner testified that he immediately noticed sharp pain to his neck and right shoulder and dizziness. Petitioner testified that he was initially seen at Prompt Care and then taken to St. John's Emergency Room for x-rays. Petitioner then returned to Prompt Care for treatment. Subsequently, Petitioner testified he continued to work full duty up until a second accident on 3/12/2016. Petitioner testified that up until the second accident he still had neck symptoms and took over the counter Aleve and Tylenol.

Second Accident: 3/12/2016

Petitioner testified that on 3/12/2016 he lifted a 55-gallon garbage can that unknown to him was filled with wet oil dry and rags. Petitioner testified that after lifting the garbage can he felt severe low back pain with radiating symptoms to his right leg. Petitioner testified that he has had prior issues with his back but was having no problems while under the Respondent's employ. After three days, Petitioner testified that he returned to full duty work.

Third Accident: 4/25/2016

Petitioner testified that he was working full duty when he had his third accident on 4/25/2016. On that date, Petitioner testified he turned around and came into contact with the tailgate of a truck that he

was standing behind. Petitioner testified that he struck the right side of his head on the tailgate. Subsequently, Petitioner testified that he notified his manager of the incident but does not remember the manager's name. Petitioner testified that he immediately experienced a severe headache along with neck and head pain. Petitioner testified that this accident increased his neck pain and prompted him to seek medical treatment with the occupational health department. At this department, Petitioner received an MRI to his head and physical therapy. Petitioner testified that physical therapy helped but did not alleviate all of his problems. Subsequently, Petitioner testified that he saw a neurologist and came under the care of Dr. Kube. While under the care of Dr. Kube, Petitioner testified that he underwent an electrodiagnostic study and received an injection. Petitioner testified that the injection did not help and now he wishes to proceed with the surgery to his neck that Dr. Kube is recommending.

Regarding his current complaints, Petitioner testified he still has headaches, neck pain and dizziness. Petitioner testified that following the 4/25/2016 accident he worked light duty up until recently. At the time of each accident, Petitioner testified that he was working full duty.

On cross-examination Petitioner acknowledged that he had prior issues with his low back including surgery with Dr. VanFleet. However, Petitioner testified he could not remember that he had any treatment to his neck, including not remembering he had a cervical injection. Following low back surgery by Dr. VanFleet, Petitioner testified that he had a good result from surgery.

Petitioner testified he did not advise either of Respondent's Section 12 physicians (Dr. Weiss and Dr. Zelby) or his treating physician Dr. Kube that he sustained another work accident on 4/25/2016 regarding his neck. The records of these physicians, including deposition testimony, confirms this.

Medical History Prior to First Accident of 10/25/2015

The medical records in evidence confirm Petitioner suffered from various injuries and conditions and received considerable imaging studies, testing and medical treatment prior to the first accident of 10/25/3015. This includes imaging studies, testing and medical treatment to his cervical spine and lumbar spine. Much of these are directly related to and dispositive of the issues in dispute herein.

A cervical spine CT scan was performed on June 7, 2007.

A cervical spine MRI was performed on January 13, 2012.

Medical records indicate that on 7/24/2013, Petitioner was seen by Dr. Poonam Paruchuri of the SIU School of Medicine. On that date, it was noted that Petitioner wanted to start the disability process. The records document that Petitioner was unemployed. Petitioner complained of constant chronic back pain and chronic right shoulder pain with numbness down his elbow and hand. Petitioner also complained of ringing in his ears which he "had for 20y, after he injured C5-C6(MVC)." Dr. Paruchuri's physical examination revealed a sensory deficit on the right at the level of C5 and C6. After a phone conversation with Dr. Paruchuri's office on 7/31/2013, Petitioner was referred to Dr. Tim VanFleet for an orthopedic consult. RX2.

Petitioner was initially seen by Dr. VanFleet on 8/30/2013. An intake form on that date notes that Petitioner's primary problem concerned pain to his cervical, thoracic, and lumbar spine. **It was noted that Petitioner was retired and last worked in 2006**. Petitioner noted weakness and numbness in his legs/feet and arms/hands. **Dr. VanFleet's record notes that the onset of Petitioner's problems of neck, mid-back and low-back pain were gradual for the past 20 years with the symptoms being constant and worsening**. Petitioner's low back pain radiated into the right buttock and down the posterior aspect of the right leg to the calf. His pain also radiated across the shoulder, he had numbness in the posterior right leg, neck stiffness, headaches, upper extremity weakness and impaired hearing and vision. Regarding his back, Petitioner described his pain as being dull, aching and numbness. Regarding his neck pain, Petitioner noted that his symptoms include "neck stiffness, muscle spasms, impaired range of motion, shoulder pain, headache, upper extremity weakness, impaired hearing and impaired vision, but not crepitus, no tenderness and no impaired memory. **Patient states that the pain gets so bad that he has had to go to the ER several times. He is currently taking Aleve and has for 10 years and currently started Tramdol for the pain."** X-rays of the lumbar, thoracic, and cervical spine were secured and revealed degenerative changes. Dr. VanFleet diagnosed the claimant with low back pain, mid-back pain and neck pain. Dr. VanFleet prescribed lumbar and cervical MRIs. RX3. Dr. VanFleet also indicated

Petitioner returned to Dr. VanFleet on 9/13/2013. At that time, Petitioner had secured his MRIs. Dr. VanFleet interpreted the cervical MRI as demonstrating evidence of degenerative changes at the level of C5-6 with resulted right sided foraminal stenosis. The lumbar MRI revealed degenerative changes at

the levels of L4-5 and L5-S1. Dr. VanFleet diagnosed the claimant with low back pain, neck pain and cervical radiculopathy. Dr. VanFleet recommended a cervical and lumbar injection. RX3.

On 10/10/2013 Dr. Paul Smucker performed a right transforaminal lumbar epidural steroid injection. On 10/17/2013, Dr. Smucker performed a C7-T1 epidural steroid injection. RX3.

Petitioner returned to Dr. VanFleet on 10/25/2013 and noted that his neck symptoms improved. However, his low back pain and right leg pain continued. Dr. VanFleet diagnosed the claimant with cervical and lumbar radiculopathy and recommended a surgical procedure to Petitioner's back.

On 11/18/2013, Dr. VanFleet proceeded with bilateral L4-5 hemilaminotomies. RX3.

Petitioner returned to Dr. VanFleet's office on 12/04/2013 with reports of continued back pain and lower extremity numbness. Petitioner had similar complaints when he saw Dr. VanFleet on 12/18/2013. On that date, physical therapy was prescribed.

Physical therapy records from Midwest Rehab on 12/24/2013 and 12/31/2013 document Petitioner's continued low back and radiculopathy pain following surgery. The therapy records note that Petitioner used to work as a truck driver but stated that he has been unable to do so for some time. RX3.

Petitioner returned to Dr. VanFleet on 1/03/2014 with continued low back and right leg radiculopathy. It was noted that Petitioner had to stop physical therapy due to an insurance change. Petitioner was instructed to start a home exercise program and double his anti-inflammatory medication. Due to continued radiculopathy complaints, Dr. VanFleet prescribed an updated MRI on 2/12/2014. On that date, Petitioner's active problems consisted of cervical radiculopathy, mid-back pain and lumbar radiculopathy. RX3.

The follow up MRI proceeded on 2/19/2014 and did not reveal any new disc protrusions. Petitioner returned to Dr. VanFleet's office on 2/19/2014. Petitioner continued to complain of pain and stiffness and right leg radiculopathy. Petitioner was started on Lyrica.

Petitioner returned to Dr. VanFleet's office on 4/0/2/2014. Petitioner described his pain as burning and radiating to his right lower leg. Petitioner noted that he gets minimal relief from medication.

Petitioner was using a cane due to the pain in his right leg when he walks. Dr. VanFleet ordered an electrodiagnostic study. RX3.

Dr. VanFleet last saw Petitioner on 4/16/2014. Petitioner noted continued pain in his right low back and down his right leg. It was noted that **"He has significant difficulty with walking."** On that date, Dr. VanFleet noted that there was nothing further that he could do for Petitioner and Petitioner was released from his care with continued use of Lyrica. The active problems for Petitioner on that date were cervical radiculopathy, lumbar radiculopathy, and neck pain. RX3.

Medical History After First Accident of 10/25/2015

Following the 10/23/2015 accident, Petitioner was seen at the Springfield Clinic Prompt Care for neck and shoulder pain. A consistent history of the accident is contained in that record. Petitioner was directed to the emergency room of St. John's Hospital. PX2.

Petitioner was seen in the emergency room on 10/26/2015. Petitioner noted that his neck pain has been gradually getting worse over the last four days and that he was experiencing headaches and dizziness. A CT scan of the brain was secured and interpreted as being unremarkable. A CT scan of the cervical spine revealed no evidence of an acute injury but documented stable mild cervical spondylosis at C5-6 and C6-7. A CT scan of the thoracic spine revealed degenerative changes. Petitioner was diagnosed with a concussion and was started on medication and advised to follow up with his primary care physician in three days. RX1.

Petitioner returned to Prompt Care on 10/29/2015. That record documents "No dizziness, changes in vision, nausea or vomiting since the head injury. No numbness or tingling in his extremities." Petitioner was advised to return to full duty work on 11/02/2015 and follow up as needed. PX2.

Petitioner did not seek any further medical treatment until after his lifting incident on 3/12/2016. On that date, Petitioner was seen at Prompt Care on the date of loss for low back pain. A consistent history of the accident is contained in those records. Petitioner was prescribed Flexeril and Toradol and was taken off work for a few days. PX2.

Petitioner testified that he returned to work and was working full duty when he allegedly reinjured his neck while striking it against the tailgate of a truck on 4/25/2016.

Subsequently, Petitioner returned to Prompt Care on 4/26/2016. The history in that record states "Room 5 – head injury at work yesterday. Had head injury in Dec. 2015 and has had dizzy, lightheaded, ringing in ear, problems concentrating. Also head injury in February/March of 2016. Also injured lower back in March of 2016 and is still having pain." Petitioner was advised to go to Midwest Occupational Health Associates (MOHA). PX2.

Petitioner was seen at MOHA on 4/26/2016. The history in that record states "Patient is a 59 year old male seen in the office today secondary to a head injury which he sustained yesterday while working at Brahler's Oil & Lube." Petitioner advised the physician assistant that he has had at least five incidents where he hit his head since working for Respondent. The medical record documents that Petitioner became agitated that MOHA did not have all of his medical records and as such, the physician assistant advised Petitioner that they would reschedule him with another provider in the near future. On 4/28/2016 Petitioner was seen by Dr. Matthew Yociss. Dr. Yociss diagnosed Petitioner with headache with questionable concussive syndrome, right shoulder pain, and diffuse back pain. Petitioner was placed on light duty. A MRI of the brain and physical therapy was prescribed. PX4.

The MRI of the brain proceeded on 5/09/2016 and was interpreted as being unremarkable. Petitioner was seen at Midwest Industrial Rehabilitation Center on 5/10/2016 to start physical therapy. The history in the therapist's record states "Client reports his original injury occurred in October, 2015 when he was working in the lower bay of the shop and he skimmed the top of his head on a car as the car was moving through the bay- this caused his head to move into extension and lateral flexion. This injury was the start of his neck, right shoulder and headache symptoms. An incident occurred in March of 2016 when client lifted a garbage can that was about 80# (significantly heavier than he thought it was) and he hurt his low back. About two weeks ago, client picked up a box wrong and felt a "pop" in his low back and also hit his head on a pipe when transitioning from bent forward to an upright position swiftly. This further aggravated his neck and head, and low back symptoms." Petitioner was to be seen for two times a week for two weeks. PX4.

On 5/12/2016, Petitioner returned to MOHA and was seen by nurse practitioner Michelle Smart. The nurse practitioner noted that Petitioner's headaches, ringing in his bilateral ears, blurred vision, and

loss of concentration was most likely a personal health condition rather than from any mild head trauma. Petitioner was referred to Dr. Narla for a neurological consult and kept on work restrictions. Petitioner was seen by Dr. Koteswara Narla on 5/18/2016 for a neurological consult. Dr. Narla diagnosed Petitioner with most likely cervicogenic headaches, cervical pain with right radiculopathy, and dizziness and tinnitus which was likely from Meneare's. Dr. Narla recommended a referral to an ENT for Meneare's disease. PX4.

Petitioner returned to MOHA on 6/20/2016 and was seen by Dr. Nisha Raja-Rahman. Petitioner continued to complain of low back pain, neck pain, ringing in his ears, dizziness and headaches. It was noted that Petitioner was working light duty and would occasionally have to work full duty. Petitioner was administered a trigger point injection into his right trapezius. It was recommended that Petitioner continue with physical therapy, secure a cervical MRI, and remain on work restrictions. PX4.

Petitioner continued to receive physical therapy at Memorial Industrial Rehabilitation Center. He was seen on 6/27/2016, 7/01/2016, 7/15/2016, and 7/25/2016. During the visit on 7/25/2016, it was noted that Petitioner was going to undergo an independent medical evaluation. PX4.

At Respondent's request, Petitioner was seen by orthopedic surgeon, Dr. Stephen Weiss on 9/07/2016. The history in Dr. Weiss' report states:

> "Please note that I have been asked to evaluate Mr. Marquardt for his neck and low back relating to an injury of March, 2016. However, Mr. Marquardt indicates that the injury of March, 2016 involved only his low back, which has essentially returned to its pre-injury level. With regard to his neck, this injury occurred in October of 2015, when he was working in a lube center and a car on the assembly line struck him in the head." RX6.

Dr. Weiss diagnosed Petitioner with a cervical strain and probable right radiculopathy and a lumbar strain which had resolved. Dr. Weiss' physical examination of Petitioner's low back was unremarkable. Dr. Weiss did not recommend any further medical treatment to Petitioner's lumbar spine. Regarding the cervical complaints, Dr. Weiss recommended a cervical MRI to determine what further treatment was needed. RX6.

On 9/16/2016 Petitioner underwent a cervical MRI at the Springfield MRI & Imaging Center. This study was interpreted as demonstrating bilateral foraminal stenosis at C5-6 with the right side being greater than the left and multi-level degenerative disc disease. PX5.

On 10/10/2016 Dr. Weiss authored a supplemental report after reviewing the cervical MRI. It was Dr. Weiss' opinion that "The October 15, 2015 work injury produced only a significant soft tissue cervical strain secondary to the October, 2015 work incident in question. Mr. Marquardt does have advanced cervical degenerative disc disease, but in my opinion the findings noted in his recent MRI are unrelated to the October, 2015 work incident and instead represent a normal progression of his underlying degenerative condition. Specifically, I find no evidence of any trauma-related findings." RX6.

Dr. Weiss did not believe that Petitioner required any further treatment or work restrictions related to his neck injury and felt that Petitioner sustained no permanent impairment secondary to the soft tissue neck strain he sustained at work on October 15, 2015. RX6.

On 11/04/2016 Petitioner completed an application for adjustment of claim for dates of accident 10/23/2015 and 3/12/2016. PX1.

On 11/15/2016, Petitioner was seen by Dr. Richard Kube at his attorney's request. On that date, Petitioner advised Dr. Kube of his injury to his neck on 10/23/2015. **Petitioner did not advise Dr. Kube of the 4/25/2016 accident.** X-rays of the cervical spine were secured. It was Dr. Kube's thought that Petitioner had C7 radiculopathy. Dr. Kube recommended an electrodiagnostic study and a motion analysis. There is no mention of low back pain on that date. PX8.

On 11/28/2016, Petitioner underwent an electrodiagnostic study by Dr. Edward Trudeau. Dr. Trudeau interpreted this study as revealing moderately severe right C6 radiculopathy with no current evidence of C7 radiculopathy. PX8.

On 12/09/2016, Petitioner underwent motion studies at Dr. Kube's office. These studies were interpreted as demonstrating instability between C0-C1 and a neighboring level (9 degrees) and evidence of severe posterior subluxation without instability at C3-C4. PX8.

Petitioner returned to Dr. Kube's office on 12/15/2016. Dr. Kube noted that the vertebral motion analysis scan did not show instability. Dr. Kube noted that the nerve study showed C6 radiculopathy on the right side which he felt was consistent with stenosis. Dr. Kube recommended an epidural steroid injection. PX8.

On 2/13/2017, Dr. Kube attempted to perform a cervical epidural steroid injection. However, he was not successful as Petitioner's spinus process was too shingled. Subsequently Petitioner followed up with Dr. Kube on 2/28/2017. On that date, Dr. Kube recommended an anterior cervical diskectomy and fusion at C5-6. Also on that date for the first time, Petitioner advised Dr. Kube that he was experiencing back pain. PX8.

Petitioner returned to Dr. Kube's office on 4/04/2017 for a "new evaluation" for his low back. Petitioner noted that his low back complaints were similar to those that Dr. VanFleet performed surgery on. Dr. Kube secured lumbar x-rays which he interpreted as demonstrating some loss of disc height at L4-5 and L5-S1. Dr. Kube also noted stenosis at these levels. Dr. Kube also documented mild scoliosis at L1-L5. Dr. Kube recommended an MRI along with a kinematic study. PX8.

At Respondent's request, Petitioner was seen for a Section 12 examination by Dr. Andrew Zelby on 6/12/2017. Exhibit 2, in Resp. Ex. No. 4). Petitioner provided Dr. Zelby with a history of the 10/23/2015 and 3/12/2016 accidents. **Petitioner did not provide Dr. Zelby with a history of the alleged 4/25/2016 accident.** As part of his evaluation, Dr. Zelby reviewed the complete medical records starting with a cervical CT scan from 6/07/2007 and a cervical MRI scan from 1/13/2012. Dr. Zelby reviewed Petitioner's treatment at the SIU School of Medicine (Dr. Paruchuri) in July of 2013. Dr. Zelby also reviewed the cervical diagnostic studies from before and after the alleged accidents cervical MRI from 9/06/2016. Based on this extensive medical records review, Dr. Zelby concluded:

> "Mr. Marquardt reports two injuries at work, one related to his neck and one related to his low back. His exam today reveals an essentially normal neurologic exam, except for a report of diminished sensation that is inconsistent with any spinal condition. Mr. Marquardt also reports never having any problems with his neck before October of 2015 and that his back problems went away after surgery in 2010 and did not return until March, 2016. However, the medical

records indicate that the assertions by Mr. Marquardt are very inaccurate recollections of his history of neck and low back pain. The records indicate that as of 2013, Mr. Marquardt already had chronic neck and low back pain, described as severe and such that Mr. Marquardt was seeking disability for his severe pain. He also received treatment for diagnosis of radiculopathy including injections. Mr. Marquardt reported persistence and reported severity of symptoms even in the context of his chronic complaints of pain are inconsistent with the objective medical findings and inconsistent with the natural history of his objective condition. Mr. Marquardt also has 3/5 positive Waddell signs with significant symptom amplification. Based on the disparity between his subjective complaints and his objective findings, the magnitude and persistence of his complaints appear more related to symptom amplification and even the manifestations of his chronically symptomatic degenerative condition. Mr. Marquardt's cervical MRI from September, 2016 show no acute abnormalities or any progression compared to his January, 2012 MRI other than the changes associated with the passage of time. Mr. Marquardt has also had no change in symptoms related to either his complaints of neck pain or low back pain as well as the radiating symptoms or described feelings of weakness documented since at least 2013. Based on the objective medical findings, Mr. Marquardt sustained a minimal concussion and transient post-concussive syndrome, along with a cervical strain as a result of his reported work injury in October of 2015. Based on his reported symptoms following his March, 2016 incident at work, taken in a context of his prior complaints and his findings on exam today, Mr. Marquardt sustained a lumbar strain. There is no medical evidence to suggest that either of his injuries aggravated, exacerbated, accelerated or altered his symptoms or findings compared to before those incidents." (RX4, EX2.)

Treating physician Dr. Richard Kube testified via an evidence deposition on 8/31/2017. Dr. Kube is a board-certified orthopedic surgeon. Dr. Kube testified that throughout his treatment Petitioner provided him a history of the 10/23/2015 and 3/12/2016 accident. Dr. Kube was not provided with a history of the alleged 4/25/2016 accident. Based on his review of the cervical MRI and physical examination, initially Dr. Kube felt that Petitioner had a C7 pathology. However, after an electrodiagnostic study, Dr, Kube felt that Petitioner's problems arose from the level of C5-6. Dr. Kube recommended a decompression and fusion at that level. Regarding Petitioner's low back, Dr. Kube testified that the x-ray revealed loss of

disc height at the levels of L4-5 and L5-S1. Dr. Kube recommended an MRI to further analyze this. However, the MRI has yet to be authorized. Regarding the issue of causation, Dr. Kube opined that the 10/23/15 work injury caused a C6 radiculopathy to occur in addition to aggravating Petitioner's degenerative disease. Dr. Kube testified that the 3/12/16 accident caused Petitioner's low back symptoms that Dr. Kube is currently treating him for. Dr. Kube did not know if Petitioner's attorney referred Petitioner to him. Dr. Kube did not know why Petitioner, who lives in Springfield, would treat with him in Peoria. Dr. Kube did not review any of Petitioner's prior medical records. Dr. Kube did not review any of Petitioner's diagnostic studies that pre-dated the 10/23/2015 accident. Dr. Kube did not believe that Petitioner was diagnosed with cervical radiculopathy in the past. It was Dr. Kube's understanding that after the 10/23/2015 accident, Petitioner developed radicular symptoms soon after and those complaints never resolved. Regarding the lumbar complaints, it was Dr. Kube's understanding that following surgery by Dr. VanFleet, Petitioner did well. Dr. Kube agreed that his understanding of Petitioner's cervical and lumbar history was based on the history that was provided by Petitioner. Dr. Kube agreed that his causation opinion is therefore also based on the honesty of Petitioner and the accuracy of the information that he supplied. PX7.

Dr. Andrew Zelby's evidence deposition proceeded on 10/16/2017. Dr. Zelby is a board-certified neurosurgeon. 95% of Dr. Zelby's practice consists of treating patients. 75-80% of Dr. Zelby's practice is dedicated to the treatment of the spine. Dr. Zelby testified consistent with his IME report. Dr. Zelby testified that his review of Petitioner's medical records prior to the work accidents were glaringly inconsistent with the histories provided by Petitioner regarding his prior cervical and lumbar complaints. Based on his review of the complete medical records and diagnostic studies along with this physical examination, Dr. Zelby believed that Petitioner had a resolved cervical concussion and cervical spondylosis without mylopathy or radiculopathy, a cervical strain, lumbar spondylosis without radiculopathy and a lumbar strain. Regarding the issue of causation, Dr. Zelby testified that there is no evidence to suggest that Petitioner aggravated, exasperated or accelerated his pre-existing conditions in any way. Dr. Zelby testified that in comparing the cervical MRIs from 1/13/2012 to 9/16/2016, there was no signs of an acute accident nor did the 9/16/2016 film show a progression of Petitioner's condition beyond that of the normal passage of time. Dr. Zelby's opinion that following the October of 2015 accident, Petitioner would have reached maximum medical improvement by January of 2016. Dr. Zelby testified that Petitioner would have reached maximum medical improvement following the March of

2016 accident by June of 2016. It was Dr. Zelby's opinion that Petitioner would have been able to return to full duty work after maximum medical improvement was reached. RX4.

On 3/21/2019, Petitioner completed an application for adjustment of claim for date of accident 4/25/2016 – nearly three years later.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the above Findings of Fact.

After a careful review of the evidence and after due deliberation, the Arbitrator finds and concludes on the disputed issues presented at trial as follows:

The undisputed fact that Petitioner did not advise either of Respondent's Section 12 physicians (Dr. Weiss and Dr. Zelby) or his treating physician Dr. Kube that he sustained another (third) work accident on 4/25/2016 holds **paramount significance to both a determination of Petitioner's credibility and a resolution of the disputed threshold issue of causation.**

Fatal to Petitioner's claims is the stark fact that there is no ***credible*** medical opinion in evidence linking, or even taking into due consideration, to any degree, Petitioner's current condition of ill-being in relation to the last accident or even discussing the significance, if any, of this last accident in relation to Petitioner's current condition of ill-being. This is simply because treating physician **Dr. Kube** (who offered flawed causation opinions in Petitioner's favor) **was totally unaware of Petitioner's third accident** and therefore, **being unaware of all the relevant facts and circumstances, thereby could not offer a fully informed, credible, reliable and persuasive causation opinion.**

Any medical opinion that fails to take into account the third claimed accident irrevocably renders **any causation opinion** fatally and irreparably flawed. Further, in addition, **any medical opinion that fails to take into account an accurate and complete prior medical history also irrevocably renders any causation opinion fatally and irreparably flawed.** This is why Dr. Kube's favorable causation opinion must be afforded very little, if any, weight and credibility. This is why Dr. Kube's favorable causation opinion does not meet or fulfill the standard of proving causation by a preponderance of the credible evidence because his opinion it lacks vital information which, as a result, cannot support a foundation of the causation opinion.

The Arbitrator notes it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). It is the Commission's function to choose between conflicting medical opinions. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 4, 31 Ill. Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992).

Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. **Expert opinions must be supported by facts and are only as valid as the facts underlying them.** *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. "If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative [**18] to be reliable." Id. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). **Further, and very significant, an expert's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information. That is the situation presented herein.**

Applying the above principles to the facts, the Arbitrator finds and concludes the opinions of Respondent's examining expert Dr. Zelby and Dr. Weiss are afforded far greater weight and credibility than those of treating physician Dr. Kube.

Further, the undisputed fact that Petitioner did not advise either of Respondent's Section 12 physicians (Dr. Weiss and Dr. Zelby) or his treating physician Dr. Kube that he sustained another work accident on 4/25/2016 **significantly reflects negatively on his credibility. How and why Petitioner did not advise these physicians about his third accident is inexplicable. Petitioner offered no explanation for these omissions in his trial testimony.**

This fact also made it impossible for any and all physicians to have a full appreciation and understanding of Petitioner's complete and relevant medical history and condition – a prerequisite for a medical expert to establish a proper foundation to render informed medical opinions (e.g., How could Dr. Kube offer opinions in Petitioner's favor when he was not aware of important, relevant facts? This includes Dr. Kube's lack of awareness of Petitioner's past medical history).

Lastly, with great significance, as Dr. Zelby astutely noted, Petitioner offered relevant and important "histories" throughout the course of his treatment over the years to various providers and examiners <u>that were either plainly wrong or that he failed to mention</u>. The various medical records and reports in evidence clearly contradict these many inaccurate histories and omissions. The inference drawn is that Petitioner presented these inaccurate histories and omissions to bolster his claims, since providing accurate histories without omissions would conversely harm his claims. This scenario was also exhibited during Petitioner's trial testimony, when Petitioner could not remember, or denied, specific histories contained in medical records in evidence, all of which again only related to issues and facts which would act against Petitioner's claims and his credibility. The Arbitrator does not find this to be mere coincidence.

Therefore, the Arbitrator finds and concludes Petitioner is not credible, and accordingly places reliance on the histories found in the actual records in evidence, and not Petitioner's trial testimony, and any statements Petitioner made that conflict with the records are discredited.

<u>In support of the Arbitrator's Decision relating to issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds and concludes the following</u>:

Petitioner's unrebutted testimony was that he reported this injury timely to his manager, although he did not know the name of the manager. Petitioner further testified that it was this manager who directed

him back to Midwest Occupational Health Associates (MOHA). Based on his unrebutted testimony, the Arbitrator finds that Petitioner met his burden on this issue.

In support of the Arbitrator's Decision relating to issue (D), whether an accident occurred which arose out and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes the following:

Petitioner testified that on 4/25/2016 he struck the right side of the head on a steel tailgate of a truck while at work. Petitioner testified that at the time of the incident, he was standing behind the truck.

Petitioner was seen at the Springfield Clinic Prompt Care on 4/26/2016. That record states that Petitioner was seen for a head injury at work yesterday. No other information regarding the incident is contained in that record. Petitioner was referred back to MOHA.

Petitioner was seen at MOHA also on 4/26/2016. The history in the MOHA record for 4/26/2016 states that Petitioner sustained a head injury yesterday while working at Respondent. No other information about the accident was contained in that record.

Petitioner followed up with MOHA on 4/28/2016. That record states that Petitioner was seen at Prompt Care on April 26 in regard to a head injury from the 25th. No specifics regarding the incident are contained in that record. The only record that speaks to how the accident took place is contained in the initial evaluation record from Memorial Industrial Rehab on 5/10/2016. That record states "About two weeks ago, client picked up a box wrong and felt a "pop" in his low back and also hit his head on a pipe while transitioning from bent forward to an upright position swiftly." There is no history of Petitioner striking his head against the tailgate of a truck.

The Arbitrator also notes again that Petitioner did not provide a history of this accident to Dr. Weiss during his Section 12 examination on 9/07/2016. Nor did Petitioner provide Dr. Zelby with a history of this accident when he was seen for his Section 12 examination on 6/12/2017. Petitioner also did not provide Dr. Kube with a history of this accident. While the Arbitrator notes that this is inexplicable and calls matters into question, the Arbitrator finds that Petitioner has met his burden on the issue of accident based on his unrebutted testimony and the corroboration in the contemporaneous medical records.

In support of the Arbitrator's Decision relating to issue (F), whether Petitioner's current condition of ill-being is causally related to any or all of the claimed injuries, the Arbitrator finds and concludes the following:

The Arbitrator adopts and incorporates the facts as included in the Statement of Facts above and the above findings and conclusions.

The Arbitrator specifically finds and concludes Petitioner is not credible, as noted above and further explained below. This finding has a direct and significant negative impact on the Arbitrator's conclusions of law that follows.

The Arbitrator finds and concludes Petitioner has not proven by a preponderance of the credible evidence that his current conditions of ill-being are causally related to any of three filed claims and most clearly not to the last filed claim for the claimed 4/25/2016 accident. The Arbitrator specifically agrees with and adopts the opinions of Respondent's Section 12 examiner Dr. Zelby.

The Arbitrator notes the numerous inconsistencies - of a material nature - between Petitioner's trial testimony and the documentation in the many medical records in evidence (which the Arbitrator adopts and finds and concludes are far more credible and reliable than Petitioner's trial testimony and the histories he provided – or failed to provide – as found in the medical records and reports in evidence), especially the very significant evidence relating to Petitioner's cervical and low back condition prior to the 10/23/2015 work accident.

Petitioner consistently and without hesitation testified that prior to the 10/23/2015 work injury, he had no issues with his low back and neck. Petitioner also consistently testified that following back surgery with Dr. VanFleet, he had a very good outcome. Regarding his prior neck treatment, Petitioner could not recall any prior treatment or issues with his neck, which the Arbitrator finds highly doubtful. Petitioner's statements are indisputably inconsistent with the medical records. The Arbitrator trusts the medical records and notes Petitioner's testimony (when against the medical records) always served to bolster his claims.

The significance of Petitioner's pre-accident medical history cannot be overstated. An analysis of Petitioner's past treating medical records reveals the following:

The medical records at the SIU School of Medicine reveal that in July of 2013, Petitioner appeared to undergo a "disability evaluation." The exact nature of this "disability evaluation" is not indicated but the Arbitrator infers this means plainly what it states, that is, Petitioner sought a medical opinion for the purpose of proving he was "disabled" and therefore unable to work. This indicates his state of mind.

Dr. Paruchuri's 7/24/2013 medical record notes that **Petitioner was experiencing constant chronic back pain with right radiculopathy that caused him to fall 1-2 times a month**. It was noted Petitioner cannot stand more than 35-40 minutes. **Petitioner also described numbness radiating down to his right elbow causing his right hand to go numb. That record also notes Petitioner had experienced ringing in his ears for 20 years after he injured "C5-C6."** Dr. Paruchuri's physical examination noted a **sensory deficit at C5-C6**. Clearly, at this time, again, Petitioner claimed to have significant physical disability.

In the following month, medical records from The Orthopedic Center of Illinois, orthopedic surgeon Dr. Tim VanFleet, document these same issues. Dr. VanFleet's initial record from 8/30/2013 notes Petitioner complained of low back, mid back and neck pain with **the onset being gradual for the past 20 years. Petitioner noted these symptoms were constant and worsening. Petitioner was taking Aleve for the past 10 years and just started to take Tramdol.**

Regarding the neck pain, Dr. VanFleet's records consistently document that Petitioner complained of neck pain with associated symptoms of impaired range of motion, shoulder pain, headaches and upper extremity weakness.

In the following month, Dr. VanFleet, during a visit on 9/13/2013, reviewed the cervical MRI and noted **degenerative changes at the level of C5-6 with right sided foraminal stenosis**. The Arbitrator notes that this is the same level at which Dr. Kube now wants to operate.

Following Dr. VanFleet's low back surgery on 11/18/2013, the medical records document that Petitioner had a poor result from surgery. Consistently following surgery, Petitioner complained of severe low back pain with radiculopathy down his right leg. These complaints necessitated Dr. VanFleet ordering a post-operative MRI and doubling Petitioner's anti-inflammatory medication. Dr. VanFleet's

medical records document that Petitioner had problems walking and as a result, Petitioner was using a cane.

When Dr. VanFleet last saw Petitioner on 4/16/2014, Petitioner's continued low back and right leg radiculopathy was documented. Dr. VanFleet noted on 4/16/2014 that **Petitioner "has significant difficulty with walking."** In addition to documenting lumbar radiculopathy, Dr. VanFleet also noted that Petitioner's active problems include neck pain and cervical radiculopathy. Dr. VanFleet noted that Petitioner had been retired for years and stated that he did not believe that there is anything further that he could do for him.

The Arbitrator also notes Petitioner's selective memory, especially concerning his cervical spine. Petitioner had a difficult time recalling any of his cervical spine treatment prior to the work accident. Petitioner could not recall the treatment that he received for his cervical spine remarkably including the cervical injection that he underwent while under the care of Dr. VanFleet. Petitioner testified he could not remember ever going to see Dr. Stephen Weis for a Section 12 evaluation on 9/07/2016, testimony that defies belief. While Petitioner testified that whatever issues he had with his neck prior to this work accident were to a "different area", all of the medical records document that Petitioner's prior complaints centered around the level of C5-6 where degenerative changes and stenosis were most pronounced.

The Arbitrator notes with greatest emphasis that Petitioner failed to provide a history of this 4/25/2016 accident to Dr. Weis during his 9/07/2016 Section 12 evaluation, to Dr. Zelby during his 6/12/2017 Section 12 evaluation and even failed to mention this to his treating physician to Dr. Kube. All of these providers offered causal connection opinions without the necessary and vital knowledge of this accident. **While it could be believable that Petitioner forgot to mention this accident to one of these three physicians, it is wholly inconceivable Petitioner would fail or forget to mention the accident to all three physicians - multiple omissions that are inexplicable and weigh heavily on a determination that Petitioner again is not credible.**

There is no dispute that Petitioner had significant degenerative disc disease and stenosis to his cervical spine which pre-dated the 10/23/2015 accident and clearly pre-existed this accident on 4/25/2016. An obvious and important medical issue exists as to what effect, if any, this accident had on Petitioner's pre-existing condition and the prior two accidents.

Case law is clear that under these circumstances, expert testimony is necessary to show that the Petitioner's work activities caused or aggravated the condition complained of. *Inner Lake Steel Company v. Industrial Commission*, 136 Ill. App. 3d 740, 43 N.E. 2d 979 (1985). Cases involving aggravation of a pre-existing condition primarily concern medical questions and not legal questions. *Berry v. Industrial Commission*, 99 Ill. 2d 401, 459 N.E. 2d 963 (1984). The rights to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24, 368 N.E. 2d 1292 (1977).

While Petitioner relied on the testimony of Dr. Kube to address this causal connection issue, as noted above, Dr. Kube's understanding of Petitioner's cervical condition was based solely on the history and complaints that Petitioner provided to him. **The history and complaints Petitioner offered to Dr. Kube were incomplete and missing not only vital facts (such as the fact of the claimed accident) but were inaccurate and flatly erroneous.** As such, **Dr. Kube's causal connection is unequivocally critically flawed and therefore must be discounted.** See *Horath v. Industrial Commission*, 449 N.E. 2d 1345 (1983).

Unlike Dr. Kube, Respondent's examining expert **Dr. Zelby had the distinct and compelling advantage of reviewing Petitioner's entire medical records starting with Petitioner's visit in July of 2013** at the SIU School of Medicine. **Dr. Zelby also had the benefit of comparing diagnostic studies from before and after the accident.** In comparing the cervical MRIs from January of 2012 to September of 2016, Dr. Zelby noted that there were **no acute abnormities or any progression in Petitioner's underlying disease other than the changes associated with the passage of time.**

Dr. Weis also agreed that the September of 2016 cervical MRI showed no signs of an acute injury whatsoever. **Unlike Dr. Kube, Dr. Zelby was aware that prior to the work accident, Petitioner was diagnosed with cervical radiculopathy at the same level at which Dr. Kube now wants to operate. The Arbitrator accordingly adopts and places reliance on the opinions of Dr. Zelby and Dr. Weiss.**

It is incumbent upon Petitioner to prove each and every element of his claim. Based on the above, the Arbitrator finds that Petitioner has failed to meet his burden of proof on the issue of causal connection.

Determination of other disputed issues is accordingly moot.

In support of the Arbitrator's Decision related to the issue of (J), were medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes the following:

Based on the Arbitrator's finding regarding the issue of causation, Respondent has no obligation to pay any medical bills.

In support of the Arbitrator's Decision related to the issue of (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes the following:

Based on the Arbitrator's finding related to the issue of causal connection, Petitioner is not entitled to any prospective medical treatment as Petitioner's current condition of ill-being is not related to the work injuries.

Robert M. Harris

Robert M. Harris, Arbitrator
Dated: December 16, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD PETTIT,

Petitioner,

vs. NO: 16 WC 28220

20IWCC0603

COLLINSVILLE SCHOOL DISTRICT,

Respondent.

DECISION AND OPINION ON REVIEW

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

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

20IWCC0603

The Commission reverses the Arbitrator's Decision with respect to Petitioner's alleged cervical spine injury, and finds instead that Petitioner's current condition of ill-being for the cervical spine is not causally related to the August 30, 2016 work accident. The Commission finds that Petitioner's cervical condition pre-dated the August 30, 2016 accident.

The evidence demonstrates that prior to the work injury, Petitioner had reported complaints of left-sided neck pain in February 2016 that had been affecting him for approximately two months. Petitioner was then diagnosed with a cervical disc protrusion and left cervical radiculitis. Chiropractor Jonathan Brooks, of Multicare Specialists, noted that Petitioner had been treating with another chiropractor but had not been getting any relief. Dr. Brooks ordered an MRI of the cervical spine and physical therapy for the neck; Petitioner underwent physical therapy and chiropractic treatment at Multicare Specialists beginning February 18, 2016.

The MRI of the cervical spine, dated February 25, 2016, revealed no fracture or listhesis of the cervical spine; there was degenerative disc disease and facet arthropathy with moderate central canal stenosis at C5-6 and C6-7; also noted was mass effect on the right anterior margin of the cervical spinal cord at these levels; there was significant neural foraminal stenosis on the left at C3-4 and bilaterally at C6-7; the medical record stated that these findings could correspond to radicular symptoms in the left C4 or bilateral C7 nerve root distributions. Dr. Brooks ordered continued physical therapy of the cervical spine and gave Petitioner work restrictions. By May 2016, chiropractic care and epidural steroid injections for the neck were recommended.

The Commission additionally finds the opinions of Respondent's Section 12 examiner, Dr. Frank Petkovich, more persuasive than the opinions of Petitioner's treating physician, Dr. Matthew Gornet. After comparing the pertinent diagnostic images pre- and post-injury, including the February 25, 2016 MRI of the cervical spine, the September 2016 MRI, the September 23, 2017 MRI films of the cervical spine and CT myelogram, Dr. Petkovich noted no change in findings.

Dr. Petkovich testified that Petitioner had no acute findings during his examination on May 2, 2018. He stated that all the findings on the radiographic studies were consistent with degenerative disc disease at C5-6 and C6-7 with some spinal canal narrowing, and that these findings were chronic and unrelated to the August 30, 2016 work accident. Dr. Petkovich did find, however, that Petitioner sustained a cervical strain and contusion at the time of the incident, but that this condition had resolved about six weeks after the work injury. Dr. Petkovich did not believe that the August 30, 2016 accident aggravated or accelerated Petitioner's chronic degenerative conditions in his cervical spine. He stated that Petitioner had been under treatment for his cervical spine prior to the work injury, and that the February 25, 2016 MRI revealed the same chronic degenerative conditions in his cervical spine as were noted in the MRIs completed after the accident.

The Commission finds that Dr. Petkovich's opinions are supported by the objective evidence together with the prior medical records which demonstrated that Petitioner's cervical condition had not resolved prior to the August 30, 2016 accident date. Therefore, the

20IWCC0603

Commission reverses the Arbitrator's Decision and finds that Petitioner's current condition of ill-being with respect to the cervical spine is not related to the August 30, 2016 work accident. The Commission instead finds that Petitioner sustained a cervical strain that resolved six weeks after the work injury.

The Commission further notes that Petitioner sustained a left shoulder injury on August 30, 2016. The parties confirmed on the record that no dispute existed with respect to causal connection or treatment for the left shoulder.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed October 30, 2019, is hereby modified as indicated herein. The remainder of the Arbitrator's Decision is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current condition of ill-being with respect to the cervical spine is not causally related to the August 30, 2016 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current condition of ill-being with respect to the left shoulder is causally related to the August 30, 2016 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services related to the left shoulder only, and as evidenced in Petitioner's Exhibit 8, namely: $487.00 to Dr. George Paletta, Jr. and $14,389.46 to The Orthopedic Center of St. Louis, and as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to Section 8(j) of the Act, Respondent is entitled to a credit for those amounts paid under its group plan that are related to the treatment of injuries found compensable by this Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective treatment for the cervical spine is hereby denied.

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

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

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

20IWCC0603

DATED: OCT 14 2020

DDM/pm
O: 8/26/2020
052

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

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

PETTIT, TODD
Employee/Petitioner

Case# **16WC028220**

COLLINSVILLE SCHOOL DISTRICT
Employer/Respondent

20IWCC0603

On 10/30/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICE PC
DAVID GALANTI
PO BOX 99
E ALTON, IL 62024

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

20IWCC0603

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Todd Pettit
Employee/Petitioner

v.

Collinsville School District
Employer/Respondent

Case # **16** WC **28220**

Consolidated cases: _____

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/30/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**90,471.75**; the average weekly wage was $**1,739.84**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**3,344.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,344.49**.

Respondent is entitled to a credit of $**41,576.17** under Section 8(j) of the Act.

ORDER

Petitioner's current condition of ill-being is causally related to the injury of August 30, 2016.

Respondent shall pay reasonable and necessary medical bills, pursuant to the medical fee schedule, of $694.90 to Dr. Gornet, $487.00 to Dr. Paletta, $157.50 to Multicare Specialists, $5,046.12 to CT Partners of Chesterfield, $14,389.46 to The Orthopedic Center of St. Louis, and $1,426.09 to Orthopedic Ambulatory Surgery Center as provided in Sections 8(a) and 8.2 of the Act.

The two-level cervical disc replacement procedure recommended by Dr. Gornet is awarded and shall be paid pursuant to the fee schedule.

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

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

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

Charles M Watts

Signature of Arbitrator

October 30, 2019
Date

OCT 30 2019

20IWCC0603

STATEMENT OF FACTS

Petitioner, Todd Pettit, is in his seventh year of employment with Respondent, Collinsville School District. Petitioner is the principal of Kreitner Elementary School. Petitioner testified that on August 30, 2016, he was assisting in restraining a 60 pound student, who was described as being in a fit of rage. While applying a restraint hold, the student grabbed his left arm, yanked down, and then sprang backwards. Petitioner fell into a wall of lockers. (Tr. 12-14) Petitioner testified he immediately felt a pop in his left shoulder, with neck pain manifesting later. (Tr. 16, 18)

PRIOR MEDICAL HISTORY

On February 18, 2016, six months prior to the work injury of at issue, Petitioner presented to Multicare Specialists with complaints of left neck pain. (Resp. Ex. 2) He reported he had been dealing with these symptoms for the past two months. (*Id.*) Petitioner denied any injury, instead stating some days he had intense neck pain and other days he had no neck pain. (*Id.*) Radiological studies obtained that day revealed degenerative changes in Petitioner's cervical spine. (*Id.*) Petitioner was diagnosed with a cervical disc protrusion with left cervical radiculitis and referred for an MRI. (*Id.*)

On February 25, 2016, the MRI of Petitioner's cervical spine was obtained. (Resp. Ex. 2) It revealed degenerative disc disease with facet arthropathy and stenosis, as well as significant neural foraminal stenosis on the left at C3-4 and bilaterally at C6-7, corresponding with possible radicular symptoms. (*Id.*) Petitioner followed-up at Multicare Specialists on February 29, 2016 reporting continued left-sided neck pain. (*Id.*) He was referred for physical therapy. (*Id.*)

Petitioner treated in physical therapy from February 29, 2016 through March 21, 2016. (Resp. Ex. 2) He consistently reported left neck pain rated at 4/10. (*Id.*) During this time he returned to Multicare Specialists for periodic checkups and treatment of his cervical spine. (*Id.*) On March 1, 7, and 8, Petitioner reported tightness and soreness throughout the left side of his neck. (*Id.*) At the March 14 visit, Petitioner was noted to still have left cervical pain. (*Id.*) Petitioner reported feeling better at the March 21 visit. Petitioner reported continued left neck pain at the April 5 session. (*Id.*) When he returned on April 18, Petitioner was noted to have cervical spine tenderness from C4-C7. (*Id.*) And on April 21, Petitioner again reported tightness in his neck. (*Id.*)

On May 2, 2016, four months prior to the August 30, 2016 work injury, Petitioner returned to Multicare Specialists reporting an injury to his cervical spine. (Resp. Ex. 2) He stated he was attempting to restrain a child when the child jerked Petitioner's arm and neck. (*Id.*) On physical exam, Petitioner exhibited left-sided cervical spasms extending from C4-C7. (*Id.*) He also had limited cervical spine range of motion. (*Id.*)

Following the May 2 incident, Petitioner continued to obtain chiropractic treatment at Multicare Specialists for his cervical spine on a weekly basis from May 12 through August 11, 2016. (Resp. Ex. 2) At the June 2 visit, Petitioner reported continued soreness in his neck. (*Id.*) On June 30, he reported having a lot of stiffness and tightness in his neck. (*Id.*) At the next visit on July 7, Petitioner complained of cervical pain. (*Id.*) Then at the July 12 visit, Petitioner stated he aggravated his neck symptoms due to the stress of the beginning of the new school year. (*Id.*) On

the physical exam that date, Petitioner exhibited limited cervical spine range of motion and cervical tightness. (*Id.*) Petitioner was also seen on August 2 and his physical examination revealed neck pain with rotation to the left and with flexion. (*Id.*) On August 11, Petitioner complained of neck discomfort with right rotation. Physical examination found both compression and distraction to be negative and this note indicated that Petitioner "was doing much better this week." (*Id.*)

MEDICAL HISTORY AFTER AUGUST 30, 2016 ACCIDENT

After reporting this injury, Petitioner sought medical care from Dr. Mark Eavenson. Petitioner chose Dr. Eavenson as his family doctor is Kevin Bell who is in the same practice as Dr. Eavenson.

At trial, Petitioner readily admitted to prior neck problems. Specifically, that he had occasional range of motion problems and pain on his right side. Petitioner had treated 2 to 3 times a month for his neck before this injury. This is corroborated by Dr. Eavenson's prior treatment records. (RX 2). Petitioner testified that after this injury his pain was more toward the center and to the left of his neck and more intense than before. With his prior neck treatment, he had treated with Dr. Eavenson and had never been referred for a cervical injection or referred to a surgeon. This is corroborated by Dr. Eavenson's prior treatment records. (RX 2). In the last treatment note before this injury, Dr. Eavenson noted the Petitioner was being treated for neck pain, left shoulder pain, mid-back pain, and low back pain. (PX 1 at 261). However, Petitioner was "much better this week". (Id.)

Petitioner presented to Dr. Eavenson on September 1, 2016 and gave a consistent history of injury while trying to restrain a student who was roughly 60 lbs. (Id. at 259). Petitioner indicated that he some prior issues with his neck and shoulder before, however, that the incident with the student had "significantly worsened his condition". (Id.). Petitioner testified at trial that his prior neck problems consisted of routine stiffness. Petitioner testified that he had never previously missed work for neck problems nor had Dr. Eavenson ever previously prescribed injections or made a referral to an orthopedic surgeon. Dr. Eavenson made a provisional diagnosis of a left rotator cuff tear, as well as cervical disc protrusion. (Id. at 268). The Petitioner was referred to Dr. Paletta for his left shoulder and to Dr. Gornet for his cervical spine issue.

Respondent does not dispute Petitioner's left shoulder injury being causally related to this accident. Petitioner's care with Dr. Paletta ultimately resulted in surgery to his left shoulder on November 8, 2016. (PX 3). Petitioner missed work from November 8, 2016 through November 27, 2016, a period of 2 and 6/7 weeks. All TTD benefits were paid at the correct rate. Petitioner was last seen by Dr. Paletta on March 10, 2017. (PX 2 at 1). On that date, the Petitioner was doing well, however, he did complain of some discomfort with forward flexion. (Id.).

Petitioner first saw Dr. Gornet on September 16, 2016. Petitioner gave a history of injuring himself when his arm was pulled down suddenly while trying to restrain a student. (PX 4 at 20). Dr. Gornet interpreted the MRI of September 16, 2016 as revealing a central disc herniation at C5-C6 and C6-C7. He recommended conservative care in the form of a steroid injection and failing this, a consideration could be given for a cervical disc replacement at C5-C6 and C6-C7.

There is an extensive record of physical therapy and chiropractic care for both the shoulder and neck during this period. There is evidence of changes in pain levels reported such that pain might increase or decrease visit to visit.

On October 23, 2017, Dr. Gornet compared Petitioner's current MRI cervical spine with the MRI of September 23, 2017. Dr. Gornet felt that the MRI showed similar findings with no significant change. (Id. at 17). Petitioner was last seen on September 6, 2018 by Dr. Gornet Dr. Gornet was still recommending a disc replacement at C5-C6 and C6-C7. Reviewing a prior MRI which was performed on February 25, 2016, Dr. Gornet noted the herniation at C5-C6 worsened, but there were no significant changes at C6-C7. (Id. at 1).

Petitioner was examined by the behest of the Respondent by Dr. Petkovich on May 2, 2018. (RX 1 at Ex 2). Petitioner gave Dr. Petkovich a consistent history of injuring himself while trying to restrain a student. (Id.). Dr. Petkovich performed a physical examination, as well as compared the MRIs from September 16, 2016 and February 25, 2016. Dr. Petkovich noted that there was no significant change in the MRI scans. Dr. Petkovich also reviewed the Multicare Specialist's records which indicated that the Petitioner sought chiropractic and physical treatment care between February 18, 2016 and August 11, 2016 with complaints of pain into his neck and left shoulder. (Id. at Depo Ex 2 at 3). Following his review of Petitioner's prior and current medical records and conducting his clinical examination, Dr. Petkovich concluded that Petitioner's sustained a cervical contusion secondary to the injury which was resolved. (Id. at Depo Ex 2 at 6). Further, Dr. Petkovich opined that Petitioner's chiropractic and physical therapy was necessary for up to 6 weeks following the incident of August 30, 2016. (Id.). On cross examination, Dr. Petkovich admitted that he no longer had an active surgical practice, and that approximately 15% to 20% of his practice involved performing Independent Medical Evaluations. (RX 1 at 35, 37). Dr. Petkovich did not feel the Petitioner was trying to exaggerate his symptoms or mislead him. (Id. at 39). When he was in active practice, Dr. Petkovich did not perform disc replacement. (Id. at 40). Dr. Petkovich did perform cervical spine surgery for persons who had solely degenerative disc disease so long as there was a radicular component. (Id. at 41). Dr. Petkovich admitted that the Petitioner was never referred for pain management or to a surgeon with his cervical complaints which predated the date of accident. (Id. at 47, 48).

Dr. Gornet opined that Petitioner's current condition of his cervical spine was related to the work accident of August 30, 2016. (PX 5 at 12). Dr. Gornet based his opinion largely on his review of the prior medical records that showed Petitioner was doing better before the injury and that his symptoms were dramatically worse following the injury with his cervical spine when he last saw Dr. Eavenson on August 11, 2016 before this injury. (Id. at 11, 12). Further, Dr. Gornet explained that you can have a change in symptoms even when there is no change in the appearance on a MRI because of the inflammatory response of any injury is not measured on an MRI scan. (Id. at 12). Petitioner testified that he understands Dr. Gornet wants to perform surgery and that he would like to proceed with that surgery. Currently, he is complaining of pain down his left side of his neck and into his arm, which is getting worse. Further, Petitioner testified to a restricted range of motion in his cervical spine which he did not have before this injury. This causes him difficulty in driving as well as doing his activities of everyday living. The Arbitrator notes that during the Petitioner's testimony, he was having difficulties turning his head to address the Court throughout his testimony.

The petitioner presented the following medical bills into evidence:

Dr. Gornet: $694.90
Dr. Paletta: $487.00
Multicare Specialists: $157.50
CT Partners of Chesterfield: $5,046.12
The Orthopedic Center of St. Louis: $14,389.46
Orthopedic Ambulatory Surgery Center: $1,426.09

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the above Findings of Fact in support of the foregoing Conclusion of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Although the Arbitrator is at a disadvantage because this decision is written on review of the transcript without the benefit of viewing live testimony, there is compelling evidence to find that the testimony of the Petitioner was credible. First, Petitioner's trial testimony is entirely consistent with the medical records including those of Respondent's Section 12 examining physician. Petitioner's testimony regarding his medical records from before the accident at issue in this claim was also entirely consistent and demonstrated an unusual level of candor. Second, Respondent's Section 12 examining physician testified that Petitioner was credible. Therefore, the Arbitrator has no difficulty believing the testimony of Petitioner with regard to symptomatology and the changes pre and post accident.

WITH RESPECT TO ISSUE (F), IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY? THE ARBITRATOR FINDS:

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. *R & D Thiel v. Workers' Compensation Comm'n,* 398 Ill. App. 3d 858, 867 (2010). Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. *Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n,* 409 Ill. App. 3d 943, 948 (2011). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." *Int'l Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. *Schroeder v. Ill. Workers' Comp. Comm'n*, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

The Petitioner current condition of ill-being is related to the injury of August 30, 2016. The Arbitrator finds Dr. Gornet's testimony to be more credible than Dr. Petkovich for a number of reasons. First, Dr. Gornet still has an active surgical practice and is the Petitioner's treating physician. The Arbitrator also places more weight on Dr. Gornet's testimony as he specifically reviewed the chiropractic records precededing the date of accident, and noted the Petitioner was improving and that the Petitioner's MRI findings after the accident, particularly at C5-C6 were worse following the accident. Petitioner gave clear and convincing testimony that he felt a fundamental change in his physical condition following the accident that continued to the date of trial. Further, Petitioner's credible testimony that he is still symptomatic a year and half after the accident is not consistent with Dr. Petkovich's diagnosis of a cervical contusion.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES? THE ARBITRATOR FINDS:

These bills were both reasonable and necessary for Petitioner's medical care. These bills are awarded pursuant to the fee schedule:

Dr. Gornet: $694.90
Dr. Paletta: $487.00
Multicare Specialists: $157.50
CT Partners of Chesterfield: $5,046.12
The Orthopedic Center of St. Louis: $14,389.46
Orthopedic Ambulatory Surgery Center: $1,426.09

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE? THE ARBITRATOR FINDS:

Dr. Gornet's two-level proposed disc replacement at C5-C6 and C6-C7 is reasonable and necessary for Petitioner's condition. The Petitioner is awarded the surgery proposed by Dr. Gornet.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven W. Davis,

Petitioner,

vs.

NO. 18WC 21909

Continental Tire, The Americas, LLC.

20IWCC0604

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is hereby affirmed and adopted.

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

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

20IWCC0604

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 14 2020
SJM/sj
o-8/26/2020
44

Stephen J. Mathis

D. Douglas McCarthy

Douglas D. McCarthy

SPECIAL CONCURRENCE

I concur with the determination that Petitioner's permanent disability is properly measured under Section 8(d)2 of the Act. Unlike the Majority, however, I do not believe our deliberative burden is met simply stating "The [Commission] concludes Petitioner is not entitled to a wage differential award under Section 8(d)1 of the Act" followed by three sentences in support of this conclusion. *Arbitration Decision*, p. 6-7. Rather, I believe a detailed analysis is necessary to comply with the mandates of the Act.

Petitioner alleges entitlement to benefits pursuant to Section 8(d)1 of the Act. Section 8(d)1 provides an impaired worker is entitled to a wage differential award when he is (1) "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." *820 ILCS 305/8(d)1* (West 2013). Further, absent a waiver, Section 8(d)1 mandates an award of such benefits if Petitioner provides the necessary proof. *Gallianetti v. Industrial Commission*, 315 Ill. App. 3d 721, 729, 734 N.E.2d 482 (2000).

The Majority appears to find Petitioner has met his burden as it relates to the first element finding "While Petitioner is not able to work the job he ~~had~~ at the time he sustained the accident, Respondent provided Petitioner with a job which conformed to his restrictions and paid him at the same rate of pay he would have made." *Arbitration Decision*, p. 7. I disagree. I find Petitioner failed to offer sufficient proof that he has lost access to his ~~usual~~ and customary line of employment.

At the time of his accident, Petitioner was employed as mixer operator fabricating tires. T. 16. Following his injury, Petitioner was unable to return to work as mixer operator due to his restrictions; instead Respondent provided him a job as a forklift operator. T. 24. While this seemingly would support a finding as to the first element, a close review of the evidence-leads to the opposite conclusion.

The medical records from Dr. Kovalsky, Petitioner's treating physician, are replete with references to symptom magnification and positive Waddell findings. PX3. Dr. Kovalsky conceded as much during his evidence deposition. PX1, p. 34. Moreover, the Functional Capacity Evaluation (FCE) performed on April 12, 2016 was invalid; specifically, the evaluator documented the following:

> Inconsistent Performance/Unacceptable Effort indicates the client's perceived limitations and return to work confidence are markedly affecting symptom expression, consistency of effort, reliability of pain, and quality of effort. The client could have performed at markedly higher levels than willing during musculoskeletal and functional testing. Behavioral factors are affecting evaluation results to such a degree the evaluator cannot identify the client's true musculoskeletal status, project full-time work tasks and/or true impairment. PX3.

Further, Dr. Kovalsky testified Petitioner's increased restrictions were due to his age and not his injury. PX1, p. 38. Taken as a whole, there is no way in which to reliably determine if Petitioner is in need of work restrictions, and assuming so, the level of the restrictions. Therefore, I find Petitioner failed to provide sufficient credible evidence to establish he has lost access to his usual and customary line of employment.

Even assuming *arguendo* Petitioner is able to establish the first element, Petitioner failed to prove the second element- a diminution of his earnings, either actual or potential. As stated above, Petitioner's symptom magnification, unreliable performance at his FCE, and the restrictions being age related call into question his work abilities, and therefore, his true earning potential. More importantly, Respondent provided a bona fide job to Petitioner, a forklift operator wherein Petitioner earned his same pre-injury wages. Petitioner performed this job for over a year until his resignation on August 9, 2017. T. 34.

Certainly, Mr. Hammond, Petitioner's vocational expert, testified Petitioner's earning potential was adversely affected by his injury. PX2, p. 34. Significantly, though, Mr. Hammond's opinion is predicated on Petitioner's invalid FCE as well as Petitioner's significant medication regimen as limiting factors in Petitioner's employability. PX2, p. 27. As Dr. Boutwell credibly testified, Petitioner's ongoing use of narcotic medication is neither reasonable nor necessary. RX3, p. 20. Dr. Boutwell offered Petitioner an alternative treatment plan in order to wean Petitioner from his significant opioid usage which Petitioner declined. T. 22. It is Petitioner's choice to continue an unreasonable treatment regime that is negatively impacting his earning potential, not his low back injury.

Lastly, Petitioner is capable of performing the duties of a commercial truck driver as recommended by Dr. Kovalsky. PX1, p. 45-46. Petitioner conceded Dr. Kovalsky made such a recommendation, and he declined to pursue this employment opportunity. T. 57. As such, I find Petitioner failed to prove he suffered a loss in his earning capacity due to his accident.

For the above stated reasons, I concur with the Majority's decision to award 35% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAVIS, STEVEN W
Employee/Petitioner

Case# **18WC021909**

CONTINENTAL TIRE THE AMERICAS LLC
Employer/Respondent

20IWCC0604

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5274 HASSAKIS & HASSAKIS PC
JAMES M RUPPERT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

20IWCC0604

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steven W. Davis
Employee/Petitioner

v.

Continental Tire, The Americas, LLC
Employer/Respondent

Case # 18 WC 21909

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on December 4, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On July 13, 2014, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $43,371.64; the average weekly wage was $834.07.

On the date of accident, Petitioner was 37 years of age, married with 1 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator has determined that the appropriate charges are through September 9, 2016.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $46,540.92 for other benefits, for a total credit of $46,540.92. The parties stipulated the other benefits was an advance on payment of permanency.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $500.44 per week for 175 weeks because the injury sustained caused the 35% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator

January 27, 2020
Date

JAN 28 2020

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on July 13, 2014. According to the Application, Petitioner was "Injured in the course of work" and sustained an injury to his "Back and other body parts" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related accident on July 13, 2014; however, Respondent disputed liability for medical services provided to Petitioner after September 9, 2016, on the basis of causality and reasonableness/necessity (Arbitrator's Exhibit 1).

Petitioner alleged he was entitled to a wage differential award as provided in Section 8(d)1 of the Act. In that regard, Petitioner and Respondent stipulated Petitioner would have had an average weekly wage of $886.80 at the time of trial if he had continued to work for Respondent. Further, Petitioner and Respondent stipulated temporary total disability benefits had been paid in full and Respondent had paid Petitioner $46,540.92 for permanency, for which Respondent was entitled to a credit (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a mixer operator. On July 13, 2014, while lifting a bag of rubber, Petitioner sustained an injury to his low back. At the time of the accident Petitioner had worked for Respondent for approximately five years. Prior to working for Respondent, Petitioner worked as a janitor, route driver and as an assistant manager at K Mart. Petitioner had a GED and one year of college.

Following the accident, Petitioner sought treatment from Dr. Don Kovalsky, an orthopedic surgeon. Dr. Kovalsky initially evaluated Petitioner on August 14, 2014. At that time, Dr. Kovalsky reviewed an MRI which was performed on August 5, 2014 (no medical records were submitted into evidence regarding same). He opined it was of "very poor quality," but revealed abnormalities at L4-L5 and L5-S1. He opined Petitioner had right SI joint dysfunction and possible right lumbar radiculopathy. He prescribed medication and ordered physical therapy (Petitioner's Exhibit 3).

Dr. Kovalsky continued to treat Petitioner in September/October, 2014. He ordered a new MRI (Petitioner's Exhibit 3).

The MRI was performed on November 4, 2014. According to the radiologist, the MRI revealed an annular bulge at L4-L5 and a right transforaminal disc herniation at L5-S1 (Petitioner's Exhibit 3).

Dr. Kovalsky saw Petitioner on December 5, 2014, and reviewed the MRI. His interpretation of it was consistent with that of the radiologist. At that time, Dr. Kovalsky recommended Petitioner undergo surgery consisting of a discectomy and fusion at L5-S1 and a discectomy and disc replacement at L4-L5 (Petitioner's Exhibit 3).

Dr. Kovalsky subsequently performed surgery on June 23, 2015. The procedure consisted of a discectomy and fusion at L5-S1 and discectomy and disc replacement at L4-L5 (Petitioner's Exhibit 3).

Following surgery, Dr. Kovalsky ordered physical therapy and prescribed medication. When Dr. Kovalsky saw Petitioner on December 9, 2015, he noted Petitioner's range of motion was limited and there were Waddell's signs indicative of symptom magnification or psychological issues affecting Petitioner's perception of pain. Petitioner was working light duty, but complained he was worse than he was prior to undergoing surgery. Dr. Kovalsky authorized Petitioner to be off work, ordered additional physical therapy and prescribed hydrocodone, tramadol, and Cymbalta (Petitioner's Exhibit 3).

Dr. Kovalsky saw Petitioner on January 13, 2016. At that time, Petitioner advised his pain symptoms increased with physical therapy, but improved with rest. Petitioner stated he was not progressing. On examination, Petitioner had a normal gait and some axial back pain on the right and was able to forward flex to where his fingertips were about one inch off of the floor. Dr. Kovalsky continued to prescribe hydrocodone and tramadol (Petitioner's Exhibit 3).

Dr. Kovalsky again saw Petitioner on February 19, 2016. Petitioner continued to complain of axial back pain; however, Dr. Kovalsky opined Petitioner had hit a plateau in physical therapy. He ordered a Functional Capacity Evaluation (FCE) (Petitioner's Exhibit 3).

The FCE was performed on April 12, 2016. The examiner opined Petitioner could function at the medium demand level, but likely could have performed at a modestly higher level. It was noted Petitioner's frequent lifts were nearly what he lifted as his occasional/maximum. Petitioner was able to handle 25 to 30 pounds frequently and pushing/pulling greater than 50 pounds. The examiner noted "Behavioral factors are affecting evaluation results to such a degree the evaluator cannot identify the client's true musculoskeletal status, project full time work tasks and/or true impairment." (Petitioner's Exhibit 3).

When examined during the FCE, Petitioner demonstrated a different range of motion than what was noted and Dr. Kovalsky's most recent report. Petitioner's range of motion was "severely guarded" and Petitioner stated Dr. Kovalsky was lying (Petitioner's Exhibit 3).

Dr. Kovalsky examined Petitioner on April 12, 2016, and he reviewed the FCE report. He noted Petitioner exhibited some self limiting behavior so the FCE was an under estimation of Petitioner's true physical capabilities. Dr. Kovalsky imposed permanent restrictions of 30 pounds frequent lifting and 50 pounds occasional lifting. He continued to prescribe hydrocodone and tramadol; however, he noted that once Petitioner had returned to work, he would start to wean him off narcotics (Petitioner's Exhibit 3).

Respondent accommodated the permanent restrictions imposed by Dr. Kovalsky and Petitioner was able to return to work. When Petitioner returned to work for Respondent, his primary job was driving a forklift. At trial, Petitioner testified he was unable to change the fuel tank because of its weight or pick up rubber that was dropped. When that occurred, Petitioner was able to get other employees to help him. Respondent paid Petitioner $20.80 an hour during that time.

Dr. Kovalsky saw Petitioner on July 21, 2016. Petitioner had returned to work, but advised he continued to take hydrocodone before and after he went to work. Petitioner expressed concerns

about becoming drug dependent; however, Dr. Kovalsky noted that Petitioner taking three or four hydrocodone per day should not cause him to become dependent. He noted tramadol was not a drug which caused addiction/dependence (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Kaylea Boutwell, a pain management specialist, on September 9, 2016. In connection with her examination of Petitioner, Dr. Boutwell reviewed medical records provided to her by Respondent. Petitioner complained of low back pain which improved with medication, but only "sometimes." Dr. Boutwell's findings on examination were normal and she opined Petitioner's continued use of hydrocodone and tramadol was not appropriate and Petitioner needed to be weaned off of them. She recommended a course of treatment for Petitioner to get off of narcotic medications (Respondent's Exhibit 3; Deposition Exhibit 1).

Dr. Kovalsky saw Petitioner on October 13, 2016, and reviewed Dr. Boutwell's report. Dr. Kovalsky opined Petitioner was not affected mentally by the medications and if he diminished Petitioner's pain medications, Petitioner would not be able to work on a regular basis. He continued to prescribe hydrocodone and tramadol (Petitioner's Exhibit 3).

On November 22, 2016, Respondent sent Petitioner a letter attaching a copy of Dr. Boutwell's report of September 9, 2016. Respondent offered to authorize the treatment plan recommended by Dr. Boutwell (Respondent's Exhibit 2).

Dr. Kovalsky saw Petitioner on February 23, 2017, and Petitioner's symptoms remained unchanged. Dr. Kovalsky reaffirmed Petitioner's permanent restrictions and continued his medications (Petitioner's Exhibit 3).

Dr. Kovalsky again saw Petitioner on May 18, 2017. At that time, Petitioner had some axial back pain which Dr. Kovalsky thought was because of facet arthritis L3-L4. He opined Petitioner was at MMI and noted Petitioner would not need any further surgery or treatment. He continued to prescribe hydrocodone (Petitioner's Exhibit 3).

On August 9, 2017, Petitioner signed a resignation form. At trial, Petitioner testified the resignation was part of a settlement of his workers' compensation case, but the settlement was never finalized (Respondent's Exhibit 1). Petitioner never attempted to return to work for Respondent.

Dr. Kovalsky saw Petitioner on August 17, 2017. His findings on examination were essentially the same as they were previously. He continued Petitioner's work restrictions and renewed the prescription for hydrocodone (Petitioner's Exhibit 3).

Petitioner continued to be seen by Dr. Kovalsky who maintained his work restrictions and prescriptions for pain medication. When Dr. Kovalsky saw Petitioner on February 1, 2018, he recommended Petitioner obtain a commercial drivers' license and opined Petitioner would be able to perform such a job without difficulty (Petitioner's Exhibit 3). At trial, Petitioner testified he did not attempt to obtain a commercial drivers' license.

On April 17, 2018, Dr. Kovalsky modified the work restrictions to no lifting over 30 pounds and no repetitive bending. When Dr. Kovalsky saw Petitioner on May 24, 2018, he noted Petitioner exhibited symptom magnification, but continued to prescribe hydrocodone (Petitioner's Exhibit 3).

On August 30, 2018, Respondent's counsel wrote Petitioner's counsel a letter and attached a copy of Dr. Boutwell's report of September 9, 2016. The correspondence referred to the fact Respondent had sent Petitioner a copy of Dr. Boutwell's report prior to his representation and had tendered an offer for Petitioner to undergo a weaning program. Respondent's counsel again tendered the offer to Petitioner's counsel at that time (Respondent's Exhibit 2).

Dr. Kovalsky saw Petitioner on February 13, 2019, and again noted Petitioner had a problem with symptom magnification. Dr. Kovalsky continued Petitioner's work restrictions and medication (Petitioner's Exhibit 3).

Again, at the direction of Respondent, Dr. Boutwell examined Petitioner on March 12, 2019. In connection with her examination of Petitioner, Dr. Boutwell reviewed medical records for treatment Petitioner received subsequent to her prior examination. At that time, Petitioner advised the medication did not seem to be working anymore and he had received no education regarding the ongoing use of narcotics. Dr. Boutwell opined Petitioner had become physiologically dependent upon the medications and their use was medically unreasonable and unnecessary. She renewed her recommendation that Petitioner participate in a weaning program to cease the use of narcotic medication (Respondent's Exhibit 3; Deposition Exhibit 1).

On April 10, 2019, Respondent's counsel sent Petitioner's counsel a copy of Dr. Boutwell's report of March 12, 2019. Again, an offer was tendered by Respondent's counsel for Petitioner to be treated by Dr. Boutwell (Respondent's Exhibit 2).

At trial, Petitioner testified he declined to treat with Dr. Boutwell or any pain management physician to wean off the use of the narcotic medications. Petitioner stated he did not trust or feel comfortable with Dr. Boutwell and her recommendations.

Petitioner has continued to follow up with Dr. Kovalsky or a physician assistant in his office. He was last seen there on November 8, 2019, and continues on various medications (Petitioner's Exhibit 3).

Dr. Boutwell was deposed on May 15, 2019, and her deposition testimony was received into evidence at trial. On direct examination, Dr. Boutwell's testimony was consistent with her medical reports and she reaffirmed the opinions contained therein. Specifically, Dr. Boutwell stated Petitioner's use of hydrocodone and tramadol was unreasonable and unnecessary. She stated the use of opiates should be for the lowest possible dose and for the shortest duration of time (Respondent's Exhibit 3; pp 14, 31-33).

Dr. Kovalsky was deposed on November 20, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kovalsky's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. When questioned about his

continued prescription of medication, Dr. Kovalsky noted Petitioner had a low pain threshold. Therefore, Dr. Kovalsky has continued to prescribe medication so that Petitioner can continue to work and function. He stated he did not observe Petitioner acting sedated or exhibiting any mental side effects (Petitioner's Exhibit 1; pp 22-26).

On cross-examination, Dr. Kovalsky agreed the L5-S1 fusion was solid and the disc replacement at L4-L5 was in good position. Further, he opined Petitioner's current complaints were because of arthritis at L3-L4 and facet arthritis at L4-L5, and not the work accident of July 13, 2014 (Petitioner's Exhibit 1; pp 43-44).

At the direction of his attorney, Petitioner was evaluated by Bob Hammond, a vocational rehabilitation/employment expert. Hammond initially saw Petitioner on August 2, 2018. He opined Petitioner could find work in retail management, but it would be at the lower end of the pay scale because of Petitioner's lack of education (Petitioner's Exhibit 2; Deposition Exhibit 2).

At the direction of Respondent, Petitioner was evaluated by Liala Slaise, a vocational rehabilitation/employment expert on June 12, 2019. She opined Petitioner could earn in the range of $13.00 to $26.21 per hour (Respondent's Exhibit 4; Deposition Exhibit 2).

At trial, Petitioner testified he obtained a job at Hibbett Sports. He worked as an assistant manager and earned $10.00 an hour.

Bob Hammond was deposed on September 18, 2019, and his deposition testimony was received into evidence at trial. In regard to Petitioner's job at Hibbett Sports, Hammond testified Petitioner's pay was reasonable given Petitioner's training, education, work history and restrictions. He stated Petitioner was precluded from returning to work for Respondent and driving a forklift because of the physical restrictions and use of narcotics. He opined Petitioner had sustained an impairment of earning secondary to the restrictions (Petitioner's Exhibit 2; pp 30-40).

On cross-examination, Hammond agreed there was no evidence Respondent forced Petitioner to work outside of his restrictions and if Petitioner had continued to be employed by Respondent, he would be earning more than what he was earning at Hibbett Sports. He agreed Respondent made an accommodation for Petitioner by providing him with the forklift position (Petitioner's Exhibit 2; pp 41-46).

Liala Slaise was deposed on September 19, 2019, and her deposition testimony was received into evidence at trial. Slaise's testimony was consistent with her report and she reaffirmed the opinions contained therein. Further, Slaise stated Petitioner's medication did not necessarily preclude him from performing the forklift position and, if Petitioner had remained employed by Respondent, he would be earning more than what he was earning at Hibbett Sports (Respondent's Exhibit 2; pp 17-19, 23-24).

Petitioner testified he continues to take the narcotic medication because it allows him to work and without it, the pain would be too much. He stated he is dependent upon the medications

because they allow him to work, sleep and get through everyday life. Petitioner still has low back pain with radiation down the right leg.

Shortly before the trial, Petitioner left the employment of Hibbett Sports and obtained a job at Dunham Sporting Goods. He is presently making $10.00 an hour there as well.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is, in part, causally related to the accident of July 13, 2014.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on July 13, 2014, and the disc replacement and fusion surgery performed on June 23, 2015, was causally related to same.

Petitioner continued to have low back symptoms which Dr. Kovalsky subsequently related to arthritis at L3-L4 and facet arthritis at L4-L5 and not the accident of July 13, 2014.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner from July 13, 2014, through September 9, 2016, was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith. Respondent is not liable for medical services, including prescription medication, provided to Petitioner from September 9, 2016, and thereafter.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds Petitioner's continued use of hydrocodone and tramadol is medically unreasonable and unnecessary. The Arbitrator finds the opinion of Dr. Boutwell, a pain management physician, to be more persuasive than that of Dr. Kovalsky. Further, the Arbitrator notes Respondent offered, on more than one occasion, to provide treatment to Petitioner to wean him off the use of narcotic medication, but Petitioner refused same.

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

The Arbitrator concludes Petitioner is not entitled to a wage differential award under Section 8(d)1 of the Act.

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 35% loss of use of the person as a whole.

In support of these conclusions the Arbitrator notes the following:

While Petitioner was not able to return to work the job he had at the time he sustained the accident, Respondent provided Petitioner with a job which conformed to his restrictions and paid him at the same rate of pay he would have made.

No physician ever restricted Petitioner from working as a forklift driver. Further, Petitioner voluntarily resigned his employment with Respondent.

Neither Petitioner not Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked for Respondent is a mixer operator at the time of the accident and subsequently as a forklift driver. At trial, Petitioner was working for sporting goods store. The Arbitrator was not persuaded that Petitioner was precluded from continuing to work for Respondent as a forklift driver. The Arbitrator gives this factor minimal weight.

Petitioner was 37 years old at the time of the accident and will have to live with the effects of this injury for the remainder of his working and natural life. The Arbitrator gives this factor moderate weight.

Petitioner voluntarily resigned from a position in which he earned essentially the same amount as what he earned at the time of the accident. Although Petitioner presently earns substantially less than what he earned while employed by Respondent, the Arbitrator is not persuaded that Petitioner has a decreased earning capacity. The Arbitrator gives this factor no weight.

Petitioner's ongoing complaints are only corroborated, in part, by the medical treatment records. Although Petitioner underwent surgery consisting of fusion at L5-S1 and a disc replacement at L4-L5, the medical records have found instances of Waddell's signs, symptom magnification and the restrictions indicated in the FCE may not be valid. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jamie S. Mendoza,

Petitioner,

20IWCC0605

vs. No. 15 WC 38605

American Comfort One Hour Heating & Air Conditioning,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner, an HVAC service technician, testified that while servicing a customer's air conditioner on May 28, 2015, he tripped over a board and struck his left hand on a gas meter. Petitioner described the injury: "[M]y middle finger on my left hand came all the way back and my hand instantly swelled." Petitioner felt intense pain in the left left hand and wrist. Petitioner denied prior problems with his left hand or wrist. Petitioner reported the accident, and Respondent sent him to Alexian Brothers Immediate Care. Petitioner treated at Alexian Brothers and underwent physical therapy through August 12, 2015. Petitioner's symptoms persisted, and he was referred to Dr. Sam Biafora, with whom he began treating on August 19, 2015.

The medical records from Dr. Biafora, a hand and upper extremity surgeon, show that initially he diagnosed tenosynovitis.

On October 27, 2015, Dr. Craig Phillips, a hand and upper extremity surgeon, examined Petitioner at Respondent's request. Dr. Phillips diagnosed flexor tenosynovitis of the left middle finger and recommended surgery.

On December 7, 2015, Dr. Biafora performed a left middle finger A1 pulley release. Postoperatively, Petitioner complained of pain in the hand. During an initial physical therapy evaluation, Petitioner complained of "shooting sharp pain in left MF and palm, with numbness on pad of finger and end of finger." Petitioner followed up with Dr. Biafora monthly, continuing to complain of pain and sometimes swelling. On March 15, 2016, Dr. Biafora ordered an MRI. On April 3, 2016, Dr. Biafora reviewed the MRI and opined Petitioner's complaints were "without clear etiology." Petitioner requested a second opinion, and Dr. Biafora referred him to Dr. Taizoon Baxamusa.

The medical records from Dr. Baxamusa show that on April 12, 2016, Petitioner presented for a second opinion. Physical examination findings were as follows: "He does have some mild hyperhidrosis and sweatiness in the palm, but there does not appear to be any asymmetric discoloration. He has some mild crepitus with range of motion and some discomfort over the left hand with some mild asymmetrical swelling in the left hand compared to the right. There is no instability at the MCP joint and there is no evidence of active triggering, but there is some faint crepitus. He is able to flex and extend with some discomfort and his FDP, FDS, and EDC are all intact with no gross evidence of bowstringing. Fingers are warm and well perfused." Dr. Baxamusa reviewed the MRI, agreeing with Dr. Biafora that a minor abnormality within the flexor tendon would not explain the symptoms. Dr. Baxamusa suspected CRPS.

On April 26, 2016, Petitioner complained to Dr. Biafora of continued and nighttime pain. Dr. Biafora disagreed with Dr. Baxamusa that Petitioner showed signs of CRPS. Dr. Biafora performed a steroid injection into the surgical site. On May 19, 2016, Petitioner reported no improvement from the injection. Dr. Biafora stated: "[I]t is possible he sustained a digital nerve neurapraxia at the time of the injury causing his symptoms. He does not have typically presenting symptoms for CRPS." Dr. Biafora referred Petitioner to Dr. Joseph Belmonte, a pain medicine specialist.

The medical records from Dr. Belmonte show that on June 17, 2016, Dr. Belmonte opined Petitioner did not suffer from CRPS. Rather, Dr. Belmonte thought Petitioner's symptoms could be indicative of carpal tunnel syndrome and recommended electrodiagnostic studies. Dr. Biafora noted that electrodiagnostic studies indicated carpal tunnel syndrome. Regarding causation, Dr. Biafora opined: "It is possible the median nerve was also involved in the injury as the finger and hand were forcefully hyper extended."

On August 12, 2016, Dr. Phillips reexamined Petitioner, stating: "[The claimant's] examination is not typical or concordant for carpal tunnel syndrome. His only provocative test was a Tinel over the carpal tunnel, which is weakly sensitive and specific for the diagnosis. He displayed multiple non-organic non-concordant findings on examination. His nerve studies, however, displayed moderately severe carpal tunnel syndrome. *** It is possible that the injury caused the flexor tendons to stretch causing a trigger finger in the left middle finger, which has ultimately caused secondary carpal tunnel syndrome." Dr. Phillips recommended a carpal tunnel release.

On September 30, 2016, Dr. Biafora performed the carpal tunnel release. Postoperatively, Petitioner complained of pain and swelling to Dr. Biafora and in physical therapy. Dr. Biafora discontinued physical therapy because of the complaints. On December 14, 2016, Dr. Biafora felt Petitioner reported greater pain than Dr. Biafora would typically anticipate. Dr. Biafora again referred Petitioner to Dr. Belmonte. Dr. Belmonte prescribed pain medication. On January 17, 2017, Dr.

20IWCC0605

Biafora opined Petitioner's complaints and findings were consistent with median neuritis at the wrist/carpal tunnel syndrome.

On February 13, 2017, Dr. Phillips reexamined Petitioner. On physical examination of the left hand, Dr. Phillips found signs of symptom magnification, no trophic changes, and normal hair and nail growth. Dr. Phillips did note increased sweating throughout the hand. Dr. Phillips interpreted Petitioner's complaints of pain and sensitivity as symptom magnification. With regard to the right hand, Dr. Phillips found asymptomatic flexor tenosynovitis of the index finger, increased sweating (but less than on the left), and subjective complaints of pain and numbness. Dr. Phillips concluded: "At the present time, I believe that [the claimant] had significant symptom magnification on both sides. At this juncture, while his physical examination does not point towards a neuroma/neuritis of the palmar cutaneous branch of his median nerve, I feel this could be excluded with a diagnostic and potentially therapeutic injection of lidocaine and steroids around the nerve proximally or by doing an ultrasound." Dr. Phillips also recommended electrodiagnostic studies on the right side, opining that a right carpal tunnel syndrome would be "clearly unrelated to his injury or any work activities."

On February 24, 2017, Dr. Belmonte stated: "[The patient] still does not meet the criteria for a diagnosis of CRPS, despite noticeable sweating of the left palm and nerve pain. He may be suffering a median neuritis and may benefit from a median nerve block should symptoms continue." On March 19, 2017, Petitioner reported to Dr. Biafora the pain spread to the distal forearm. Dr. Biafora recommended an ultrasound to rule out a neuroma. On April 2, 2017, Dr. Biafora noted the ultrasound, which was supposed to focus on the palmar cutaneous branch of the median nerve, did not visualize that area. On April 6, 2017, Dr. Belmonte performed a median nerve block at the left wrist. On April 12, 2017, Petitioner reported worsened pain after the procedure. Dr. Belmonte recommended against further interventional procedures. On April 18, 2017, Petitioner reported to Dr. Biafora increased pain after the injection. Dr. Biafora believed the symptoms would improve with time and had nothing else to offer. On June 1, 2017, Petitioner reported no improvement. Dr. Biafora noted no dystrophy or abnormal hair pattern. Dr. Biafora reiterated his opinion that Petitioner did not have CRPS and discharged Petitioner from care to return to work full duty.

In the meantime, on April 21, 2017, Petitioner consulted Dr. Kiran Chekka at Premier Pain & Spine. Petitioner described chronic swelling in the left hand and fingers, increased nail growth, pain in the nail beds, "symptomatology consistent with diffuse hyperalgia throughout the hand and digits and allodynia particularly at the fingertips. He reports symptoms consistent with chronic and constant hyperhidrosis in the left hand." Physical examination was as follows: "All five digits show very restricted range of motion. He clearly has more hair throughout his left forearm than he does have on his right forearm. *** His left palm is extremely sweaty and he has no sweats in his right palm and his right palm is dry. His all five digits are swollen, erythematous and non-pitting, but definitely has circumference markedly larger than the digits on the right side. On exam, he does have true allodynia to the nail bed in the fingertips and is hyperalgia and patchy non-dermatomal distributions diffusely throughout the left hand. He does have subtle color different presently between the right and left hand and the left hand is much warmer to touch than the right hand." Dr. Chekka diagnosed CRPS, noting that Petitioner met "each and every single criteria for the diagnosis of [CRPS] with regards to Budapest Criteria in all four categories and with both signs and symptoms making the diagnosis quite concrete."

Dr. Chekka performed left stellate ganglion blocks on May 19, June 2 and June 16, 2017. Petitioner continued to be severely symptomatic. On June 30, 2017, Dr. Chekka recommended a trial

spinal cord stimulator. On July 27, 2017, Petitioner complained of worsening depression and anxiety. Dr. Chekka referred Petitioner to a psychiatrist for management of his mental condition, as well as preoperative clearance for the spinal cord stimulator. After Dr. Chekka left the practice, Drs. Amish and Arpan Patel took over Petitioner's care. Drs. Patel continued to note severe, debilitating pain and continued to recommend a spinal cord stimulator.

The records from Dr. Linda Bedsole, a licensed clinical psychologist, show ongoing treatment since August 9, 2017. Dr. Bedsole diagnosed severe depression and anxiety secondary to CRPS, and provided approximately weekly psychotherapy. Dr. Bedsole cleared Petitioner to receive a trial spinal cord stimulator. Petitioner testified that he is also treating with a psychiatrist, Dr. Gorman, who prescribes medication. Dr. Gorman's records are not in evidence.

On July 11, 2018, Petitioner began treating with Dr. Thomas Poepping, an orthopedic surgeon, for symptoms in the right hand. Dr. Poepping noted: "His left arm has been completely nonfunctional since [he developed CRPS] and he has been relying on his right arm for essentially all his activities of daily living. As a result, he has developed numbness and tingling into the right hand and pain at nighttime." Dr. Poepping diagnosed an overuse injury, likely carpal tunnel syndrome. Electrodiagnostic studies confirmed carpal tunnel syndrome. Dr. Poepping performed an injection and recommended occupational therapy. On November 7, 2018, Petitioner reported minimal improvement. Dr. Poepping recommended against surgery because of Petitioner's CRPS, and therefore declared him at maximum medical improvement. Petitioner last saw Dr. Poepping on June 5, 2019, complaining of persistent symptoms in the right hand and severe symptoms in the left hand and arm. "On examination of the left arm, he has severe trophic changes of the left arm with pain with any stimulus. There is moderate atrophy of the forearm musculature." Dr. Poepping continued to declare Petitioner at maximum medical improvement. With respect to the left hand and arm, Dr. Poepping stated: "The patient obviously has severe compromise of the left upper extremity due to the CRPS."

Dr. Arpan Patel, a pain medicine specialist, testified by evidence deposition on July 30, 2018. Dr. Patel testified consistently with his practice's medical records, reiterating Petitioner's diagnosis of CRPS and affirming that Petitioner definitely met all four of the Budapest Criteria. Dr. Patel opined the inciting events were the work accident and subsequent surgeries. Dr. Patel continued to recommend a spinal cord stimulator, which is a mainstay treatment for CRPS. Dr. Patel affirmed that Petitioner had received psychological clearance for the spinal cord stimulator. Dr. Patel opined that Petitioner had exhausted all other treatment options.

Dr. Richard Noren, a pain medicine specialist and Respondent's section 12 examiner, testified by evidence deposition on August 14, 2018. Dr. Noren testified that he examined Petitioner on June 29, 2017. Petitioner scored very high on the pain and disability questionnaires. On physical examination, Petitioner reported allodynia and hyperalgesia in the left hand and wrist and slightly decreased strength and range of motion in the left hand and arm. Dr. Noren also noted swelling and longer fingernails on the left. There were no visible hair changes, trophic changes, color changes or increased sweating. The temperature on the left and the right was equal. Dr. Noren opined that Petitioner "appeared to have findings of symptom magnification, that he had subjective findings of neuropathic pain, that the unusual complaint of nails growing faster on that extremity is not consistent with any medical condition, certainly no medical pain related condition." Dr. Noren concluded Petitioner was not suffering from CRPS, based on objective findings. Dr. Noren acknowledged that Petitioner's subjective complaints would meet the Budapest Criteria for CRPS. On October 29, 2017,

Dr. Noren issued an addendum report after reviewing additional medical records. Dr. Noren's opinions remained unchanged.

On December 11, 2018, Dr. Bryan Neal, a hand surgeon, examined Petitioner at Respondent's request with respect to his right hand, diagnosing: "1. Right wrist/hand pain with digital paresthesias, overall medically unexplainable, non-physiological, element of non-organic findings, suspected element of symptom magnification, suspected element of lack of full cooperative effort, with totality of all symptoms not explainable by any single musculoskeletal diagnosis, but with probable element of right-sided carpal tunnel symptomatology. 2. Current daily narcotic use with polypharmacy for chronic pain. 3. Suspected underlying biopsychosocial confounders, symptom magnification, and/or issues of secondary gain. 4. Obesity." Dr. Neal affirmed a subset of Petitioner's symptoms could be consistent with carpal tunnel syndrome, opining the right carpal tunnel syndrome would not be causally connected to the work accident or any compensatory phenomenon.

Petitioner testified that he continues to suffer from disabling symptoms of CRPS and wishes to receive a spinal cord stimulator. Petitioner showed the Arbitrator his left arm. The Arbitrator noted "a bunch of blotches" on the left arm and none on the right arm.

The Arbitrator found that Petitioner suffers from CRPS causally connected to the work accident. The Arbitrator further found the right carpal tunnel syndrome and psychological conditions are also causally connected to the accident. The Arbitrator awarded medical bills in the sum of $62,916.16 pursuant to sections 8(a) and 8.2 of the Act and subject to appropriate credit, and prospective medical care in the form of a spinal cord stimulator and associated care.

The Commission agrees with the Arbitrator regarding the diagnosis of CRPS and its causal connection to the undisputed work accident. The Commission further agrees with the Arbitrator that Petitioner's psychological/psychiatric conditions are also causally connected to the accident. The Commission disagrees with the Arbitrator regarding Petitioner's right carpal tunnel syndrome. The Commission gives greater weight to the opinions of Dr. Neal and Dr. Phillips that the right carpal tunnel syndrome would not be causally connected to the work accident or any compensatory phenomenon. Accordingly, the Commission awards causally related medical bills in evidence, subject to appropriate credit, and prospective medical care in the form of a trial spinal cord stimulator and psychological/psychiatric treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 2, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for a trial spinal cord stimulator and psychological/psychiatric treatment, pursuant to §§8(a) and 8.2 of the Act.

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

such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

OCT 14 2020

DATED:
o-09/09/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its order compelling Respondent to authorize medical treatment. As to this aspect, I dissent.

This issue was previously addressed by the Court in *Hollywoood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19.

In the recent matter of *O'Neil v. The Illinois Workers' Compensation Commission*, 2020 IL App (2d) 190427WC, the Court reaffirmed and extended its holding in *Hollywood Casino* to both penalties pursuant to Section 19(l) and attorneys' fees pursuant to Section 16 of the Act. The Court stated "Similar to *Hollywood Casino*, while Section 19(l) addresses a failure, neglect, refusal, or unreasonable delay in *payment of benefits*, the plain language of the statute contains no language authorizing an arbitrator or the Commission to assess penalties for an employer's failure, neglect, refusal, or unreasonable delay in *authorizing medical treatment*. (Emphasis in the original)." *Id.* at ¶ 22.

Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holdings in *Hollywood Casino* and *O'Neil*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

For the above stated reasons, I, respectfully, dissent.

L. Elizabeth Coppoletti

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

MENDOZA, JAMES S
Employee/Petitioner

Case# **15WC038605**

AMERICAN COMFORT ONE HOUR & HEATING & AIR CONDITIONING
Employer/Respondent

20IWCC0605

On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0009 ANESI OZMON RODIN NOVAK KOHEN
JENNIFER J C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

STATE OF ILLINOIS) 20IWCC0605
) SS
COUNTY OF DU PAGE)

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

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

Jamie S. Mendoza
Employee/Petitioner
v.
American Comfort One Hour Heating & Air Conditioning
Employer/Respondent

Case # 15 WC 38605
Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0605

FINDINGS

On the date of accident **May 28, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$50,731.72;** the average weekly wage was **$975.61.**

On the date of accident, Petitioner was **37** years of age, ***single*** with **3** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.
Respondent ***owes*** for all reasonable and necessary medical services.
Respondent shall be given a credit of **$142,287.44** for TTD and for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$142,287.44**

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

ORDER

Medical benefits

Respondent shall pay the bills totaling **$62,916.16** subject to the fee schedule and pursuant to §8 and §8.2 of the Act, with to credit to be given for any payments made by respondent directly or through the group insurance in accordance with the provisions of §8 j of the Act.

Prospective Medical benefits

Respondent shall authorize and pay for all reasonable and necessary costs of the implantation of the spinal cord stimulator, and all associated care, pursuant to the fee schedule and in accordance with §8 and §8.2 of the Act.

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

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

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

Christine M Day
Signature of Arbitrator

December 31, 2019
Date

IC ArbDec19(b) p. 2

JAN 2 - 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jaime S. Mendoza	)	20IWCC0605
Petitioner,	)	
vs.	)	**No. 15 WC 38605**
American Comfort One Hour Heating &	)	
Air Conditioning	)	
Respondent.	)	

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

This matter proceeded to hearing under the provisions of §19b/§8a in Wheaton on August 23, 2019. The parties agree that on May 28, 2015, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of in the course of his employment with respondent and that timely notice of the accident was provided. They agree that in the year predating the accident, petitioner earned $50,731.72 and his average weekly wage calculated pursuant to §10, was $975.61.

At issue in this hearing is as follows:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills
3. Whether petitioner is entitled to payment for prospective medical treatment.

STATEMENT OF FACTS

Petitioner was born on August 6, 1977. He began his employment with respondent in 2014 as a HVAC service technician; as such he uses his hands with various tools in performing his job. On May 28, 2015, he was working at a customer's house that was surrounded by bricks, rocks and boards. He tripped over a board and fell into a meter. He injured his left hand and wrist. He reported the injury to Mr. Sword. He denied prior injuries. He was working full time at the time of the accident.

On the day of the occurrence, he was seen at Alexian Brothers Hospital. He continued to receive care at Alexian Brothers Hospital. On June 18, 2015, physical therapy was order; which began on June 29, 2015. In August, 2015 the doctors at Alexian Brothers Hospital referred him to hand specialist, Dr. Biafora. He saw Dr. Biarfora in September, 2015.

On October 15, 2015 petitioner underwent a §12 exam by Dr. Craig Phillips. He had surgery on December 7, 2015. After the surgery, the physical therapist thought petitioner had CRPS. Therefore, Dr. Biafora ordered a MRI; which was done on March 25, 2016. Petitioner was then referred to Dr. Baxamusa.

Petitioner was seen by Dr. Baxamusa on April 12, 2016. Petitioner received an injection by Dr. Biafora on April 26, 2016.

On June 17, 2016, he was seen by pain management specialist, Dr. Joseph Belmonte. Dr. Belmonte referred petitioner back to Dr. Biafora, who performed a carpal tunnel release.

On November 8, 2016, petitioner reported a burning sensation to the physical therapy; physical therapy was halted. He was referred back to Dr. Belmonte.

On February 13, 2017, petitioner returned to Dr. Phillips for another §12 exam.

An ultrasound was performed on March 16, 2017.

On April 6, 2017, petitioner underwent a median nerve block. The pain got worse after the injections. Dr. Belmonte then referred petitioner to another pain specialist, Dr. Chekka, who diagnosed CRPS. Petitioner reported his fingernails [on the left hand] had grown faster than the right hand. He noted sensitivity with simply the wind blowing on his left hand, or when the cuffs of his shirt touched his left hand. He also noticed showering caused pain to the left hand. He has constant sweating of his left hand. He had no response to the ganglion blocks

He was examined by Dr. Richard Noren at respondent's request.

Petitioner was referred for psychological treatment. He was initially seen Psychologist Bedsole on August 9, 2017, and has continued under her care. He also receives treatment by psychiatrist, Dr. Julie Gorman, who prescribes medication including Amitriptyline (Elavil) and Notriptyline (Pamelor). As he has had suicidal thoughts, his medication was switched to Clonazepam (Klonopin). He denied having prior treatment or diagnosis of any psychological disorders.

Petitioner remains under the care of Dr. Patel, of Premier Pain and Spine; he last saw him on July 17, 2019. He came under Dr. Patel's care after Dr. Chekka left the practice. Dr. Patel has continued to recommend a trial of spinal cords stimulator.

Petitioner sought treatment from Dr. Poepping for complaints of right hand pain. As of June 5, 2018, Dr. Poepping determined petitioner should not have surgery for the right carpal tunnel as Dr. Poepping was afraid the CRPS would go to petitioner's right hand.

Petitioner worked light duty from May 28, 2015 to May, 2017. He been off work under doctors' direction since May, 2017.

He continues to have pain in both right and left hands. He used to be very active; now he does not like to leave the house. He is able to sleep only three to four hours a day. He drops things constantly. He takes Lyrica, Norco, Methocarbamol and Clonidine.

Alexian Brothers Medical Center (PX.1)

Petitioner was initially seen on May 28, 2015 for the work injury. The Z-rays were negative for fractures. The diagnosis was contusion of the left hand and sprain of the proximal interphalangeal joints. He was released to return to work using right hand only.

He was seen in follow-up on June 4, 2015; petitioner's hand was still very painful and swollen. He was seen again on June 11, 2015 with only slight improvement. He was seen again on June 18, 2015; occupational therapy was ordered. Petitioner was seen on July 2, 2015 and July 16, 2015; occupational therapy was continued. On August 17, 2015 petitioner was referred to Dr. Sam Biafora.

The records contain the December 7, 2015 operative report by surgery performed by Dr. Biafora for left middle finger stenosing tenosynovitis. Dr. Biafora performed a left middle finger A-1 pulley release.

ATI Physical Therapy Records (PX. 2)

Petitioner underwent occupational therapy from June 29, 2015 to October 7, 2015. He was also initially evaluated, after surgery, on December 16, 2015.

Hand to Shoulder Associates/Dr. Sam J. Biafora Records (PX.3)

Petitioner was initially seen on August 19, 2015 by Dr. Biafora, who diagnosed tenosynovitis of the left hand/wrist. Dr. Biafora. An injection into the ligament sheath was administered. Petitioner was released to return to work with restrictions.

Petitioner was seen by Dr. Biafora on September 9, 2015; surgery was discussed.

On December 7, 2015 Dr. Biafora performed left middle finger A-1 pulley release surgery for left middle finger stenosing tenosynovitis. He followed up with Dr. Biafora on December 10, 2015, December 18, 2015, January 19, 2016 and February 18, 2016.

On March 15, 2016 a MRI was ordered. The March 25, 2016 left hand MRI showed a thickening of the A1 pulley from scarring or previous surgery, partial tear of the flexor digitorum profundus, and possibly superficialis tendon at the level of the head of the proximal phalanx.

Petitioner was seen on March 29, 2016 in followed after the MRI and referred to Dr. Baxamusa.

On April 26, 2016, Dr. Biafora injected the left middle finger A1 pulley. Dr. Biafora noted petitioner had been seen by Dr. Baxamusa on April 12, 2016. Dr. Biafora was hesitant to refer petitioner to pain management as Dr. Biafora was not certain petitioner had CRPS.

On May 19, 2016, Dr. Biafora again did not believe petitioner had CRPS, but referred to Dr. Belmonte. Petitioner was seen again on May 16, 2016; he had not yet seen the pain management doctor.

On July 14, 2016, Dr. Biafora reported petitioner had been seen by the pain management doctor, who concurred with Dr. Biafora that petitioner did not have CRPS. Dr. Biafora indicated the EMG showed carpal tunnel syndrome. On August 25, 2016 surgery for the carpal tunnel syndrome was proposed.

Dr. Biafora performed left carpal tunnel release for carpal tunnel syndrome on September 30, 2016.

Petitioner was seen post-operatively by Dr. Biafora on October 4, 2016; physical therapy was ordered. Physical therapy evaluation was carried out. Petitioner to have physical therapy closer to home.

Petitioner was seen on October 11, 2016 and October 27, 2016. On December 1, 2016 Dr. Biafora referred petitioner back to Dr. Belmonte for further evaluation and treatment. He was seen again on December 29, 2016, January 17, 2017, February 28, 2017 and March 23, 2017.

An ultrasound was performed on the left median nerve on March 16, 2017.

On April 18, 2017, Dr. Biafora released petitioner from his care as he no longer had anything to offer.

The records contain a May 4, 2017 report from Dr. Belmonte wherein Dr. Belmonte stated he was referring petitioner to Dr. Kiran Chekka at Premier Pain & Spine as Dr. Belmonte did not believe petitioner would benefit for any further interventional therapy as petitioner had exacerbation of his pain after receiving an uncomplicated nerve block.

Illinois Bone & Joint/Dr. Taizoo Baxamusa Records (PX.4)

Petitioner was seen on April 12, 2016 for a second opinion at the request of Dr. Sam Biafora. Dr. Baxamusa concluded petitioner possibly had complex regional pain syndrome after the left middle finger trigger finger release. Dr. Baxamusa suggested he be referred for pain management.

Chicago Pain & Wellness Institute/Dr. Joseph Belmonte Records (PX.5)

Petitioner was seen by Dr. Belmonte on June17, 2016 as a referral by Dr. Biafora. Dr. Belmonte believed petitioner had carpal tunnel syndrome and recommended an EMG.

Petitioner was seen again on July 1, 2016 by Dr. Belmonte, who diagnosed carpal tunnel surgery on the left. He referred petitioner back to Dr. Biafora.

Petitioner returned to Dr. Belmonte on December 23, 2016 after undergoing carpal tunnel release in September, 2016 with only slight improvement. The diagnosis remained the same. Dr. Belmonte did not find any symptoms of CRPS.

He was seen again on January 13, 2017 with continued nerve pain for which Lyrica was prescribed. He was seen again on January 25, 2017.

On February 24, 217, Dr. Belmonte reported petitioner did not show signs of complex regional pain syndrome; but rather, suffering from median neuritis for which Dr. Belmonte believed he would benefit from a median nerve block.

He was seen again on March 24, 2017 with the same ongoing complaints and findings.

On April 6, 2017, Dr. Belmonte performed a left median nerve block with ultrasound of the left wrist due to left median neuropathy and neuritis.

He returned on April 12, 2017 and reported having worse pain after the injection. Dr. Belmonte did not find petitioner met the criteria for the diagnosis of complex regional pain syndrome, but rather median neuritis. Dr. Belmonte determined petitioner would not benefit from further intervention given his negative response to the injection.

Premier Pain & Spine Records (PX.6)

Petitioner was examined Dr. Kira Chekka on April 21, 2017. Dr. Chekka advised the Budapest Criteria was positive for complex diagnosed complex regional pain syndrome. Dr. Chekka refilled petitioner's Lyrica and advised petitioner to consider antidepressant medication and cannabinoids in lieu of opioids. Dr. Chekka also recommended a series of three left stellate ganglion blocks.

Petitioner was seen again on May 3, 2017; stellate ganglion was scheduled and carried out on May 19, 2017. Another ganglion stellate block was carried out on June 2, 2017 and the third was done on June 16, 2017. On June 30, 2017, Dr. Chekka noted petitioner did not receive the permanent relief expected from the three ganglion stellate blocks. Dr. Chekka recommended a trial of spinal cord nerve stimulator.

On July 27, 2017, Dr. Chekka referred petitioner to a psychiatrist for pre-surgical clearance for spinal cord stimulator as well as to treat petitioner for depression and anxiety. Dr. Chekka indicated petitioner was a candidate for a spinal cord stimulator as Dr. Chekka stated regarding petitioner's CRPS: "This is one of the most classic case of CRPS type 1 I have seen in my career."

Thereafter, beginning on August 29, 2017, petitioner was seen by Dr. Arpan Patel on a monthly basis. Dr. Patel continued to recommend implantation of a spinal cord stimulator.

On June 29, 2018, petitioner reported complaints regarding his right hand, which was consistent with right carpal tunnel syndrome and was attributable to the overuse due to the left hand injury.

G & T Orthopaedics and Sports Medicine Records (PX.7)

Petitioner was initially seen on July 11, 2018 by Dr. Thomas Poepping for right hand pain and numbness and left hand complex regional pain syndrome. Dr. Poepping's diagnosis was over use of right hand; compensating for inability to use his left hand. He was referred for an EMG.

On August 1, 2018, Dr. Poepping reported the EMG was positive for right carpal tunnel syndrome of both hands and left hand complex regional pain syndrome. An injection into the right wrist was administered. He was seen again on September 19, 2018, November 7, 2018, December 12, 2018 and June 5, 2019.

Creative Psychology, Ltd./Linda Bedsole Psy.D Records (PX.8)

The Case Notes of Linda Bedsole dated August 9, 2017, January 15, 2018 and June 4, 2019 indicate petitioner has been seen on a weekly basis beginning on August 9, 2017 for adjustment disorder with mixed anxiety and depressed mood secondary to complex regional pain syndrome. (Linda Bedsole noted on June 4, 2019 petitioner's left arm was purple, blotchy, severely painful which was spreading.)

Dr. Arpan Patel July 30, 2018 Deposition (PX.9)

Dr. Arpan Patel, board certified in anesthesia and pain medicine, was called upon to testify in behalf of petitioner.

Dr. Patel explained in considering complex regional pain syndrome, an individual should have symptoms in three of the four general categories of the Budapest Criteria to determine if the patient has complex regional pain symptoms; these categories include: sensory, motor, vasomotor and pseudomotor. An individual must have two signs at the time of the exam in two of those four categories. (13-14)

Dr. Patel found petitioner had symptoms in all four categories. Petitioner had allodynia, when the wind blew on his had causing significant pain; this is sensory. The weakness and restrictions in range of motion of the digits is the motor aspect. The increased sweating is the pseudomotor part, as well as increased nail growth. The color change is another symptom. Dr. Patel concluded petitioner met all of the criteria. (15-16)

Dr. Patel believed it was appropriate for petitioner to utilize marijuana rather than opioids. Dr. Patel determined that as petitioner did not receive relief from the blocks, the next appropriate treatment would be implantation of the spinal cord stimulator (32-33).

Dr. Patel believed had complex regional pain syndrome and that the complex regional pain syndrome was the result of the work accident of May 28, 2015 and that petitioner requires a spinal cord nerve stimulator to treat his condition.

Medical Bills (PX.10)

$2,020.00 G & T Orthopaedics/Dr. (07/11/18-12/12/2018)
$22,868.16 IWP (10/09/2017 to 05/03/2019)
$30,273.00 Premier Pain & Spine (01/11/2018-07/17/2019)
$7,755.00 Alexian Brothers (12/07/2015)
$12,228.00 Alexian Brothers (04/04/2019)
$11,805.00 Alexian Brothers (05/30/2019)

Dr. Craig Phillips October 27, 2015 Report (RX.1)

Dr. Phillips examined petitioner at respondent's request on October 16, 2015. Although Dr. Phillips believed petitioner had only minor flexor tenosynovitis of the left middle finger and showed signs of symptom magnification, he agreed he should undergo surgery for the left middle finger flexor tenosynovitis.

Dr. Craig Phillips August 12, 2016 Report (RX.2)

Dr. Phillips re-examined petitioner on July 29, 2016. Dr. Phillips agreed the treatment to date was appropriate and agreed carpal tunnel release to the left hand was reasonable and necessary.

Dr. Craig Phillips February 13, 2017 Report (RX.3)

Dr. Phillips examined the petitioner again on February 13, 2017. Dr. Phillips found the treatment to date was appropriate. He strongly discouraged petitioner from undergoing any further surgical procedures. He recommended petitioner obtain nerve conduction studies. He also recommended a diagnostic injection around the palmar cutaneous branch of the median nerve and ultrasound of the left forearm/wrist to exclude a palmar cutaneous branch of the median neuroma. Dr. Phillips' prognosis was guarded due to petitioner's perception of pain. He released petitioner to return to work with 20-pound lifting restriction with the left hand.

Dr. Bryan Neal December 11, 2018 Report (RX.4)

Dr. Bryan Neal examined petitioner on November 29, 2018 relative to petitioner's right hand. Dr. Neal, after examining the petitioner and reviewing the medical records, concluded petitioner developed right carpal tunnel syndrome when he was not working and was not related to the May 28, 2015 work accident.

Dr. Richard Noren August 14, 2018 Deposition (RX.5)

Dr. Richard Noren, board certified in anesthesia with subspecialty in pain management, testified in behalf respondent. Dr. Noren examined petitioner on June 29, 2017.

Petitioner did show signs of allodynia, which is a subjective.

Dr. Noren did not find petitioner met the Budapest Criteria for complex regional pain syndrome. He, therefore, did not find petitioner had complex regional pain syndrome.

Dr. Noren agreed all treatment to date, with the exception of the stellate ganglion blocks as petitioner did to have CRPS, was appropriate. Dr. Noren agreed the Lyrica and the limited use of opiates was appropriate. Dr. Noren's opinion regarding use of medicine marijuana was that there was no scientific basis for it use and it was culturally and politically driven.

Dr. Noren's response regarding work restrictions was that petitioner was functioning at a sedentary level and self-reporting restrictions involving use of his extremity.

Dr. Noren did not believe a spinal cord stimulator would be appropriate due to petitioner's symptom magnification noted in various medical records.

On cross-examination, Dr. Noren agreed people suffering from pain syndromes can experience subject complaints of pain. Dr. Noren agreed that at the time of his examination of petitioner on June 29, 2017 he found allodynia, hyperalgesia, decreased cool sensation in petitioner's left hand compared with the right, decrease grip strength, edema and swelling across the palm of the left hand. All of these findings are used in the Budapest Criteria in determining CRPS; however, he would not confirm petitioner had CRPS.

Dr. Noren agreed spinal cord stimulators are used in the treatment of CRPS. He did not believe it was appropriate treatment for petitioner's pain. Dr. Noren confirmed petitioner's pain was limiting petitioner's ability to use his left hand; petitioner was limited to sedentary work. He also agreed ongoing pain management with use of Norco and Lyrica was appropriate.

CONCLUSIONS OF LAW

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

The Arbitrator had the opportunity to view the petitioner's expressions and mannerisms during testimony and found his expressions of pain appeared to be sincere and believable.

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

There is no dispute petitioner suffered left middle finger stenosing tenosynovitis for which he underwent an A-1 pulley release by Dr. Biafora on December 7, 2015. There is also no dispute that petitioner had left carpal tunnel syndrome for which he underwent carpal tunnel release on September 30, 2016. Neither surgeries brought relief to petitioner.

Although the orthopedic surgeon, Dr. Biafora did not believe petitioner had CRPS, he referred petitioner to Dr. Baxamusa for a second opinion. On April 12, 2016, Dr. Baxamusa determined petitioner possibly had CRPS and referred him for pain management. On June 17, 2016 petitioner was seen by Dr. Joseph Belmonte with Chicago Pain & Wellness Institute. Dr. Belmonte believed petitioner had carpal tunnel syndrome and referred petitioner back to Dr. Biafora for surgery. After the carpal tunnel release was performed, petitioner returned to Dr. Belmonte. Dr. Belmonte performed left median nerve blocks; which brought no relief. Although Dr. Belmonte did not believe petitioner fit the criteria for CRPS, but rather had median neuritis. Dr. Belmonte referred petitioner to Dr. Chekka with Premier Pain & Spine. Dr. Chekka stated in his July 27, 2017 records: "This is one of the most classic case of CRPS type 1 I have seen in my career". He recommended a spinal cord stimulator. Dr. Patel, who took over petitioner's care from Dr. Chekka, testified petitioner had symptoms in all four general categories of the Budapest Criteria; including sensory, motor, vasomotor and pseudomotor. Dr. Patel, as did Dr. Chekka, continued to recommend a spinal cord stimulator. (Psychologist Bledsoe noted on June 4, 2019 that petitioner's left arm was purple, blotchy, severely painful and spreading.)

Based upon the foregoing, the Arbitrator finds petitioner has CRPS and that that the CRPS, for which he needs implantation of a spinal cord stimulator, was caused by the work accident of May 28, 2015.

The Arbitrator makes this finding despite the opinion of Dr. Noren, who found that, although petitioner had some findings of the Budapest Criteria, he would not confirm petitioner had CRPS. The Arbitrator finds Dr. Noren ignored these findings in concluding petitioner did not have CRPS.

The Arbitrator also finds petitioner's right hand carpal tunnel condition was the result of overuse in compensating for the inability to use his left hand due to the direct work injury. In reaching this conclusion, the Arbitrator relied on Dr. Thomas Poepping's opinion that the right hand condition resulted from compensating for the limited use of his left hand, as well as Dr. Patel's opinion, as reported on June 29, 2018, that petitioner had right carpal tunnel syndrome attributably to overuse due to the left hand injury.

The Arbitrator did not find Dr. Neal's opinion to be persuasive. Although Dr. Neal found petitioner had right carpal tunnel syndrome, he did not find it was work related as petitioner developed right carpal tunnel while off work. Dr. Neal failed to consider the fact that petitioner's condition was the result of overuse of the right hand from compensating due to the inability to use the left injured hand.

Finally, the Arbitrator, in reliance on Psychologist Bledsoe that petitioner was suffering from adjustment disorder with mixed anxiety and depressed mood secondary to CRPS, finds this condition was caused by the work accident. Respondent offered no evidence to rebut the causal connection between petitioner's psychological condition and the work accident.

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

The Arbitrator, having determined petitioner's CRPS was caused by the work accident, as well as petitioner's right hand and psychological issues, awards the following bills pursuant to the fee scheduled, as well as §8 and §8.2 of the Act:

$2,020.00 G & T Orthopaedics/Dr. (07/11/18-12/12/2018)
$22,868.16 IWP (10/09/2017 to 05/03/2019)
$30,273.00 Premier Pain & Spine (01/11/2018-07/17/2019)
$7,755.00 Alexian Brothers (12/07/2015)

Respondent to be given credit for any payment made directly or by the group insurance pursuant to §8 j.

(There were no records for the Alexian Brothers treatment for April 4, 2019 and May 30, 2019. There is no award for these claimed bills.)

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

The Arbitrator, having determined petitioner's CRPS was caused by the work accident of May 28, 2015 and that all treatment to date has failed to alleviate petitioner's pain, finds the next reasonable treatment would be implantation of the spinal cord stimulator and awards the reasonable costs of same, along with the associated care, pursuant to the fee schedule and §8 and §8.2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL HUFF,

Petitioner,

20IWCC0606

vs. NO: 18 WC 31595

TRILLIUM STAFFING,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's Decision and finds that the preponderance of the evidence supports the determination that Petitioner achieved maximum medical improvement on January 17, 2019 based upon the records of Dr. Rudowski. On that date Dr. Rudowski released Petitioner with permanent sedentary restrictions that included the use of a cane. Furthermore, the Commission finds that Petitioner is entitled to permanent total disability benefits commencing January 18, 2019.

The sole issue on review is whether the Arbitrator's award of maintenance (versus permanent total disability) commencing January 28, 2019 through July 31, 2019 was proper. Petitioner sought permanent total disability benefits commencing January 27, 2019, that being the date he was "let go" from his accommodated position with Respondent Trillium Staffing.

This is a troubling factual situation. Accident is stipulated. Causal connection is proven. Petitioner was 80 years of age on March 5, 2018 when he sustained a fall at work that required

20IWCC0606

an open reduction and internal fixation of his right hip. Petitioner's inpatient hospitalization was followed by a nursing home admission and outpatient physical therapy.

In September 2018 Petitioner was released to return to light duty, sedentary employment. At that time, he was using a 4-prong cane to ambulate which rendered him unable to lift or carry. Respondent Trillium assigned Petitioner the task of sitting in a 10 x 10 ft. room with a pad of paper copying the contents of the Yellow Pages. Petitioner dutifully reported to work and performed this demeaning task from September 25, 2018 through January 27, 2018, at which time he was dismissed by Respondent Trillium after being informed they had no further work for him. (During the period from October 5, 2018 to October 11, 2018 Petitioner received TTD benefits). Following his termination Petitioner received maintenance benefits until July 31, 2019 when Petitioner's vocational rehabilitation specialist wrote a report concluding that Petitioner was permanently and totally disabled.

The Arbitrator found that Petitioner was capable of performing restricted modified work on and after January 27, 2019. Petitioner did not request vocational rehabilitation services from Respondent. The Arbitrator found that there is no credible evidence to support a finding that Petitioner was permanently totally disabled on the basis of Dr. Rudawski's work restrictions. She further found that there was no credible evidence that Petitioner was an odd-lot permanent total during this period.

Petitioner graduated from high school in the mid 1950's. His entire 50- year career was spent as a meat-cutter/manager for a local store. When the store closed Petitioner sought employment with Respondent staffing company and was placed in a position as a "depallet operator". This position required that Petitioner lift, carry, push and pull.

The credible evidence that supports the finding that Petitioner was an odd-lot perm total is apparent when one considers the nature of the "busywork job" Respondent created for Petitioner. There is no stable job market seeking workers to sit in a room for 8 hours a day copying the Yellow Pages. Respondent is a staffing company. It is fair to assume that if an employment position existed for Petitioner considering his age, education, and work experience that Respondent would have made an appropriate job placement in the time between September 25, 2018 and January 27, 2018.

The Court in *E.R. Moore Co. vs. Industrial Commission,* 71 Ill.2d 353 (1978) recognizes that the determination of the extent of an employee's disability is a question of fact for the Commission. The nature of Petitioner's disability, age, training, capabilities and limited work experience are to be considered in the determination as to whether a finding of permanent total disability is warranted.

Benefits for permanent total disability are hereby awarded to Petitioner commencing January 18, 2018 based upon the foregoing analysis.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 30 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

20IWCC0606

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $548.93 per week for life, commencing January 18,2019 as provided in §8(f) of the Act, for the reason that the injuries rendered Petitioner wholly and permanently incapable of work.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

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

DATED: OCT 14 2020
o: 9/9/20
SM/msb
44

Stephen Mathis

D. Douglas McCarthy

Douglas McCarthy

L Elizabeth Coppoletti

L.Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HUFF, DONALD
Employee/Petitioner

Case# **18WC031595**

20IWCC0606

TRILLIUM STAFFING
Employer/Respondent

On 11/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1551 STOKES LAW OFFICES
GARY J STOKES
200 N GILBERT
DANVILLE, IL 61832

1872 SPIEGEL & CAHILL PC
PHILLIP JOHNSON
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

20IWCC0606

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DONALD HUFF,
Employee/Petitioner

v.

TRILLIUM STAFFING,
Employer/Respondent

Case # **18** WC **031595**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **October 25, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 5, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,680.00**; the average weekly wage was $**340.00**.

On the date of accident, Petitioner was **80** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**14,911.41** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**14,911.41**.

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

ORDER

Respondent shall pay Petitioner maintenance benefits of $253.00/week for 26-2/7 weeks, commencing 1/28/19 through 7/30/19, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 30 weeks, from 3/6/18 through 9/24/18, and 11/5/18 through 11/11/18, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $548.93/week for life, commencing 7/31/19 as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Kaureen U. Lulia

Signature of Arbitrator

11/11/19
Date

NOV 20 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, an 80 year old temporary worker for respondent, which a staffing agency, that placed petitioner at Fullfill in Henning, IL, sustained an accidental injury to his right hip that arose out of and in the course of his employment by respondent on 3/5/18. Prior to working for respondent, the petitioner worked as a meat manager in Danville, Illinois where he had been employed for 50 years.

On March 5, 2018, the petitioner was working in his assignment as a "depallet" operator. His duties included cutting off a "saran wrap" like wrapping around the pallet and removing the product. Petitioner testified on March 5, 2018 while working, he cut the wrapping off the pallet and was moving the pallet to a different location. He stepped on some of the plastic wrap on the floor and fell to his right knee. Petitioner testified he could not get up. Petitioner stated that co-employees came over to assist him. After being helped up, the co-employees eventually helped the petitioner to his personal vehicle, his truck. He was helped into the vehicle and drove himself home approximately 22 miles away. Unable to exit the truck on his own, petitioner testified he drove to a neighbor's home for assistance. Petitioner testified that he was unable to put any weight on his right leg in order to exit the truck. He was assisted by the neighbors to get into his home. Due to the severity of the pain, an ambulance was called. The petitioner was taken to Hoopeston Hospital. Petitioner testified that Hoopeston Hospital is affiliated with Carle Hospital. X-rays were completed at the Hoopeston Hospital. Petitioner was diagnosed with a fracture of the right hip. Petitioner testified that prior to the fall on March 5, 2018, he had no problems with his right hip.

On the following day, March 6, 2018, after being transferred to the Carle Hospital, the petitioner completed right hip surgery. Petitioner testified that upon discharge from Carle Hospital, he could not walk and was transferred to Hoopeston for additional nursing care.

Petitioner testified subsequently, on March 31, 2018, he was transferred from the Hoopeston Nursing Facility to his home. On the date of discharge, March 31, 2018, the petitioner was required to use a walker for assistance. Petitioner testified he was taking Norco for pain. Following the release from the nursing facility at Hoopeston, the petitioner was provided home healthcare through April 24, 2018. After April 24, 2018, the petitioner began outpatient physical therapy for approximately three weeks. In May 2018, petitioner testified that he had received a steroid injection. Petitioner testified that he completed his outpatient physical therapy at the end of May 2018. Petitioner testified that on July 18, 2018, he received an injection into the right hip which provided some relief. Petitioner saw Dr. Rudawski, DO., from the outpatient care center at Carle Hospital who directed him to see Dr. Santiago, a pain management specialist. Petitioner testified that he scheduled an examination and saw Dr. Santiago on or about October 17, 2018. Petitioner testified that Dr. Santiago evaluated

and examined him, but he did not receive any treatment from Dr. Santiago since none was authorized by Respondent.

Petitioner testified that he last saw Dr. Rudowski on January 17, 2019. Dr. Rudowski released the petitioner from his care and directed that he sit mostly, and use a cane to ambulate.

At arbitration, petitioner testified that he still had hip pain, especially when lying on his side to sleep. Due to the severity of the pain, petitioner testified that he would awaken, and for the remainder of the night he would sit in his recliner chair, which allowed him the ability to sleep in a more comfortable position.

The petitioner testified as to his daily activities. Petitioner testified that each day he arises at approximately 4:00 AM. He then has coffee with his wife and gets dressed. Petitioner testified that when his wife leaves for her job, he spends most of the day sitting. Petitioner testified that he does walk, but after about 15 minutes of walking, he sits down due to the pain. Petitioner testified that his walking is limited to approximately 300 feet before he feels pain. Petitioner testified that currently he takes only over-the-counter medications. Petitioner testified that he takes medications approximately 2 to 3 times per week when he has severe pain.

Petitioner further testified that on September 25, 2018, following his restricted duty release from Dr. Rudawski, he returned to work for Trillium in Danville Illinois. Petitioner testified that he was given a position at a desk where his responsibilities the first day were to staple pamphlets. On the second day, he watched safety videos and when that was completed, he was given a Yellow Pages telephone book and a pad of paper. He was assigned the responsibility of writing down the names and addresses of businesses contained within the Yellow Pages. Petitioner testified that he continued to copy telephone books until January 27, 2019, when Respondent instructed him to stay home. Petitioner testified that since that time he has not been called back to work.

Medical Evidence

Petitioner's Exhibit 1: contain the medical records from Carle Hospital. These records indicate that the petitioner was admitted on March 5, 2018 with the history of having sustained a fall resulting in an intertrochanteric, comminuted, closed fracture of the proximal femur. The records further indicate the petitioner, on March 6, 2018, completed an open reduction and internal fixation of the fracture. X-rays completed following surgery demonstrated an intramedullary rod with interlocking screws across the inter-trochanter fracture with some improvement in alignment. Following completion of surgery and postoperative management the petitioner, was discharged from the Carle Hospital on March 11, 2018.

Petitioner's Exhibit 2: is the operative report from Carle Hospital demonstrating the surgical procedure for repair of the petitioner's right hip comminuted fracture indicating the use of the Cephlomedullary nail.

Petitioner's Exhibit 3: the radiological reports from Carle Hospital demonstrate on July 20, 2018 an x-ray examination of the petitioner's right femur, and on November 30, 2018, a bone scan.

Petitioner's Exhibit 4: medical records from Hoopeston Retirement Village Foundation. The records of this facility indicate that the petitioner was admitted for nursing care following his discharge of March 11, 2018 from the Carle Hospital. Petitioner appears to have been admitted on March 12, 2018. The admitting records from the Hoopeston facility indicate that petitioner had sustained a right femur fracture, he had completed surgery, and was admitted for follow-up skilled therapy/inpatient. The records of the Hoopeston Retirement Village document that the petitioner received managed care for the right femur fracture secondary to the open reduction and internal fixation. Petitioner's medications for the pain were managed on a daily basis. The petitioner was discharged from the Hoopeston facility on March 31, 2018.

Petitioner's Exhibit 5: the post-operative ambulatory care rendered at the Carle Hospital Trauma Center. These records indicate the history of the surgery of March 6, 2018. An evaluation of the petitioner was completed six weeks post operatively. The records document that the petitioner was not working, and he was residing in his home. It is noted the petitioner was using a "roll walker". He had no complaints of pain about the right hip on initial evaluation. It was further noted that the petitioner has horrible arthritis of the right knee which was noted to give the patient some discomfort. Imaging studies completed indicated ongoing healing about the intertrochanteric hip fracture with some indication of compression of the lag screw. The distal interlocked was in place and intact. Petitioner had bone-on-bone arthritis in the right knee. It was recommended the petitioner should continue therapy. Petitioner was scheduled for outpatient physical therapy with strengthening and conditioning. Petitioner was kept off work. Petitioner was scheduled for a six week reevaluation and reassessment. It was anticipated that the petitioner might be allowed to return to work and possibly be discharged from the clinic.

Petitioner was again seen 12 weeks post operatively on June 4, 2018. The Petitioner reported he was progressing, slightly. It was noted petitioner had finished physical therapy and was using a cane or walker depending on distance. Petitioner was walking with a mild limp and demonstrated mild soreness in the right hip. Petitioner was not released to return to work as the job required him to stand for 10 hours. It was recommended that the petitioner continue the home exercise program and strengthening to the right leg. It was further recommended that the petitioner not return to work and continue with ambulatory aids as needed. It was recommended the petitioner should return in three months for further evaluation.

On July 18, 2018, the petitioner was seen for follow-up. Petitioner was using a cane for ambulation. Petitioner had a slight limp. It was noted that the incisions were well healed and there was no notable atrophy in the right quadriceps. Petitioner was demonstrating some right groin pain with internal and external rotation of the right hip. Petitioner demonstrated tenderness over the right trochanteric bursa. Petitioner was advised that he may be suffering from some trochanteric bursitis in the hip. It was recommended that a cortisone injection might help with the inflammation and pain. On July 18, 2018, the petitioner completed a right hip injection into the right trochanteric bursa.

The petitioner was next seen six months post operatively on August 29, 2018. Petitioner stated that he was doing okay. Petitioner demonstrated some discouragement at being required to use a cane for walking. Petitioner said he tried going without it but almost falls. Petitioner reported that he walks on concrete surfaces because uneven ground caused him to be unsteady. Petitioner complained of occasional groin pain with activity. Petitioner expressed the desire to return to work but knows he will not be able to accommodate the requirements of his job, such as standing for ten hours. The petitioner reported he was compliant with the HEP as outlined.

The petitioner was advised that some patients never return to full function and the cane may be required indefinitely for ambulation, however, because the evaluation was only six months status post-surgery there was room for improvement. A prescription for Norco was written for pain and petitioner was referred to occupational medicine for further management.

Petitioner's Exhibit 6: the medical records of the Iroquois Memorial Hospital. These records cover a period of outpatient therapy between April 24, 2018 and May 17 of 2018, and document the petitioner's status post-surgery outpatient therapy.

Petitioner's Exhibit 7: the medical records of Carle Occupational Medicine, Dr. Steven Rudawski. The petitioner noted his history of the fall on March 5, 2018 and surgery on March 6, 2018. The petitioner also noted his history of chronic atrial fibrillation. It is further noted that the petitioner had an unremarkable postoperative course and completed physical therapy at the postoperative phase. Petitioner was complaining of discomfort in the right hip and groin. Petitioner demonstrated discomfort in the right hip and noted that he slept in a recliner. The records further document that the petitioner had a greater trochanteric bursa steroid injection which did not produce much alleviation of his symptoms. There was no indication that petitioner's pain radiated into the leg. There was no evidence of loss of bowel or bladder control. Petitioner indicated that he walks with a cane because he does not feel stable and he does not wish to fall again. It was noted the petitioner also had severe osteoarthritis in the right knee.

Following examination on September 4, 2018, Dr. Rudawski recommended that petitioner try Gabapentin 300 mg twice a day for neuropathic pain. Petitioner was not a candidate for nonsteroidal anti-inflammatory medications due to him taking Warfarin. It was suggested that the petitioner should return in two months. Petitioner was released to a modified duty where he can sit most of the time and uses a cane. He can do other activities at work using common sense. Dr. Rudawski goes on to state," obviously he is not going to be able to lift probably greater than 20 pounds with one hand if he has to use a cane". Follow-up visits were made with Dr. Rudawski on November 5 of 2018. Dr. Rudawski notes that the Gabapentin which petitioner took did not make him feel well. Therefore, he cannot take it and he stopped. Petitioner indicated that he has been taking Tylenol as needed. Dr. Rudawski suggested that he wanted petitioner to see Dr. Santiago, a pain management specialist. Dr. Santiago recommended that a bone scan and inter articular steroid injections in the hip and knee might be appropriate. Dr. Rudawski added that petitioner was probably going to have chronic pain post reduction and internal fixation.

The petitioner returned to Dr. Rudawski on December 6, 2018. Petitioner demonstrated chronic right hip pain status post open reduction and internal fixation with the intra-trochanteric fracture. Petitioner's hip pain was chronic postoperatively. Dr. Rudawski noted that the bone scan recommended had been completed and demonstrated a healing fracture line without any evidence of hardware loosening or sequestering elsewhere within the femur. As of December 6, 2018, the petitioner was reporting some increase in pain but the pain was mostly over the incision area and leveled at 4/10 in severity. Dr. Rudawski was reluctant to perform steroid injection due to increased risk of infection. Petitioner demonstrated no additional complaints. It was anticipated thatpPetitioner would have lifelong pain secondary to the injury and surgery. It was recommended that petitioner returned to Dr. Rudawski in a month for additional evaluation.

Petitioner was last seen by Dr. Rudawski, January 17, 2019. He notes the visit of September, 2018 and the recommendation for Gabapentin and the referral to the pain specialist Dr. Santiago. Following a discussion with the petitioner, Dr. Rudawski suggested that he had nothing else to offer the petitioner and was releasing him from care. Dr. Rudawski provided the same restrictions ordered on September 17, 2019. He suggested petitioner was going to have some disabilities as a result of his chronic pain which are going to allow him to sit mostly and to use a cane to ambulate. It was recommended that the petitioner go back to see the primary care physician for his blood pressure issues and consider processing it through his private insurance company any additional care with Dr. Santiago. As of January 17, 2019, Dr. Rudawski released the petitioner from care "since there is nothing else I can do". No additional examination was performed.

Petitioner's Exhibit 8: medical records from Christie Clinic / Dr. Santiago. The records of Dr. Santiago demonstrated a consistent history of the petitioner's injury, surgery and complaints regarding his pain in the right hip. Records of Dr. Santiago also document previous physical therapy and injections which had been administered by Dr. Rudawski. Dr. Santiago recommended the need for additional differential diagnoses to determine the etiology of the pain in the right hip and to determine whether or not there was involvement of the right knee which was severely arthritic or any loosening of the screws or possibly lumbar radiculopathy.

Petitioner's Exhibit 9: the vocational rehabilitation report prepared by Dr. Mr. David Patsavas, MA, CRC. Mr. Patsavas interviewed the petitioner and prepared a report dated July 31, 2019. The report contains the medical history. The report also documents the petitioner's subjective complaints of pain and documents petitioner's activities as reflected not only in petitioner's testimony, but also, petitioner's medical records. Mr. Patsavas also reviewed the petitioner's educational background which demonstrated petitioner had attended high school and graduated in 1956. It also documents that petitioner was not a college graduate but was an apprentice and journeyman in the meat cutters union. The documents show that petitioner was in the Army reserve and held the rank of Sergeant First Class.

Mr. Patsavas's report also documents petitioner's employment with Trillium, the respondent herein. Petitioner describes the category of work which the petitioner was doing for Trillium as a "light "category of physical demands with lifting carrying, pushing of 20 pounds occasionally and 10 pounds frequently or a negligible amount constantly. He further documents the job would include walking and standing frequently even with negligible weight. He describes the job as including pushing, pulling with the arms or leg controls. Mr. Patsavas also reviews the job description (at the time of the accident). This indicates petitioner was to fill aerosol spray cans and work as a depallet operator, unwrapping and cutting bands off materials on a pallet. He would remove the material from the pallet and place the materials on a rotating conveyor system. Mr. Patsavas described the petitioner's work at Trillium as a fast pace position and that the work would be completed on a 10 hour shift which was standing only. He further documents the job would entail a 20 minute break and a 30 minute lunch break and that the hours were from 6 AM to 4 PM. Mr. Patsavas describes the work for Trillium (at the time of the accident) as involving constant moving which it also addressed emptying the pallets, replacing the pallets and reloading a conveyor system.

Mr. Patsavas reviewed petitioner's prior employment as a meat cutter and as a meat manager. The conclusion reached by Mr. Patsavas after review of the medical records, the petitioner's educational training, petitioner's age and the functional capacity, with physical limitations as recommended by Dr. Rudawski, was that there was no stable marketplace for the petitioner based upon evidence available. Mr. Patsavas references

Dr. Rudawski's discharge of January 17, 2019, indicating petitioner was going to continue with disability and chronic pain. He referenced Dr. Rudawski's statement that petitioner would require mostly a sitting job and the utilization of the cane in order to ambulate. Based upon that those limitations, petitioner's age, education and transferrable skills Mr. Patsavas stated there would not be a viable and stable marketplace which would allow the petitioner to be capable of returning to work in an occupation that he was able to and qualified to perform. Mr. Patsavas opined that petitioner had limited sedentary type position skills and that he had no transferable skills into sedentary categories. Mr. Patsavas further suggested that even at an unskilled entry level position with the staffing agency, it would require petitioner standing in assembly-line type positions. The petitioner did not qualify for any type of clerical or computer positions as he had neither any experience nor training. His conclusion was that a viable and stable marketplace does not exist for Mr. Huff. Also, the petitioner is not a candidate for any vocational rehabilitation services.

Petitioner's Exhibit 10: Records of petitioner's family physician at Gibson Health. Petitioner received intraarticular steroid injection into right knee on May 25, 2018. Petitioner testified that the injection alleviated most of the knee pain. Subsequent visits reported the knee was stable but Petitioner continued with hip, upper thigh and groin pain.

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

It is unrebutted, based on the credible evidence that the petitioner had never sustained any injuries to his right hip prior to 3/5/18. As a result of his injury petitioner sustained a fracture of the right hip. On 5/6/18 petitioner underwent surgery that included implantation of an intra-medullary rod and interlocking screw. Post-operatively petitioner was in the hospital for about a week, followed by a stay in a rehabilitation facility until 3/31/18. After his release from the rehabilitation facility petitioner was provided home healthcare. On 4/24/18 petitioner began outpatient therapy. This therapy continued for approximately three weeks and ended on 5/17/18.

Petitioner progressed from a walker to a cane. He also has continued with chronic right hip pain for which he underwent steroid injections. Petitioner continued to follow-up with his surgeon through 8/29/18. Petitioner then treated with Dr. Rudawski for his chronic right hip pain. Dr. Rudawski placed permanent restrictions on petitioner with respect to his right hip that prevented him from returning to his regular duty job for respondent. On 12/6/18 Dr. Rudawski was of the opinion that petitioner had chronic post operative right hip pain and there was nothing more he could offer petitioner.

Petitioner had no subsequent injuries to his right hip, and there are no causal connection opinions opining that petitioner's current condition of ill-being as it relates to his right hip is not causally related to the injury on 3/5/18.

Based on the above as well as the credible evidence, the arbitrator finds the petitioner's current condition of ill-being as it relates to his right hip is causally related to the injury he sustained on 3/5/18.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

It is unrebutted that petitioner was off work from 3/6/18 through 9/24/18, a period 29 weeks. Petitioner further testified that on 9/25/18, following his restricted duty release from Dr. Rudawski, he returned to work for Trillium in Danville Illinois. Petitioner testified that he was given a position at a desk where his responsibilities the first day were to staple pamphlets. On the second day, he watched safety videos and when that was completed, he was given a Yellow Pages telephone book and a pad of paper. He was assigned the responsibility of writing down the names and addresses of businesses contained within the Yellow Pages. Petitioner testified that he continued to copy telephone books until 1/27/19, when Respondent instructed him to stay home. Petitioner testified that since that time he has not been called back to work. Respondent claims that during the period of 9/25/18 through 1/27/19 respondent was off work from 11/5/18 through 11/11/18.

The arbitrator finds it significant that petitioner was 80 years old on the date of injury, and after being released from care on 9/24/18 with permanent restrictions that prevented him from returning to his regular duty job for Fullfill, Fulfill offered petitioner a job within his permanent restrictions, and were able to accommodate him from 9/25/18 through 1/27/19, with the exception of the period 11/5/18 through 11/11/18 when respondent claims petitioner was off work and entitled to temporary total disability benefits.

After 1/27/19 respondent did not initiate any vocational rehabilitation services, and petitioner did not request and vocational rehabilitation services from respondent. As of 1/27/19, petitioner was capable of performing restricted modified duty work where he can sit most of the time and use his cane. As of that date, no doctor had determined that petitioner was medically permanently totally disabled.

It was not until 7/31/19, that petitioner's vocational rehabilitation counselor Patsavas opined that petitioner was an odd lot permanent total. Patsavas opined that based on petitioner's educational training, age, and functional capacity, with physical limitations as recommended by Dr. Rudawski, there is no stable marketplace for the petitioner, based on the evidence available. Patsavas was of the opinion that there is no viable and stable marketplace which would allow the petitioner to be capable of returning to work in an

occupation that he was able to and qualified to perform. Patsavas opined that petitioner had limited sedentary type position skills, and no transferable skills into the sedentary categories.

The arbitrator finds it significant that for the period 1/28/19 through 7/30/19, there is no credible evidence to support a finding that petitioner was permanently totally disabled, given the fact that petitioner had only been given permanent sedentary restrictions by Dr. Rudawski, and there were no other medical opinions rebutting this opinion. Additionally, there is no credible evidence to support a finding that petitioner had been found to be an odd-lot permanent total during this period. For these reasons, the arbitrator finds that from 1/28/19 through 7/30/19 petitioner had not been determined to be permanently totally disabled or an odd-lot permanent total, and was able to seek work within his restrictions.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner was temporarily totally disabled from 3/6/18 through 9/24/18, and 11/5/18 through 11/11/18, of total of 30 weeks, pursuant to Section 8(b) of the Act. Additionally, the arbitrator finds the petitioner is entitled to maintenance benefits from 1/28/19, the time he was released from the position he had that was within the restrictions placed on him by Dr. Rudawski, through 7/30/19, the date Patsavas determined that petitioner was an odd-lot permanent total, pursuant to Section 8(a) of the Act. This is a period of 26-2/7 weeks.

The arbitrator finds the petitioner is entitled to a credit of $14,911.41 for temporary total disability benefits already paid pursuant to Section 8(b) of the Act.

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

The arbitrator notes that the parties stipulate that the petitioner is currently permanently totally disabled. The dispute between the parties on this issue is whether or not the starting date of petitioner's permanent total disability is 1/28/19, or 7/31/19. Petitioner claims the start date of petitioner's permanent total disability benefits should be 1/28/19, and respondent claims it should be 7/31/19, the date petitioner was found to be an odd-lot permanent total by Patsavas.

Petitioner was released by Dr. Rudawski with permanent restrictions that allowed him to sit mostly, and use his cane. On 9/25/18 Fullfill, the company petitioner was placed at by respondent, and was working at on the date of injury, offered petitioner a job within his restrictions. Petitioner worked for Fullfill from 9/25/18 through 1/27/19. At that time, petitioner was let go by Fullfill, and respondent did not offer petitioner any other employment opportunities, and did not offer petitioner any vocational rehabilitation services. The arbitrator further finds it significant that petitioner did not request any vocational rehabilitation services, and did not

decide to hire its own vocational rehabilitation expert until May 2019, to assess petitioner's vocational possibilities.

Following his assessment, Patsavas issued his report on 7/31/19. At that time, Patsavas determined that petitioner was an odd-lot permanent total. The arbitrator finds it significant that before this date petitioner was never determined to be permanently totally disabled, and in fact had modified duty restrictions that were placed on him by Dr. Rudawski, that were still in effect.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to permanent total disability benefits, beginning 7/31/19 for life, as provided in Section 8(f) of the Act, based on the fact that this was the first date petitioner was actually found to be permanently totally disabled. The arbitrator finds a determination of permanent total disability before this date would be speculative at best, and totally inconsistent with Dr. Rudawski's finding that petitioner was capable of working restricted work.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JULIET OBODOAKOR,

Petitioner,

20IWCC0607

vs. NO: 11 WC 44064

JACKSON PARK HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision of the Arbitrator and finds that Petitioner achieved maximum medical improvement on March 20, 2014. On March 20, 2014 Petitioner presented to her treating physician, Dr. Rinella in follow-up. Petitioner was seen by Dr. Rinella's physician's assistant. The clinical note reflects that imaging studies were reviewed, and a physical examination was performed. The examiner also referenced the Functional Capacity Evaluation performed on January 28, 2014 which was invalid. The FCE report states, "The results represent a manipulated effort by the client. Therefore, the levels identified by the client represent less than their true safe capability level." No additional work restrictions were deemed appropriate by Dr. Rinelli secondary to Petitioner's clinical findings and she was to return to clinic on an as needed basis.

On December 22, 2014 Petitioner underwent a lumbar MRI. Dr. Ghanayem, Respondent's Section 12 examiner saw Petitioner on April 2, 2015. He reviewed the lumbar MRI

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and interpreted the scan as normal with no evidence of neurologic compression. The Commission notes and corrects a scrivener's error in Dr. Ghanayem's report which mistakenly identifies the date of the lumbar MRI as having been performed in "February of 2014" rather than the correct date of December 22, 2014. Additionally, Dr. Ghanayem reviewed the invalid FCE report of January 2014, and performed a physical examination. Dr. Ghanayem found Petitioner to be at maximum medical improvement and capable of returning to regular duty. He stated the impression that Petitioner "has subjective complaints of neck and back pain that are not substantiated objectively".

The Commission finds based upon the foregoing analysis that Petitioner achieved maximum medical improvement on March 20, 2014 and modifies the Arbitrator's award of temporary total disability benefits and medical benefits accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $757.20 per week for a period of 138 6/7 weeks, commencing July 22, 2011 through March 20, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $681.46 per week for a period of 28.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the 15% loss of the use of the hand, and $681.46 per week for a period of 25 weeks, as provided in Section 8(d)2 for the reason that the injuries sustained caused 5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical bills incurred on and prior to March 20,2014, as well as the referenced x-ray and physical therapy on Petitioner's right hand, as ordered by the Commission, if not already paid, as well as any medical services related to Petitioner's carpal tunnel and de Quervain's syndrome for medical expenses under Sections 8(a) and 8.2 of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that no penalties or attorney's fees are awarded.

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

OCT 14 2020

DATED:
SJM/msb
o: 9/9/20
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OBODOAKOR, JULIET
Employee/Petitioner

Case# **11WC044064**

JACKSON PARK HOSPITAL
Employer/Respondent

20IWCC0607

On 8/27/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

5146 ODELSON & STERK
MATTHEW DALEY
3318 W 95TH ST
EVERGREEN PK, IL 60805

STATE OF ILLINOIS)
) SS
COUNTY OF Cook)

20IWCC0607

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Juliet Obodoakor
Employee/Petitioner

v.

Jackson Park Hospital
Employer/Respondent

Case # **11** WC **44064**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **March 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On **July 21, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being, a carpal tunnel injury, and de Quervain's syndrome, and lumbar strain only, ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**59,061.60**; the average weekly wage was $**1135.80**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**83,074.56** for TTD, $**0** for TPD, $**0** for maintenance, and **$4770.36 as an advance for permanent partial disability benefits**, for a total credit of $**87,844.92**.

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

ORDER

Medical benefits

Respondent shall pay medical bills incurred on and prior to August 28, 2013, as well as the referenced x-ray and physical therapy on Petitioner's right hand, as ordered by the Commission, if not already paid as well as any medical services related to Petitioner's carpal tunnel and de Quervain's syndrome.

Temporary total disability

Respondent shall pay Petitioner temporary total disability benefits of $757.20 per week commencing July 22, 2011 through February 14, 2014.

Permanent partial disability

Respondent shall pay Petitioner permanent partial disability benefits of: $681.48 per week for 28.5 weeks because the injuries sustained caused 15% loss of a hand; and $681.48 per week for 25 weeks because injuries sustained caused 5% loss of a man as a whole.

Penalties

No penalties or attorneys' fees are awarded.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/26/19
Date

AUG 27 2019

Juliet Obodoakor v. Jackson Park Hospital, No. 11 WC 44064

Preface

The parties proceeded to hearing March 28, 2019, on a Request for Hearing indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to an accidental injury on July 21, 2011; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to temporary total disability from July 22, 2011, through November 29, 2018; what is the nature and extent of the injury; and whether Petitioner is entitled to penalties and attorney's fees. Juliet Obodoakor v. Jackson Park Hospital, No. 11 WC 44064 Transcript Proceedings on Arbitration at 5; Arbitrator's Exhibit 1. The hearing was recessed and resumed four times concerning the return of subpoenaed records, with proofs closed May 30, 2019. The resumed dates of April 25, 2019, May 23, 2019, and May 30, 2019, were not transcribed.

This matter was previously heard as a Section 19(b) Petition, and on Petition for Review of an Arbitration Decision on the 19(b) Petition, the Commission found Petitioner entitled to temporary total disability at the sum of $757.21 per week for 109 6/7 weeks from July 22, 2011, through August 28, 2013. It further found Respondent responsible to pay for medical services incurred from July 21, 2011, to August 28, 2013. It further ordered Respondent authorize and pay for an x-ray of the lumbar spine and physical therapy on Petitioner's right hand. The Commission denied Petitioner's claims for penalties and attorney's fees. Petitioner's Exhibit 1.

Findings of Fact

The facts, prior to this hearing, are taken and condensed from the decision of the Commission. Petitioner was a registered nurse working at Respondent when, on July 21, 2011, she was kicked by a patient in the chest causing her to fall backwards on the floor. Petitioner sustained a carpal tunnel injury that failed conservative treatment. Carpal tunnel release surgery on the right hand was performed May 19, 2012, and Petitioner performed post-operative physical therapy. During that therapy, symptoms of de Quervain's syndrome manifested in Petitioner, as a complication of physical therapy. Additional surgery to relieve the de Quervain's syndrome was performed May 14, 2013. Petitioner's Exhibit 1.

Petitioner testified she has severe pain in her back, but does not remember when it started to get worse. She did not recall all her doctors. Her testimony was marked by histrionic outbursts, and seemed exaggerated. She showed selective memory. She did not remember certain medical treatment. Obodoakor at 16, 20, 27, 45, 34, 39, 42.

Petitioner submitted to an independent medical examination April 2, 2015, by Dr. Alexander Ghanayem, Director of the Division of Spine Surgery at Loyola University Medical Center. Petitioner complained of neck pain; pain and numbness of both thumbs; low lumbar back pain; and numbness in her foot. Dr. Ghanayem reviewed a lumbar MRI of Petitioner done in February 2014, and found it normal with nothing pathological. He found facet joint thickening consistent with age. He noted, in a cervical MRI, a disc herniation at C4-5. Dr. Ghanayem believed that if the disc herniation was from the accident, it would have been

symptomatic within a week or so. Petitioner had no neurological finding of a disc herniation. Ghanayem found Petitioner's subjective complaints of back pain not substantiated by objective diagnostic testing. He said Petitioner had multiple nonorganic physical examination findings consistent with symptom magnification. Dr. Ghanayem found that Petitioner's subjective complaints of neck and back pain were not objectively substantiated. Ghanayem noted Petitioner had an FCE in January 2014 that was invalid. That functional assessment done January 28, 2014, at ATI identified it as an invalid representation of the present physical capabilities of Petitioner. It noted "the results represent a manipulated effort by [Petitioner]." The observations contained over 20 instances where Petitioner terminated testing saying some variation of "I'm having pain in my lower back." Dr. Ghanayem found Petitioner at MMI and noted she should be back to work regular duty with no need of further medical care. Respondent's Exhibit 6; Petitioner's Exhibit 3.

Petitioner testified she saw a doctor at the request of her attorneys, Dr. Ross. Dr. Matthew Ross testified via evidence deposition. He said he saw Petitioner as a second opinion for legal purposes, March 2, 2018. That was nearly seven years after Petitioner was kicked in the chest by a patient. He did not think Petitioner sustained significant disc injury as a result of the accident. He said Petitioner was on a number of mind-altering drugs and could not work as a nurse on the with the cocktail of drugs she was on. He testified Petitioner displayed situational depression and her examination was marked by depressed affect, frequent crying, anger and overall depression. He believed a significant portion of Petitioner's pain is facet mediated. Obodoakor at 21; Petitioner's Exhibit 20 at 7, 9-10, 14, 15, 19.

Dr. Ross admitted he was hired by Petitioner's attorneys and saw Petitioner only once. He reviewed the IME report of Dr. Ghanayem, but not the opinions. He testified Ghanayem is a capable, respected orthopedic spine surgeon. He admitted he did not see the study or report of Petitioner's February 2014 MRI. Ross said he would expect symptoms of a lumbar or cervical spine injury to resolve in days. He thought Petitioner's psychological distress is playing a role in her physical distress. Ross testified the degree of disruption to Petitioner's life and disability is much greater than would be seen with even true facet mediated pain. Petitioner's Exhibit 20 at 25-26, 27, 28, 29-30, 40, 42.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury of July 21, 2011. An injured employee bears the burden of proof to establish the elements of her right to compensation, including the existence of a causal connection between her condition of ill-being and her employment. Navistar International Transportation Corporation v. Industrial Commission (Diaz), 315 Ill. App. 3d 1197, 1202-1205 (2002). A claimant must prove that some act or phase of her employment was a causative factor in the ensuing injury. Whether a causal connection exists is a question of fact. Vogel v. Illinois Worker's Compensation Commission, 354 Ill. App. 3d 780, 786 (2005).

I found, as a conclusion of law, Petitioner's current condition of ill-being, that of a carpal tunnel injury and de Quervain's syndrome, and lumbar strain, causally related to being kicked in the chest by a patient on July 21, 2011. Those conditions resolved long ago. In support of this, I

rely on the opinions of Dr. Lim in 2011 and 2012; Dr. Ghanayem in 2015. Respondent's Exhibit 2; Respondent's Exhibit 3; Respondent's Exhibit 6.

There is, looming over Petitioner's claim, a substantial amount of exaggeration, embellishment, and lack of objective support for her claims. Having observed her performance at this hearing, I find her less than a credible witness. Doctors have observed symptom magnification and overreaction to pain symptoms mere months after the accident. Petitioner's functional assessment was found invalid, as she attempted to manipulate the results. Even a doctor hired by Petitioner who saw her nearly seven years after the accident thought Petitioner's claimed disability was much greater than should be seen. Respondent's Exhibit 2; Respondent's Exhibit 3; Petitioner's Exhibit 3; Petitioner's Exhibit 20 at 42; Respondent's Exhibit 6.

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

I find as a conclusion of law, as set forth by the Commission, Respondent shall pay medical bills incurred on and prior to August 28, 2013, as well as the referenced x-ray and physical therapy on Petitioner's right hand. I further find, consistent with the findings on causal connection, that medical services related to Petitioner's carpal tunnel and de Quervain's syndrome are to be paid by Respondent. Any treatment of Petitioner's lumbar strain, except for the x-ray previously awarded, is not the responsibility of Respondent. Petitioner does not offer a coherent explanation for Respondent's responsibility for payment of the list of bills. The sheer number of disparate providers without correlation to a specific condition of ill-being, works against imposing liability on Respondent.

Disputed issue **K** is, is Petitioner entitled to a period of temporary total disability. She certainly is through August 28, 2013. Petitioner's Exhibit 1. To be entitled to a temporary total disability award under the Act, an injured worker must prove not only she did not work, but was unable to work. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App. 3d 710 (1993). Here the issue comes down to how long past August 28, 2013, should the award extend. On February 14, 2014, Petitioner's doctor released her to work as to her right hand. Petitioner's Exhibit 5. An MRI of her back done on that date was normal. Respondent's Exhibit 6.

I find, as a conclusion of law, Petitioner is entitled to a period of temporary total disability benefits from July 22, 2011, to February 14, 2014, at $757.20 per week. The parties have stipulated Respondent has paid $83,074.56 in such benefits.

Disputed issue **L** is, what is the nature and extent of the injury of July 21, 2011. That date of injury predates the establishment criteria in 820 ILCS 305/8.1b, and so disability need not be established using those criteria.

Petitioner sustained injuries to her right hand and a subsequent condition in that hand during physical therapy. I find the level of permanent partial disability for that hand at 15%

(28.5 weeks) at $681.48 per week. She recovered from these injuries to the extent she was seeking employment as a Case Manager, a Clinical Manager, Dialysis Nurse, Registered Nurse, and Travel Nurse in 2017. Petitioner's Exhibit 19. She secured employment as a Supervisor in a nursing home in 2017. Obodoakor at 29; Petitioner's Exhibit 31.

Petitioner also sustained a lumbar strain. That has long since resolved. I find the level of permanent partial disability at 5% (25 weeks) man as a whole at $681.48 per week.

The parties have stipulated Respondent has paid an advance of such benefits of $4,770.36.

Disputed issue **M** is, should penalties or fees be imposed upon Respondent. The Commission previously denied Petitioner's claim for penalties and attorney's fees. Penalties are discretionary, rather than mandatory. I note Respondent has paid over $150,000 in benefits in a claim where an injury occurred eight years ago. I also note Petitioner's lack of credibility and the repeated recognition of doctors and therapists of Petitioner's attempted manipulation of findings and symptom magnification. I find this is not a case that, by any stretch of the imagination, warrants the imposition of penalties or fees.

Arbitrator

8/26/19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESUS MEZA,

Petitioner,

20IWCC0608

vs. NO: 11 WC 36930

DIAMOND GRANITE, INC.,
AND ILLINOIS STATE TREASURER, AS
EX-OFFICIO CUSTODIAN OF THE
INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, benefit rate/wage calculations, temporary total disability, medical expenses, nature and extent, and "any and all other issues raised at hearing," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

We disagree with the Arbitrator's finding that Petitioner failed to prove his Average Weekly Wage (AWW) in the year preceding his injury. The Arbitrator appears to have applied an evidentiary standard which exceeds the "preponderance of the evidence" standard as indicated by the use of the phrases "concrete evidence" and "less than clear or comprehensive" in his analysis. *Dec. 5.* This seems to indicate that something approaching a "clear and convincing" standard was used, which is inappropriate.

Petitioner testified that as of the date of accident on September 14, 2011, he had been employed by Respondent for "close to two years." *T.17.* His unrebutted testimony was that his normal work schedule was four days per week, 9½ hours per day (for a total of 38 hours per

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week) although he sometimes worked more hours but was *not* paid at an overtime rate. *T.21.*

We find that Petitioner's testimony is supported by the two timecard reports in evidence (*Px14*). The first one, dated July 21, 2011, indicates Petitioner worked 51.5 hours between July 11th and July 15, 2011, and all of these were considered "Regular" hours. The second report, dated August 5, 2011, indicates that he worked 49.5 hours between July 25th and July 30, 2011. Again, these were all listed as "Regular" hours. We are mindful that the timecards do not have the name "Diamond Granite" printed on them but they do contain an illegible "Manager's signature." Petitioner's unrebutted testimony was that these were his timecards and they were accurate. *T.22-23.*

Petitioner's Exhibit 14 also contains what appear to be two paycheck stubs. The first, dated June 15, 2011, appears to be check number 1718 written to "Jesus Meza" in the amount of $824.00. The top part of this photocopied stub seems to be missing but, in the area that appears to be a "memo" line, it states "D G Inc," which would be consistent with Respondent's name. The second stub does contain the name of Respondent, "Diamond Granite Inc." and reflects check number 5140, dated August 22, 2011, written to "Jesus Meza" in the amount of $776.00. The "memo" line on this stub indicates, "SEALER." We are mindful that no bank account numbers appear on either of the check stubs and it is unknown why there is such a large gap in the check numbers. However, Petitioner's unrebutted testimony was that these were his paycheck stubs and they were accurate. *T.22-23.*

We note that Respondent, Diamond Granite, Inc., failed to appear at the hearing. There is no evidence to contradict Petitioner's testimony regarding his wages or his supporting exhibits, which we find credible. In this case, we believe it would be unfair to require Petitioner to have all 52 weeks of timecards and paycheck stubs in order to prove his AWW. Furthermore, Petitioner is requesting that his AWW be based on his testimony of 38 hours per week at $16 per hour. This number of weekly hours worked (38) is supported by, and is significantly less than, the number of hours listed (51.5 and 49.5) on the timecard reports he entered into evidence. The total weekly amount Petitioner is claiming ($608.00) is also supported by, and is significantly less than, the amounts indicated ($824.00 and $776.00) on the paycheck stubs he entered into evidence.

Based on the analysis as outlined above and a thorough review of the evidence, we find Petitioner has proven that his Average Weekly Wage (AWW) in the year preceding his injury was $608.00.

The Commission disagrees with the Arbitrator's analysis and characterization of Dr. Chami's medical records. We strike paragraph four on page three of the Decision and replace it with, "Petitioner testified he last treated with Dr. Chami on September 12, 2012. T.40."

We next modify the Arbitrator's award of temporary total disability (TTD) benefits. Petitioner was taken off work by La Clinica as of September 15, 2011. Even if Petitioner wanted to return to a light duty job at Respondent when he was given five-pound restrictions by La Clinica on October 19, 2011, he had concurrent off-work restrictions by other medical providers. Petitioner was taken off work by Leah Brown, PAC, at Pain Care Specialists on September 22,

2011, which she continued on October 4, 2011. On October 25th and November 22, 2011, Stephanie Riley, PAC, continued Petitioner off work. On February 15th and April 11, 2012, Dr. Chami kept Petitioner off work. The March 14, 2012 record from Dr. Chami indicates Petitioner "remains on total temporary disability."

On May 2, 2012, Dr. Chami indicated Petitioner could return to work at a "medium capacity level." This is consistent with Petitioner's testimony that he found work in early May 2012 and this was the first time he worked since the accident. *T.39.* We find the off-work restrictions of these medical providers to be persuasive and find that Petitioner is entitled to 33 weeks of TTD benefits from September 15, 2011 through May 2, 2012. Based on our finding that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $608.00, his weekly TTD rate is $405.33.

Regarding the medical bills, it is unclear why the Arbitrator limited the La Clinica charges to only certain dates. All of the dates in the La Clinica billing ledger have corresponding CMS-1500 forms and treating records. Therefore, we award $5,393.67 for the La Clinica expenses subject to the fee schedule in §8.2 of the Act.

We affirm the award of the Specialized Radiology bill of $55.00 and the Preferred Open MRI bill of $2,100.00.

We reverse the Arbitrator's decision and hereby award the Pain Care Specialists bill of $449.00. We reverse the Arbitrator's finding that the records of Central Medical Pain Specialists and Chicagoland Advanced Pain Specialists lack credibility and hereby award those charges with the caveat that duplicate charges are to be excluded. We reverse the Arbitrator's blanket denial of the EqMD prescription charges and hereby award only those bills which have supporting documentation indicating they were specifically prescribed.

Following is our analysis of Petitioner's permanent partial disability under §8.1b(b) of the Act:

i) No AMA impairment rating was submitted so we give this no weight.

ii) Petitioner's occupation was a granite fabricator/installer. We disagree with the Arbitrator's characterization that Petitioner did not return to this occupation by his own choice. Petitioner credibly testified that the owners of Respondent did not answer his phone calls after his accident. Respondent did not have workers' compensation insurance and did not attend the hearing. Petitioner testified that he was injured when he slipped while carrying a piece of granite that weighed "about 150 up to 170, something like that" and it landed on top of him. *T.24.* The September 15, 2011 La Clinica record indicates that Petitioner slipped while carrying a 150-pound piece of granite. This is confirmed by the September 22, 2011 record of Leah Brown, PAC. It is undeniably clear that Petitioner's job was heavy duty. There is no medical opinion to contradict Dr. Chami's medium-duty restrictions. We give this factor significant weight in favor of an increased award.

20IWCC0608

iii) Petitioner was 30 years of age at the time of his accident. Petitioner has medium-duty work restrictions by Dr. Chami. However, no evidence was presented indicating how Petitioner's age affects his disability. We give this factor no weight.

iv) Regarding future earning capacity, Petitioner is now earning $450 per week at his in-law's grocery store. Petitioner testified that he worked for a time as a flooring installer but was unable to continue to do so because he was on his knees all the time and he was unable to stand up on his own. Although he moved to Georgia and now works stacking shelves and produce, there is no evidence that this is the most Petitioner is able to earn within his restrictions. He had been earning $16 per hour at Respondent as a granite installer but Petitioner did not introduce evidence of any job search or labor market survey to indicate Petitioner's job prospects in Illinois. He chose to move to Georgia, and it is not clear whether this reduction in pay is due to lower wage rates in that state or if it is actually due to his medium duty work restrictions. Although we believe Petitioner is incapable of returning to his previous job as a granite installer, and considered that to be a significant factor above, we do not believe he proved a reduction in earning capacity based on the evidence. Therefore, we give this factor no weight.

v) We find there is evidence of Petitioner's disability that is corroborated by the treating medical records. Petitioner underwent conservative treatment in the form of facet injections and radiofrequency rhizotomy. Petitioner testified that he has not had any treatment for his low back since he was discharged by Dr. Chami in September of 2012, but when he feels pain he takes medication such as Tylenol or Advil and he does the home exercises he was taught, which provide relief. *T.46-47.* Petitioner testified that he feels okay when he is active but has problems sitting for long periods of time and "I feel like the disks are running against each other and then I have to stand up." *T.43.* When lifting cases of canned goods at his new job, he uses his legs instead of bending over because, when he bends, he has difficulty standing up again. *T.44.* We find that Petitioner's complaints are consistent with the medical records and Dr. Chami's medium-duty work restrictions.

Based on the above, we find that Petitioner has sustained the loss of use of 17.5% of the person-as-a-whole under §8(d)2 of the Act. Since we have found that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $608.00, his weekly permanent partial disability rate is $364.80.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $405.33 per week for a period of 33 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $364.80 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 17.5% of the person-as-a-whole.

20IWCC0608

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses outlined above under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

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

DATED: OCT 15 2020

María Elena Ortega

Thomas J. Tyrrell

SE/
O: 8/18/20
49

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MEZA, JESUS
Employee/Petitioner

Case# **11WC036930**

DIAMOND GRANITE INC AND ILLINOIS STATE TREASURER EX-OFFICIO CUSTODIAN INJURED WORKERS' BENEFIT FUND
Employer/Respondent

20IWCC0608

On 5/17/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1922 SALK, STEVEN B & ASSOC LTD
FRANK I GAUGHAN
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

0000 DIAMOND GRANITE INC
12301 NEW AVENUE
LEMONT, IL 60439

5705 ASSISTANT ATTORNEY GENERAL
CAITLIN PAPADOPOULOS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20 IWCC0608

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jesus Meza
Employee/Petitioner

v.

Case # **11** WC **36930**

Consolidated cases: _____

Diamond Granite, Inc., and Illinois State Treasurer, ex-officio custodian, Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **July 10, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 14, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

Petitioner failed to meet his burden of proof as to earnings and average weekly wage.

On the date of accident, Petitioner was **30** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Medical Benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule of $2775.00 to La Clinica, $55.00 to Specialized Radiology Consultants, and $2100.00 to Preferred Open MRI, as provided in Sections 8(a) and 8.2 of the Act.

Injured Workers' Benefit Fund

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

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

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

Signature of Arbitrator

MAY 17 2018

5/17/2018
Date

Jesus Meza v. Diamond Granite and the Illinois Injured Workers' Benefit Fund, No. 11 WC 36930

Preface

This matter was tried before Arbitrator Robert Falcioni on July 10, 2017. Subsequent to trial and before issuance of a written decision, including findings of fact and conclusions of law, Arbitrator Falcioni passed away. The parties have agreed, in lieu of retrial, to have Arbitrator Thomas L. Ciecko render a decision based upon the transcript submitted of trial and the exhibits submitted at trial. This is that decision.

Findings of Fact

Jesus Meza (Petitioner), a 30 year old male, testified at trial with the assistance of an interpreter. Medical records introduced at trial from Central Medical Specialists and Dr. Antoine Chami indicate that during an initial evaluation of Petitioner on February 15, 2012, Dr. Chami indicated Petitioner "...is conversational with good language skills and comprehension." Jesus Meza v. Diamond Granite, Inc., Injured Workers' Benefit Fund, No. 11 WC 36930 Transcript of Proceedings on Arbitration at 14; Petitioner's Exhibit 3 at 2. This discrepancy was not addressed at trial.

Petitioner testified that on September 14, 2011, he was employed by Diamond Granite (Respondent) fabricating and installing marble, granite and natural stone. He had worked there for over two years. In the course of his employment, he used grinders and saws, electric, and power driven, supplied by Respondent. He also used a company vehicle for installation jobs. Meza at 17-20.

Petitioner testified, at the time of the accident, he was making "...more like 650." He did not indicate whether it was daily, weekly, or monthly. He further testified his hourly rate was $16.00 an hour, and his normal schedule was four days a week, nine and one-half hours a day. He said they did not have a lot of work. He was not paid overtime. On cross examination, Petitioner testified he did not really work a set schedule. The owner told him when to work. He said he was paid by check and issued W-2's. Petitioner testified Exhibit 14 contained a check of his, as well as time cards. Meza at 21, 49-50; Petitioner's Exhibit 14.

The time cards in Exhibit 14 are for two periods of time two months prior to the accident: July 25, 27-30, 2011, and July 11-15, 2011. Neither has a rate of pay, nor indicate they are from Respondent. The hours are not uniform. The 'check" is not any sort of facsimile of a check, or copy. It cannot reasonably be interpreted as a negotiable instrument or even a pay stub. Exhibit 14 offers no support on the issue of earnings. No W-2's were offered into evidence.

Petitioner testified he was working alone, unsupervised, on September 14, 2011. At about 1:30 p.m. he had to move a piece of granite about 25 ½ feet by 3 feet, weighing about 150-170 pounds. At the time, Petitioner was six feet tall, 159 pounds. He testified he tried to pick up the granite, but the floor had a lot of water on it. When he was walking, his foot slipped and he fell on his back. He landed on his buttocks. The granite was on top of him. He tried to throw off the stone, and lowered it down. Meza at 23-26, 55; Petitioner's Exhibit 1 at 3. In a subsequent medical visit to Pinnacle Pain Management, eight days after the accident, Petitioner told Leah Brown, a Physician's Assistant, he was a construction laborer who fell carrying a 120-150 pound piece of granite. Petitioner told her he slipped "...on the muddy ground..." Petitioner's Exhibit 2 at 1. Five months later, Petitioner told Dr. Antoine Chami at Central Medical Specialists, he was employed as a construction worker when he suffered a slip and fall while carrying a slab of granite weighing approximately 100-150 pounds. Petitioner's Exhibit 3 at 1.

Petitioner further testified after lowering the piece of granite, he went to see his boss, Sylvia Wilk, and told her he didn't feel so good, he slipped with the stone. He said he had to leave and she said ok, go. Meza at 26. In a subsequent medical visit to La Clinica S.C., a chiropractic clinic, Petitioner said he reported his slip to the owner, who gave him some ibuprofen but it didn't help. He told the owner he was going to see his own doctor, and she said it was fine. Eight days after the accident, Petitioner told Leah Brown at Pinnacle Pain Management he was sent home after reporting the injury. Petitioner's Exhibit 1 at 4; Petitioner's Exhibit 2 at 1.

Petitioner testified he left work, went home, "...tried to take something." He went to the doctor the next day. He said on September 15, 2011, he went to Dr. Jao at La Clinica S.C. Meza at 26.

Petitioner presented at La Clinica on September 15, 2011. The records of La Clinica are, to a large part, illegible. What can be gleaned from them is that on September 15, 2011, Petitioner complained of pain 7-8/10 in his lower back, and right knee and numbness in his rear upper thighs. Treatment consisting of thermal modalities, interferential therapy, and therapeutic exercises were ordered three days a week for four weeks. By October 25, 2011, Petitioner was diagnosed with lumbar radiculopathy and was to follow up with Dr. Jain. He was reexamined May 10, 2012, and diagnosed with lumbago/lumbar sprain/strain. Petitioner was referred to Dr. Jain and Dr. Chami. He was issued a "Disability Certificate" on September 16, 2011, indicating he was totally incapacitated from September 15, 2011, to September 23, 2011, and partially incapacitated from October 19, 2011, to October 28, 2011. Petitioner's Exhibit 1 at 1, 2, 16, 26-27, 28, 29.

Petitioner testified that after the accident he attempted to call Respondent two or three times, but they would not answer his calls. He never left a message or provided anyone at Respondent with medical records or off work slips. Petitioner never went to Respondent after he left work on September 14, 2011. He said when he was released for light duty in late October 2011, he never contacted anyone at Respondent about light duty because he "...didn't want to do that anymore..." He did not want to work for Respondent. Meza at 50, 51, 53; Petitioner's Exhibit 1 at 29.

Petitioner received an MRI on September 26, 2011. There was no evidence of fracture, dislocation, osseous or joint pathology. The MRI was technically compromised due to excessive patient motion on all sequences, degrading image quality and limiting detailed evaluation. Petitioner's Exhibit 1 at 38, 40.

Referred by Dr. Jao at La Clinica, Petitioner was initially seen at Pinnacle Pain Management on September 22, 2011. He complained of low back pain and intermittent buttock numbness extending into his hamstrings and diagnosed with lumbar strain and lumbosacral radiculopathy. The records from Pinnacle Pain Management show three follow up visits, October 4, 25, and November 22, 2011. Petitioner declined recommendations for bilateral facet joint injections. He remained off work through November 22, 2011. The last diagnosis here was lumbar facet syndrome, lumbar spinal stenosis, lumbar spondylolisthesis. Petitioner's Exhibit 2 at 1, 3, 5, 7. Petitioner testified he did not want the injections, he was scared. Meza at 31.

Petitioner testified he was referred to Dr. Chami, who examined him on February 15, 2012, about five months post accident. Chami's records indicate Petitioner told him, his job did not want to take him back with anything less than full capacity. This is contrary to Petitioner's testimony at trial that he did not want to work for Respondent and never contacted them about light duty. Petitioner, contrary to his testimony at trial that he did not have injections because he was scared, told Chami there was no follow through because of confusion over insurance coverage. For some reason, Chami thought it important to note in the initial evaluation that Petitioner was "...represented by attorney Steven Salk & Associates. He was assigned attorney Alex Broderick." Meza at 35; Petitioner's Exhibit 3 at 1; Meza at 53.

Chami's records are rife with inconsistencies and misstatements. Chami indicates Petitioner speaks English with good language skills and comprehension. At trial he needed an interpreter. Chami combines the records of two patients, Petitioner and Santos Martinez, for a visit of March 14, 2012. On May 2, 2012, eight months after leaving Respondent, Chami notes Petitioner is contemplating switching jobs to avoid the heavy lifting of his occupation. Petitioner testified he never went back to Respondent after September 14, 2011, and didn't want to work there. Chami's treatment plan at the May 30, 2012, visit was for Petitioner to remain at light duty at his job. Petitioner had not worked in eight months. On September 12, 2012, a year after the accident, Chami noted Petitioner was working at a modified medium level capacity. Yet there was no testimony as to what that work was. Chami never described what he meant by working at a medium capacity level or what level of restrictions were placed on Petitioner. Chami noted Petitioner benefitted from a course of work conditioning. Petitioner testified he did not know what work conditioning is. There are no records to support that therapy. Chami's records lack the credibility necessary for consideration of treatment and medical bills. Moreover, as set forth in Petitioner's Exhibit 8, those medical bills are totally inadequate, lacking the reason for charges, or definition of "procedure" and "product" charges. The bills are for Jesus Meza-Gutierrez. There is no evidence Petitioner's name is Meza-Gutierrez. Petitioner testified he last treated with Chami September 12, 2012. Petitioner's Exhibit 3 at 3-4, 16, 24, 29, 17; Meza at 51, 53, 39, 40.

Petitioner testified he had injections in his back April 4, 2012, and radio frequency rhizotomy May 23, 2012. He said he was released to medium work May 12, 2012, and released from care September 12, 2012. He said he has been living in Atlanta since 2016 working for his in-laws at Guadalajara Supermarket stacking shelves and taking care of vegetables. He is on his feet eight hours a day, five days a week. Meza at 36-37, 40-42, 52.

Letters advising Respondent of the trial date were returned as undeliverable with no forwarding address. The National Council on Compensation Insurance has no policy information showing proof of workers' compensation insurance on September 14, 2011, for Respondent. Petitioner's Exhibit 12; Petitioner's Exhibit 13; Petitioner's Exhibit 11.

Conclusions of Law

To recover benefits under the Illinois Worker's Compensation Act, a claimant has the burden of proving all the elements of his case. Arbuckle v. Industrial Commission, 32 Ill. 2d 581, 585 (1965).

Disputed issue **A** is was Respondent operating under and subject to the Illinois Workers' Compensation Act. This Arbitrator finds, as a conclusion of law, it was. The testimony of Petitioner as to his work, use of tools, and equipment place the Respondent squarely within the enterprises or businesses in Section 3 of the Act. Meza at 18-20; 820 ILCS305/3 paragraphs 8, 15, 16.

Disputed issue **B** is was there an employee-employer relationship. This Arbitrator finds there was. Petitioner testified that prior to the accident he worked for respondent for close to two years. An owner assigned his work and set the schedule, and hired him. His clothes and tools came from the Respondent. He was paid by check. Meza at 17, 18-20, 48-50, 55.

Disputed issue **C** is did an accident occur that arose out of and in the course of Petitioner's employment by Respondent. This Arbitrator finds, as a conclusion of law, it did. Petitioner testified he was at work, fabricating granite when he tried to move a heavy piece of granite and slipped on a wet floor. The granite landed on top of him. Meza at 17, 24-25. Although two medical providers noted Petitioner told them he was a construction worker, both providers indicate he fell while carrying a piece of granite. I conclude this is not a material inconsistency. Petitioner's Exhibit 2 at 1; Petitioner's Exhibit 3 at 1.

Disputed issue **D** is what is the date of the accident. This Arbitrator finds the date is September 14, 2011. I rely on the testimony of the Petitioner and the medical records of La Clinica. Meza at 23; Petitioner's Exhibit 1 at 1-6.

Disputed issue **E** is was timely notice of the accident given to Respondent. This Arbitrator finds, as a conclusion of law, it was. Petitioner testified after he fell he lowered the stone off his chest and went to see his boss Sylvia and told her he slipped with the stone. Meza at 26. Oral

notice of the accident is sufficient. Mclean Trucking Co. v. Industrial Commission, 72 Ill. 2d 350 (1978).

Disputed issue **F** is whether Petitioner's current condition of ill-being is causally related to the injury. This Arbitrator concludes it is. Petitioner testified that prior to September 14, 2011, he had no problems with his back. After slipping and falling with a piece of granite landing on his chest, he was diagnosed first, on September 22, 2011, with lumbar strain; and lumbosacral radiculopathy and later October 4, 2011, with lumbar facet syndrome; lumbar spinal stenosis; and lumbar spondylolisthesis. He suffered a low back injury. Meza at 27; Petitioner's Exhibit 2 at 1, 3.

Disputed issue **G** is what were Petitioner's earnings. The claimant bears the burden of establishing his average weekly wage under 820 ILCS 305/10. Ricketts v. Industrial Commission, 251 Ill. App. 3d 809, 810 (1983). The evidence presented was less than clear or comprehensive. The sum total of the evidence on this issue was: Petitioner's hourly rate was $16.00 an hour; his normal schedule was four days a week, nine and one-half hours a day but sometimes he had to work more days; he did not really have a set schedule, sometimes they didn't have a lot of work; he had worked for Respondent for close to two years; he sometimes had to work on Fridays; he was not paid overtime. Meza at 17, 21, 51-52.

The Act details the calculation of average weekly wage in Section 10. There are four methods to do so. Two methods, where an employee works fewer than 52 weeks prior to the injury, and where an employee works a short period of time, seem inapplicable to this case. This leaves one of the other two methods, one where the employee has worked for the employer continuously for the previous 52 weeks. That calculation is determined by taking the actual earnings of the employee and dividing by 52. The other method, is for employees who have missed more than five workdays in the previous 52 weeks. That calculation is based on how many days were actually worked, and actual earnings divided by the resulting number of weeks worked.

However, we do not know the actual earnings of Petitioner. We do not have concrete evidence of lost days or days off work. We do not know the number of hours Petitioner worked in the past 52 week period, or even the number of days. No W-2 information or tax returns were submitted as evidence. Petitioner's Exhibit 14 is no support at all for Petitioner's earnings, containing at best, two random time cards two months before the accident, and an unrecognizable piece of paper with two dates in 2011 and two vastly different amounts without context. Because I find Petitioner has failed to meet his burden of proof as to earnings and average weekly wage, no calculation can be made under Section 10. Any attempted scenario would be pure speculation. Neither the minimum nor maximum rates for benefits are available because the average weekly wage is a prerequisite for those considerations.

Disputed issue **H** is what was Petitioner's age at the time of the accident. This Arbitrator concludes Petitioner's age at the time of the accident was 30 years old. Petitioner testified his birthday is April 22, 1981, and the date of the accident was September 14, 2011. Meza at 20, 23.

Disputed issue **I** is what was Petitioner's marital status at the time of the accident. This Arbitrator, based on Petitioner's testimony, concludes Petitioner was married at the time of the accident with two children under the age of 18. Meza at 20.

Disputed issue **J** is were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services.

There is no evidence anyone paid any charges for medical services. Petitioner testified he didn't pay them and did not know if they had been paid. Meza at 41. I find Respondent has not paid appropriate charges for all reasonable and necessary medical services.

As to the medical services provided, I find services provided by La Clinica reasonable and necessary and the only the following charges verified by the records: 9-15-11 ($415.00); 9-21-11 ($275.00); 9-26-11 ($245.00); 10-4-11 ($315.00); 10-17-11 ($315.00); 10-25-11 ($275.00); 11-8-11 ($385.00); 11-14-11 ($385.00); 4-9-12 ($60.00); and 5-10-12 ($105.00) for a total award of $2775.00.

I find the services provided by Specialized Radiology Consultants reasonable and necessary and award $55.00.

I find the services provided by Preferred Open MRI reasonable and necessary and award $2100.00.

The charges submitted for Pain Care Specialists in Petitioner's Exhibit 6 are denied. The submissions are not medical bills.

As previously stated, the records of Central Medical Specialists and by extension Chicagoland Advanced Pain Specialists lack credibility and all charges are denied.

The submissions of EqMD are denied as not medical bills and no evidence presented supported these purported services or charges.

Disputed issue **K** is what temporary total disability benefits are due. To be entitled to a temporary total disability award under the Act, and injured worker must prove not only that he did not work but that he could not work. Lukasik v. Industrial Commission of Illinois, 124 Ill. App. 609 (1984). Compensation begins on the day after the accident. 820 ILCS 305/8(b). An employee is temporarily totally disabled from the time the injury incapacitates him from work until such time as he is recovered or restored as the permanent character of the injury will permit. Once an injured employee's physical condition stabilizes, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co. v. Industrial Commission, 138 Ill. 2d 107 (1990).

Here, Petitioner was placed off work September 15, 2011, by La Clinica. He could return to work October 19, 2011, with restrictions. Petitioner's Exhibit 1 at 28, 29. When an employee is released to light duty he must take any light duty provided by the employer. See Beuse v. Industrial Commission (Village of Franklin Park), 299 Ill. App. 3d 180 (1998). Petitioner testified he never provided Respondent with medical records or off work slips. He did not want

to work at Respondent and never contacted them about light duty. Thus, Petitioner is entitled to temporary total disability benefits for 4 6/7 weeks. I find that because these benefits are based on an average weekly wage, and Petitioner has failed to meet his burden to prove an average weekly wage, no calculation can be made and benefits are denied.

Disputed issue **L** is what is the nature and extent of the injury. I find, based on Petitioner's testimony and the medical records of La Clinica, Petitioner suffered a lumbar strain/sprain. He underwent two sets if injections.

As to permanent partial disability, I consider the factors found in Section 8.1b(b) of the Act. No impairment report was submitted into evidence; thus, I give no weight to this factor. The employee was a granite fabricator and I note that although Petitioner did not return to work, it was by choice. I give no weight to this factor. Petitioner was 30 years old at the time of the accident and should, as a young man, have a relatively good healing process. I give no weight to this factor. No testimony was directly offered as to Petitioner's future earning capacity. We do not know was his earnings were at Respondent, and do not know what led him to work for his in-laws. He testified he now works in a grocery store in Georgia eight hours day five days a week making $450.00 a week. I give some weight to this factor. There is no evidence of disability corroborated by treating medical records. Petitioner testified he was last treated almost six years ago. He testified he is ok when he is active but has problems when he sits down. He uses over the counter medications. I give some weight to this factor.

Based on the above factors and the record taken as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 2.5% man as a whole as a result of the injury. However, because these benefits are based on an average weekly wage, and Petitioner has failed to meet his burden to prove an average weekly wage no calculation can be made and benefits are denied.

Disputed issue **O** is whether notice of the hearing was provided to Respondent and whether proof was offered Respondent lacked statutory insurance. I find adequate notice of the hearing was provided Respondent, and proof was sufficient to show Respondent lacked statutory insurance. Petitioner's Exhibit 11; Petitioner's Exhibit 12; Petitioner's Exhibit 13.

Arbitrator

5/17/2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JANET SPENCER,

Petitioner,

vs. NO: 14 WC 22558

STATE OF ILLINOIS,
JACK MABLEY DEVELOPMENTAL CENTER,

Respondent.

20IWCC0609

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of average weekly wage (AWW) and penalties, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Pursuant to Section 10 of the Act, overtime hours are explicitly excluded in calculating an employee's average weekly wage. *820 ILCS 305/10*. "Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. Illinois Workers' Compensation Commission*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979 (2007).

Petitioner was employed as an LPN. She testified that overtime was mandatory and they could select their shift by signing up for overtime. T.68. If they did not sign up, overtime would then be assigned and there was progressive discipline if they did not work overtime. T.69. She stated, however, that overtime was no longer being mandated for LPN's after June 16, 2013. T.72. Respondent's witness, Melissa Shaw testified that, between May 2013 and May 2014, overtime was posted and voluntary. Employees had a choice and did not have to sign up. T.139-140. If no

20IWCC0609

one signed up, then they would mandate overtime. T.140. Ms. Shaw testified, however, that LPNs did not get mandated to work overtime. *Id.* The overtime policy was changed in September 2013 and overtime was no longer mandatory. T.136-T.137.

Pursuant to Petitioner's exhibit 6, Petitioner worked overtime during the following pay periods: May 16, 2013, June 1, 2013, June 16, 2013, October 16, 2013, and December 16, 2013. She earned $1,148.84 in overtime for the pay period of May 16, 2013, $1,129.03 in overtime for the pay period of June 1, 2013, $2,226.36 in overtime for the pay period of June 16, 2013, $85.47 in overtime for the pay period of October 16, 2013, and $128.21 in overtime for the pay period of December 16, 2013.

The Commission finds that the overtime was not mandatory for LPNs. While Petitioner may have worked overtime during part of the year prior to her injury, she worked overtime during a few pay periods only and those hours were not consistent. Therefore, the overtime hours are to be excluded from the AWW calculation. Pursuant to Petitioner's wage statement, Petitioner earned $59,588.44, excluding overtime, in the year prior to her accident. This results in an AWW of $1,145.93, and a TTD and permanent total disability rate of $763.95.

The Commission further modifies the award of penalties. The Commission finds that Respondent had a good faith defense regarding the exclusion of overtime from the AWW calculation. However, the Respondent offered no explanation as to why the medical bills from the Mayo Clinic totaling $56,286.13 remain unpaid. The Commission finds Respondent's actions unreasonable and vexatious as they offered no explanation as to why the bills remained outstanding and failed to address the issue in its Statement of Exceptions. Accordingly, the Petitioner is entitled to 19(l) penalties of $10,000.00; 19(k) penalties of $28,143.06; and, Section 16 attorney fees of $7,628.61.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 23, 2019 is hereby modified, as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $763.95 per week for a period of 273-3/7 weeks, May 31, 2014 through June 11, 2014 and June 14, 2014 through August 28, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay the reasonable and necessary medical services as provided in PX Group Exhibit 2 (2.1-2.19) and the outstanding medical expenses to the Mayo Clinic, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent total disability benefits of $763.95 per week for life, commencing August 29, 2019, as provided in Section 8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second

20IWCC0609

July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner penalties, pursuant to Section 19(k) in the amount of $28,143.06, pursuant to Section 19(l) in the amount of $10,000.00, and pursuant to Section 16 in the amount of $7,628.61.

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

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

DATED: OCT 15 2020

D. Douglas McCarthy

DDM/tdm
O: 8/26/20
052

Stephen Mathis

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's decision save its award of penalties and attorneys' fees pursuant to Sections 19(k) and (l) and 16. As to this award, I dissent.

The Majority takes umbrage to Respondent's failure in its Statement of Exceptions and Supporting Brief to specifically address the issue of penalties and fees as it relates to the outstanding balance from Mayo Clinic in the amount of $56,286.13. During oral argument, on questioning from the panel, Respondent addressed the issue.

Moreover, in determining whether to assess penalties and fees, it is the relevant evidence not the arguments offered by the parties. Petitioner provided HFCA forms regarding charges from Mayo Clinic in Rochester, MN. Respondent provided payment logs concerning such charges. Petitioner sent an e-mail stating "The agency has indicated that Mayo does not accept discounted payments on their bills and that 100% of their balances have to be paid." PX14.1.

Section 8.2 of the Act states, in relevant part, "Providers of out-of-state procedures, treatments, services, products, or supplies shall be reimbursed at the lesser of that state's fee schedule amount of the fee schedule amount for the region in which the employee resides." *820 ILCS 305/8.2* (West 2013). Whatever policy Mayo Clinic may have regarding the payment of its charges does not alter the law in Illinois.

I do not find Respondent's conduct to be unreasonable, vexatious nor intentional. As such,

20IWCC0609

I would vacate the award of penalties and attorneys' fees pursuant to Sections 19(k) and (l) and 16. Therefore, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SPENCER, JANET
Employee/Petitioner

Case# **14WC022558**

SOI-JACK MABLEY DEVELOPMENTAL CENTER
Employer/Respondent

20IWCC0609

On 9/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.87% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0021 REESE & REESE
TODD S REESE
979 N MAIN ST
ROCKFORD, IL 61103

6202 ASSISTANT ATTORNEY GENERAL
COURTNEY SCHOCH
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

SEP 23 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Janet Spencer
Employee/Petitioner

v.

State of Illinois – Jack Mabley Developmental Center
Employer/Respondent

Case # **14** WC **22558**

Consolidated cases:

20IWCC0609

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Ottawa**, on **August 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/29/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,943.64**; the average weekly wage was $**1,229.69**.

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

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

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

Respondent shall be given a credit of $**166,142.46** for TTD/Maintenance, $**0.00** for TPD, and $**42,980.42** for other benefits (extended benefits), for a total credit of $**209,122.88** for the 273-3/7ths week benefit period.

ORDER

Respondent shall pay Petitioner TTD/Maintenance benefits of $819.79/week for 273-3/7 weeks, commencing 5/31/14 through 6/11/14 and 6/14/14 through 8/28/19, as provided in Sections 8(a) and 8(b) of the Act.

Respondent shall pay Petitioner reasonable and necessary medical services as provided in PX Group Exhibit 2 (2.1 through 2.19), as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for payments made.

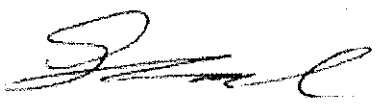
Respondent shall pay Petitioner permanent total disability benefits of $819.79/week for life, commencing 8/29/19, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Respondent shall pay Petitioner penalties, pursuant to Section 19(k) in the amount of $35,658.63, pursuant to Section 19(l) in the amount of $10,000.00, and pursuant to Section 16 in the amount of $9,131.73.

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

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



Signature of Arbitrator

September 20, 2019
Date

SEP 23 2019

Janet Spencer v. State of Illinois, Jack Mabley Developmental Center
14 WC 22558

FINDINGS OF FACT

The Petitioner testified that she has worked for the Respondent, State of Illinois, Jack Mabley Center, for approximately 19 years. Petitioner worked for Respondent as a licensed practical nurse (LPN-2). Her duties included, but were not limited to, supervision and care of mentally and physically disabled adults that can become combative and violent at times. Petitioner was trained in restraint techniques to deal with residents that would become aggressive or combative.

Petitioner offered into evidence a copy of her wage records for the 52 weeks prior to the date of accident. (PX 9). Petitioner was paid bi-monthly and the wage records cover 24 pay periods. She testified that the wage records accurately reflect her wages prior to the date of accident. Petitioner testified that the overtime she worked, as reflected in the wage records for the first three periods was mandatory. The Respondent would post signup sheets for overtime positions. If she did not choose the shift that she could work by signing up, then the Respondent would mandate her for a shift of their choice. The overtime was mandatory and the act of signing up for the overtime was not a choice but a way for Petitioner to avoid being mandated for an overtime shift that would be inconvenient. Petitioner testified that if she refused to work the mandatory overtime, then she would get written up and face termination of her employment. Petitioner also testified that she had a prior claim that went to trial and the Arbitrator found that the overtime then was mandatory. (PX 11 & 12). Petitioner testified that the mandating of overtime during the first three pay periods was the same now as it was in her prior case. After the first three wage periods, there was a change in the overtime policy as it related to nurses and Petitioner was no longer mandated for shifts. Petitioner also testified that she earned a small amount of overtime in two other periods when she would have had to stay after her regular shift until she was properly relieved of her duties. The Arbitrator finds petitioner's testimony credible.

Petitioner testified that on 5/29/14 she was passing out medications and one of the clients was trying to get on her medication cart. She tried to keep him away from the cart with her right hand. As she was shielding the client from the cart with her right hand the client grabbed her right hand and wrist and began pulling and jerking her arm. She noticed immediate pain in her right hand, arm and shoulder. She notified her supervisor, Cathy Bell, and finished her shift. She did not seek treatment on the date of accident because she had hoped that the pain would go away, but it did not, and she sought treatment a couple days after the accident. A written incident report was eventually completed on 6/21/14. (PX 3). Petitioner testified that she had a prior left shoulder injury but had not had any injuries to her right shoulder, arm or wrist. Petitioner also testified that she had a preexisting diagnosis of rheumatoid arthritis.

On 5/31/14, Petitioner testified, and the medical records reflect that she presented to the St. Anthony Medical Center. (PX 1.1). She presented with complaints of right shoulder, elbow and wrist pain that started on Thursday, 2 days ago, and had not improved. She indicated that this started when she was at work and a patient was pulling on her right arm. Since then, she stated that she has had pain. She was given an injection of Toradol and advised to take some pain medications and follow up with her primary care doctor. She was given an off-work slip starting 5/31/14.

On 6/2/14, Petitioner testified, and the medical records reflect that she saw Dr. Madhan Prabhakaran at L.P. Johnson Family Health. (PX 1.2). She related her work accident and the pain she was having from her right shoulder and wrist. After examination, Dr. Prabhakaran ordered MRI of the right shoulder, referred her to an orthopedic specialist and instructed her to use conservative measures such as ice packs and heating pads in the

meantime. She was continued off work, but a letter was given to her employer that she was to be off work through 6/11/14.

On 6/13/14, Petitioner was seen by Dr. Madham Prabhakaran at the UIC Clinic. (PX 1.2). She was still in a lot of pain and awaiting to be seen by a specialist and undergo a MRI. She was given an off work slip for the next two weeks, starting on 6/14/14.

On 6/30/14, Petitioner underwent MRI of her right shoulder at Forest City Diagnostics. (PX 1.4). The MRI revealed: 1) Glenoid labrum anterior superior low-grade SLAP tear; 2) rotator cuff supraspinatus and infraspinatus mild tendinosis and both have insertional limited fraying or very small partial thickness tears. No rotator cuff full thickness tear; and 3) AC joint degenerative arthritis and secondary subacromial impingement on rotator cuff.

On 7/25/14, Petitioner testified, and the medical records reflect that she was seen by Dr. Tony Choi at Midwest Orthopedics. (PX 1.5). She related her right shoulder and wrist pain, along with loss of motion, as a result of the work accident on 5/29/14. She reported weakness and decreased range of motion in the shoulder and right wrist, as well as constant, severe pain and dull ache. Her pain was exacerbated with cold air and movement. On examination, no tenderness was elicited at the posterior cervical spine or in the paraspinous muscles. She had mild tenderness at the right trapezius. Spurling's test was negative. On the right side, she had moderate tenderness at the greater tuberosity and slightly less tenderness at the AC joint. She was also tender about the right trapezius. Range of motion of the right shoulder was 160/160/60/sacrum. The left was 160/160/60/5. Impingement signs were mildly positive on the right. Cross body adduction was negative. There was a painful arc on the right. Left was unremarkable. Strength of the rotator cuff was 5/5 both right and left. Manual motor testing for right finger extension, flexion and abduction caused pain on the right. Grip strength on the right in position 2 of the Jamar was 35, 25, 30 psi. Left grip strength was 90, 85, and 85. These were measured and rapidly alternating sequence from right to left. The MRI of 6/30/14 was reviewed and a SLAP tear was seen, and AC joint degeneration was appreciated. Also reviewed were cervical x-rays, right shoulder x-rays, right wrist x-rays from 7/25/14. Dr. Choi's impression was: 1) acute injury to the right upper extremity on 5/29/14 resulting in exacerbated right wrist pain associated with underlying degenerative arthritis; and 2) right shoulder pain which is associated with less disability today than that of the right wrist. Dr. Choi performed a radiocarpal injection to the right wrist. She was advised to utilize her wrist splint and moderate her activity. She was advised to remain off work.

On 8/7/14, Petitioner was seen by Dr. Michele Glasgow at Midwest Orthopedics and underwent a right shoulder injection. (PX 1.5). Dr. Glasgow noted that she has pre-existing significant degenerative changes in the right wrist which have been treated with injection in the past by her rheumatologist, Dr. Jasek, at Rockford Orthopedic Associates and it was recommended that she see Dr. Jasek since he has x-rays of her right wrist and can evaluate her for any change in her exam in comparison to prior evaluations. She was also instructed to begin physical therapy. She remained off work and continued to follow up with Dr. Glasgow regarding her right shoulder. On 10/9/14, Dr. Glasgow indicated that therapy would be put on hold until she had a chance to discuss with the therapist, but Petitioner would continue home exercises. Dr. Glasgow did indicate that if Petitioner's right shoulder failed to improve then a shoulder arthroscopy could be performed, which would likely involve a biceps tenodesis.

On 11/3/14, pursuant to Section 12, the Respondent had Petitioner examined by Dr. Sam J. Biafora at Hand to Shoulder Associates. (PX 5.1 and RX 6). Petitioner and Respondent offered Dr. Biafora's report into evidence. Dr. Biafora obtained a history of the accident and current complaints, performed an examination, reviewed diagnostic studies and gave his opinions to certain questions. Dr. Biafora diagnosed Petitioner with right shoulder pain with rotator cuff tendinopathy, biceps/labral pathology, acromioclavicular arthritis, and

aggravation of significant right wrist arthritis. **Dr. Biafora opined that Ms. Spencer's diagnoses are consistent with the diagnostic studies and mechanism of the work injury and that both the right shoulder and the right wrist conditions are causally related to the work injury.** Dr. Biafora opined that Petitioner's objective findings supported her subjective complaints, that she had not reached MMI. Regarding the right shoulder, Dr. Biafora recommended a repeat injection followed by physical therapy. If Petitioner continued to have pain with minimal improvement, then he recommended that she proceed with a right shoulder arthroscopy. **Regarding the right wrist, Dr. Biafora recommended that she continue her treatment and if she failed to return to baseline over the next couple months, then he would recommend she proceed with surgical intervention consisting of a total wrist fusion with need for a distal ulnar resection.**

On 11/20/14, Petitioner followed up with Dr. Glasgow. (PX 1.5). She had recently been started on Enbrel by her rheumatologist and she was currently taking Percocet 1 to 2 every four hours. Petitioner felt that her right wrist pain was significantly worse than her shoulder and she wished to have her wrist evaluated and treated. On 12/9/14, she was seen by Dr. Robert Swartz at Midwest Orthopedics. On examination of the right wrist, her right wrist had almost no active range of motion. Her fingers had approximately one-third of normal active motion when asked to move them. Dr. Swartz's impression was that she had advanced rheumatoid arthritic changes of the wrist. They spoke about symptomatic treatment options with splinting, anti-inflammatories and steroid injection, as well as a total wrist fusion as a reasonable option for her. She needs to get her finger range of motion back more comfortably, however before considering such surgery. She was instructed on these exercises and also given a therapy referral. Petitioner started physical therapy at Rochelle Hospital and continued to follow up with Dr. Swartz until she was referred to Mayo Clinic for further treatment regarding her right wrist. Petitioner continued to follow up with Dr. Glasgow for her right shoulder complaints. Petitioner remained off work.

On 3/5/15, Dr. Glasgow noted that she had a note from Dr. Glaser that stated that while Petitioner was under the influence of opioid medications or other medications that may impair judgment, she was unable to operate a vehicle or heavy machinery. Petitioner was again seen by Dr. Glasgow on 4/16/15 and remained off work.

On 4/24/15, Petitioner testified, and the medical records reflect that she presented to Dr. Scott Steinmann at the Mayo Clinic. (PX 1.8). Petitioner related the work accident on 5/29/14 when she was trying to keep the client/resident from getting to her medication cart and the client grabbed her right hand/wrist, twisted her wrist and yanked on her arm several times. She was referred to Dr. Luthra at Mayo and seen on 6/3/15. Dr. Luthra referred Petitioner to Dr. Julie Adams in the orthopedic department at Mayo and petitioner was seen the same day.

On 6/3/15, Petitioner began her treatment with Dr. Julie Adams at the Mayo Clinic. (PX 1.8). Dr. Adams noted the work accident when a patient grabbed Petitioner's right wrist and began shaking her by the arm. It was noted that Petitioner carried a diagnosis of rheumatoid arthritis which had been ongoing for the past five or more years and started out in her right thumb and long finger and settled into her right wrist with pain in that region that predated the injury; however, it was manageable up until the work accident. **Dr. Adams indicated that Petitioner's right wrist was exacerbated by the work-related injury and that she was unable to return to work**. She also indicated that a wrist replacement may be a reasonable consideration. Petitioner continued to follow up with Dr. Adams and remain off work.

On 5/14/15, Petitioner was again seen by Dr. Glasgow. Dr. Glasgow noted that Petitioner had continued treatment for the right wrist and recommended that Petitioner proceed with management of the right wrist at this time and then proceed with the shoulder later on. Petitioner was continued off work.

On 7/1/15, Petitioner was taken to surgery by Dr. Adams, who performed a right total wrist replacement arthroplasty, tendon transfer EDQ to EDC, distal ulna osteophyte excision and posterior interosseous nerve neurectomy. Petitioner continued to follow up with Dr. Adams postoperatively and entered into another course of physical therapy at Rochelle Hospital. Petitioner remained off work.

On 2/23/16, Petitioner testified, and the medical records reflect that she underwent a functional capacity evaluation (FCE) at Orthopedic Rehab Specialists. (PX 1.9). Petitioner demonstrated the ability to perform work at the Sedentary/Light demand level, lifting 10 pounds on an occasional basis bilaterally to her waist, unilateral lift and carry with the right upper extremity 7.5 pounds on an occasional basis and 14 pounds on an occasional basis with the left upper extremity. She is also to avoid forceful gripping and pinching activities with the right upper extremity and avoid fine motor control with the right upper extremity.

On 6/1/16, Petitioner was last seen by Dr. Adams at the Mayo Clinic for her right wrist. (PX 1.8). Dr. Adams noted the FCE on 2/23/16 and agreed with the permanent restrictions. On 7/1/16, Petitioner was last seen by Dr. Glasgow at Midwest Orthopedics for her right shoulder. (PX 1.5). At this time, Petitioner was not interested in pursuing surgery as she felt that her current restrictions made her right shoulder discomfort tolerable. Dr. Glasgow did note that with her permanent restrictions it was apparent that she would not be returning to her former job with the Respondent. Dr. Glasgow agreed with the permanent restrictions set out by the FCE on 2/23/16 and recommended that she continue her home exercise program. If the pain worsened, then a repeat MRI could be considered, as well as a repeat injection. Petitioner was advised to return as needed.

Petitioner testified that she presented her permanent restrictions to the Respondent and she was not allowed to return to her employment. (PX 13.1 and 13.7). She wanted to return to work with the Respondent, and if not the Respondent, then she wished to return to work in some fashion. Petitioner testified that she began her own self-directed job search, beginning in September of 2016, when the Respondent was not responding to her requests for vocational rehabilitation and job search assistance. Petitioner kept a log of her job search efforts from 9/6/16 through 8/10/18. (PX 7).

Petitioner testified that she requested, through her counsel, that Respondent provide her with vocational rehabilitation and job search assistance. Petitioner requested that Respondent provide vocational rehab on 7/13/16, 8/30/16, 9/9/16, 9/23/16, 10/6/16, and 11/1/16. (See PX 13.1 – 13.7). On 11/17/16, Respondent finally agreed to approve vocational rehabilitation and schedule an initial vocational assessment. The initial vocational assessment was not completed until 1/4/17 and actual vocational rehabilitation and job search assistance was not initiated until 8/25/17, more than a year after the initial requests by Petitioner. Petitioner testified that she cooperated with the vocational counselor and gave her best efforts throughout the time the Respondent provided job search assistance. The Respondent provided job search assistance until April of 2018 when it was terminated. Petitioner continued to look for work on her own until 8/10/18.

On 11/13/17, pursuant to Section 12, Respondent had Petitioner reexamined by Dr. Sam J. Biafora at Hand to Shoulder Associates. (PX 5.2 and RX 7). Petitioner and Respondent offered Dr. Biafora's report into evidence. Dr. Biafora obtained a current history of treatment and complaints since his last examination on 11/13/14, reviewed the medical treatment and diagnostic studies, performed an examination and provided opinions to certain questions. Dr. Biafora found Petitioner's exam to be reliable, which revealed reproducible pain with right shoulder motion, specifically at the acromioclavicular joint, as well as anterior shoulder pain, consistent with a biceps/labral complex injury. She also had findings of impingement/rotator cuff tendinopathy. The right wrist exam revealed significant motion loss, including flexion, extension, supination, pronation and

radial/ulnar deviation and mild loss of finger motion. Dr. Biafora also found that Petitioner's exam was consistent on both direct and indirect examination. There were no findings which would be consistent with symptom magnification and her behavior was appropriate. Dr. Biafora's diagnoses were: 1) continued, though mildly improved, shoulder pain related to rotator cuff tendinopathy, biceps/labral pathology, acromioclavicular arthritis; and 2) status post right total wrist replacement/arthroplasty with significant residual motion loss and mild pain, with some residual finger motion loss. **Dr. Biafora opined that Petitioner's right shoulder and right wrist conditions are related to the accident she described in May of 2014. Dr. Biafora opined that Petitioner's medical treatment has been reasonable and medically necessary, and that it is related to the May 2014 work injury.** Regarding further treatment for the right shoulder, Dr. Biafora opined that proceeding with additional treatment would be left to the discretion of Ms. Spencer and her treating physician, as she clearly had residuals of the right shoulder. If she decides to pursue additional treatment, then Dr. Biafora would recommend a repeat MRI and consider a shoulder injection. Further treatment would be based on the MRI and the response to the injection. Regarding the right wrist, Dr. Biafora did not believe any further treatment was indicated. Dr. Biafora opined that Petitioner would not have any further improvement in her right wrist condition and regarding the right shoulder that he did not believe any further improvement would be anticipated without further treatment. Dr. Biafora opined that all of his opinions were made within a reasonable degree of medical and surgical certainty.

On 8/22/18, at the request of Petitioner's counsel, Ms. Spencer met with Mr. Ed Pagella of Health Connection of Illinois to undergo a vocational assessment. Mr. Pagella prepared a report, dated 9/11/18. (PX 8). Mr. Pagella reviewed the 15 vocational reports by Tracy Peterlin of Creative Case Management (Respondent's vocational counselor), Ms. Spencer's job search logs, the reports of Dr. Biafora, the treatment records of Mayo Clinic, the FCE report from Orthopedic Rehab Specialists and the records of Dr. Scott Glaser. Mr. Pagella obtained a history of Ms. Spencer's current medications, her pertinent medical history, her physical capacities, psycho-social factors, educational history, employment history, performed a transferable skills analysis and provided an assessment and opinions. Mr. Pagella noted that Ms. Spencer demonstrated the ability to perform work at the Sedentary/Light demand level, lifting 10 pounds on an occasional basis bilaterally to her waist, unilateral lift and carry with the right upper extremity 7.5 pounds on an occasional basis and 14 pounds on an occasional basis with the left upper extremity. She is also to avoid forceful gripping and pinching activities with the right upper extremity and avoid fine motor control with the right upper extremity. Mr. Pagella noted that Dr. Adams agreed with these restrictions. Also noted was the 2/11/15 report from Dr. Glaser that Ms. Spencer should not operate a commercial vehicle or heavy machinery while under the influence of opioid medication. Mr. Pagella reviewed with Ms. Spencer her ongoing job search efforts over the last year and a half and that she has been unable to identify any employer that will hire her and that she is getting quite depressed that no one will hire her and that Creative Case Management continues to give her job leads they know she cannot perform. Mr. Pagella opined that Ms. Spencer has done an awesome job in trying to help herself find alternative work while in pain and taking narcotic medication. Mr. Pagella noted that Creative Case Management indicated in numerous reports that "her vocational outcomes should be guarded due to her physical limitations." Mr. Pagella stated, "In my professional opinion as a Certified Rehabilitation Counselor and Vocational Expert, Ms. Spencer is an 'Odd Lot' perm total as both Ms. Spencer and Creative Case Management demonstrated that there are no suitable or viable occupations for her." Mr. Pagella opined that "Creative Case Management did not demonstrate that there is any type of suitable or viable work for her" and that "she is an 'Odd Lot' permanent total as outlined in Valley Mold & Iron Co. v. Industrial Commission and Interlake Inc. v. Industrial Commission." Mr. Pagella further opined, "Ms. Spencer has looked for alternative work for over 18 months and any continuation of vocational rehabilitation would be futile as both Ms. Spencer and Creative Case Management have demonstrated that no suitable or viable occupation exists for her."

At this point, Respondent was not providing any job search assistance or vocational rehabilitation and

Petitioner discontinued her job search efforts. In the middle of 2019, Respondent requested that they be given permission to do another vocational assessment. On 7/18/19, Petitioner met with Tracy Peterlin of Creative Case Management. Ms. Peterlin prepared a Vocational Assessment report, dated 7/29/19. (RX 5). Ms. Peterlin indicated that the purpose of the meeting was to obtain any updated information and determine if resuming vocational services would be appropriate. Ms. Peterlin opined, "It continues to be this vocational case manager's opinion – based on a reasonable degree of vocational certainty that **Ms. Spencer is not a good candidate for continued vocational services/guided job search efforts and successful vocational outcome is guarded** ..." The Respondent did not provide any further vocational services or guided job search efforts.

At the time of hearing, Petitioner called Mr. Ed Pagella to testify. Mr. Pagella is a vocational rehabilitation expert with over 30 years' experience. He currently works for Health Connection of Illinois and holds consulting positions with both the Social Security Administration Office and Railroad Retirement Board. His present duties include vocational assessments and evaluations, testing, job placement, job analysis, vocational case management, ergonomic assessments, job modifications, labor market research, vocational counseling, medical management, job development, and counseling services for depression/anxiety. Mr. Pagella testified that he met with Ms. Spencer on 8/22/18 and prepared his report that is dated 9/11/18. (PX 8). Mr Pagella testified as to his review of Respondent's vocational reports from Creative Case Management by Tracy Peterlin. He clarified the definition of fine motor control and what the Sedentary/Light job classification meant. He testified that the jobs that Ms. Peterlin had identified for Petitioner were outside of her permanent restrictions. He testified that it is his opinion within a reasonable degree of vocational certainty that Ms. Spencer conducted a good faith job search and she did her due diligence. He testified that Ms. Spencer did an awesome job at looking for work. Mr. Pagella testified that it is his opinion within a reasonable degree of vocational certainty that Ms. Spencer did a good faith job search, that there is no suitable or viable occupation for her, that she is unemployable, that this is a permanent condition, there is no job within her geographical area and that she has been compliant. The Arbitrator finds Mr. Pagella's testimony convincing and credible.

The Respondent called Tracy Peterlin to testify. Ms. Peterlin testified to her licensures, education and memberships. She is a vocational and medical case manager. She testified that she met with Ms. Spencer, reviewed medical notes, reviewed Ms. Spencer's geographical area and prepared a labor market survey. Ms. Peterlin assisted Ms. Spencer in her job searches and prepared periodic reports that were identified as Respondent's Group Exhibit 4. Ms. Peterlin also testified that she conducted a second vocational assessment on 7/18/19 and that it was her opinion that a successful outcome was guarded. On cross-examination, Ms. Peterlin confirmed that the outcome was guarded and that she believed Ms. Spencer was unemployable. Ms. Peterlin did note in several vocational reports that Petitioner was not fully compliant with the job search plan. However, Ms. Peterlin testified that the reason for discontinuing the vocational services was not because of lack of effort on Petitioner's part, but that Ms. Spencer was unemployable.

The Respondent called Melissa Shaw to testify regarding the mandatory nature of overtime. Ms. Shaw has been the Assistant Center Director since 3/1/13. She testified that she supervises over the areas of nursing and training. She testified that her regular duties included scheduling, payroll and that she would enter overtime earned in the payroll system. Respondent offered into evidence a handwritten wage statement (RX 8) that alleges Petitioner's total earnings prior to the accident as $58,522.00. The wage statement indicates that only earnings from May of 2013 through April of 2014 were included. The wage statement is incomplete as it does not include any earnings during May of 2014. Respondent then calculated Petitioner's AWW, based on the incomplete handwritten wage statement, as $1,125.42. Ms. Shaw did testify that overtime sheets were posted for employees to sign up and employees would be mandated for overtime if the sheets were not filled. Ms. Shaw also corroborated Petitioner's testimony that the overtime policy did change sometime in the latter half of 2013, after the first three wage periods.

Petitioner testified as to what she currently notices about herself. Petitioner testified that she is unable to drive while taking her medications because they make her drowsy and she has been given restrictions of operating a motor vehicle while using the medications, which include medical marijuana. She testified that her right wrist is very stiff, and she is barely able to move it. She misses out on a lot of opportunities to be involved with her grandchildren because she is unable to lift them. When she is at church, she is unable to clap. She has difficulty with grooming and personal hygiene. She is no longer able to apply her makeup or do her hair on her own. She has had to resort to using a wig. She is very depressed that she no longer can work again and do the things that she used to do. Prior to this work accident, her arthritis was manageable, and she enjoyed working and being active. She continues with daily pain and notices increased pain with weather changes and especially cold. Air conditioning aggravates her pain. She understands that there is nothing further that can be done for her right wrist and she will have to live with it. Regarding her right shoulder, she still wishes to avoid surgery – but, she knows that it is still an option if she decides.

Regarding the Arbitrator's finding (F) Are Petitioner's current conditions of ill-being causally related to the injury; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

On 5/29/14, Petitioner was involved with an aggressive client at the Jack Mabley Developmental Center and was injured when the client grabbed her right wrist, twisted her wrist and jerked her arm several times. Petitioner sought immediate treatment with complaints to her right wrist and right shoulder. Her treatment continued uninterrupted and consistent until she was released from active treatment by Dr. Adams on 6/1/16 and Dr. Glasgow on 7/1/16 with permanent restrictions that prevented her from returning to work. Petitioner's treating physicians have also indicated that her conditions of ill-being for the right wrist and shoulder are related to her work accident on 5/29/14.

Respondent had Petitioner examined twice by Dr. Sam Biafora, pursuant to Section 12 of the Act. On 11/13/14, Dr. Biafora causally related Petitioner's conditions of ill-being related to her right wrist and right shoulder and recommended further treatment. On 11/13/17, Petitioner was again examined by Dr. Biafora. Again, Dr. Biafora causally related Petitioner's conditions of ill-being to the work accident on 5/29/14.

Therefore, the Arbitrator finds that Petitioner's conditions of ill-being for her right wrist and right shoulder are related to the work accident on 5/29/14.

Regarding the Arbitrator's finding (G) What were Petitioner's earnings; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

Petitioner offered into evidence her wage records with the Respondent for the 52 weeks prior to the date of accident. (PX 6). Petitioner testified that the overtime she worked, as reflected in the wage records for the first three periods was mandatory. The Respondent would post signup sheets for overtime positions. If she did not choose, the shift that she could work by signing up, then the Respondent would mandate her for a shift of their choice. The overtime was mandatory and the act of signing up for the overtime was not a choice but a way for Petitioner to avoid being mandated for an overtime shift that would be inconvenient. Petitioner testified that if she refused to work the mandatory overtime, then she would get written up and face termination of her employment. Petitioner also testified that she had a prior claim that went to trial, and the Arbitrator found that the overtime then was mandatory. (PX 11 & 12). Petitioner testified that the mandating of overtime during the

first three pay periods was the same now as it was in her prior case. After the first three wage periods, there was a change in the overtime policy as it related to nurses and Petitioner was no longer mandated for shifts. Petitioner also testified that she earned a small amount of overtime in two other periods when she would have had to stay after her regular shift until she was properly relieved of her duties. The Arbitrator finds petitioner's testimony credible.

Respondent called Melissa Shaw as a witness to testify regarding the mandatory overtime. Ms. Shaw has been the Assistant Center Director since 3/1/13. She testified that she supervises over the areas of nursing and training. She testified that her regular duties included scheduling, payroll and that she would enter overtime earned in the payroll system. Respondent offered into evidence a handwritten wage statement (RX 8) that alleges Petitioner's total earnings prior to the accident as $58,522.00. The wage statement indicates that only earnings from May of 2013 through April of 2014 were included. The wage statement is incomplete as it does not include any earnings during May of 2014. Respondent then calculated Petitioner's AWW, based on the incomplete handwritten wage statement, as $1,125.42. Ms. Shaw did testify that overtime sheets were posted for employees to sign up and employees would be mandated for overtime if the sheets were not filled. Ms. Shaw also corroborated Petitioner's testimony that the overtime policy did change sometime in the latter half of 2013.

The Arbitrator notes that based on Petitioner's actual payroll records (PX 6 and RX 9) and "base pay" only, during the 52 weeks prior to the accident, that Petitioner earned $60,798.37. Even with overtime excluded from the calculation, Petitioner's AWW would be $1,169.20 and the Respondent under calculated Petitioner's AWW. Furthermore, the Respondent, in their proposed findings, has allegedly recalculated Petitioner's AWW without overtime and now calculates and recommends an AWW of $1,218.46.

The Arbitrator finds that Petitioner's overtime was mandatory and should be included in the calculation of average weekly wage. The Arbitrator has reviewed the actual wage records for Petitioner's earnings in the 52 weeks prior to the date of accident and finds that petitioner earned $60,798.37 in base pay and $3,145.27 in mandatory overtime at the straight time rate, for total earnings of $63,943.64. The Arbitrator finds Petitioner's AWW to be $1,229.69.

Regarding the Arbitrator's finding (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

The Arbitrator finds that there was no objection by the Respondent with regard to the reasonableness and necessity of the medical care and treatment or the usual and customary nature of the charges. Respondent's objection to awarding medical services was one of liability. Based on the Arbitrator's findings on the issue of causation, the Arbitrator finds that Respondent shall pay Petitioner for medical expenses incurred by Petitioner in the care and treatment of her causally related injuries, pursuant to Sections 8 and 8.2 of the Act. The Arbitrator finds that the Respondent is responsible for the charges set forth in Petitioner's Group Exhibit 2 (2.1 – 2.19) and is responsible for the payment of the unpaid medical of $56,286.13 with Mayo Clinic as identified in PX 9. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent receives credit pursuant to Section 8(j) of the Act.

Respondent refused to pay the Mayo Clinic medical expenses that were incurred mostly in 2015, despite Petitioner's requests for payment. See Petitioner's Group Exhibit 14 (14.1 through 14.3). The Arbitrator finds Respondent's failure to pay medical expenses in the amount of $56,286.13 is unreasonable and vexatious.

An award of compensation must be paid directly to the Petitioner. "The law is clear that an award of medical expenses is an award of compensation." Virgilio Carreno v. Cambridge Homes, 96 IL.W.C. 56337, 2006 WL 1968954 (June 30, 2006). The Arbitrator thereby directs the Respondent to pay the remaining unpaid balance of medical expenses directly to Petitioner in the amount of $56,286.13.

Regarding the Arbitrator's finding (K) What temporary benefits are in dispute; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

Petitioner has indicated a period of TTD benefits from 5/31/14 through 6/11/14 and 6/14/14 through 8/10/17, when she discontinued her self-directed job search. Petitioner claims Maintenance benefits from 8/11/17 through the date of hearing on 8/28/19. The evidence supports that Petitioner was off work for the periods indicated by the Petitioner, but the Arbitrator finds that the periods of TTD and Maintenance need to be adjusted.

Petitioner was taken off work as of 5/31/14. On 6/2/14, Petitioner was seen by Dr. Prabhakaran and his notes indicate that Petitioner was given a letter to be off work through 6/11/14. On 6/13/14, Petitioner was again seen by Dr. Prabhakaran again and his office notes indicate that Petitioner was taken off work as of 6/14/14 for another 2 weeks. Petitioner did not return to work and has remained off work through the date of hearing on 8/28/19 as a result of the injuries she sustained in the work accident.

Based on the finding of causal connection, the Arbitrator finds that Petitioner was temporarily and totally disabled from work for the period of 5/31/14 through 6/11/14 and 6/14/14 through 6/1/16, the date in which Dr. Adams agreed with the permanent restrictions outlined in the FCE on 2/23/16. The period of TTD represents 104-3/7 weeks.

Further, based on the finding of causal connection, the Arbitrator finds that Petitioner is entitled to maintenance benefits from 6/2/16 through the date of trial on 8/28/19, for a period of 169 weeks.

Therefore, the Arbitrator finds that Petitioner is entitled to TTD/Maintenance benefits from 5/31/14 through 6/11/14 and 6/14/14 through 8/28/19, for a total period of 273-3/7 weeks.

Regarding the Arbitrator's finding (L) What is the nature and extent of the injury; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

The Arbitrator notes that the Petitioner is a 57-year-old female who worked for the Respondent as a licensed practical nurse, which requires supervision of mentally disabled adults that can become violent and require physical restraint. On 5/29/14, petitioner sustained injuries to her right wrist and right shoulder by an aggressive patient/resident at the Jack Mabley Center. Petitioner underwent extensive conservative treatment, including physical therapy and steroid injections. Petitioner was taken to surgery on 7/1/15 and Dr. Julie Adams

at the Mayo Clinic performed a right total wrist replacement arthroplasty, tendon transfer EDQ to EDC, distal ulna osteophyte excision and posterior interosseous nerve neurectomy.

Petitioner underwent a functional capacity evaluation on 2/23/16, which placed her at a Sedentary/Light job classification. Petitioner demonstrated the ability to perform work at the Sedentary/Light demand level, lifting 10 pounds on an occasional basis bilaterally to her waist, unilateral lift and carry with the right upper extremity 7.5 pounds on an occasional basis and 14 pounds on an occasional basis with the left upper extremity. She is also to avoid forceful gripping and pinching activities with the right upper extremity and avoid fine motor control with the right upper extremity. Dr. Adams and Dr. Glasgow agreed with the permanent restrictions of the FCE. She also has the restriction to avoid driving while using her narcotic medication and medical marijuana that has been prescribed.

In September of 2016, Petitioner began a self-directed job search. In August of 2017, the Respondent began to help Petitioner with formal vocational rehabilitation and job search assistance. In April of 2018, the Respondent terminated the vocational rehabilitation services and Petitioner continued her own self-directed job search until 8/10/18. Petitioner was not offered any employment during her self-directed job search or during the period that Respondent provided vocational services.

The Respondent's vocational counselor, Tracy Peterlin, has testified that Ms. Spencer's job search outcome is very guarded and that she believes she is unemployable. Petitioner's vocational expert, Ed Pagella, has opined that Ms. Spencer is unemployable.

In *A.M.T.C. of Illinois, Inc. v. Industrial Commission*, 77 Ill.2d 482, 488 (1979), the Illinois Supreme Court stated that the burden is upon the claimant to establish the unavailability of employment. Once the claimant has initially established that he/she falls in what has been termed the "odd-lot" category, then the burden shifts to the employer to prove that some kind of suitable work is regularly and continuously available to the claimant. A claimant can demonstrate that they are permanently and totally disabled by either: 1) a preponderance of the medical evidence; or 2) by showing a diligent but unsuccessful job search; or 3) by demonstrating that because of their age, training, education, experience, and condition, no jobs are available to a person in their circumstances. *See Abb C-E Services v. Industrial Commission,* 316 Ill.App.3d 745, 750 (5th Dist. 2000).

Based on the credible and unrebutted testimony of Petitioner, the unrebutted functional capacity evaluation of Orthopedic Rehab Specialists, the unrebutted medical records of Dr. Julie Adams and Dr. Michele Glasgow, and the credible and unrebutted testimony of Petitioner's vocational expert, Ed Pagella, the Arbitrator finds that petitioner has proven by a preponderance of the evidence that her conditions of ill-being render her permanently disabled and obviously unemployable. Also, Ms. Spencer has shown a diligent but unsuccessful job search and demonstrated that because of her age, training, education, experience and condition, that no jobs are available in her circumstances.

Once a claimant has met his/her burden, the burden shifts to the respondent who must show that the claimant is capable of engaging in some type of regular and continuous employment that is reasonably available. *See ER Moore v. Industrial Commission*, 71 Ill.2d 353 (1978). The Arbitrator notes that Respondent has provided no evidence to show that petitioner is capable of engaging in some type of regular and continuous employment that is reasonably available. In fact, Respondent's own vocational expert, Tracy Peterlin, testified that Ms. Spencer is unemployable.

In summary, the Arbitrator, having considered the totality of the evidence presented, specifically, the credible testimony of the petitioner, the functional capacity evaluation, the opinions of Ed Pagella and the

medical records of Dr. Julie Adams and Dr. Michele Glasgow, finds that petitioner has met her burden of proof by a preponderance of the evidence that she is unemployable and/or that Petitioner has proven by a preponderance of the evidence that there exists no stable labor market given Petitioner's age, disability, work experience, training, skills, education, and capabilities, as a result of the work injury on 5/29/14. The Arbitrator notes that the burden of proof shifted to the Respondent. The Arbitrator finds that Respondent has not met their burden of proof that Petitioner is capable of engaging in some type of regular and continuous employment that is reasonably available. The Arbitrator finds Petitioner permanently totally disabled, pursuant to Section 8(f) of the Act as of 8/29/19. The Petitioner is entitled to receive from Respondent $804.28 per week as of 8/29/19.

Regarding the Arbitrator's finding (N) Is Respondent due any credit; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

Per Arbitrator's Exhibit 1, Respondent claims credit of $51,986.51 in TTD benefits and $114,155.95 in maintenance benefits, for a total credit of TTD/Maintenance benefits in the amount of $166,142.46. The Respondent did not claim any other credits.

However, Respondent has submitted a Payment Listing printout (RX 1) that indicates payments of "extended benefits" to Petitioner for the period of 6/13/14 through 6/15/15 in the amount of $56,218.94. Respondent provided no testimony or evidence as it relates to these benefits, but the Arbitrator understands these benefits to be payments made to the Petitioner by the employer. Respondent's Exhibit 9 includes the actual Comptroller Records for each pay period showing amounts received by Petitioner from the employer; however, the payments do not match the payments in Respondent's printout contained in Respondent's Exhibit 1. Either way, Petitioner received payments from the employer during the period of 6/13/14 through 6/15/15.

Section 8(j)2 of the Act states in pertinent part, "...where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier **shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.**"

The Arbitrator finds that Petitioner did receive compensation from the employer during the period of 6/13/14 through 6/15/15. The Arbitrator finds that the Respondent is entitled to a credit "only to the extent" of the compensation that would have been payable during the period covered by such payment. Petitioner was off work during the period of 6/14/14 through 6/15/15 (52-3/7 weeks) and was entitled to TTD benefits. The Arbitrator has found that Petitioner's AWW is $1,229.69 and the TTD rate is $819.79. Petitioner was entitled to TTD benefits in the amount of $819.79 for 52-3/7 weeks or $42,980.42. Respondent is not entitled to the $56,218.94 that was paid by the employer, but the Respondent is entitled to $42,980.42 as credit for the "extended benefits."

The Respondent, for the period of 5/31/14 through 6/11/14 and 6/14/14 through 8/28/19, shall receive credit of $166,142.46 for TTD/Maintenance benefits and $42,980.42 in "extended benefits," for a total credit of $209,122.88. Respondent shall also be given credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator has found that Petitioner was entitled to TTD/Maintenance benefits for 273-3/7 weeks, which equates to $224,154.00 (273-3/7 weeks @$819.79). Respondent is entitled to credit in the amount of $209,122.88. The Arbitrator finds that Respondent has underpaid benefits in the amount of $15,031.12.

Regarding the Arbitrator's finding (M) Should penalties or fees be imposed upon Respondent; the Arbitrator finds the following facts:

The Arbitrator adopts and incorporates all the above findings of fact into these findings.

820 ILCS 305/19(k) holds, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award."

The intent of Sections 16, 19(k) and 19(l) of the Illinois Workers' Compensation Act is to implement the Act's purpose to expedite the compensation of injured workers and to penalize an employer who unreasonably delays or withholds compensation due an employee. Avon Products, Inc. v. Indus. Comm'n, 82 Ill.2d 297, 412 N.E.2d 468, 45 Ill. Dec. 117 (1980).

The Illinois Supreme Court has established a test of "objective reasonableness" to determine whether Section 19(k) penalties should be awarded. Board of Education of the City of Chicago v. Industrial Commission, 93 Ill.2d 1, 442 N.E.2d 861, 66 Ill.Dec. 300 (1982). The "objective reasonableness" of the Respondent's conduct is a factual question for the Commission to resolve and should not be disturbed unless it is against the manifest weight of the evidence. *Id.* at p.304. The burden of proving reasonableness of its conduct is upon the Respondent. See City of Chicago v. Industrial Commission, 63 Ill.2d 99, 345 N.E.2d 477 (1976). The "objective reasonableness" test is applied in situations where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation.

Budgetary problems do not justify the delay in benefit payment. See Jackson v. State of Illinois, 03 IL.W.C. 46895, 2007 WL 1920892 (May 25, 2007); See also: Stafford v. State of Illinois, 04 IL.W.C. 59092, 2007 WL 2152858 (June 28, 2007) (penalties awarded despite defense that Respondent simply did not have the money); Giordano v. State of Illinois, 05 IL.W.C. 25052, 2007 WL 1523770 (April 4, 2007) (penalties awarded despite Respondent's defense of insufficient funds). The Respondent has unilaterally decided to place the burden of medical expense payment, and the risks associated with nonpayment, on its employees. "This defense would not be available to a private employer and the Act does not except out the State of Illinois for liability for failure to pay benefits timely." See Lee v. State of Illinois, 05 IL.W.C. 24303, 2007 WL 891260 (February 21, 2007).

In the present case, Respondent has intentionally underpaid TTD/Maintenance benefits and refused to pay accepted outstanding medical services that date back to 2015, when there is no real controversy, but Respondent's actions are merely frivolous and for delay. Petitioner respectfully requests that penalties be awarded against the Respondent in this matter.

The Arbitrator notes that the issue of mandatory overtime in the AWW calculation has been previously litigated in a prior adjudication between these same parties and the issue in the present case is identical to the issue in the prior action. The prior adjudication resulted in a final judgment on the merits. As such, the Respondent had a full and fair opportunity to litigate the issue in the prior proceedings.

The Respondent has refused to include Petitioner's mandatory overtime in the calculation of AWW. The Respondent has also refused to pay the full amount of TTD/Maintenance benefits during the period of off work. The Arbitrator notes that Respondent provided no evidence at trial for the refusal to pay the full amount of TTD/Maintenance at the correct rate and that no basis for any real controversy exists.

In accordance with the Arbitrator's findings of average weekly wage ($1,229.69), petitioner is entitled to the TTD/Maintenance rate of $819.79 per week for the period of 5/31/14 through 6/11/14 and 6/14/14 through 8/28/19 (273-3/7 weeks or $224,154.00). Respondent is credited with $166,142.46 in TTD/Maintenance benefits paid and $42,980.42 in "extended benefits," for a total credit of $209,122.88. Petitioner has been underpaid TTD/Maintenance benefits in the amount of $15,031.12.

Also, Respondent has refused to pay outstanding medical services, in the amount of $56,286.13, incurred by Petitioner as a result of her treatment dating back to 2015, despite the fact that their own Section 12 examiner, Dr. Sam Biafora, examined Petitioner on two separate occasions (11/3/14 and 11/13/17) and opined that Petitioner's conditions of ill-being were causally related by the work accident on 5/29/14, and that Petitioner's medical treatment has been reasonable and necessary. Petitioner has requested on numerous occasions that Respondent pay the outstanding medical expenses and has been ignored. On 9/21/16, Petitioner, through her counsel, began sending Respondent's counsel a request for payment of the unpaid medical expenses. (PX 14.1-14.3). Furthermore, Petitioner is not required to show collection notices to be entitled to penalties, but Petitioner did receive collection notices and those were forwarded to the Respondent as well. (See PX 13.8, 14.1-14.3).

The Arbitrator calculates penalties as follows:

19(k): Penalty for delay of payment or intentional underpayment of compensation, in accordance with the provisions of Section 8(b), equal to 50% of the amount payable at the time of such award. Respondent has intentionally underpaid TTD/Maintenance benefits in the amount of $15,031.12 and medical expenses of $56,286.13. Petitioner is awarded 50% of the underpaid TTD/Maintenance benefits and 50% of the unpaid medical expenses, in the amount of $35,658.63.

19(l): $30.00 per day for the period of 9/21/16 through 8/28/19. 1071 days at $30.00 per day = $32,130.00. The penalty is limited to $10,000.00.

16: Attorney fees are awarded as 20% of the total award. ($35,658.63 + $10,000.00) * 20% = $9,131.73.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA LOPEZ,

Petitioner,

20IWCC0610

vs.

NO: 17 WC 37177

TONY'S FINER FOODS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, and medical expenses, both current and prospective, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner proved she sustained work-related injuries other than only a myofascial strain and awards additional benefits accordingly. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327 (1980).

I. FINDINGS OF FACT

A. Background

Petitioner testified through an interpreter that on November 22, 2017 she worked for Respondent in the meat department and had for about six months. On that date, she was weighing pig legs. Petitioner explained that she would take them off the cart, weigh them on a scale, put the price on them, and return them to the cart. She had to bend down to lift the legs. As she was weighing the meat, Petitioner felt a pop in her lower back and "a strong pain" in her right leg as well as in her back. Petitioner described the cart with the pig legs to measure about three feet high and the scale was about four feet high. The legs weighed 30 to 40 pounds each.

Petitioner testified that she continued to work the next few days, even though her pain was increasing. She then reported the accident on November 27, 2017 after which Respondent sent her to Concentra.

B. Medical Treatment

Petitioner first received medical treatment on November 27, 2017 at Concentra. She presented with lower back pain that radiates down the right leg post lifting injury five days prior. The examining physician, Dr. Simon, noted Petitioner's report that she was lifting 40-pound boxes when she developed pain in her lower back. She also reported that it radiated down to the right lateral foot. Petitioner rated her pain at a level of 7/10. Petitioner reported no previous problems with her back. On physical examination, Petitioner had limited and painful range of motion. Straight leg raise testing was negative. X-rays were normal except for moderate narrowing at L5-S1. Dr. Simon diagnosed lumbar strain and acute low back pain without sciatica. He also administered an injection, prescribed Ibuprofen/Toradol, ice/hot packs, muscle rub, and physical therapy. Dr. Simon imposed work restrictions including occasional 20 pounds lifting, occasional 30 pounds pushing/pulling, and occasional bending.

Petitioner also had her first physical therapy session on November 27, 2017. She reported 4/10 pain in her lower back radiating to her right knee. She also reported lifting relatively heavy boxes, 40 pounds, when she started to develop pain. Petitioner gave a history with two knee surgeries in 2006. The physical therapist noted pain, gait, and range of motion as impairments.

The medical records reflect that Petitioner continued in physical therapy at Concentra reporting slow improvement, but continued pain. On December 1, 2017, Petitioner reported improving, but her work was not respecting her restrictions. Petitioner testified that the physical therapy did not alleviate her pain. She denied that she improved in physical therapy, if the Concentra records so reflected.

Petitioner last returned to Concentra on December 13, 2017, after five physical therapy sessions. She reported her symptoms were improving, but also reported continued and constant bilateral lower back pain. Dr. Simon noted that Petitioner demonstrated functional improvement, and also noted limited and painful range of motion on physical examination. He maintained her previous work restrictions and ordered additional physical therapy.

Petitioner initially testified that Respondent could not accommodate her restrictions and she was off work from November 27, 2017 to December 8, 2017 but clarified that she actually worked from November 27, 2017 through December 16, 2017.

Petitioner then sought treatment on December 17, 2017 with Dr. Zaragoza, her doctor at La Clinica. She reported that on November 22, 2017 she was weighing 25 to 30-pound ham legs

and was given two food carts full of meat when she felt a sharp stabbing pop in her low back. She did not want to cause problems at work, so she did not report the incident immediately doing so on November 27, 2017. Petitioner reported that she was miserable for the next few days and became bedridden because of the pain and being miserable with the pain reported the injury on November 27, 2017. She rated her pain at 7-10/10. Dr. Zaragoza noted that Petitioner appeared in acute distress and she had abnormal sensation in the right S1 distribution. He diagnosed lumbar strain/sprain, nerve root irritation, and mild spasms. Dr. Zaragoza noted that Petitioner would have physical therapy at La Clinica and ordered an MRI to rule out herniated disc and radiculopathy. He opined that Petitioner's condition was directly caused by her work accident. Petitioner testified that she was also referred to a pain doctor.

Petitioner underwent the recommended MRI on December 19, 2017. The interpreting radiologist found: (1) mild spondylosis from L3-S1; (2) a posterior broad-based herniation at L4-5 causing mild foraminal and central canal stenosis; (3) a posterior broad-based herniation at L5-S1, causing mild foraminal stenosis; and (4) straightening of normal lumbar lordosis, to be correlated for muscle spasm versus strain. An EMG taken on December 27, 2017 was found to be normal by the electrodiagnostic technologist.

On December 28, 2017, Petitioner presented to Dr. Patel at the Pain & Spine Institute for low back pain. On physical examination he noted facet loading bilaterally and a positive right-sided straight leg raise. Dr. Patel diagnosed low back pain and lumbar radiculopathy. He refilled prescription medications and referred Petitioner back to Dr. Zaragoza for continued chiropractic treatment.

On January 4, 2018, Petitioner presented to Dr. Koutsky at Elmhurst Orthopedics for evaluation of low back pain radiating down the right leg with associated numbness/tingling. Petitioner testified that Dr. Zaragoza referred her to Dr. Koutsky, an orthopedic surgeon. The medical records reflect she reported the accident on November 22, 2017 when she was carrying trays of meat weighing about 60 pounds. She felt a sharp pain in her back radiating down her right leg, and had been unable to work due to pain. Dr. Koutsky noted a positive right-sided straight leg raise, spasm to palpation with limited range of motion, and reduced sensation to pinprick. He diagnosed L4-5/L5-S1 radiculopathy with segmental instability. Dr. Koutsky prescribed medication for pain, inflammation, and muscle tension. He also referred her for pain clinic evaluation and discussed use of lumbar support and a TENS unit. Petitioner remained off work.

On January 15, 2018, January 29, 2018, and February 26, 2018, Petitioner returned to Dr. Patel. At those visits, he noted a positive right-sided straight leg raise and recommended a right L4 and L5 transforaminal epidural steroid injection. He administered the injections on January 19, 2018, February 28, 2018, and February 28, 2018. Petitioner testified that the injections did not provide much relief.

On April 12, 2018, Petitioner returned to Dr. Koutsky. He noted that Petitioner's lumbar

radiculopathy was unchanged with 7/10 pain. Dr. Koutsky opined that she failed conservative treatment and noted that Petitioner now wanted definitive treatment. Dr. Koutsky recommended a lumbar decompression and instrumentation with stabilization surgery and referred Petitioner to Dr. Geoffrey Dixon for a neurosurgical evaluation. Petitioner would continue physical therapy in the interim.

On May 9, 2018, Petitioner returned to La Clinica and still complained of 6-9/10 pain. She reported that medication provided only minimal short-term relief. It was noted that Petitioner would continue her home exercise program and could return to the clinic as needed. This is the last treatment note from La Clinica. In total, Petitioner had about 40 sessions at this facility.

On May 17, 2018, Petitioner returned to Dr. Koutsky with continued low back pain and radicular complaints. He again noted the referral to Dr. Dixon for a neurosurgical evaluation, and that Petitioner had been unable to work because of her pain. Dr. Koutsky maintained Petitioner's diagnosis of L4-L5, L5-S1 radiculopathy with segmental instability and continued to recommend a lumbar decompression and instrumentation with stabilization.

Petitioner underwent another EMG on June 21, 2018 as ordered by Dr. Dixon. The electrodiagnostic technologist found electrical evidence of a right L4 radiculopathy with denervation of the vastus medialis.

Petitioner returned to Dr. Koutsky on June 21, 2018. He notes that she saw Dr. Dixon and that they awaited the EMG test results. A note of the same date shows that they received the EMG, which revealed right radiculopathy at L4.

Petitioner last saw Dr. Patel on July 16, 2018 with continued 7/10 pain. He noted that she had a follow up set with Spine Surgery. Dr. Patel indicated that he would defer to their recommendations and released Petitioner to return for treatment on an as-needed basis.

On July 26, 2018, Dr. Koutsky noted that Dr. Dixon agreed that Petitioner would be a reasonable candidate for the recommended surgery. Dr. Koutsky noted that Petitioner continued to suffer from a significant amount of back and leg symptoms after her work-related injury in November of 2017, that she had failed conservative treatment, and an EMG was positive for radiculopathy at L4. He continued to recommend surgery.

Petitioner returned to see Dr. Koutsky regularly from August 30, 2018 through a final visit on April 11, 2019. Petitioner's pain continued, or progressively worsened. As of March 14, 2019, Petitioner's back and leg symptoms were interfering with activities of daily living. Petitioner remained unable to work throughout this period, and it was noted that they continued to wait for authorization for surgery.

C. Deposition Testimony – Dr. Koutsky

Dr. Koutsky was called as a witness by Petitioner and testified by evidence deposition on April 29, 2019. Dr. Koutsky testified that he is an orthopedic surgeon and generally about his medical treatment of Petitioner.

Petitioner first presented to him on January 4, 2018 on referral from Dr. Zaragoza, a chiropractor. She complained of low back pain radiating into the right leg with associated numbness/tingling and weakness. She reported carrying meat weighing about 60 pounds and felt a sharp pain in her back radiating into her right leg. Petitioner had a positive right straight leg raise, which connoted an irritated or pinched nerve.

A lumbar MRI showed herniations at L4-45 and L5-S1, some collapse with Modic changes, and some segmental instability. Petitioner did not improve and Dr. Koutsky recommended fusion surgery. He referred Petitioner to Dr. Dixon for a second opinion. Dr. Dixon ordered a new EMG, which showed L4 radiculopathy. That result supported the theory that Petitioner had irritation or pinching of the nerve root. Dr. Koutsky testified that since that recommendation, they have been waiting for authorization for the surgery. He kept Petitioner off work from January 4, 2018 to the present. She could not work because of the spine instability and pain medication.

Dr. Koutsky opined that the work injury aggravated a pre-existing degenerative condition of Petitioner's lumbar spine causing back and leg pain and requiring surgical intervention. He thought the treatment she received to date was reasonable. Physical therapy sessions could have been reduced but they were waiting for authorization for surgery. Dr. Koutsky testified that he was still recommending fusion surgery.

On cross-examination, Dr. Koutsky testified he only saw the MRI scan and no prior medical records. When asked whether he was aware that Petitioner displayed inconsistent[1] physical examination findings, Dr. Koutsky testified that he did not. Dr. Koutsky acknowledged that straight leg raise testing involves a subjective component. He also agreed that his treatment was based, at least partially, on Petitioner's subjective statements. Finally, Dr. Koutsky acknowledged that some of the MRI findings were pre-existing and degenerative, and that the segment instability noted in the MRI pre-existed the accident. Dr. Koutsky testified that he released Petitioner to sedentary duty work on April 6, 2018, but then placed her off work completely on April 12, 2018.

On redirect examination, Dr. Koutsky testified that he was not aware of Petitioner complaining about lower back symptoms prior to the accident and saw no medical records to support that she did. He had no reason to doubt Petitioner's report of the mechanism of injury. Dr. Koutsky testified that the mechanism of injury was sufficient to aggravate Petitioner's

[1] The inconsistent physical examination findings alleged in the question to Dr. Koutsky were not specified.

20IWCC0610

condition, which was what happened here.

D. Deposition Testimony – Dr. Levin

Respondent called Dr. Levin as a witness and he testified by deposition on May 14, 2019. Dr. Levin testified that he is a board-certified orthopedic and spine surgeon. He has regularly treated patients with symptoms similar to those of Petitioner.

At Respondent's request, Dr. Levin performed an examination of Petitioner on January 24, 2018. Petitioner reported working in a meat department and was required to lift 60 pounds maximum. She also did a lot of overhead lifting and reaching. Petitioner "stated that she was having back pain prior to [the accident] from lifting the bins which are filled with meat which weigh approximately 60 pounds." She had no workup despite that pain and continued working.

On November 22, 2017, she was weighing pig legs which weighed about 35 pounds each. As she was performing that activity, she developed pain in the right low back. She did not report the accident immediately and thought the pain would resolve. The accident was on a Wednesday and, by Sunday, she had difficulty getting out of bed. The next Monday she came into work and reported the accident. She was sent to Concentra, and had five sessions of physical therapy, which did not help. Petitioner was sent back to work with restrictions that Respondent did not honor. She started treating with Dr. Zaragoza, to whom she was referred by a friend. Petitioner was referred to Dr. Koutsky whom she had seen once. She also had one epidural steroid injection prior to Dr. Levin's examination.

Petitioner reported 6/10 pain which could reach 7-8/10 with certain activities. The pain went from her back and radiated into the right buttock and leg through the thigh. She also reported minor intermittent left buttock/thigh pain. She awoke from sleep, she avoided lifting which caused pain, and she no longer felt safe driving. On examination, Petitioner showed tenderness, but no trigger-point tenderness. Straight leg raises were negative. However, it was positive in the right in a supine position. Dr. Levin testified that this was an inorganic response.

Dr. Levin summarized treatment to date and noted that the MRI showed degenerative disc disease, which was not abnormal considering Petitioner's age. The findings in the MRI were degenerative in nature. Dr. Levin did not see any evidence of clinically significant disc herniations where nuclear material has violated the annulus of the disc or instability. It did show a possible "transitional segment of L5-S1," but he further testified "that [is] in essence [what] you're born with. That's not an acute finding."

Ultimately, Dr. Levin diagnosed a lumbar myofascial strain. Besides the positive supine straight leg raises, Dr. Levin noted a "Hoover sign being positive on both sides. That is a reported test that shows non-organic findings." Dr. Levin testified he uses Hoover signs in lieu of Waddell signs. Dr. Levin would have considered 10 physical therapy sessions or six chiropractic visits to be appropriate for Petitioner's condition. She needed no additional

treatment for her work injury. In his opinion, Petitioner was at maximum medical improvement for her work-related injury at the time of his examination and could work her job at full duty.

After his examination of Petitioner, Dr. Levin was provided subsequent medical records, which he summarized. He criticized Dr. Koutsky's diagnosis of segmental instability. Dr. Levin stressed that one cannot see segmental instability in an MRI or in a general physical exam, rather on x-rays with lateral extension if it demonstrates significant segmental motion. He took x-rays of Petitioner and did not see any evidence of that. In Dr. Levin's opinion, the positive EMG was inconsistent with some previous clinical examinations which showed 5/5 strength and lack of neurological deficits. Finally, Dr. Levin testified that the lack of correlation between Petitioner's physical findings and clinical complaints, and his finding of a positive Hoover sign, were consistent with symptom magnification. Dr. Levin disagreed with Dr. Koutsky's recommendation for fusion surgery at L5-S1 and reiterated that objective findings did not support surgery. He also testified that findings of L4 radiculopathy would not indicate fusion at L5-S1. Although he also noted that incorrect EMG findings were possible.

On cross examination, Dr. Levin testified that he performed about 250 workers' compensation Section 12 medical examinations a year, almost all for employers. He explained that he tries to review prior medical records prior to making any diagnosis, either regarding his own patients or in Section 12 examinations. He also takes into account the diagnosis of the patients' treating doctors.

Dr. Levin testified that Petitioner's first EMG was taken within sufficient time after the accident to prevent a false positive or negative test. However, he qualified his answer stating that "the classic thing with too early testing is a false negative." Notwithstanding, Dr. Levin believed that the EMG was clinically relevant, as is all diagnostic information. He did not, however, find that the MRI findings were clinically relevant because they did not clinically correlate to the Petitioner's complaints. Dr. Levin seemed to suggest that a patient's subjective complaints can result in overreading of MRI results, citing an article. He reiterated that he did not appreciate herniated discs on the MRI films.

Dr. Levin admitted that a patient can experience pain from degenerative disc disease in the lumbar spine, and that it is possible for asymptomatic degenerative disc disease to become symptomatic from a traumatic event and/or acceleration of the degenerative condition. He also agreed that Dr. Koutsky indicated that Petitioner was unable to work due to pain. However, Dr. Levin testified that he did not know whether Dr. Koutsky was simply reporting what Petitioner said or was making his own conclusions. He testified that Petitioner reported to him that she experienced some back pain with her job prior to her accident but agreed that she denied any prior treatment or MRIs.

E. Additional Information

Regarding her current condition of ill-being, Petitioner testified that she used to walk

about 10 blocks, but no longer could. Petitioner testified that she takes medication for pain, which takes away her appetite and makes her very nervous, tense, and tired. She does not like these side effects. Petitioner testified that she was awaiting insurance approval for her surgery.

Petitioner denied telling Dr. Levin that she had prior back problems. She never had previous back problems. No records were submitted into evidence reflecting that Petitioner had prior back problems or treatment.

II. CONCLUSIONS OF LAW

A. Accident and Causal Connection

The Arbitrator found that Petitioner proved her accident caused a condition of ill-being but only to the extent of a resolved myofascial strain. The Arbitrator then concluded that Petitioner reached maximum medical improvement as of January 24, 2018, the date of Dr. Levin's Section 12 examination report. He found that the diagnoses of radiculopathy and segmental instability were not supported by the record and found Dr. Levin more persuasive than Dr. Koutsky adopting his opinions and conclusions. In so concluding, the Arbitrator noted that Dr. Koutsky did not review Petitioner's prior records and he was troubled that Dr. Koutsky did not show that he attempted to verify Petitioner's reported positive right straight leg raise result. The Arbitrator also found Petitioner not to be credible noting inorganic responses found by Dr. Levin during his one-time evaluation, inconsistencies in her clinical complaints, and inconsistencies in her testimony and the medical records. He stressed that Petitioner reported no improvement in her condition even though the medical records indicate some improvement.

The Commission agrees with the Arbitrator that Petitioner sustained a compensable accident at work on November 22, 2017. In order to obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Petitioner reported that, as she was weighing meat at work, she felt a pop in her lower back and "a strong pain" in her right leg as well as in her back. She estimated that the pig legs weighed approximately 30-40 pounds each. The records also reflect that Petitioner did not report the incident immediately because she did not want to cause any problems at work, and until she could no longer tolerate her pain. She reported the accident five days later and was sent to Concentra by Respondent. The initial treatment record confirms Petitioner's report that she was

lifting 40-pound boxes at work when she developed pain in her lower back with radiating symptoms. In addition, there is no evidence that Petitioner had any prior pain, symptoms or treatment to the low back or any radicular symptoms that prevented her from performing her full-time duties for Respondent at any time prior to November 22, 2017. Thus, the evidence establishes that Petitioner was injured in the course of her employment and that the injury arose out of her employment, and the Commission agrees with the Arbitrator that Petitioner sustained a compensable accident at work on November 22, 2017 as claimed.

Next, the Commission turns to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

Petitioner began treatment five days after her injury at the clinic to which she was referred by Respondent. There, she underwent conservative care that failed to alleviate her symptoms. Petitioner then began treatment with a chiropractor who referred her to Dr. Patel for pain management and Dr. Koutsky for orthopedic evaluation. An MRI taken less than one month after the accident revealed a posterior broad-based herniation at L4-5 and L5-S1 causing mild foraminal stenosis. Both Dr. Patel and Dr. Koutsky noted clinical evidence that Petitioner had pathology on the right side competent to cause her reported radicular symptoms into the right lower extremity. As of December 28, 2017 with Dr. Patel and January 4, 2018 with Dr. Koutsky, and continuing at every visit thereafter, these physicians noted positive right-sided straight leg raise testing.

From the outset, Petitioner reported a largely consistent mechanism of injury as well as consistent, and continued, low back pain and radiating symptoms. The difference in weight of the pig legs that she reported at the hearing, to her physicians, and to Dr. Levin are minor. It is not unexpected that pig legs, coming from different animals would vary somewhat in their weights. Petitioner generally reported that they weighed up to 40 pounds and she explained to Dr. Levin that she was required to lift bins of up to 60 pounds. As to her improvement with conservative care, the medical records reflect some reported improvement, but ultimately the conservative treatment modalities failed. An EMG performed approximately one month after the

accident was negative. However, clinical evaluation by Dr. Koutsky and Dr. Patel revealed positive straight leg raise testing corroborating an MRI showing two posterior broad-based disc herniations at L4-5 and L5-S1. Later, Petitioner underwent an EMG in 2018 that confirmed her subjectively reported radicular symptoms.

The Arbitrator was persuaded, in part, by Dr. Levin's opinions because he was troubled that Dr. Koutsky did not show that he attempted to verify Petitioner's reported positive right straight leg raise result. However, Dr. Koutsky's straight leg raise testing results are confirmed by the clinical findings of Dr. Patel, the pathology evident in Petitioner's MRI, and Petitioner's positive EMG in 2018. The Arbitrator was also not persuaded by Dr. Koutsky, in part, because he did not review Petitioner's prior medical records. This is not entirely accurate as Dr. Koutsky reviewed Petitioner's post-accident MRI and EMG.

In contrast, Dr. Levin was unable to explain the pathology found in the MRI performed less than one month after the accident or the EMG performed in 2018 after six months of clinically corroborated straight leg raise testing by Dr. Zaragoza, Dr. Patel, and Dr. Koutsky. Dr. Levin testified that he did not appreciate that the MRI showed "clinically significant" disc herniations, contrary to the interpretation of the radiologist, Dr. Patel and Dr. Koutsky. He discounted the finding of radiculopathy in the 2018 EMG suggesting it represented a false positive, but also admitted that "the classic thing with too early testing is a false negative[]" conceding that Petitioner's first EMG may not have been diagnostically accurate. In addition, Dr. Levin did not adequately explain the alleged inorganic responses, which he referred as Hoover signs. He simply testified that he found such signs during his one-time examination. No Waddell's testing was performed. Given the foregoing, the Commission does not find the opinions of Dr. Levin to be persuasive in this case.

Finally, the Arbitrator found that Petitioner was not credible based on her report at the hearing that she did not experience any improvement as a result of her conservative treatment, and because of suspect medication usage compared to the medical records. The medical records do show Petitioner's reports of some temporary improvement in her symptoms, but clearly reflect an ongoing need for treatment causing her to return to her physicians over time with continued low back pain and radicular symptoms that are yet intractable. The Commission does not find Petitioner's testimony that she did not benefit overall from her treatment to date to conflict with the medical records showing only temporary relief from the attempted conservative treatment modalities.

The Commission is similarly unpersuaded that the medical records establish that she should not be believed because of "suspect" medication usage. Dr. Koutsky continually discussed Petitioner's medication with her throughout treatment, but neither Petitioner's treating physicians nor Respondent's Section 12 examiner found that Petitioner's medication usage was problematic. The foregoing, in addition to the objective medical and diagnostic evidence establishing pathology competent to cause Petitioner's subjectively reported symptoms, the Commission finds Petitioner to be credible overall.

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Ultimately, the record establishes that Petitioner's work-related accident either caused the pathology in her lumbar spine or caused a previously asymptomatic pre-existing condition to become symptomatic, resulting in her inability to work and necessitating treatment. Thus, the Commission finds that Petitioner has established a causal connection between her current condition of ill-being and her injury at work as opined by Dr. Koutsky.

B. Temporary Total Disability

The Commission further awards Petitioner outstanding temporary total disability (TTD) benefits claimed. "To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Id.* The record reflects that Petitioner's condition has not stabilized and that she is unable to work per her treating physicians. Accordingly, the Commission awards Petitioner TTD benefits from December 17, 2017 through June 14, 2019, the date of arbitration, totaling 77 and 6/7ths weeks.

C. Medical Expenses

Under the provisions of section 8(a) of the Act, an employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of her employment. 820 ILCS 305/8(a) (West 2006). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)). The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 267 (2011). The Commission must consider a utilization review "along with all other evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical bills or treatment." 820 ILCS 305/8.7(i) (West 2014).

The Commission has found that Petitioner has established a causal connection between her low back condition and accident at work as noted above. The record reflects that Petitioner's claimed medical expenses were reasonable and necessary to alleviate her from the effects of her occupational injury. However, Petitioner has the burden of proving all charges are reasonable and necessary.

Respondent presented a utilization reviews dated January 30, 2018, February 28, 2018, April 2, 2018, and April 3, 2018 denying a drug screen, various medications, topical compound

20IWCC0610

creams, and a LidoPro patch. There is insufficient evidence in this record to establish that the recommended topical creams or LidoPro patch were efficacious. The remainder of the non-certified medications were prescribed by Dr. Patel or Dr. Koutsky to alleviate symptoms causally related to her low back condition including inability to sleep.

Thus, the Commission awards unpaid medical expenses to be paid pursuant to sections 8(a) and 8.2 of the Act with the exception of the charges for topical creams and the LidoPro patch denied per utilization review.

D. Prospective Medical Care

Having found accident and causal connection as explained herein, the Commission reverses the Arbitrator's ruling and awards the prospective surgery recommended by Dr. Koutsky.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $283.69 per week for a period of 77 & 6/7ths weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all medical expenses medical expenses to date incurred to treat Petitioner's work-related condition of ill-being pursuant to §8(a) and §8.2 of the Act with the exception of the charges for topical creams and the LidoPro patch, which are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective treatment prescribed by Dr. Koutsky.

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

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

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

20IWCC0610

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

DATED: OCT 15 2020
DLS/dw
O-8/20/20
46

Barbara N. Flores

Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

The Arbitrator found that Petitioner sustained only a myofascial strain in her work accident, which had resolved by the time of Dr. Levin's section 12 medical examination and report. In so doing he also found that Petitioner was not a credible witness. He noted that Dr. Levin found multiple instances of inorganic clinical responses and found that she exhibited symptom magnification. The Arbitrator also noted that Petitioner's testimony was inconsistent with the medical records. Specifically, he cited Petitioner's testimony that she did not improve with treatment, while the medical records indicate otherwise. In my opinion, an Arbitrator who is present for testimony and can personally observe the demeanor of the witnesses is in a better position to determine credibility than the Commission who must do so from a sterile transcript. I see no reason why the Commission should substitute its assessment of Petitioner's credibility over that of the Arbitrator in this instance.

I also agree with the Arbitrator that the opinions of Dr. Levin are more persuasive than those of Dr. Koutsky. Dr. Koutsky did not review Petitioner's prior medical records and relied largely on her subjective complaints to arrive at his diagnosis and treatment recommendations. In addition, Dr. Koutsky's diagnosis of segmental instability, which is a primary basis for his recommended surgery, was not diagnosed by any other doctor who examined her. In my opinion, Dr. Levin successfully argued that one cannot identify segmental instability in an MRI which shows soft-tissue pathology. Rather, Dr. Levin took flexion/extension x-rays which should identify segmental instability, but none was found. Finally, Dr. Levin was persuasive in making the point that the if the EMG findings were correct, those findings would suggest surgery at a level other than the level on which Dr. Koutsky recommended surgery. These factors, make Dr. Koutsky's recommendation for surgery problematic, as is the Majority's award of prospective treatment recommended by Dr. Koutsky.

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For the reasons stated I agree with the Arbitrator's finding that Petitioner suffered only a myofascial strain which resolved by January 24, 2018 and his denial of benefits thereafter. Therefore, I would have affirmed and adopted the Decision of the Arbitrator and respectfully dissent from the Decision of the Majority.

O-8/20/20
DLS/dw
46

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEGAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dennis Stallworth,
Petitioner,

20IWCC0611

vs.

NO: 17 WC 2223

Delicate Plastics/Illinois State Treasurer as
ex-officio of the Injured Workers' Benefit Fund,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 2, 2019, is hereby affirmed and adopted.

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

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

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

20IWCC0611

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 15 2020
o10/8/20
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0611

STALLWORTH, DENNIS Case# **17WC002223**

Employee/Petitioner

DELICATE PLASTICS/ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE INJURED WORKERS' BENEFIT FUND

Employer/Respondent

On 10/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES ATTY AT LAW
ANDREA CARLSON
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0000 DELICATE PLASTICS
1310 PRESTON ST
ROCKFORD, IL 61102

6285 ASSISTANT ATTORNEY GENERAL
DANIEL KALLIO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20 IWCC0611

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Dennis Stallworth
Employee/Petitioner

v.

Delicate Plastics / Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **17 WC 2223**

Consolidated cases:

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 1, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$457.00**. SEE DECISION

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

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

Respondent is not entitled to any credit as no sums have been paid by Respondent.

ORDER

- Respondent shall pay Petitioner permanent partial disability benefits of $274.20/week for 20 weeks, because the injuries sustained caused the disfigurement of the forearms, as provided in Section 8(c) of the Act.

- Respondent shall pay the petitioner temporary total disability benefits of **$304.67/** week for **3-4/7** weeks, commencing **December 9, 2016 through January 2, 2017**, as provided in Section 8(b) of the Act.

- Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injuries pursuant to Sections 8 and 8.2 of the Act. PX 8.

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

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

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

Carolyn M. Doherty

Signature of Arbitrator

10/1/19
Date

OCT 2 - 2019

STATEMENT OF FACTS

The parties appeared for hearing on August 16, 2019. Petitioner was represented by counsel. Petitioner attempted to provide notice of a prior hearing date to Respondent, Delicate Plastics, by certified mail. (Px. 9). As Respondent did not have workers' compensation insurance coverage, the Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund. (Px.4).

Petitioner testified that on December 1, 2016, he was employed by Delicate Plastics as a laborer. At that time, he was 52 years old, having been born on June 6, 1964. He had 0 dependent children. He began working for Delicate Plastics in April or May 2016. He testified that he worked approximately 8 months for Respondent prior to December 1, 2016. Rodney Hunt, a friend of Petitioner who was employed by Delicate Plastics, informed him of a job opening. Petitioner was hired "off the street" by the owner and operator Jim. He was paid in cash once a week by Jim, with no taxes withheld or social security deductions. Rodney Hunt testified as a witness at trial and noted that Jim paid both he and Petitioner in cash once a week.

Petitioner testified that he initially began working on roofing jobs outside for Delicate Plastics in April 2016 and was paid $17 an hour. He was moved inside the warehouse during October or November 2016. Inside the warehouse, his job required him to destroy plastic containers by inserting them into a chipper. A bin below the chipper was filled with the shredded pieces of plastic. He testified that he worked full time, 4 nights a week from 3:00pm to 11:00pm. Petitioner testified that he was paid $11 an hour once he started working inside the warehouse chipping plastic containers. Rodney Hunt that the men were paid a minimum of $121 per night but that here there was an expectation from Jim that they were to fill 11 to 13 bins a shift with the chipped plastic remnants.

On December 1, 2016, Petitioner was lifting a plastic container into the chipper. While he lifted the container, an unknown liquid poured out and splashed onto his bilateral forearms. Petitioner initially felt a cooling sensation on his arm and when he started to wash it off he experienced burning to his forearms where the chemicals splashed. He testified that he went home following the burning, and that his fiance later took him to the Swedish American Hospital emergency room.

Petitioner initially received care at the Swedish American Hospital emergency room on December 2, 2016 (Px. 6). He reported a chemical burn from an unknown chemical splash while working onto his bilateral forearms. The treating physicians noted first degree burns to the bilateral forearms, worse to the left and a small amount of second degree burns left pinky finger. He received burn care and was treated for pain (Px. 7).

On December 9, 2016, Petitioner received follow up care with Nurse Practitioner Joann Cobb at Crusader Clinic. He complained that is left arm burn had gotten worse the past week. He was assessed with a second degree of the left arm and referred to the OSF Surgical Group for burn care (Px.5). He was examined by Advanced Practice Nurse Denise Nordenberger on December 9, 2016 at the OSF Surgical Group (Px.6). Petitioner provided a history of being injured while working when one of the bins he moved broke and splashed chemicals on December 1, 2016. He was assessed with a second degree burn of the left forearm and a first degree burn of the right forearm. APN Nordenberger noted burns to 3% total body surface area (TBSA) to the left forearm and circumferential and posterior aspect of his right forearm. She also noted no signs of infection and that no grafting was required. She noted that the right arm was healed with dry skin. The area to the left forearm was noted as pink with budding; open to the anterior aspect, the posterior was healed and dry.

She provided wound care and applied Silvadene to the left anterior forearm and lotion to the posterior left and forearm and to the right forearm. Petitioner was placed on restrictions that he was not to return to work until reevaluated in two weeks (Px. 6). Petitioner presented for a follow-up on December 23, 2016. (PX6 at 19). An examination revealed that both his left and right arm were "well healed with dry skin." (PX6 at 20). Petitioner was released to work without restrictions as of January 2, 2017. PX 6, p. 24-25.

Petitioner did not physically present to the clinic following this visit, but the notes indicate that he called on February 6, 2017 and was advised that he did not need a skin graft. (PX6 at 23). The appointment for the following day was then cancelled. *Id.*

At trial, the Arbitrator examined Petitioner's left forearm as presented and noted the burn area consisted of mild forearm-circumferential scarring which was highly visible. The scarring consisted of minor disfigurement, dryness over the site, and slight pigment discoloration in relation to the rest of his arm. The scarring on the posterior of the arm was approximately four inches in length and narrowed as it descended into the anterior of the left arm, where it was approximately two to three inches in length. The visible portion of the burn covered approximately one third of the left arm. The scarring did not extend below the wrist or above the elbow. No scarring of the right arm was visibly apparent.

Petitioner reported his injury to Jim the day after the accident on December 2, 2016. Petitioner testified that he was fired on the spot. Jim received notice of his workers' compensation claim by mail about a week after the accident on or about December 6th, 2016.

Notice of the trial date was attempted on the Respondent. (Px. 9). Petitioner offered a certificate of noncompliance from the NCCI confirming that Respondent failed to have insurance. (Px. 4). Finally, Petitioner offered exhibits 1 and 2 which were the original Application for Adjustment of Claims and the amended Application for Adjustment of Claims, adding the Injured Workers Benefit Fund is a party to the case. (Px. 1, 2). All issues were in dispute at the time of trial.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

The Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on December 1, 2016. Petitioner testified that he was hired by Jim, the owner and operator of Delicate Plastics to work as a laborer in the warehouse to dispose of plastic containers through feeding them into a chipper. Testimony at trial established that Delicate Plastics engages in the recycling of plastics in which corrosive acids are used. The provisions of the Act apply automatically to the operation of any warehouse or general or terminal storehouses as well as to the use, storage or conveyance of corrosive acids by a business or enterprise. As such, the Arbitrator finds that automatic coverage under Section 3 of the Illinois Workers Compensation Act applies and that Respondent was operating under and subject to the Illinois Workers' Compensation Act on December 1, 2016.

B. Was there an employee-employer relationship?

The Arbitrator finds that there was an employee-employer relationship between Petitioner and Delicate Plastics. Petitioner testified that he was hired by the owner Jim to work as a laborer. Petitioner testified that he was hired off the street. Petitioner testified that he worked approximately 32 hours a week, from 3 p.m. to 11 p.m., four days a week. He also testified that Jim provided the equipment that he used while working. Jim also instructed them on the tasks they would complete while working for Delicate Plastics. Initially, Petitioner started working outside on roofing. When the weather cooled down in the fall, Jim directed the Petitioner and his other employees to work inside the warehouse destroying plastic bins. Witness Rodney Hunt testified that he and Petitioner were instructed to destroy plastic containers and fill at least 11 bins with the chipped plastic waste each shift. Both Petitioner and Rodney Hunt testified to being paid in cash weekly.

Petitioner testified that he was offered a job by Jim and that he accepted. Jim demonstrated the right to control Petitioner's work day and duties by determining what job duties Petitioner would complete and the production expectations. Both Petitioner and Rodney Hunt testified that Jim provided the direction and controlled what job duties they were to complete for Delicate Plastics. They worked on roofing when the weather was warm and when fall arrived they were instructed to work inside the warehouse chipping plastic containers. Witness Rodney Hunt testified that both he and Petitioner were provided with expectations on how many plastic containers should be chipped at the end of a shift by Jim. Jim clearly controlled the manner of Petitioner's work. Second, Petitioner was compensated for his labor on an hourly basis and paid weekly by Jim. Petitioner also testified that Jim provided the materials and equipment he used while working. Therefore, the Arbitrator finds that there was an employee-employer relationship between Petitioner and Delicate Plastics. The Arbitrator is not dissuaded in this finding by the other facts demonstrating the seemingly casual structure of the work schedule or by the simplicity of the job related tasks to be performed.

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

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent on December 1, 2016. Petitioner testified that on that day, while working at Delicate Plastics, an unknown chemical liquid spilled on his arms. The incident in question arose from Petitioner's work duty to chip and dispose of plastic containers filled with chemicals.

D. What was the date of the accident?

The Arbitrator finds that the date of the accident was December 1, 2016. Petitioner was seen in the Emergency Room at Swedish American Hospital shortly after the injury on December 2, 2016. He reported that the work accident occurred at 11:00 p.m. the day before while working (Px. 7) The medical records support an injury date of December 1, 2016.

E. Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner provided timely notice of the accident to Respondent, Delicate Plastics. Petitioner testified that he informed Jim the day after the accident occurred. No evidence was provided to contradict Petitioner's testimony. Therefore, the Arbitrator finds that timely notice was given by Petitioner to Respondent.

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

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to the injury that occurred on December 1, 2016. Petitioner was seen at the Swedish American Hospital emergency department on December 2, 2016, following his shift for burns to the bilateral forearms (Px.7). He complained of burning caused by a splash from an unknown chemical while working. Followup visits with his primary care physician and the OSF Surgical Group consistently note the burning and blistering to this bilateral forearms, especially the left forearm (Px. 6) Petitioner testified to the burning and displayed his residual scarring of the left forearm to the Arbitrator at trial. His symptoms and residual scarring are consistent with the chemical burn he endured while working. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his December 1, 2016 injury. Petitioner presented with no complaint or injury to the right forearm at trial.

G. What were Petitioner's earnings?

The Arbitrator finds that Petitioner earned $457.00 per week at Delicate Plastics. Petitioner testified that he was paid $17 per hour while working on roofing outside and paid $11 per hour while working inside the warehouse. Petitioner testified that he worked approximately 8 months for Respondent before the accident on December 1, 2016; 6 months outside and 2 months inside. Rodney Hunt testified that he was paid $17 per hour for the outside work but that Petitioner was paid $14 per hour for outside work and then both were paid $11 per hour for the inside bin loading work. Rodney Hunt specifically and more clearly testified that he and Petitioner were paid a minimum of $121 per night for the inside bin loading and they worked 4 nights per week for a total of $484.00 per week for the inside work. Relying again on the more exact testimony of Rodney Hunt on the issue of wage, the Arbitrator finds that Petitioner earned $14 per hour for 32 hours per week of outside work (8 hours per day 4 days per week) for a total of $448 per week for outside work.

Petitioner worked a total of 8 months/32 weeks for Respondent. Based on the credible testimony, the Arbitrator finds that Petitioner earned a total of $10,752 ($448 x 24 weeks) for outside work and a total of $3,872.00 ($484 x 8 weeks) for inside work for a total earned of $14,624 in 32 weeks =$457.00 per week AWW.

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

Petitioner testified that he was born on June 6, 1964 and was 55 years old at the time of his injury. This testimony is unrebutted. Petitioner's medical records confirm his date of birth. Therefore, the Arbitrator finds that Petitioner was 55 years old at the time of his injury on December 1, 2016.

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

Petitioner testified that he was single with 0 dependent children under the age of 18 at the time of his December 1, 2016 injury. This testimony is unrebutted. Therefore, the Arbitrator finds that Petitioner was single and with 0 dependent children at the time of his December 1, 2016.

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries he sustained on December 1, 2016. The Arbitrator finds that the Respondent did not offer any evidence to refute the reasonableness and necessity of the medical treatment received by Petitioner for his causally related injuries. Therefore, the Arbitrator finds that the treatment Petitioner received at Swedish American Hospital, Crusader Clinic, and OSF surgical Group were reasonable and necessary.

Based on the Arbitrator's findings that the Petitioner suffered an injury that arose out of and in the course and scope of his employment for Respondent, Delicate Plastics, and that the treatment Petitioner received was reasonable and necessary to treat his causally related injuries. The Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred pursuant to Sections 8 and 8.2 of the Act. PX 8.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from December 9, 2016 through January 2, 2017 for a total of 3-4/7 weeks.

Petitioner initially received emergency care at Swedish American Hospital and at Crusader Clinic 8 days after his injury. He then referred to the OSF Surgical Group for burn care. At the OSF Surgical Center, Petitioner was taken off work until reevaluation in 2 weeks. A followup visit at the OSF Surgical Center on December 23, 2016 Petitioner was allowed to return to work on January 2, 2017 with no restrictions. Therefore, the Arbitrator finds that TTD is owed from December 9, 2016 to January 2, 2017, a period of 3-4/7 weeks.

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

The Arbitrator notes that the entirety of Petitioner's treatment consisted of an ER visit and two subsequent follow up visits with a burn center. It was determined that a skin graft was not needed and only conservative treatment was rendered. Petitioner testified that he received burn care including bandages and Silvadene application. Although Petitioner's blisters eventually healed, he still maintains scarring predominantly on his left forearm. Petitioner's last date of treatment was approximately one month post-accident and he has not had any additional treatment since his visit at OSF Surgical Group on December 23, 2016.

Accordingly, the Arbitrator finds that Petitioner suffered serious and permanent disfigurement of 20 weeks pursuant to Section 8(c) of the Act.

O. **Other Liability of Injured Workers' Benefit Fund/Lack of insurance**

The Illinois State Treasurer as ex officio custodian of the IWBF was named as a party respondent in this matter. Petitioner submitted sufficient credible evidence that Respondent-Employer was not insured at the time of the injury. Such evidence consisted of the National Council on Compensation Insurance Certificate. (PX4). Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer. (PX9). A representative of Respondent was not present at trial.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Collinson,
Petitioner,

vs.

John Deere Harvester,
Respondent.

20IWCC0612

NO: 17 WC 18629

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 24, 2020, is hereby affirmed and adopted.

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

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

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

DATED: OCT 15 2020
o10/8/20
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0612

COLLINSON, RICHARD Case# **17WC018629**

Employee/Petitioner

JOHN DEERE HARVESTER

Employer/Respondent

On 1/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES ATTY AT LAW
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0077 BOZEMAN NEIGHBOUR PATTON ET AL
JOHN HARRIS
1620 5TH AVE SUITE 101
MOLINE, IL 61265

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

20IWCC0612

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Richard Collinson
Employee/Petitioner

v.

John Deere Harvester
Employer/Respondent

Case # **17** WC **18629**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Rock Island**, on **1/7/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/22/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,760.00**; the average weekly wage was $**1,880.00**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

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

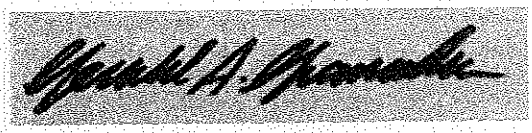
Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner failed to provide sufficient notice under the Act. Therefore the claim for benefits is denied.

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

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



Signature of Arbitrator Gerald Granada

1/23/20
Date

JAN 24 2020

20IWCC0612

FINDINGS OF FACT

This case involves Petitioner Richard Collinson, who alleges to have been injured while working for Respondent John Deere Harvester on April 22, 2015. Respondent disputes Petitioner's claim, with the issues being: 1) accident; 2) notice; 3) causation; 4) TTD; 5) nature and extent; and 6) statute of limitations.

Petitioner testified the he began working for Respondent in October of 1996. Petitioner testified that in August of 2011, he began the position in which he claims to have suffered the injury to his left shoulder. At that time, he began installing grain tank covers on combines. He testified that the covers were first built on a stand. It would be assembled, with hinges attached. The build process would take approximately 20 minutes. Then, the covers would be installed on top of the combine. Petitioner testified that the covers were approximately 4 feet by 4 feet and weighed approximately 180 lbs. A manipulator was also attached, itself weighing approximately 180 lbs. Once built, a hoist was attached to the cover to assist with the install. To install the grain tank covers, Petitioner would hold the cover to guide it while ascending a ladder. Once to the top of the ladder, the cover had to be pushed and pulled in place. Petitioner testified that he would reach and pull with his left arm to get the cover in place on the combine. Petitioner would then jump into the combine with a tote of hardware and tools. He would use a torque gun to attach bolts to the lid, to hold it in place. He testified to doing this while standing on angled surfaces and using his arms in a variety of positions, included overhead and bent over the lid. Petitioner testified that they were assembling and installing up to 27 covers per 12 hour shift.

Petitioner testified that around the middle of 2012, he began to experience pain in his left shoulder, mainly with pulling the lid to the center of the combine. He continued in his regular job, without seeking treatment. In September, 2014 Petitioner became a Union Rep, which involved mainly desk and office work and did not require heavy pushing or pulling. Even with the job change, Petitioner's left shoulder pain continued to increase. By 2015, he was having difficulty just lifting his arm to put it on the window while driving. Laying on it at night was becoming increasingly painful.

Petitioner testified that he did not initially report his left shoulder pain to Respondent because he did not want to be forced to see the company doctors or therapists. He felt other workers who had been injured had been put on display after reporting an injury. He did not want his treatment or injury to be controlled by Respondent, so he did not report his injury until August 13, 2015, the day before his surgery, when he reported it to Nancy Hawk, the clinic nurse. (Rx. 2).

Petitioner first sought treatment at ORA Orthopedics on April 22, 2015. (Px 1). At this initial visit, Petitioner provided a written medical history form (Rx. 3) in which he provided the following written answers – "when did your problem start or what was the date of injury? Unknown. If there was a specific injury, please describe what happened. Not sure". The notes from that visit further indicate "no known injury, but it has been ongoing for quite some time." (Px. 1). He reported lifting and direct pressure bothered him. An injection was provided and an MRI arthrogram was recommended. (Px. 1). The MRI was performed and found to be consistent with a labral tear. (Px. 1). Petitioner underwent left shoulder arthroscopy, subacromial decompression, and labral repair on August 14, 2015. (Px. 1). He began physical therapy on August 17, 2015. (Px. 2). Petitioner was returned to work on August 24, 2015, given that he was performing office work as the Union Rep at that time. Petitioner continued in physical therapy through September 29, 2015. (Px. 2). On October 15, 2015, Petitioner was released to return to work without restrictions. (Px. 1).

Petitioner presented medical bills relative to Petitioner's left shoulder treatment, noting $7,197.33 in payment by Petitioner's group insurance through Respondent, with no outstanding charges. Respondent claimed the payments as bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act. Respondent's group medical plan paid for Petitioner's August 14, 2015 surgery on August 25, 2015. (Px. 4).

Petitioner returned to an assembly position for Respondent as of June 2017. Petitioner did not return to the positions installing grain tank covers, but performs lighter assembly work with no overhead activity. He has maintained that work without significant problems. He filed the underlying Application for Adjustment of Claim in this matter on June 26, 2017.

Petitioner was seen by Dr. Jeffrey Coe for a Section 12 exam on August 14, 2018. (Px. 3) Petitioner described an assembly position beginning in the summer of 2012 in which he installed the cover of combine grain tanks. He described maneuvering the cover with his left arm while standing on a ladder. He described the work as being awkward with his left arm extended overhead as he pulled and twisted the cover in place. Petitioner told Dr. Coe that he developed left shoulder pain with that activity, which continued to increase in severity. In his history, Dr. Coe stated "beginning in the summer of 2012, [Petitioner] stated that he was assigned to an assembly position installing the cover of combine grain tanks. . . . as [Petitioner] performed this work activity with his left upper extremity, he developed left shoulder pain and crepitus." (Px. 3) Dr. Coe offered the opinion that Petitioner's shoulder condition was causally related to the described repetitive work activities. (Px. 3).

Petitioner was also seen by Dr. Camilla Frederick for a Section 12 exam, at Respondent's request, on May 13, 2019. (Rx. 1). Dr. Frederick noted that Petitioner had worked assembling and installing grain tank lids for combines from August of 2011 to August of 2014. He described manipulating the 180lb lids overhead, with development of left shoulder pain. Dr. Frederick diagnosed a superior labrum lesion and impingement syndrome, but deferred to offer an opinion on causation. Dr. Frederick requested a job description and video for the position of Grain Tank assembly. (Rx. 1). Dr. Frederick did offer an AMA impairment rating, noting a rating of 2% whole person. (Rx. 1).

Petitioner testified he has received an additional cortisone injection, but no additional treatment since October 15, 2015. Petitioner stated that his shoulder is improved since his surgery, but he does continue to have difficulty lifting his arm overhead. He is no longer in constant pain, but certain movements will cause some pain.

On cross-examination, Petitioner testified that he has had at least one prior workers compensation claim, which settled.

CONCLUSIONS OF LAW

1. With regard to the issue of notice, the Arbitrator finds that the Petitioner has not met his burden of proof. This finding is based primarily on the preponderance of the evidence and an assessment of Petitioner's credibility. For a workplace accident to be compensable, an employee must provide notice to the employer. Proper notice should provide the place of accident and approximate date. Notice must be given as soon as is practicable, but no later than 45 days after the accident. A claimant is barred from making a claim based on lack of notice in cases in which no notice at all is given. For an employee to recover for an injury or condition suffered as a result of repetitive trauma, a date of injury must be determined. When the injury developed over

20IWCC0612

time, the date of injury is crucial in determining when the statute of limitations runs on the Workers' Compensation claim. Peoria County Bellwood Nursing Home vs. Industrial Commission, 115 Ill. 2d 524, 505 NE 2d 1026 (1987). The date of injury, for the sake of Workers' Compensation, is a date on which the injury manifests itself. This occurs when the fact of the injury and the causal relationship of the employment become plainly apparent to a reasonable person. It is not dependent upon a doctor's opinion of causation.

In the present case, Petitioner testified that he began having problems with his left shoulder in 2012. When he first began medical treatment for his left shoulder on April 22, 2015, he did not mention a specific injury, but indicated that his shoulder would bother him with his work activities. He continued to actively treat for his left shoulder, leading up to his August 14, 2015 surgery. Petitioner first reported his left shoulder condition to the Respondent via the company clinic nurse on August 13, 2015 – a day before he was to have left shoulder surgery. He put his medical treatment through group insurance. He subsequently filed the underlying Application for Adjustment of Claim on June 26, 2017. (Ax. 2) When asked why he did not report his accident sooner, Petitioner testified that he did not want to be forced to see the company doctors or therapists, did not want the company to control his medical treatment and did not want to be put on display because of his injuries.

Typically, notice issues are liberally viewed in the Petitioner's favor so as not to be a trap for the uninformed employee who is not sure if a condition is work-related, or the employee who continues working with the hope that the injury will go away. This case, however, is different because it involves a claimant who intentionally withheld notice to his employer. The Petitioner in this case had prior knowledge of the Workers' Compensation system and intentionally failed to give notice for at least 91 days after the date of injury set forth in the application or for at least 38 months after the work related pain developed in his left shoulder as set forth in the history given to Dr. Coe. Petitioner's explanation for not reporting his accident was tantamount to saying that he did not want to have to abide by the requirements of the Workers Compensation Act and did not want to "be on display" for his injuries. However, contrary to the Petitioner's assertions, he is now asking that the Respondent must abide by the requirements of the Act after having put himself "on display" via his testimony at the hearing. This blatant contradiction taints the credibility of Petitioner's claims.

On the issue of notice, the Act further states that: "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." In this case, the facts show that the Respondent has been unduly prejudiced as they have been deprived the chance to investigate the Petitioner's claim or have any involvement in Petitioner's medical treatment – which was clearly the Petitioner's intention. To award the Petitioner for his intentional withholding of notice would be the realization of the undue prejudice on Respondent.

Based on the above, the Arbitrator concludes that the Petitioner has failed to provide notice as required by the Act. Therefore, his claim is denied and all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VERONICA LEWIS,
Petitioner,

vs.

CITY OF CHICAGO,
Respondent.

20IWCC0613

NO: 18 WC 37328

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, average weekly wage, credit, temporary total disability, and medical expenses both current and prospective, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner suffered more than a right-shoulder strain, that her current condition of ill-being of her right shoulder is causally related to her work accident on June 25, 2018, and awards benefits accordingly. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327 (1980).

I. FINDINGS OF FACT

A. Background

Petitioner testified that in June of 2018 she worked for Respondent as a construction laborer and had been so employed for 11 years. At that time, she was pouring concrete into potholes. As a construction laborer, Petitioner explained that most of her duties are "physical in nature."

On June 25, 2018, Petitioner was "shoveling out the concrete out of the hole, throwing it back up into the chute, [she] came down," and felt a sharp, drastic pain in her right shoulder. She was lifting wet concrete with a hand-held shovel and moving from one location to another. Petitioner estimated each shovel of concrete weighed at least 30 to 35 pounds and testified that

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she was shoveling concrete the entire day. Petitioner reported the incident and went to MercyWorks that day.

The medical records reflect that, on June 25, 2018, Petitioner presented to Dr. Anderson at MercyWorks with 7/10 pain reporting that she was shoveling concrete that morning when she "felt a pain in [her] right shoulder down" her back. Examination of the right shoulder appeared to be normal except for diffuse tenderness. X-rays suggested possible chronic rotator cuff tendinopathy. Dr. Anderson diagnosed right-shoulder strain, prescribed Ibuprofen and Flexeril, and took Petitioner off work until further notice. He also ordered an MRI.

As of July 6, 2018, Dr. Sanderson referred Petitioner to physical therapy. Petitioner testified that physical therapy did not improve her condition very much.

On August 30, 2018, Dr. Anderson noted that Petitioner showed some improvement with apparently 11 sessions of physical therapy, and now reported 5/10 pain. He also noted that the MRI showed tendinopathy of the subcapularis and infraspinatus tendons with questionable partial thickness tears. Dr. Anderson referred Petitioner to Dr. Heller.

Petitioner testified that she was referred to an orthopedist, Dr. Domb at Hinsdale Orthopedics. The medical records reflect that on October 16, 2018, Petitioner presented to Dr. Domb's office and was seen by PA-C, Ms. Rabe, at Hinsdale Orthopedics for evaluation of her right shoulder. It was noted that Dr. Domb had performed an arthroscopic left-knee surgery in 2015. Petitioner reported that she had been shoveling concrete for eight months when she felt a sudden surge in shoulder pain and discomfort. Petitioner reported that she had been in physical therapy for about two months with improvement but no resolution of the pain. She also reported associated upper extremity paresthesia and inability to work because of the severity of her symptoms, which were constant in the right shoulder with occasional symptoms in her left shoulder as well. Petitioner had no shoulder dysfunction prior to June 25, 2018.

Ms. Rabe noted that the MRI of the right shoulder showed partial thickness tearing of the distal subcapularis tendon and anterolateral insertional fibers of the distal supraspinatus tendon, mild tendinopathy/strain injury, and mild hypertrophic AC joint arthrosis with osteophyte formation. There was no evidence of a full-thickness tear or tendon retraction. Ms. Rabe diagnosed right shoulder pain with partial thickness tearing, AC joint arthrosis, mild biceps tendonitis, subacromial impingement, and cervical radiculopathy. Given her mechanism of injury, temporal onset of symptoms, and lack of symptoms prior to the accident, Ms. Rabe opined that Petitioner's shoulder and cervical dysfunction were causally related to her accident. She recommended continued physical therapy for her shoulder and neck, prescribed additional medication, recommended a cervical MRI, and recommended referral to Dr. Darwish due to her radiculopathy. Petitioner was offered an injection but declined.

On December 3, 2018, Petitioner presented for follow up for her right shoulder. She reported moderate improvement of her shoulder and arm symptoms with physical therapy, and

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activities of daily living were easier to perform. However, her greatest concern was loss of dexterity in the hand and frequent dropping of items due to "hand weakness." Petitioner had not yet had a cervical MRI or seen Dr. Darwish. Ms. Rabe continued physical therapy, medications, and kept Petitioner off work. She also reiterated that Petitioner should undergo a cervical spine MRI and follow up with Dr. Darwish to evaluate for ongoing radiculopathic symptoms.

At Respondent's request, Dr. Jay Levin performed a Section 12 medical examination of Petitioner on December 5, 2018 and issued a report. He noted that Petitioner reported being a laborer for Respondent since 2008. She described her job as being "very physical requiring her to lift over 100" pounds. She had prior work-related injuries to her back in 2010 and her knee in 2014. She was able to return to work at full duty after those injuries.

Petitioner reported that on June 25, 2018 she was shoveling concrete into a chute. Each shovel full weighed about 50 pounds. She felt a pop in her right shoulder and had to stop working due to pain in her shoulder. She denied any cervical complaints at that time. She was still in physical therapy that had been initially prescribed by MercyWorks and continued by Dr. Domb. Petitioner reported 20% improvement since the accident. She currently had 4/10 pain on average, and it could reach 8/10. She had numbness/tingling down her right arm into the hand. She denied left-shoulder pain. Cervical x-rays showed degenerative disc disease at C3-C5, and mild changes at C5-C6. X-rays of the right shoulder showed minimal cystic changes in the right greater tuberosity, but no significant AC joint arthritis. Dr. Levin noted that the MRI showed a partial thickness tear with cystic changes in the humeral head, but no evidence of any full-thickness tear.

Dr. Levin diagnosed that Petitioner sustained a right-shoulder strain with no cervical injury. He opined that her condition was causally related to her reported incident, assuming her history was correct. He also thought a subacromial injection was indicated. He did not believe the recommendation for a cervical MRI was indicated because she suffered no cervical injury. Petitioner needed no work restrictions because of her work injury.

On December 18, 2018, Petitioner returned to Ms. Rabe at Dr. Domb's office for follow up of her right shoulder. Ms. Rabe noted that Petitioner had been doing very well, but after an IME further treatment had been denied. Petitioner reported that her pain, range of motion, and arm weakness had severely worsened since stopping physical therapy. She was also unable to restfully sleep due to the significant pain. Petitioner also reported occasional neck pain, upper extremity paresthesia, and loss of hand dexterity for which a cervical spine MRI and referral to Dr. Darwish had been previously made. She further reported diligence with her home exercise program. Ms. Rabe noted that Petitioner was unable to return to work and reiterated the recommendation for continued physical therapy, the cervical MRI, and referral to Dr. Darwish.

On January 15, 2018, Petitioner presented to Ms. Rabe again for evaluation of her shoulders bilaterally. She reported that she was doing very well in physical therapy and with medication until additional treatment and physical therapy was denied by workers'

compensation. Petitioner reported significant exacerbation of her right shoulder and severe left shoulder pain and symptoms, though less severe than the right shoulder, after discontinuation of physical therapy which she attributed to overcompensating from her initial right shoulder injury. Ms. Rabe diagnosed incomplete rotator cuff tears or shoulder ruptures bilaterally, reiterated prior treatment orders, and ordered a left shoulder MRI. Ms. Rabe opined that the left-shoulder condition was caused by overuse.

Ms. Rabe indicated that "we agree" with Dr. Levin that Petitioner's right shoulder symptoms and injury were caused by the accident and that an injection was indicated but given Petitioner's poor response to cortisone in the past recommended an alternative injection with PRP. Petitioner remained off work and Ms. Rabe noted that if Petitioner did not respond to the injection, surgery could be considered. Ms. Rabe also indicated that "it is our opinion that a portion of Ms. Lewis's condition and pain is related to her cervical spine given her ongoing history of upper extremity paresthesia, positive Spurling sign, and burning pain. We have therefore recommended that she follow up with Dr. Darwish, as well as obtain a cervical spine MRI and continue with physical therapy targeting not only her shoulders but her cervical spine as well. Ms. Rabe further stated that "[w]e again agree with Dr. Levin that subacromial injection to the right shoulder would be appropriate treatment. We tend to seek approval for platelet rich plasma injections." Petitioner testified that she had a bad reaction to a cortisone injection in the past, so Dr. Domb recommended an alternative injection. She has not been able to get the injection or additional physical therapy.

Since the accident, Petitioner testified that she has noticed pain in both shoulders, difficulty lifting, difficulty sleeping, and difficulty with overhead activities. She also has pain in her neck radiating into her shoulders. Dr. Domb referred Petitioner to Dr. Darwish, with whom Petitioner wants to treat, but the treatment had not been approved. All treatment had been denied and TTD was terminated after an IME with Dr. Jay Levin. She wants the treatment recommended by Dr. Domb, as well as prospective treatment with Dr. Darwish. She has been off work per her doctor's recommendation.

Petitioner testified she never had symptoms in either shoulder or her neck prior to the instant accident. She did, however, have a previous cortisone injection in her knee. She started feeling symptoms in her left shoulder in October, about four months after the accident. The neck symptoms began in "maybe December." She has symptoms in her legs which "come and go." Her legs were not involved in the accident. She agreed that as a laborer she had soreness from her work activities, but she denied she ever had any soreness in her shoulders. Her soreness was in her back. Dr. Levin did not recommend an injection.

On redirect examination, Petitioner testified she had surgery on her left knee and she has seen Dr. Domb about that knee. She complained of left-shoulder and neck symptoms in October of 2018. She never talked to Dr. Levin about an injection.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Arbitrator found that Petitioner proved she suffered only a right-shoulder strain in the stipulated accident, and she failed to prove the accident caused incomplete right rotator cuff tears, biceps tendinitis, a left shoulder injury, or cervical dysfunction. He found the opinions of Dr. Levin more persuasive than those of Ms. Rabe, noting that Dr. Levin is a board-certified orthopedic surgeon, while he did not know of Ms. Rabe's credentials. He found Ms. Rabe's diagnoses of left-shoulder tears and cervical disc dysfunction with radiculopathy "totally unreliable," noting Petitioner's left-shoulder complaints did not arise until the clinical notes on January 15, 2019, seven months post accident. He also questioned Petitioner's credibility noting that she testified she treated with Dr. Domb, when Dr. Domb did not sign any of the clinical notes.

Petitioner argues the Arbitrator erred in finding that Petitioner did not prove that the accident caused partial rotator cuff tears. She stresses that the Arbitrator failed to address the MRI findings, which she says is in the records of MercyWorks, Dr. Anderson's diagnosis of rotator cuff tears, and Petitioner's unrebutted testimony that she had no prior problems or treatment for her shoulders or neck.

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

The Commission views the evidence differently than the Arbitrator. As an initial matter, the Commission does not find that Petitioner lacks credibility because she testified that Dr. Domb was providing treatment, when the medical records from his office only reflect signatures from his certified physician's assistant, Ms. Rabe. Simply because Dr. Domb did not personally sign the treatment notes does not necessarily indicate that he was not present during the examinations or that he did not actively participate in her treatment.

In so concluding, the Commission notes that the Arbitrator recognized that Ms. Rabe and Dr. Domb had discussed a PRP injection, and that the treatment records issued from Dr. Domb's office were signed by Ms. Rabe with reference to medical opinions in the form of "we agree" and "it is our opinion." Dr. Domb's records were admitted into evidence in response to a subpoena pursuant to the Illinois Workers' Compensation Act (Act) and absent any objection by Respondent. The Commission finds it to be a reasonable inference, in the absence of evidence of the unauthorized practice of medicine[1] by Ms. Rabe, with medical records elicited from Dr. Domb's office pursuant to the Act, in the absence of any objection by Respondent, and given the "we" and "our" statements in the treatment notes by Ms. Rabe, that an appropriate collaborative relationship existed and that Petitioner understood Dr. Domb to be the physician in charge of her care. This also provides a reasonable basis for the questions on direct examination being framed to Petitioner as to her treatment with Dr. Domb instead of Ms. Rabe. Thus, the Commission does not question Petitioner's credibility as did the Arbitrator.

Turning to Petitioner's right shoulder and cervical spine conditions, there is a notable consensus of medical opinion that Petitioner has partial thickness rotator cuff tears in the right shoulder as reflected on the MRI. In addition, cervical x-rays showed some pathology of the cervical spine. Dr. Anderson and Ms. Rabe both diagnosed partial rotator cuff tears, and Respondent's Section 12 medical examiner, Dr. Levin, acknowledged that the MRI showed that pathology. There is no evidence in the record that Petitioner had any previous tearing of the rotator cuff or any symptoms of rotator cuff pathology or any cervical pathology. Given the objective medical evidence of right shoulder and cervical pathology, lack of prior symptoms in the right shoulder or cervical spine, and causal connection opinion of Respondent's Section 12 examiner relating to the right shoulder, the Commission concludes that Petitioner's current conditions of ill-being of her right shoulder and cervical spine are causally related to the work accident.

While the Commission disagrees with the conclusions of the Arbitrator that the partial rotator cuff tears and cervical pathology were not caused by the work accident, the Commission agrees with the determination of the Arbitrator that her alleged condition of ill-being of her left shoulder was not causally related to the accident. The Commission notes that she did not complain of any left-shoulder symptoms until seeing Dr. Domb after the accident. In addition, Ms. Rabe noted Petitioner's attribution of her left shoulder symptoms given overcompensation for her right shoulder condition, but Petitioner had remained off work since her accident. Given the length of time before her onset of symptoms, the Commission finds that Petitioner has failed to prove that her left shoulder symptoms were causally related to her accident at work.

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[1] The Nurse Practice Act generally requires advanced practice registered nurses to operate under a collaborative agreement with a physician. 225 ILCS 65/65-35 (West 2018). Since 2018, this restriction has been loosened slightly to allow independent practice generally by an advanced practice registered nurse certified as a nurse midwife, clinical nurse specialist, or nurse practitioner who files with the Department a notarized attestation of completion of at least 250 hours of continuing education or training and at least 4,000 hours of clinical experience after first attaining national certification. See 225 ILCS 65/65-43 (West 2018). Indeed, a nurse certified in Illinois generally cannot prescribe medication unless permitted by the physician. See 225 ILCS 65/65-40 (West 2018).

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B. Temporary Total Disability

Petitioner claims entitlement to temporary total disability (TTD) benefits from June 26, 2018 to March 1, 2019, the date of the arbitration hearing. Respondent stipulates that Petitioner is only entitled to benefits through December 12, 2018. The Commission finds that Petitioner has established entitlement to the outstanding TTD benefits claimed.

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Id.*

The record reflects that Petitioner's condition has not stabilized and that she is unable to work per her treating physicians. Accordingly, the Commission awards Petitioner TTD benefits from June 26, 2018 through March 1, 2019, the date of arbitration, totaling 35 and 4/7ths weeks.

C. Medical Expenses

On the issue of medical expenses, the Arbitrator awarded medical expenses incurred through December 5, 2018, the date of Dr. Levin's Section 12 examination. He did so based on Dr. Levin's opinion that Petitioner did not need any additional medical treatment. Likewise, the Arbitrator denied Petitioner's request for prospective medical based on Dr. Levin's opinion.

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

The Commission has found that Petitioner has established a causal connection between her current condition of ill-being in the right shoulder and cervical spine and the accident at work as noted above. The record reflects that Petitioner's claimed medical expenses as related to those body parts were reasonable and necessary to alleviate her from the effects of her occupational injury. Thus, the Commission awards unpaid medical expenses related to the cervical spine and right shoulder to be paid pursuant to sections 8(a) and 8.2 of the Act. Petitioner's claim for payment of medical bills related to the left shoulder are denied.

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D. Prospective Medical Treatment

Having found causal connection and reasonableness and necessity of medical expenses as explained herein, the Commission reverses the Arbitrator's ruling and awards the prospective treatment recommended by Dr. Domb's office related to the right shoulder and cervical spine. Petitioner's claim for prospective medical treatment related to the left shoulder is denied.

E. Clerical Errors

Finally, the Commission notes that the Decision of the Arbitrator has two clerical errors. The Arbitrator found Petitioner's average weekly wage to be $1,680.00. However, the parties stipulated Petitioner's average weekly wage was $1,643.48. In addition, the Arbitrator awarded Respondent credit of $1,253.63 in overpayment of TTD. However, the parties stipulated that Respondent is entitled to a total of $26,610.10 in credit for payment of TTD. Because the Commission finds that Petitioner is entitled to additional TTD to that awarded by the Arbitrator, the Commission vacates the Arbitrator's award of credit for overpayment and awards total credit for payment of TTD based on the stipulation of the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,095.65 per week for a period of 35 and 4/7ths weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses incurred to date to treat Petitioner's work-related conditions of ill-being in the right shoulder and cervical spine pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective treatment prescribed by Dr. Domb's office related to the right shoulder and cervical spine pursuant to §8(a) of the Act.

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

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

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of said accidental injury, including a total of $26,610.10 in TTD paid.

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 15 2020
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Barbara N. Flores

Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator, except to correct clerical errors in the Arbitrator's recitation of average weekly wage and credit.

The Arbitrator found that Petitioner sustained only a right-shoulder strain in her work accident. Therefore, he denied compensation for her alleged conditions of ill-being of her left shoulder and cervical spine, as well as prospective medical treatment. The Majority affirmed the aspect of the Arbitrator's decision that Petitioner did not prove her alleged left-shoulder condition was causally related to the accident, but the majority reversed the Decision of the Arbitrator and found that the Arbitrator erred and found that Petitioner's cervical condition was causally related to her accident. I agree with the Arbitrator that Petitioner did not sustain her burden of proving the alleged condition of ill-being of her cervical spine was causally related to her work accident.

First, the Arbitrator correctly pointed out that Petitioner did not complain of symptoms in her left shoulder or neck until several months after the accident. Actually, Petitioner testified that her neck symptoms developed months after her left-shoulder symptoms. Second, there is no objective findings that there was any traumatic condition of ill-being of her cervical spine. Imaging of the cervical spine showed nothing other than mild degenerative disc disease, which

would seem appropriate for a woman of Petitioner's age (48 at the time of the accident). Finally, I agree with the Arbitrator's reliance on the opinions of Dr. Levin over those of Ms. Rabe. While the majority goes to great lengths to conclude that Dr. Domb was involved in Petitioner's treatment at Hinsdale Orthopedics, the record does not specifically support that conclusion and there is no indication whatsoever that Dr. Domb opined that Petitioner's alleged cervical condition was causally related to the work accident. In this regard, in my opinion it is proper for an Arbitrator and the Commission to consider the respective qualifications of medical professionals in assessing the persuasiveness of their respective opinions. I agree with the conclusions of the Arbitrator that Dr. Levin, a well-known, board-certified orthopedic surgeon, was better qualified to offer a persuasive opinion about Petitioner's conditions of ill-being than was Ms. Rabe.

For the reasons stated I agree with the Arbitrator's finding that Petitioner suffered only a right-shoulder strain in her work accident. Therefore, I would have affirmed and adopted the Decision of the Arbitrator, with correction of clerical errors, and respectfully dissent from the Decision of the Majority.

O-8/20/20
DLS/dw
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Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SUSAN QUALLS,

Petitioner,

vs. Nos. 17 WC 07793, 17 WC 07794

GILSTER MARY-LEE,

Respondent.

20IWCC0614

DECISION AND OPINION ON REVIEW PURSUANT TO §8(a) and §19(h)

This matter comes before the Commission on Petitioner's §8(a) and §19(h) Petition, seeking medical benefits for treatment after arbitration and alleging a material increase in her permanent disability. On May 10, 2018, in her companion decisions limited to nature and extent, the Arbitrator awarded Petitioner permanent partial disability of 7.5% loss of the person as a whole for her lumbar spine injuries and 5% loss of use of the left leg for her hamstring injury.

Petitioner filed this Petition for Review Pursuant to §8(a) and §19(h) on November 7, 2018. A hearing was held before Commissioner Parker on July 15, 2020. Petitioner seeks medical benefits for her lumbar spine treatment post-arbitration under §8(a) and an increase in permanent partial disability from the 7.5% loss of person as a whole to 10.5% loss of person as a whole under §19(h).

FINDINGS OF FACT

Petitioner sustained compensable injuries on November 9, 2016, when she injured her left hamstring tripping over a stool, and on January 14, 2017, when she slipped on a wet floor and injured her left leg, left hip, and low back. Diagnostic studies indicated she suffered from a left hamstring sprain and lumbar facet arthropathy at L4-5 and L5-S1 with disc bulging and foraminal narrowing. She received facet blocks and rhizotomies in April 2017, and Dr. Gornet found her at maximum medical improvement on August 17, 2017, releasing her to return to work with permanent restrictions. Despite the treatments, Petitioner testified at arbitration on March 13, 2018

that she continued to have back and leg symptoms, for which the Arbitrator awarded 7.5% loss of the person as a whole and 5% loss of use of the left leg in her May 10, 2018 decision.

In April 2017, prior to arbitration, Petitioner had undergone rhizotomies by Dr. Boutwell and had achieved a pain reduction of about 80%. However, as the burned nerves regenerated, her symptoms returned and she consulted again with Dr. Gornet post-arbitration, on October 15, 2018. Dr. Gornet explained that the benefit from the RFAs was of limited duration, because the nerve that had been burned to provide relief would regenerate and cause worsening symptoms. He described a cycle of increasing pain, then relief with repeated rhizotomies. Dr. Gornet rejected the treatment options of disc replacement, fusion surgery, and chronic narcotic use as being inappropriate due to Petitioner's multi-level degenerative condition and anticipated that she will need to have rhizotomies repeated every six to twelve months.

Dr. Gornet encouraged Petitioner to postpone any further conservative treatment for as long as possible, but he referred her to Dr. Blake after arbitration for additional radiofrequency ablations (RFAs). Dr. Blake noted that Petitioner's second set of RFAs, administered on November 6, 2018, was not as effective as the first, and Petitioner continued to complain of low back pain radiating into both buttocks and hips with intermittent pain in her legs.

In December 2018, Dr. Gornet ordered new diagnostic studies including a CT myelogram and concluded that Petitioner's primary pain generator was at L5-S1. However, he did not recommend fusion surgery at that level due to the possibility of early adjacent level failure which the doctor believed was more likely due to Petitioner's multi-level degenerative condition. He continued to recommend RFAs as the preferable means of controlling her pain, and Petitioner testified to significant relief from those ablations administered by Dr. Blake in June 2019 and March 2020.

Respondent obtained a post-arbitration updated §12 report from Dr. Chabot, who had previously examined Petitioner on two occasions. On October 21, 2019, Dr. Chabot noted that Petitioner was planning to retire in two weeks and observed that her symptoms remained unchanged since her previous §12 exam on January 10, 2018. Dr. Chabot found that the myelogram ordered by Dr. Gornet revealed that the herniated disc at level L5-S1 was calcified, indicating it was chronic and not associated with an acute injury, such as would have resulted from her work accidents. Dr. Chabot concluded, based on the calcified disc and severe disc space collapse at multiple levels, that Petitioner's current complaints were associated with her chronic degenerative changes rather than her work injuries. RX5.

At the review hearing on July 15, 2020, Petitioner testified that she continued to have daily low back and leg pain and had trouble sitting or standing for prolonged periods. She continued to use over-the-counter ibuprofen and occasionally pain medications prescribed by Dr. Gornet. She had retired and was not working outside the home. Petitioner did not testify that her condition caused or contributed to her decision to retire.

CONCLUSIONS OF LAW

Section 8(a)

Pursuant to §8(a) of the Act, Petitioner is entitled to any and all necessary care to cure or relieve the effects of her work-related injuries. 820 ILCS 305/8(a). Upon establishment of a causal nexus between the injury and Petitioner's current condition of ill-being, Respondent is liable for all medical care reasonably required in order to diagnose, relieve, or cure the effects of her work injuries. *Plantation Mfg. Co. v. Industrial Comm'n,* 294 Ill. App. 3d 705, 709 (2d Dist. 1997). An employer's liability for medical services under §8(a) of the Act is continuous so long as it as the services are required to relieve the injured employee from the effects of the injury. *Efengee Elec. Supply Co. v. Industrial Comm'n,* 36 Ill. 2d 450, 453 (1967).

Petitioner's complaints of low back and leg pain have been consistent since her arbitration hearing, waxing and waning in response to the RFAs. The treatment which Respondent agreed was reasonable prior to arbitration has continued to provide Petitioner relief from those symptoms.

After a careful review of the entire record, the Commission finds that Petitioner has established that the post-arbitration treatment she received from Drs. Gornet and Blake, was reasonable and necessary to relieve her from the effects of her work injuries. The Commission detects no material change in symptoms or test results that would indicate that Petitioner's work injury had resolved and that her current complaints are solely related to a progressive degenerative condition. Further Petitioner has not been involved in any post-arbitration accidents. Therefore, the Commission finds that Petitioner continues to suffer from the ill effects of her work injury and grants Petitioner's §8(a) petition.

Section 19(h)

Petitioner also seeks relief under §19(h) of the Act for her alleged increase of 3% loss of use of the person as a whole. Pursuant to §19(h) of the Act, at any time within 30 months of any award providing for compensation in installments, the Commission may review the reward at the request of either party on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. 820 ILCS 305/19(h). To obtain an increase in the permanent partial disability award under §19(h), Petitioner must show that the disability at the time of her initial hearing has increased and the increase must be material. *Gay v. Industrial Comm'n,* 178 Ill. App. 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). Section 19(h) seeks to redress changes in circumstances after the entry of an award and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare her low back and leg conditions at the two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

The Arbitrator's Decision issued on May 10, 2018. Petitioner timely filed her Petition for Review on November 7, 2018, within 30 months of the award. Thus, the Commission has

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jurisdiction to consider Petitioner's Petition for Review. At the time of arbitration, Petitioner testified to ongoing daily low back and leg pain that traveled from her hamstring to her calf. On review, Petitioner's complaints appeared to be almost identical, although she indicated that they were worse at this time.

The Commission notes that in her Decision in 17 WC 07794, the Arbitrator set forth facts relevant to a determination of permanent partial disability, as required by §8.1b(b) of the Act. In order to prove that her permanent partial disability at the time of the review hearing had materially increased so as to justify an increase in the permanency awarded by the Arbitrator, the Commission must consider the same factors.

(i) Disability impairment rating: *no weight.* Although Dr. Chabot provided an AMA impairment rating of 5% of the person as a whole at the time of arbitration, neither party provided an updated impairment rating at the time of this review.

(ii) Employee's occupation: *no weight,* because Petitioner retired on November 1, 2019. As Petitioner was 61 at the time of her accident and was nearing retirement age, the Arbitrator gave little weight to the occupation factor. At the time of the review hearing, she had already retired and did not testify that her retirement was related to her condition. The Commission gives no weight to this factor.

(iii) Employee's age: *some weight,* because although her recuperative powers are likely reduced due to her age, she does not have to cope with the physical demands of her prior occupation.

(iv) Future earning capacity: *no weight,* because of her retirement, the Commission need not consider if her future earnings are affected by her injury.

(v) Evidence of disability corroborated by the treating records: *significant weight.* Petitioner's complaints regarding her condition are nearly identical to those she made at Arbitration. She does indicate that the symptoms have gotten worse. The medical testing completed since arbitration does not show a significant difference in Petitioner's condition. Petitioner has continued to experience back and leg pain and require ongoing treatment by Dr. Gornet and Dr. Blake. These treatments have helped Petitioner maintain her level of function.

After applying the relevant factors as discussed above, the Commission finds that Petitioner's disability has not materially increased since arbitration. She remains disabled to the extent of 7.5% body as a whole and 5% loss of use of the left leg.

The Commission, therefore, denies Petitioner's §19(h) petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) Petition for additional medical benefits is granted, and Respondent shall pay to Petitioner all reasonable and necessary medical bills related to the care provided for Petitioner's lumbar spine related post-arbitration treatment, pursuant to Sections 8(a) and 8.2 of the Act.

20IWCC0614

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition for increased permanency is denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $65,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 15 2020

r-7/15/20
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SARAH EGGEMEYER,

Petitioner,

20IWCC0615

vs.

NO: 17 WC 35743
17 WC 35744

STATE OF ILLINOIS /
CHESTER MENTAL HEALTH,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and nature and extent, and being advised of the facts and law, affirms the Decisions of the Arbitrator, which are attached hereto and made a part hereof, with the corrections, clarifications, and explanations outlined below.

We initially note that the page numbers at the bottom of the "Memorandum of Decision of Arbitrator" all indicate "Page 1 of 11." We hereby correct the pagination to accurately reflect the page numbers.

Next, in the first full paragraph on page 4 that begins with, "Dr. Gornet testified by way of deposition. (PX11)," we hereby strike the sentences that begin with "Dr. Gornet is a board-certified…" through the sentence that ends with "world."

Finally, we analyze the permanent partial disability factors in Section 8.1(b)(b) of the Act as follows:

(i) No impairment rating was submitted so this is given "no weight."

(ii) Petitioner's occupation is a housekeeper. Although she was released to full duty, she testified that, after she works for a few hours, her low back still hurts and she has a sharp pain down her left leg. She has to sit down for a while and takes over-the-counter ibuprofen three or four times a week. She no longer volunteers for overtime because her back hurts, which we address in factor (iv) below. We give this factor "significant weight."

(iii) Petitioner was 36 years of age at the time of her accident. We give this factor "no weight" because there was no medical opinion that Petitioner's age was a factor in her prognosis. Dr. Gornet did testify that "oftentimes clinically these problems can progress. They're not guaranteed to, but they can." *Px11 at 10.* However, that opinion was related to Petitioner's condition and not specifically her age. We find that making an age-related determination would be speculative in this case. We also strike the Arbitrator's citation to the Commission decision in *Jones v. Southwest Airlines*.

(iv) We find that Petitioner's future earning capacity is entitled to "some weight" because there is evidence of reduced future earning capacity in this case. Petitioner testified that she used to work overtime before the accident, but she no longer does because her back hurts. She tried to work overtime once since her accident but "was miserable" and had to take a muscle relaxer and lay down. *T.24-25.* We believe that her significant symptoms while working overtime, which result in her inability to do so to the extent she had previously, should be considered in her future earning capacity. Although Dr. Gornet testified that these types of problems can oftentimes progress, he thought it was best to simply observe Petitioner. His July 30, 2018 note states that Petitioner "may require" further treatment in the future. Even if Petitioner needs future treatment, it does not necessarily follow that her earning capacity will suffer further, which is why we only gave this factor "some weight."

(v) We also give "some weight" to the evidence of Petitioner's disability corroborated by the treating medical records. We agree that Petitioner sustained an L4-5 disc injury as opposed to only a back strain. Petitioner's difficulties performing her work duties and having increased symptoms at the end of the week were considered under the "occupation" factor. We also note that Dr. Gornet did not opine that Petitioner's disc injury would "eventually" progress. Rather, he opined that they "oftentimes" progress. There is no evidence that such progression is inevitable in Petitioner's specific case. In any event, we believe the evidence supports an L4-5 disc injury and that Petitioner continues to have symptoms as supported by Dr. Gornet's final treatment note.

In summary, Petitioner sustained bilateral annular tears of the L4-5 disc and not simply a lumbar strain. Petitioner never missed any work although she did work light duty for a time. She underwent conservative treatment including injections and returned to work full duty albeit with some residual symptoms. Despite our modification of the analysis and weights given to the

20IWCC0615

five factors, we agree with Arbitrator that Petitioner has proven a loss of use of 6% of the person as a whole under Section 8(d)2 of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator filed August 6, 2019, are hereby affirmed and adopted with the corrections, clarifications, and explanations outlined above.

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

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

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

DATED: OCT 16 2020

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

SE/
O: 9/1/20
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EGGEMEYER, SARAH
Employee/Petitioner

Case# **17WC035743**

17WC035744

STATE OF ILLINOIS/CHESTER MENTAL HEALTH
Employer/Respondent

20IWCC0615

On 8/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

AUG - 6 2019

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

20 IWCC0615

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SARAH EGGEMEYER,
Employee/Petitioner

v.

STATE OF ILLINOIS/CHESTER MENTAL HEALTH,
Employer/Respondent

Case # 17 WC 35743

Consolidated cases: 17 WC 35744

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

DISPUTED ISSUES

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

FINDINGS

On **July 30, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,834.14**; the average weekly wage was **$641.42**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **1** dependent child.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Exhibit No. 1 and other exhibits, as provided in §8(a) and § 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$384.85**/week for **30** weeks, because the injuries sustained caused the permanent partial loss of use to the person as a whole under Section 8(d)2 of the Act to the extent of **6%** thereof.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

August 6, 2019
Date

AUG 6 - 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EGGEMEYER, SARAH
Employee/Petitioner

Case# **17WC035744**

17WC035743

STATE OF ILLINOIS/CHESTER MENTAL HEALTH
Employer/Respondent

20IWCC0615

On 8/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

AUG - 6 2019

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

20IWCC0615

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SARAH EGGEMEYER,
Employee/Petitioner

v.

STATE OF ILLINOIS/CHESTER MENTAL HEALTH,
Employer/Respondent

Case # 17 WC 35744

Consolidated cases: 17 WC 35743

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

DISPUTED ISSUES

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

FINDINGS

20IWCC0615

On **November 24, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**32,834.14**; the average weekly wage was $**641.42**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **1** dependent child.

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

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

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

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

ORDER

Adjudicated in companion case number 17 WC 35473 attached Order and Decision.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

August 6, 2019
Date

AUG 6 - 2019

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner is a support service worker/house keeper at Respondent's Chester Mental Health Facility. (T.14) Her duties include vacuuming, buffing, and general cleaning to keep the unit clean and patients' rooms clean. (T.14) The parties stipulated that she sustained accidental injuries at work on July 30, 2017, when she hurt her back while pulling heavy loads of laundry out of a cart to put into the dryer. (T.15) She testified that this was a job normally done by three people, sometimes even four, but she was doing it by herself due to low staffing. (T.15) Prior to July 30, 2017, Petitioner had no low back injuries, no physical therapy, no diagnostic studies, and no prior worker's compensation claims. (T.15-16)

When Petitioner's symptoms did not abate, she presented to the emergency room at Chester Memorial Hospital where the following history was taken:

> Patient is a 36 year-old F with a chief complaint of back pain for the last 5 days. Patient states that while at work she did repetitive lifting of heavy loads of laundry. She then felt the sharp pains in her lower back, which have continued through the present. She did not fall. The pain has waxed and waned since that time, but became more severe today. She took 2 Aleve without improvement. She has no hx of back issues in the past. She denies difficulty walking, or bowel or bladder derangements. (PX3, 8/4/17)

When Petitioner was evaluated and x-rays were negative, she was placed on muscle relaxants and discharged. *Id.* She then presented to the office of her family physician at Chester Clinic, where she was seen by NP Valerie Blechle. (PX4, 8/14/17) Petitioner's pain was rated at a 4-5/10 and increased to a 10 with activity. *Id.* Although her neurological examination was normal, Petitioner demonstrated point tenderness in the midline of her spine and bilateral paraspinal muscles. *Id.* Petitioner was diagnosed with a lumbar strain, given an additional prescription for medicine and physical therapy, and placed on restrictions of no lifting greater than 10 pounds. *Id.*

Petitioner then saw Dr. Risse at Shawnee Healthcare, who evaluated her on August 28, 2017. (PX5, 8/28/17) Petitioner reported that physical therapy was improving her condition but reported continued waxing and waning pain that increased with activity. *Id.* Petitioner's lumbar spine examination revealed no tenderness to palpation, but range of motion was limited in flexion and extension. *Id.* She was continued on light duty and advised to use Tylenol and Ibuprofen. *Id.* Over the next two follow-up visits, Petitioner had improved well enough to return to work full duty on September 13, 2017. *Id.* However, on November 13, 2017, Petitioner returned to Dr. Risse's office with increased symptoms of back pain. *Id.* She reported dizziness and electric shock sensation since she stopped taking Celexa and had trouble sleeping. *Id.*

The parties further stipulated that Petitioner reinjured herself on November 24, 2017, when she was buffing and vacuuming. (AX1; T.17) Between July 30, 2017, the date of the first accident, and November 24, 2017, the date of the second accident, Petitioner had no other injuries whether it be at work or at home. (T.17-18) Since November 24, 2017, she testified there were no further injuries either at work or at home.

Petitioner reported to the emergency room of the Memorial Hospital of Carbondale on that same day of November 24, 2017, where the history was taken as follows:

> "I'm having bad back pain, it's been going on for 2 weeks. I injured it a few months ago and it's just getting bad again. I've seen Dr. Anna Reese for it. I've been working a lot and it's hard to work. It's worse this time than it was before."
>
> PT ambulated to triage without difficulty c/o back pain. PT states has been taking Tylenol but it doesn't help. States was given a prescription for motrin [sic] but hasn't been taking it because she has a weak stomach. PT is AOX4, skin w/pink/dry, respirations even and nonlabored. PT states she would like something for pain to get through work. (PX6)

Physical examination showed lateral rotation and flexion were limited by pain, and straight leg raising test was positive. *Id.* A CAT scan was ordered and showed minimal disc bulging from L2 to L5. There was a partial sacralization of a left transverse process of L5, a congenital defect. *Id.* Petitioner sought treatment with Dr. Risse on November 28, 2017 and indicated that she reinjured herself while performing her job duties. (PX5, 11/28/17) Petitioner's physical examination remained positive for limited range of motion secondary to pain, and she was again given muscle relaxers. *Id.*

Petitioner saw Dr. Matthew Gornet, a board-certified spine specialist, on December 4, 2017. (PX8, 12/4/17) The consistent history of the two accidents was taken, and Dr. Gornet noted Petitioner denied any history of prior back injury that predated her July 30, 2017, accidents. *Id.* Petitioner had no complaints of leg pain, only low back and buttock pain. *Id.* Dr. Gornet's examination showed that Petitioner was able to bend and forward flex, but this exacerbated her back complaints. *Id.* Dr. Gornet reviewed x-rays which showed the partial sacralized L5-S1 segment. *Id.* An MRI was done on December 2, 2017, and although the radiologist noted a normal radiograph, Dr. Gornet reviewed the films and found it showed bilateral annular tears at L4-5. *Id.* Dr. Gornet believed Petitioner's symptoms were associated with her work injury, and he recommended she return to work light duty with no repetitive bending or lifting and alternate sitting or standing. *Id.* Dr. Gornet also prescribed Meloxicam and Cyclobenzaprine and recommended epidural steroid injections. *Id.* Petitioner underwent the L5 epidural steroid injection on December 21, 2017, and L5-S1 sacral deep segment interlaminar epidural steroid injection on January 4, 2018. (PX9)

Following the injections, Petitioner presented once again to Chester Memorial Hospital's emergency room on January 17, 2018, with increased low back pain. (PX3, 1/17/18) Petitioner's examination showed generalized lumbar tenderness and she was placed off work pending her next visit with Dr. Gornet. *Id.* She next saw Dr. Gornet on May 24, 2018. (PX8) Dr. Gornet noted these steroid injections allowed her to trend more positively. *Id.* Because Petitioner still had symptoms and had not reached a baseline, Dr. Gornet was not comfortable releasing her at maximum medical improvement. *Id.* Dr. Gornet believed that Petitioner's symptoms would drive treatment, but he allowed her to continue working full duty. *Id.*

Petitioner last saw Dr. Risse on January 19, 2018, with severe back pain. (PX5, 1/19/18) Dr. Risse noted that when Petitioner returned to work full duty, her pain worsened. *Id.* Examination of Petitioner's lumbar spine continued to show limited range of motion, and she was diagnosed with chronic low back pain and anxiety/depressive disorder. *Id.* She was kept off work for a brief period of time and allowed to return on February 12, 2018.

In the meantime, Petitioner was examined at Respondent's request by Dr. Michael Chabot on April 9, 2018. (RX2) Dr. Chabot's examination was mostly normal with near full range of motion and moderate hamstring tightness bilaterally. *Id.* He reviewed the MRI study performed on December 2, 2017 and believed it to show well-preserved disc height in the lumbar spine with mild desiccation at all levels. *Id.* Dr. Chabot's impression was that of a history of a back strain on July 30, 2017, with exacerbation of back complaints on November 24, 2017. *Id.* Dr. Chabot opined Petitioner had reached maximum medical improvement. *Id.* Dr. Chabot opined Petitioner had no objective physical findings and was not a candidate for surgical intervention. *Id.* Dr. Chabot also opined Petitioner was magnifying her symptoms and had a high level of subjective complaints associated with underlying psycho-social issues. *Id.* Because Petitioner was a smoker and didn't exercise, it was Dr. Chabot's opinion Petitioner would be prone to recurrent back complaints. *Id.* Dr. Chabot was not deposed, and his reported was admitted into evidence. (RX2)

Petitioner saw Dr. Gornet on July 30, 2018, and Dr. Gornet noted that his full duty work release remained in effect. (PX8, 7/30/18) Dr. Gornet was provided with a copy of Dr. Chabot's report, and he noted that Dr. Chabot opiend there was no causal connection between Petitioner's current level of symptoms and her reported accident and that she was at MMI. *Id.* Specifically, he stated:

> I explained to the patient that her MRI is consistent anatomically with a potential disc injury. The fact that she did not have any neurologic abnormalities is no different than any other musculoskeletal injury that may not produce neurologic dysfunction. We have discussed that at this point I do not see the functional overlays that Dr. Chabot has opined. At this point, we have never discussed surgery, so it is

> unclear why he would feel that this is an issue, but I have also explained to her that oftentimes these disc injuries do progress. My preference would be to have her live with her symptoms for now. I have placed her at maximal medical improvement, but she understands that I believe she may require further treatment in the future including injections and/or further workup for this disc injury. We have discussed briefly this future treatment today. I can follow-up with her as needed. *Id.*

Dr. Gornet testified by way of deposition. (PX11) Dr. Gornet is a board-certified spine specialist who sees 100-120 patients per week and performs about 5-10 surgeries per week depending on the complexity. *Id.* Dr. Gornet is involved in numerous FDA clinical trials for research and particularly looking at new ways to treat low back pain. Dr. Gornet is also involved in the development of new diagnostic tools to help assist in understanding and treating structural back and neck pain, a topic on which he lectures throughout the United States and around the world. Dr. Gornet described the two injuries recounted by Petitioner and summarized her treatment. Dr. Gornet testified that at the time of Dr. Chabot's evaluation, Petitioner had not returned to baseline and was still suffering from the effects of her work-related injury even though she was working fully duty. Consequently, he "left his door open" for Petitioner during a period of observation. He stated:

> Well, there's no indication by her that she's back to baseline. She has no secondary gain by stating that. She is working full duty and continues to work full duty, but still is symptomatic.
>
> She has objective findings that are known to associate with the disc injury, including the partial sacralization at L5-S1. She has findings on her MRI that are, again, strongly suggestive of a disc injury in the exact location above her sacralization, as we've already discussed, and she remained symptomatic. (PX11, p.11-12)

At Arbitration, Petitioner testified she'd never had any low back symptoms which required any treatment prior to the accident. While Petitioner is able to work full duty, her symptoms are aggravated with activity both at work and at home. Petitioner specifically testified to difficulty performing housekeeping and vacuuming. When Petitioner's symptoms increase, she has to sit down and take Ibuprofen. Petitioner notices her symptoms the most at the end of her work week. Petitioner testified that by the time the weekend comes around, she's worn out and in too much pain to engage in any activities. Petitioner takes muscle relaxers and Meloxicam 1-2 days a week; though she tries to avoid taking Meloxicam, because it upsets her stomach. Because of her back, Petitioner does not sign up for overtime. Petitioner attempted to work overtime once and was miserable. Petitioner's sleep has also been adversely affected. (T.26).

CONCLUSIONS OF LAW

The Arbitrator incorporates the facts stated above into the sections that follow. The Arbitrator further finds that Petitioner's testimony was credible and unrebutted. The Arbitrator also finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, which were offered into evidence at the time of the hearing.

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

In addition to or aside from expert medical testimony, circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982).

The Arbitrator carefully considered the opinions of Dr. Chabot, Respondent's Section 12 physician. The Arbitrator accords the opinions of Dr. Chabot less weight than those of Petitioner's treating physicians. In reaching this conclusion, the Arbitrator relies on the holding in *International Vermiculite Co. v. Industrial Comm'n,*: ***Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician.*** International Vermiculite Co. v. Industrial Comm'n, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); and, ARA Services, Inc. v. Industrial Comm'n, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

The record is clear that Petitioner had no symptoms or complaints with respect to her back prior to her work injury. The record also shows Petitioner's complaints have been consistent since the injury. Although Respondent's examiner opined Petitioner was exaggerating her complaints, he is the only physician in the record to have so stated and the only physician to not appreciate any findings on physical examination. The Arbitrator is not persuaded by his opinion, as it is contrary to the chain of events and the manifest credible weight of the evidence. The Arbitrator defers to the credible opinions of Dr. Risse and Dr. Gornet and finds and concludes Petitioner's current condition of ill-being is causally connected to her undisputed accidental work injury.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill. Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Based upon the above findings as to causal connection, Respondent is hereby ordered to pay all the medical expenses in Petitioner's Exhibit No. 1 (medial bills). Respondent shall receive credit for any amounts paid, provided that it indemnifies and holds Petitioner harmless from any claims arising from the expenses for which it claims credit.

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

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

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to work as a housekeeper and testified that her job duties aggravate her symptoms. The Arbitrator places moderaste weight on this factor.

(iii) **Age**: Petitioner was 36 years old at the time of her injury. She is very young and must live and work with her disability for an extended period of time. Accordingly, the Arbitrator places greater weight on this factor. *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time).

(iv) **Earning Capacity**: While there is no direct evidence of reduced earning capacity contained in the record, based on the severity of Petitioner's injuries, the requisite treatment, and the resulting disability, and the high probability of the need for future treatment, it is reasonable to conclude that such repercussions could manifest in the near future. The Arbitrator gives some weight to this factor.

(v) **Disability**: As a result of her accidents, Petitioner sustained an L4-5 disc injury in her lumbar spine. (PX8) The Arbitrator acknowledges there is some disagreement regarding the findings on the MRI performed on December 2, 2017, as the radiologist noted a normal radiograph while Dr. Gornet reviewed the films and found it showed bilateral annular tears at L4-5. The Arbitrator takes this difference of opinion into account when determining the extent of disability. The Arbitrator does not agree with Dr. Chabot's opinion that Petitioner sustained only a back strain and she exaggerates her symptoms. Per Dr. Gornet's testimony, Petitioner has objective findings that are known to associate with the disc injury, including the partial sacralization at L5-S1. Petitioner has findings on her MRI that are, again, strongly suggestive of a disc injury in the exact location above her sacralization, as we've already discussed, and she remained symptomatic. (PX11, p.11-12) A CAT scan was ordered and showed minimal disc bulging from L2 to L5. Despite the improvement from conservative care and injections, Petitioner continues to have symptoms which are aggravated by activity both at work and at home. (T.22-26) Petitioner specifically testified to difficulty performing housekeeping and vacuuming. When Petitioner's symptoms increase, she has to sit down and take Ibuprofen. (T.23) Petitioner notices her symptoms the most at the end of her work week. Petitioner testified that by the time the weekend comes around, she's worn out and in too much pain to engage in any activities. Petitioner takes muscle relaxers and Meloxicam 1-2 days a week; though she tries to avoid taking Meloxicam, because it upsets her stomach. Because of her back, she does not sign up for overtime. Petitioner attempted to work overtime once and was miserable. Her sleep has also been adversely affected. (T.26).

The final treatment note of Dr. Gornet reflects consistent with Petitioner's testimony that she continues to have symptoms. Dr. Gornet believed that Petitioner's disc injury would eventually progress, but he felt it best that Petitioner attempt to live with his symptoms for now. (PX8, 7/30/18) The Arbitrator therefore places substantial weight on this factor and accordingly finds **Petitioner sustained permanent partial disability to the person as a whole under Section 8(d)2 to the extent of 6% thereof, or 30 weeks of compensation at her weekly PPD rate of $384.85.**

Robert M. Harris

Robert M. Harris, Arbitrator

August 6, 2019

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN BENYON,

Petitioner,

20IWCC0616

vs.

NO: 00 WC 29298

PERILLO BMW,

Respondent.

DECISION AND OPINION ON PETITION UNDER §19(h) OF THE ACT

This matter comes before the Commission on Petitioner's 19(h) Petition, filed on December 19, 2008, for a finding of permanent total disability. A hearing was held before Commissioner DeVriendt on October 1, 2018, in New Lenox, Illinois. Both parties were represented, and a record was made. The parties submitted testimony, depositions and other documentary evidence.

On July 1, 2004, the decision of Arbitrator Prieto issued, finding that injuries to the right wrist and an aggravation injury attributable to overuse of the left wrist were causally connected to the work accident on April 18, 2000. Petitioner described limitations he experienced while performing activities of daily living and the Arbitrator found him to be credible.

In his decision, the Arbitrator awarded Petitioner temporary total disability benefits in the amount of $899.91 per week, from April 19, 2000 through November 13, 2003, a period of 184 and 6/7 weeks. Respondent was issued a credit for overpayment of temporary total disability benefits in the amount of $4,092.34.

The Arbitrator also found that as a result of the injuries Petitioner sustained to both wrists due to the April 18, 2000 work accident Petitioner was unable to return to his usual and customary occupation as a master mechanic. Accordingly, the Arbitrator found Petitioner was entitled to a wage differential award pursuant to Section 8(d)(1) of the Act in the amount of $485.65 per week.

On October 12, 2004, Petitioner filed a review of the Arbitrator's decision with the Commission.

20IWCC0616

On October 22, 2008, the Commission issued its decision modifying the period of temporary total disability benefits from April 19, 2000 through January 15, 2004, a period of 196 5/7 weeks and also modified the 8(d)(1) award to commence January 16, 2004. (The Arbitrator found the 8(d)(1) award should have commenced on November 14, 2003.) Commissioner Mason dissented stating that Petitioner should have been awarded pain management and psychological counseling and/or vocational rehabilitation. The matter was appealed to the Circuit Court wherein the Commission's decision was affirmed.

The relevant inquiry before the Commission is whether Petitioner's physical condition of ill-being to his bilateral hands, as well as his mental state has recurred, increased, diminished or ended since the Commission's award, thus allowing the Commission to declare the Petitioner permanently and totally disabled under an "odd lot" theory. (*See Gay v. Industrial Comm'n*, 178 Ill.App.3d 129, 132 (1989).

At the 2018 hearing before Commissioner DeVriendt, Petitioner argued there has been a gradual but steady worsening of his physical and mental condition of ill-being since his case was arbitrated. The Respondent argued that the same symptoms of Petitioner's disability were apparent at his original hearing and the diagnosis of Petitioner's disability was substantially the same at the 19(h) hearing as at the time of the original hearing before the Arbitrator.

Despite the voluminous testimony and records submitted into evidence at the 19(h) hearing in October of 2018, Petitioner has not met his burden that his condition – either physical or mental – as it related to the work accident has changed.

The purpose of a 19(h) hearing on review is not to allow the parties an additional opportunity to causally relate a condition of ill-being to the work accident that they failed to prove at the time of the original hearing. The purpose of a section 19(h) proceeding is to determine whether a disability has changed subsequent to an award or agreed settlement. *Zimmerly Construction Co. v. Industrial Comm'n*, 50 Ill.2d 342, 344 (1972). In determining whether an increase in disability has occurred, the entire record must be examined. *Board of Trustees of University of Illinois v. Industrial Comm'n*, 71 Ill.2d 287, 295 (1978). The evidence introduced at the original hearing must be considered, but only to determine whether the disability existing at the time of the original award has changed. *Zimmerly Construction Co.*, 50 Ill.2d at 344.

Physical Condition of Ill-Being

In the underlying case at Arbitration, the Arbitrator found that Petitioner sustained accidental injuries that arose out of and in the course of Petitioner's employment with Respondent. Specifically, the injuries the Arbitrator related to the work accident were right and left wrists. (Arb. Dec. p. 7)

The Illinois Appellate Court clarified that an employee seeking "odd-lot status" must do more than make a *prima facie* case to shift the burden to the employer. *Lanter Courier v. Industrial Comm'n*, 282 Ill.App.3d 1, 6-7 (1996). With respect to the burden of production, the employee must initially establish by a preponderance of the evidence that he falls within the "odd-lot" category. *See Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 547

(1981). Only where an employee proves by a preponderance of the evidence that he falls into the odd-lot category does the burden of production shift to the employer to demonstrate that the employee is employable in a stable labor market and that such a market exists. Whether the parties satisfy their respective burdens are questions of fact. In deciding issues of fact, it is the function of the Illinois Workers' Compensation Commission to determine the weight to be given to the evidence, judge the credibility of the witnesses, and resolve conflicting medical evidence. *City of Chicago v. Ill. Workers' Comp. Comm'n*, 373 Ill.App.3d 1080, 1092 (2007) *citing Boyd Electric v. Dee*, 356 Ill.App.3d 851, 860-61 (2005).

Petitioner has not submitted sufficient evidence to shift the burden to the employer to substantiate a finding that he is permanently and totally disabled. Petitioner has not demonstrated that his condition has materially changed. His pain medications have remained constant over a significant period of time. Petitioner's pain was described as chronic at the time of Arbitration, and his inability to return to work as a master mechanic was noted in the decision.

At the original trial, Petitioner testified to constant severe pain in his bilateral hands. The Arbitrator found that the condition of both Petitioner's right and left wrists causally connected to his work accident of April 18, 2000. (July 1, 2004, Arb. Dec., p. 7) The records after the original trial including but not limited to, the Pain Treatment Centers of Illinois, reveal that his condition has not changed (Px2 and Px10). Petitioner testified to constant severe pain in his bilateral hands at the time of the original trial. He rated the pain to be 9/10 and constant in his right hand and 7-8/10 in his left hand. Additionally, a review of the records demonstrates that the Morphine was prescribed by his physicians in Florida as a result of the same pain complaints as were made to his treating physicians in Illinois before the first trial. At his November 19, 2007 visit with Dr. Baldinger it was noted "Petitioner continues with his current pain medicine regiment with the morphine, Xanax, and Cymbalta. He [sic] is essentially no change in his pain however of course the pain medications help manage his pain to some degree." (Px2)

There is no indication of any new condition or complaints, but simply histories of chronic pain that had been present since the 2000 accident. (*See* Px2) The medical evidence is consistent that he had ongoing pain, but the cause of the pain is disputed. Additionally, Dr. Fernandez, could not causally relate Petitioner's current condition of ill-being to the 2000 work-accident. Dr. Fernandez was the only physician to examine Petitioner both before and after the original trial and testified Petitioner never met the criteria for chronic regional pain syndrome. Dr. Fernandez further testified that the carpal tunnel diagnosis post 2004 hearing, does not represent a material change and that it was not caused by the 2000 work accident or resultant surgeries. (August 15, 2006 IME with Dr. Fernandez, Rx2) An unrelated condition cannot represent a material change.

Additionally, Petitioner has not sought employment since the time of his work injury nor has he established that he is unemployable based on his physical condition of ill-being. Even at the time of the Arbitration decision in 2004, it was apparent that Petitioner did not look for work nor intend to do so. (July 1, 2004 Arb. Dec., p. 7)

Mental Condition of Ill-Being

At the hearing before the Arbitrator in 2004, Petitioner did not submit any evidence that he was receiving care or treatment for depression and/or anxiety related to the work injury of April

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16, 2000. There was also no evidence presented at the original hearing that Petitioner had been diagnosed with anxiety and/or depression in relation to his work accident. Petitioner testified that his self-worth was way down, that he gained weight, and that he and his wife were having problems since he was not working. (4/13/2004 T. 50) However, Petitioner did not present any evidence beyond his own feelings. None of Petitioner's medical experts at the time of the original hearing diagnosed Petitioner as suffering from depression/anxiety. Furthermore, the Arbitrator did not causally relate any condition other than the right and left wrists, to the work accident.

Petitioner's current psychological diagnoses and/or treatment do not represent material changes from the time of the trial on Arbitration to the present. Although Petitioner did seek psychological treatment after the 2004 Arbitration decision issued, this does not equate to a material change in his disability as at the time of the original hearing the Arbitrator did not causally relate any mental condition to injuries sustained in the work accident.

In its original decision, the Arbitrator found that the evidence established Petitioner was unable to return to his prior occupation based on only the physical injuries (right and left wrists), that he found were causally related to the work accident. Notwithstanding that Petitioner testified to feelings relating to a lack of self-worth, no formal diagnosis of depression was made or treatment obtained for same at the time of Arbitration.

19(h) proceedings are not intended to allow the Petitioner to relitigate any issues, or to attempt to causally relate a condition to the work accident that was not related to the accident at the time of the original hearing. The findings at Arbitration are considered final, and relitigation is barred under the doctrine of *res judicata. Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill.2d 230, 236 (1979); *Zimmerly Construction Co.*, 50 Ill.2d 342, 344-45 (1972).

Additionally, Petitioner has not sought employment since the time of his work injury nor has he established that he is unemployable based on his mental condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) is hereby denied as outlined above.

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

DATED: OCT 16 2020

Maria Elena Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O:081820
49

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Thompson,

Petitioner,

vs. No. 17 WC 30574

Mueller Water Products, Inc.,

Respondent.

20IWCC0617

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 5, 2019, is hereby affirmed and adopted.

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

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

20IWCC0617

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 19 2020
o-10/08/20
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMPSON, THOMAS
Employee/Petitioner

Case# **17WC030574**

18WC010212

MUELLER WATER PRODUCTS INC
Employer/Respondent

20IWCC0617

On 12/5/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0149 DANZ LAW OFFICE
WARREN DANZ
710 N E JEFFERSON AVE
PEORIA, IL 61603

2795 HENNESSY & ROACH PC
PAUL N BERARD
415 N 10TH ST
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thomas Thompson
Employee/Petitioner

v.

Mueller Water Products, Inc.
Employer/Respondent

Case # **17 WC 30574**

Consolidated with 18wc10212

20IWCC0617

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **August 27, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/28/16**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,599.30**; the average weekly wage was **$815.00**.

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

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

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

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

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

ORDER

FINDING FOR CAUSAL CONNECTION

The Arbitrator finds that there is a causal connection between the accident of November 28, 2016 and the condition of ill being diagnosed in the right shoulder.

PERMANENT PARTIAL DISABILITY: PERSON AS A WHOLE

Respondent shall pay Petitioner permanent partial disability benefits of $489/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Edward Lee
Signature of Arbitrator

11/23/19
Date

RIGHT ARM 11/28/16

FACTS OF THE CASE

The Petitioner began working for the Respondent in 2004 performing a job as a machinist, which is work that he had done in the past. The Petitioner did not have any problems with either of his shoulders when hired on for the Respondent.

The job description was that of a machinist operating production lathes on machinery. The Petitioner operated a computer on a lathe machine. First, he would have to set up his machine. He described the work as taking castings out of a wooden crate that weighed above 40 pounds and up to 55 pounds. He would run all the way up to 200 castings per day and if the castings were lighter, then more than 200 a day. The job description was to lift these castings out of a wooden crate, which is depicted in the Petitioner's Exhibit 1. After lifting the casting, he would walk to put it into the machine and chuck it up. He would start the lathe and when done, he would check the treads and then pull the plug out of the machine and turn it around and walk over and stack it on a pallet, usually five or six high. He would have to complete on one side and then he would have to turn each end and turn it around and then would load side and hit cycle start, then stack on a pallet. After this, he would then take another casting out of the crate and pallet and load another part and pick it up and load it on the other side. In his job, he would be picking up and moving the part three times for each side so he would be lifting each heavy casting six times. He would perform this on an average of 200 times per day. If the part was less weight, it would increase the volume and he could run three to four hundred pieces per day. He would work ten to twelve hours a day.

As the Petitioner continued working this job up through 2011, he started having soreness in his shoulders and pain and stiffness in his neck and arms. In October, he was having quite a bit of problems with his right shoulder and underwent decompression surgery in October of 2014. The Petitioner continued having problems with pain in both shoulders. The Petitioner saw Dr. Kahn, his family doctor in 2015 with complaints of pain in the right shoulder when he was sent to Dr. Keener, an orthopedic surgeon in St. Louis on October 13, 2015. Dr. Keener performed a right shoulder replacement on February 19, 2016.

Following shoulder replacement, the Petitioner underwent therapy and complaints were resolving on May 19, 2016 and June 29, 2016 and at that time he was doing better. The Petitioner complained that he was doing fine and was released to work with no restrictions back to machinist on July 1, 2016.

Following the release, the Petitioner was returned to lifting of the heavy castings out of the bin and complained that the third day that he was back, he began having symptoms again in the right shoulder with a lot of soreness and stiffness in both shoulders. He was treating with Dr. Kahn and complaining that both of his arms hurt and was given medication. By November his right shoulder was in constant pain and hurt into his shoulder blade.

On November 28, 2016, the Petitioner reported an accident when he reached down in the crate to pick up a 45 pound casting out of the crate and as he turned, he felt a sharp pain in his abdomen and lost the grip with his hand and the part fell and he held onto it at which time, it jerked his right shoulder and neck and he had pain in his abdomen and shoulder that ran up into the neck. He complained that after that accident, he was miserable everyday.

He reported the accident to his foreman, Chuck Duran, and reported to him that in addition to his abdomen, he injured his right shoulder. He went home that night and returned to Decatur Memorial Hospital the following day, November 29th, with his complaints.

The Petitioner told the ER room, RN Shelton Blancher, that he had pain in his neck and his right shoulder. He then tried to return to work but was told to see a company doctor, who released him without restrictions. Petitioner at that time was denied under Workers' Comp and he was returned to work without restrictions in his right shoulder and left. He continued to work with pain getting worse everyday. He continued to see his family doctor and receive pain medication. He continued to work the year of 2017. He was told that Workers' Comp was denied. If he missed work he would be disciplined.

Chuck Duran testified that he was employed for the Respondent as a supervisor and the Petitioner was one of his employees under supervision. Duran testified that the Petitioner reported the accident on November 28 to him after it happened and told him that he was lifting up castings out of a wooden crate and he was turning/twisting to load it onto the machine and injured his abdomen, his right shoulder and his neck. He offered to send him to the ER room, but the Petitioner stated he would try to work through it. Duran testified that he filled out the accident report but at the end there was a mention a strain or injury which he did not write. Duran testified that the Petitioner's work was physically demanding and testified and stated that after the November 28 accident, he weighed one of the castings and found it to be between 45 and 50 pounds, which was over the coupling limit of picking stuff up by one person over 40 pounds. Duran stated that the Petitioner would have to bend down into the crate and lift up the casting and swing it over and load it into the machine. When it's done he would have to take it out and stack it up. Duran stated that depending on the castings, the Petitioner would probably get close to a couple of hundred then in an eight-hour shift.

His right shoulder gave him problems after the November accident. It was painful all the time and it kept him from sleeping or doing any kind of yard work. He basically worked during that time and went home and sat in a chair. He was using the left hand to save the right.

The Petitioner stated that at the present he can't pick up anything heavy with the right shoulder. He has severe pain in the upper part of the shoulder. It runs down the shoulder blade and has pain inside the arm with numbness in three fingers on the right.

He can raise his arm about half way. He underwent a right shoulder decompression on April 9, 2018 with Dr. Keener but the right shoulder did not improve.

DR. KAHN TESTIMONY

Dr. Kahn first saw the Petitioner on April 10, 2014 as a family doctor. He treated the right shoulder complaints, which were made by Petitioner. Dr. Kahn was further informed that the Petitioner underwent a right shoulder arthroplasty on February 19, 2016, which was a total shoulder replacement on the right. Dr. Kahn continued to follow the Petitioner and noted that he was doing fine with occasional pain when he saw him on May 11, 2016, at which time he had the information that the Petitioner was returned back to work on July 1, 2016 with no restrictions by Dr. Keener.

Dr. Kahn saw the patient on August 11, 2016 and he had some complaints of pain stemming from the right shoulder and was taking medication. He was working ten to twelve hours per days, doing mostly heavy lifting of objects. On December 5, Dr. Kahn had a history of neck and abdominal pain and pain on the right side. Dr. Kahn stated he reported an injury at work and mentioned that it was worse when he was lifting heavy objects.

On December 26, 2016, Dr. Kahn saw the patient noting that he is having discomfort since he had the fall and went to the emergency room. He noted he was having problems at the end of December. January 10, 2017, the Petitioner came to Dr. Kahn for Workers' Comp describing that he hurt himself at work and noted that his employer did not want to address this as Workers' Comp and that he had a problem with the right shoulder. Dr. Kahn reminded the Petitioner to inform them that he had hurt himself at work.

Dr. Kahn saw the patient May 1, 2017 and noted that his problems were getting worse with the right shoulder. Dr. Kahn stated after the surgery and returning to work, the right shoulder was deteriorating and it had gotten worse after that injury. Dr. Kahn further opined that the fact that the Petitioner had a surgery on shoulder replacement and he's had repeated injury to that right shoulder definitely the type of work he was doing would definitely aggravate his pain. Dr. Khan further answered affirmatively that the accident of November 28, 2016, when he lifted the heavy object with the right arm, would be a repetitive type of injury that caused or aggravated the right shoulder to become symptomatic to which Dr. Kahn answers, "Absolutely, it can." Dr. Kahn confirmed that the type of work performed by Petitioner was a repetitive type of work where he lifted 40-50 pounds, 100 to 200 times a day. Dr. Kahn further stated that in his opinion, he did not think the Petitioner is going to be able to return to work to his previous work as a machinist.

DR. NORD TESTIMONY

Dr. Nord examined the Petitioner and recorded a history where the Petitioner worked for the Respondent for about 15 years and performed work as a machinist, which

involved lifting continuously of 40 to 50 pound objects in his job working on heavy machine parts. Dr. Nord noted that Petitioner had a prior work history of complaints in the right shoulder and had undergone arthroscopic debridement of the right shoulder. Dr. Nord also noted the Petitioner had a total right shoulder replacement on February 16, 2016 by Dr. Keener. He was released with no restrictions on July 1, 2016 back to work as a machinist doing the heavy lifting. When he returned to work, the Petitioner began to have symptoms of right shoulder pain, which developed after repetitive lifting of up to 40 pounds consistently. On November 28, 2016 he was lifting a 50-pound casting out of crate to load and noticed a sharp pain in his right shoulder when he did that. He had a painful right shoulder in which the end diagnosis was that of a loose prosthesis. Dr. Nord noted that the Petitioner may have gone back to work too early because he was not allowed to heal and by going back to work and working as a machinist and doing repetitive work with his shoulder caused the failure of his prosthesis to ingrow into the patients bone. Doctor noted that after a second injury on 3/20/18, when he slipped on a platform that he returned to Dr. Keener and on 4/9/18, Dr. Keener performed a right shoulder arthroscopic extensive debridement and subacromial decompression and acromioplasty.

Dr. Nord gave an opinion that the diagnosis of the right shoulder was caused and aggravated by his work as a machinist. He found his range of motion to have painful moderate restricted range of motion and his strength was 4/5 on the right. Dr. Nord testified based on the type of work as a machinist performed by the Petitioner when he had to pick up parts weighing anywhere from 40 to 55 pounds and he would have to do this repeatedly hundreds of times a day to lift and tighten up with dentures and reach above his head repetitively to which Dr. Nord testified that in his opinion, the accident of 11-28-16 did aggravate and cause the underlying degenerative condition in both shoulders and that his right shoulder condition was permanent at the time of his exam. He testified that the Petitioner with his condition, would not be a candidate for further employment doing any work with the shoulder, which requires pulling, pushing or lifting.

DR. KEENER RECORDS

Dr. Keener saw the patient and performed right shoulder arthroscopy in February, 2016. After seeing the patient on two occasions, Dr. Keener felt that his condition was stable and on July 1, 2016 released him to return to work with no restrictions. The Petitioner complained that his condition was fine at that time in the right shoulder. The Petitioner then returned to work as a machinist doing the heavy work when he began to have the symptoms with his right shoulder again. On August 9, 2017, Dr. Keener recorded a history of the injury of November of 2016 when he lifted something heavy and felt immediate sharp pain in his shoulder. On March 21, 2018, Dr. Keener saw the patient again and made a notation that he has persistent pain in the shoulder and has primarily activity related pain. He has a job that requires repetitive motion and lifting up to 40 pounds consistently. Dr. Keener notes that the Petitioner had a history of injuring his left shoulder when he tripped on some pallets at work. He stated, "I think his right shoulder pain is related to overuse at work." He performed a decompression surgery on April 9, 2018. Dr. Keener, however, concluded that on his last visit on May 16, 2018, that

the Petitioner's medical condition was at a standstill and that he recommended that he retire and file for disability inasmuch as no further aggressive treatment was rendered at that time. His condition was permanent.

DR. NEAL TESTIMONY

Dr. Neal examined Petitioner for the Respondent and discussed a history of two incidents, one in November to the right shoulder, where he suffered a jerked right shoulder followed by sharp stabbing pain in the abdomen. He also discussed the second accident of March, where his left foot slipped away and the right hip remained. He pulled his left shoulder and the right shoulder and found his range and motion to be significantly limited with his level of abduction at 90 degrees and loss of range of motion. He commented that both shoulders were weak and had limited motion. (TR 14, 15) Dr. Neal was asked whether he had a history of the repetitive work performed by the Petitioner lifting 45 to 50 pound molds, he answered no. He appears to rely on the conclusion that the Petitioner has had ongoing shoulder problems dating back to 2011, however, Dr. Neal has not acknowledged the fact that the Petitioner, who underwent a right shoulder replacement, was doing well as of June 29, 2016, according to the medical notes of Dr. Keener. Dr. Neal has failed to consider the fact that the Petitioner as of June 26 was doing fairly well and according to his own testimony he was feeling good. Dr. Neal again failed to consider the release to work upon July 1, the Petitioner returned to the heavy job as a machinist. Dr. Neal failed to consider that the facts presented with the Petitioner returned to work at the machinist job lifting the heavy castings and at that time, developed the onset of more pain in his right shoulder. Dr. Neal admitted that once you have an artificial shoulder, by deposition, you are at risk for injuring that shoulder replacement (Neil dep. p. 40). He acknowledges that on August 11, he saw Dr. Kahn with further pain and symptoms in the right shoulder. Dr. Neal, however, did not consider that he returned to repetitive work, in fact states in page 39 of his deposition, that Mr. Thomas never put forth to me a history of repetitive history or repetitive strain when return to work to July 1 of 2016. Dr. Neal did admit that the history following the November 28th accident does record a history of right shoulder pain as part of the complaints. Dr. Neal also fails to consider the ongoing right shoulder complaints that the Petitioner return to work on December 1, 2016 and worked through to 2017, with a note on January 10, of 2017 from Dr. Kahn that he was having problems with his right shoulder. He failed to recognize the notes of Dr. Kahn who on January 10 said the pain is getting worse and he has difficulty raising his right arm with certain positions and pulling and pushing. His pain recording in the medical records shows 7 to 8 on a regular basis and 10 in certain positions with Dr. Kahn. Dr. Neal stated that it would not surprise him that he would have pain while working. Dr. Neal simply concluded that he did not look at the work as permanently worsening his painful condition. Dr. Neal opinion fails to consider the repetitive trauma that he performed and fails to acknowledge the history of increased complaints following his return to work on the right on July 1 of 2016. Pictures were shown to doctor. Dr. Neal, who fails to recognize the Petitioner doing the work that was described. The Arbitrator accepts the opinion of Dr. Kahn and Dr. Nord to be consistent with the facts of the repetitive trauma performed by the Petitioner after shoulder surgery.

In support of the Arbitrator's Decision relating to causal connection the Arbitrator makes the following finding:

The Petitioner, as a machinist, doing heavy, repetitive work for approximately 15 years, which resulted in degeneration in both shoulders, the Petitioner underwent a prior arthroscopic surgery and eventually had a total right shoulder replacement in February of 2016.

Following the shoulder replacement, the Petitioner was released to return to work as a machinist with no restrictions. On July 1, 2016 after which he began having further symptoms in the right shoulder heavy work as a machinist lifting heavy castings that was followed by further symptoms in the right shoulder. On November 28, 2016, the Petitioner injured his right shoulder when he was lifting a heavy casting weighing 45 to 50 pounds and it became unstable and jerked his right shoulder. This was accompanied by increase pain in the right shoulder.

It is Dr. Kahn's opinion that following the right shoulder replacement that the Petitioner returned to the repetitive work of lifting the heavy castings and on November 28, 2016 sustained a further aggravation of the right shoulder to cause it to become symptomatic and unstable. Dr. Kahn found that the Petitioner performed a repetitive type of work doing a heavy lifting 100 to 200 times per day, which aggravated his right shoulder to cause the condition.

Dr. Kahn gave his opinion that the Petitioner returned to work too early to his prior job as a machinist following July 1, 2016 and caused the shoulder to become loose and unstable resulting in a failed shoulder replacement.

(L) WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator notes as follows:

1. The reported level of impairment: There was no impairment rating introduced into evidence. Therefore, the Arbitrator does not give this factor any weight.

2. The occupation of the injured employee:

Petitioner testified that was a machinist. The Arbitrator finds this job to be more labor intensive than many other jobs and gives moderate weight to this factor.

3. The age of the employee at the time of the injury:

Petitioner was 58 years old at the time of his November 28, 2016, accident. The Arbitrator gives some weight to Petitioner likely taking longer to recover from his injury due to his age.

4. The Petitioner's future earning capacity:

Petitioner testified he is currently receiving Social Security Disability and is no longer employed by Respondent. However, the Arbitrator finds Petitioner's earning capacity to be reduced based on Dr. Kahn's opinion that the Petitioner is not able to return to his job as a machinist due to his right arm injury of November 28, 2016. The Arbitrator gives significant weight to this factor.

5. The evidence of disability corroborated by the treating physicians' medical records:

Petitioner received care from the Decatur Memorial Hospital on November 29, 2016 and from Dr. Khan several times on December 5, 2016, December 26, 2016, January 10, 2017, May 1, 2017, and May 22, 2017. By his May 22, 2017, follow up with Dr. Khan, Petitioner was no longer complaining of any abdominal pain, and was primarily complaining of right shoulder and neck pain. Based upon those treating records, the Petitioner's complaints and Dr. Khan's opinion Petitioner is unable to return to work as a machinist Arbitrator finds the Petitioner sustained injury to his person-as-a-whole to the extent or 15%. The Arbitrator gives great weight to this factor.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN SANCHEZ,

Petitioner,

20IWCC0618

vs.

NO: 17 WC 25047

RESIDENCE INN MARRIOTT,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission hereby incorporates by reference the findings of fact contained in the Decision of the Arbitrator, which delineate the relevant facts and analyses. However, as it pertains to the issue of medical expenses, the Commission finds that Dr. Gregory Lopez of Midwest Orthopedics at Rush represented Petitioner's second choice of physician under §8(a) of the Illinois Workers' Compensation Act.

In relevant part, §8(a) states that the employer's liability to pay for medical services selected by the employee shall be limited to:

> "(1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in

20IWCC0618

> the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. Thereafter the employer shall select and pay for all necessary medical, surgical and hospital treatment and the employee may not select a provider of medical services at the employer's expense unless the employer agrees to such selection..." 820 ILCS 305/8(a).

The Decision of the Arbitrator indicates that Petitioner had been referred to Dr. Lopez by Dr. Kevin Koutsky for a second opinion. However, Dr. Koutsky had instead referred Petitioner to Dr. Geoffrey Dixon, who Petitioner testified he never saw. Petitioner testified that his daughter then looked on the internet for a treater who was best suited for him and found Dr. Lopez through that internet search. As such, Dr. Lopez was Petitioner's second provider choice after his first provider choice with La Clinica.

Regardless that Petitioner was not sent to Dr. Lopez within a referral chain, he nevertheless remained within his two-physician choice limit afforded by §8(a). Therefore, the Commission modifies the Decision of the Arbitrator to identify Dr. Lopez as Petitioner's second choice of physician, but otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 13, 2020 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISION that Dr. Lopez was Petitioner's second choice of physician and Petitioner did not exceed his choice of physicians as afforded by §8(a) of the Act.

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

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

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

20IWCC0618

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 20 2020

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 9/3/20
46

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

8/20

20IWCC0618

SANCHEZ, MARTIN
Employee/Petitioner

Case# **17WC025047**

RESIDENCE INN MARRIOTT
Employer/Respondent

On 1/13/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2731 SALVATO & O'TOOLE
DAIVD FROYLAN
53 W JACKSON BLVD SUITE 1750
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
DANIEL WELLNER
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20 I W C C 0 6 1 8

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Martin Sanchez
Employee/Petitioner

v.

Residence Inn Marriott
Employer/Respondent

Case # **17 WC 25047**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **March 19, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **08-14-17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner held concurrent employment and earned $**26,655.72**; the average weekly wage was $**51.61.99**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $ **7991.91** for TTD, $**0** for TPD, $**0** for maintenance, and $ **2111.92** for other benefits, for a total credit of $ **10,103.83**.

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

ORDER

The Arbitrator finds that Petitioner proved his burden that he had an accident arising out of and in the course of his employment.

The Arbitrator finds that Petitioner held concurrent employment at Best Western and earned a total of average weekly wage of $512.61 from Best Western and Respondent.

Respondent is liable for all unpaid medical bills listed in Petitioner's exhibit A, pursuant to the medical fee schedule, and as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $341.74/week for 34.286 weeks, commencing 07-23-18 through 03-19-19, as provided in Section 8(b) of the Act.

The Arbitrator finds that the recommendation for L5-S1 TLIF is causally connected to the accident of 08-14-17 and reasonable and necessary.

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

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

Signature of Arbitrator

01-11-20
Date

JAN 13 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN SANCHEZ,	)	
	)	
Petitioner,	)	
	)	**IWCC No. 17 WC 25047**
v.	)	
	)	
RESIDENCE INN MARRIOTT,	)	
	)	
Respondent.	)	

ARBITRATION DECISION

STATEMENT OF FACTS

Procedural History

On August 25, 2017, Petitioner filed an Application for Benefits for an alleged date of accident of August 14, 2017. Petitioner was initially paid benefits pursuant to the Illinois Workers' Compensation Act, (hereinafter the "Act"), until approximately February 2, 2018. Thereafter, Petitioner filed a motion pursuant to Section 19(b), 8(a), and 8(b). This matter was set for hearing on Petitioner's 19(b) before Arbitrator Bocanegra on March 19, 2019. This matter was heard by Arbitrator Bocangra, however, the Arbitrator resigned her post prior to receiving proposed decision and reviewing and deciding the issues in this matter. The Illinois Workers' Compensation Commission, (hereinafter the "IWCC"), reassigned this matter to Arbitrator Carlson. Petitioner and Respondent stipulated, with Arbitrator Carlson's consent, to forgo another trial and submit the trial transcript and 19(b) proposed decisions.

Factual History

On or about 2014, Petitioner was hired by Respondent as a chauffeur. Tr. at 17. Petitioner's job duties required him to drive hotel guests between the Residence Inn Marriott and O'Hare International Airport. *Id.* Petitioner was also responsible for loading and unloading

guest's luggage from the transport vehicle. Tr. at 18. Petitioner testified the weight of the luggage ranged from 10 to 70 pounds. Tr. at 34. Respondent provided vehicles for Petitioner to transport guests and their luggage. Tr. at 18.

Petitioner testified at the time of the alleged accident, he was working concurrently at Best Western O'Hare, also known as, OMS O'Hare, LLC, (hereinafter "Best Western"). Tr. at 21-23. Petitioner earned $10.00 per hour, working two days a week, and averaging 16 to 20 hours per week. Tr. at 23. Petitioner submitted into evidence a 2017 W-2 statement from Best Western showing wages of $2,755.30. Px. 1 and Rx. 1. Petitioner also submitted into evidence ten paystubs from Best Western ranging from January 14, 2017 thru July 22, 2017. Px. 2 and Rx. 1. Respondent submitted into evidence an earnings record for 2017 showing pay periods from January 13, 2017 thru September 8, 2017. Rx. 2.

Petitioner testified that the majority of Respondent's chauffeurs held concurrent employment. Tr. at 28. Petitioner informed Marisol Bucio (hereinafter "Marisol"), his Supervisor, he was working concurrently at Best Western. Tr. at 27.

Respondent required Petitioner to take an annual physical exam to drive. Tr. at 29. Petitioner would undergo the physicals during work. *Id.* Petitioner's last physical prior to his alleged injury was at Concentra on May 3, 2017. Px. 3 and Tr. at 32. Petitioner testified he passed the physical exam. Tr. at 30.

On August 14, 2017, Petitioner began his shift at 3:00 p.m. Tr. at 35. At approximately 6:30 p.m. or 7:00 p.m., Petitioner sustained an injury. Tr. at 36. Petitioner went to the airport to pick up a guest. Tr. at 38. Petitioner grabbed two pieces of luggage and carried them into the truck he was driving. Tr. at 36. Petitioner had to walk up two steps. *Id.* The first piece of luggage, he swung into one of three racks in the truck, pushing with his knee. *Id.* The second

piece of luggage weighed approximately 25 to 30 pounds. Tr. at 37. He swung the second piece of luggage into the middle rack that stood approximately four to five feet from the floor. Tr. at 38. Immediately after this, Petitioner felt pain in his lower back. Tr. at 37. Upon returning to the hotel, Petitioner informed his co-worker, Ida, he had injured himself. Tr. at 38.

The following day, Petitioner reported his injury to Ida, a coworker, Heather, a General Manager, and Marisol, a Supervisor. Tr. at 39. Petitioner testified he had taken Tylenol and had little pain, so he worked that day. *Id.* Thereafter, Petitioner called off work and remained at home until August 17, 2017 when he was sent to Physicians Immediate Care by Respondent. Tr. at 40.

On August 17, 2017, Petitioner sought care at Physicians Immediate Care. Px. 4. According to records, Petitioner complained of left low back pain because of lifting a heavy suitcase at work. Px. 4 at 9. Dr. Shital Shah (hereinafter "Dr. Shah") referred Petitioner to Presence Advanced Imaging for x-rays of left hip and thoracic spine. Px. 5 at 11-12. Dr. Shah prescribed pain medication to Petitioner and assigned work restrictions of avoid bending, jumping, running, climbing ladders entirely, and no lifting over 20 pounds. Px. at 19.

Petitioner continued to experience pain, so he sought a second opinion at La Clinica. Px. 6. On August 18, 2017, Dr. Rushani of La Clinica, examined Petitioner. Px. 6 at 14. Petitioner complained of left low back pain that initiated at work, after attempting to place a piece of luggage in the cargo area. Px. 6 at 14. Petitioner further complained of numbness into his left leg above the knee. Id. Dr. Rushani recommended to two weeks of physical therapy, an MRI and removed Petitioner from work. Px. 6 at 12.

On August 29, 2017, Petitioner underwent an MRI of his lumbar spine at Advanced Diagnostic MRI. Dr. George Kuritza (hereinafter "Dr. Kuritza"), the radiologists, interpreted the

MRI to reveal a 3-4 mm posterior disk herniation with extruded pulposus indenting the thecal sac with mild bilateral nueroforaminal narrowing. Px. 7 at 5.

On August 30, 2017, Dr. Rushani referred Petitioner to Dr. Jason Croxford (hereinafter "Dr. Croxford") for an EMG/NCV. Px. 6 at 158. Petitioner continued to undergo therapy with Dr. Rushani, which consisted of joint mobilization of the lumbar spine, hot packs and muscle stimulation. Px. 6 at 22. Petitioner remained off work. Px. 6 at 157.

On September 13, 2017, Petitioner underwent the EMG/NCV. Px. 6 at 124. Dr. Croxford concluded there was electrical evidence of left lumbar radiculopathy with denervation of the left paraspinals. Id. The doctor recommended clinical correlation. *Id.*

On September 14, 2017, Petitioner saw Dr. Kevin M. Koutsky of Elmhurst Orthopaedics (hereinafter "Dr. Koutsky"). Px. 10 at 24. Petitioner complained of low back pain with numbness and tingling down his left leg. *Id.* Dr. Koutsky examined Petitioner, the EMG report and the August 29, 2017 MRI films. Px. 10 at 25. Dr. Koutsky opined that the films revealed a disc herniation/annular tear at L5-S1, and diagnosed Petitioner with left L5-S1 radiculopathy. *Id.* Dr. Koutsky recommended Petitioner continue with physical therapy, use a TENS unit and follow up with Dr. Scott E. Glaser (hereinafter "Dr. Glaser") for pain management. *Id.*

On September 27, 2017, Petitioner followed up with Dr. Glaser. Px. 8 at 18. Dr. Glaser took a history of Petitioner pain, noting an onset of low back pain radiating into his left leg when lifting at work. *Id.* Dr. Glaser recommended transforaminal epidural steroid injections at L5-S1. Px. 8 at 20.

On October 30, 2017, Petitioner underwent left transforaminal epidural steroid injections at L5-S1. Px. 8 at 23. Following the injection, Petitioner reported a 60% decrease in radicular

pain, but no relief regarding axial pain. Px. 8 at 16. Dr. Glaser recommended left facet joint injections at L4-L5 and L5-S1. Px. 8 at 17.

On December 14, 2017, Petitioner saw Dr. Lawrence Lieber of DuPage Medical Group (hereinafter "Dr. Lieber") for an independent medical examination. Rx. 4. After reviewing Petitioner's EMG and the MRI from August 29, 2017, Dr. Lieber noted evidence of low back abnormality and left lower extremity. *Id.* Dr. Lieber noted in the IME that the MRI and EMG confirm abnormalities in the lower back. *Id.* Dr. Lieber recommended another round epidural injections, continue with physical therapy and estimated a MMI date within 6 weeks. *Id.*

On January 8, 2018, Dr. Lieber produced an addendum report recommending that Petitioner return to work with restrictions of no lifting over 20 pounds. Rx. 4.

On January 8, 2018, Petitioner underwent facet joint injections at L4-L5 and L5-S1. Petitioner reported relief, averaging 2/10 on a pain scale. Px. 8 at 15. Petitioner reported more severe pain when sitting. Px. 8 at 14. Dr. Glaser recommended L3-L5 medial branch nerve blocks. Px. 8 at 15. Dr. Glaser also recommended Petitioner remain off work. Px. 8 at 25.

On February 2, 2018, Petitioner's benefits were terminated based on Dr. Lieber's recommendation that petitioner return to work with restrictions. Tr. at 51-52. Petitioner attempted to return to work within his restrictions. Tr. at 52. Petitioner was placed in the laundry room taking sheets out of industrial dryers and folding them. Tr. at 53. Petitioner testified that there were many sheets in the dryers, and they were very heavy. *Id.* Petitioner's pain became more intense and ultimately reported the pain to his employer and left work. Tr. at 54. Petitioner sought an appointment with Dr. Koutsky on February 22, 2018. Px. 10 at 16. Dr. Koutsky kept Petitioner off work. *Id.*

On February 12, 2018, Petitioner underwent medial branch nerve blocks at L3-L5. Px. at 21.

On February 22, 2018, Petitioner followed up with Dr. Koutsky. Px. 10 at 14. Petitioner indicated therapy and injections had decreased his pain, however, he still had pain in his low back and into his lower extremities. *Id.* Dr. Koutsky concluded conservative care and pain management failed. *Id.* Dr. Koutsky noted the EMG test showed evidence of L5 radiculopathy, which was consistent with the pathology seen on the MRI. *Id.* Dr. Koutsky recommended decompression and stabilization with instrumentation at L5-S1. *Id.*

On April 25, 2018, Petitioner followed up with Dr. Lieber for a second IME. Rx. 5. Dr. Lieber opined that Petitioner suffered from degenerative lumbar disc disease, his current symptoms were related to the underlying-preexisting disc disease, and his current symptoms had no relationship to the August 2017 accident. *Id.*

After Dr. Koutsky recommended surgery, Petitioner requested a second opinion. Tr. at 46. Dr. Koutsky agreed, so Petitioner sought out Dr. Gregory Lopez of Midwest Orthpaedics at Rush University (hereinafter "Dr. Lopez"). *Id.*

On July 16, 2018, Petitioner saw Dr. Lopez for an initial consult. Px. 11 at 10. Dr. Lopez noted an injury history of low back pain, shooting down his left leg after a lifting injury at work. *Id.* Petitioner attempted to return to work but was unable to do so. Px. 11 at 11. Dr. Lopez reviewed the August 2017 MRI films and noted severe foraminal stenosis bilaterally at L5-S1. *Id.* Dr. Lopez recommended Petitioner undergo x-rays and an updated MRI. *Id.*

On July 23, 2018, Petitioner returned to see Dr. Lopez with an updated MRI. Px. 11 at 9. Dr. Lopez reviewed the updated MRI and noted disk degeneration at L5-S1, severe foraminal stenosis bilaterally at L5-S1 and endplate modic changes at L5-S1. *Id.* Dr. Lopez diagnosed

Petitioner with severe low back pain and bilateral lumbar radiculopathy due to severe stenosis at L5-S1 with disk degeneration. *Id.* Dr. Lopez recommended L5-S1 laminectomy/TLIF/Fusion. *Id.* Id. Dr. Lopez ordered Petitioner remain off work. Px. 11 at 69.

Based on a referral from Dr. Koutsky, Petitioner continued to undergo physical therapy at RTP Sports Medicine and Physical Therapy. Tr. at 50-51.

On January 24, 2019, Petitioner saw Dr. Lieber for a third IME. Rx. 6. Dr. Lieber noted Petitioner suffered from degenerative lumbar disc disease with foraminal stenosis, consistent with subjective complaints. *Id.* Dr. Lieber noted there was no evidence to link the lumbar abnormality to the accident, that there was no significant abnormality that would prevent Petitioner from returning to work full duty, and any surgical recommendation would be for the underlying pre-existing condition. *Id.*

ANALYSIS

I. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

In order for a claim under the Workers' Compensation Act to be considered compensable, two elements must be present: (1) the accident must "arise out of" and (2) be "in the course of employment."

The element, "in the course of" employment refers to the time, place, and circumstances under which the accident occurs. An injury meets this element if it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in something incidental to them. *Scheffler Greenhouses, Inc. v. Industrial Com'n*, 362 N.E.2d 325 (1977).

The "arising out of" element refers to the origin or cause of the accident. *Hammel v. Industrial Com'n*, 626 N.E.2d 234 (3d Dist. 1993). There are some injuries, which have their

origin of risk distinctly associated with the employment, that there is a causal connection between the employment and the accidental injury. *Orsini v. Industrial Com'n*, 509 N.E.2d 1005 (1987).

As to whether Petitioner satisfies the "in the course" element, the Arbitrator finds that in all likelihood, an accident did occur within the course of employment with Respondent. In this matter, there is no dispute that on August 14, 2017 Petitioner and Respondent were operating under the Illinois Workers' Compensation Act, and their relationship was one of employee and employer. Arb. Ex. 1. Petitioner claims that on this day during his work schedule, he suffered an accident while lifting. Respondent did not present any witnesses or evidence to contradict Petitioner's testimony or suggest that no accident occurred on said date. Of special note, no one contradicted Petitioner's testimony that he gave verbal notice on the date of the occurrence, as well as the day after. No one contradicted the Petitioner's account that he worked that evening. While it may be true that Petitioner held concurrent employment at Best Western, there is nothing in the record proving he was injured at that job. The medical records consistently reflect an injury occurring on said date. Furthermore, the Arbitrator cannot overlook that fact that Respondent promptly paid TTD and medical benefits from the date of accident through approximately February 2018, which is probably did after conducting an investigation of the claim.

As to whether Petitioner satisfies the "arise out of" element, the Arbitrator finds that an accident did arise out of Petitioner's employment. It is undisputed that Petitioner worked as driver picking up guests at the airport and hotel. Tr. at 18, 34. Petitioner was also responsible for loading and unloading guest's luggage from the transport vehicle. Tr. at 18. Petitioner testified the weight of the luggage ranged from 10 to 70 pounds. Tr. at 34. Marian Jane Wilke,

General Manager, (hereinafter "Marian"), agreed Petitioner was required to help patrons with their luggage. Tr. at 113. Petitioner testified while picking up a guest at the airport, he grabbed two pieces of luggage and carried them into the truck. Tr. at 36. The first piece of luggage, he swung onto one of three racks in the truck, pushing with his knee. *Id.* The second piece of luggage weighed approximately 25 to 30 pounds. Tr. at 37. He swung the second piece of luggage onto a rack that stood approximately four to five feet from the floor. Tr. at 38. Immediately after this, Petitioner felt pain in his lower back. Tr. at 37. The Arbitrator finds the Petitioner credible. In assessing Petitioner's credibility, the Arbitrator finds relevant the consistency of the medical histories from all of Petitioner's treating physicians. Also, the type of injury Petitioner claims to have sustained is consistent with risks associated with his job description.

For these reasons, the Arbitrator finds that an accident did arise out of and in the course of Petitioner's employment.

II. Was timely notice of the accident given to Respondent?

The Worker's Compensation Act requires that an employee notify his employer within 45 days of the accident. *Durand v. Industrial Com'n*, 862 N.E.2d 918 (2006). Whether notice was given to an employer is a question of fact. *See City of Rochelle v. Industrial Commission*, 163 N.E. 789 (1928).

The purpose of the notice requirement is to enable employers to investigate the alleged accident. Filing an Application for Adjustment of Claim within 45 days of the accident satisfies the requirement. *See Seiber v. Industrial Commission*, 411 N.E.2d 249 (1980).

In this matter, Petitioner alleged that he sustained injury on August 14, 2017. Tr. at 37. On August 25, 2017, Petitioner filed an Application for Benefits for the date of accident at issue.

Through Respondent's own admission and evidence, Petitioner was initially paid benefits pursuant to the Illinois Workers' Compensation Act, (hereinafter the "Act"), until approximately February 2, 2018. Rx. 8. The record demonstrates Petitioner sought care at Physicians Immediate Care three days after the accident, and that Respondent paid for said treatment. Petitioner credibly testified that the day after the accident, he informed Heather, General Manager, and Marisol, Supervisor. Tr. at 39. The Arbitrator must conclude that Respondent had notice, within the statutory requirement.

III. Is Petitioner's current condition of ill-being is causally related to the injury?

The requirement that an injury arise out of an injured workers' employment, "presuppose[s] a causal connection between the employment and the accidental injury." *Illinois Bell Tel. Co. v. Indus. Comm'n*, 131 Ill.2d 478, 483 (Ill. 1989). The Petitioner must prove that some "act or phase of the employment" was **a** causative factor in the ensuing injury. *City of Chicago v. Industrial Com'n*, 45 Ill. 2d 350 (1970). It is **not** necessary to prove that the "act or phase of the employment" was the sole cause or the principal cause resulting in injury. *Id.* On the burden of proof issue, it has been held that a causal connection between a condition of ill-being and a work-related accident can be established by showing a "chain of events." *BMS Catastrophe v. Industrial Com'n*, 245 Ill. App. 3d 359 (4th Dist. 1993).

Petitioner testified that he was required to take a yearly physical exam as part of his employment with Respondent. Tr. at 29. Respondent would send him to Concentra to take the exams. *Id.* On May 3, 2017, approximately three months prior to his accident, Petitioner underwent his physical exam at Concentra. Px. 3. Dr. Deborah J. O'Brian, MD, (hereinafter "Dr. O'Brian") administered the exam. Px. 3 at 11. Petitioner gave the doctor a medical history of never having surgery, not being on any medication, and **NOT** (emphasis added) having any

neck or back problems prior to the physical exam. Px. 3 at 8-9. As to "Driver Health History," Dr. O'Brien noted, "No issues." Px. 3 at 9. As for the physical exam portion, Dr. O'Brian concluded abdomen, back/spine, extremities/joints, neurological system including reflexes, and gait as **normal** (emphasis added). Px. 3 at 10.

There is no indication or evidence to suggest Petitioner suffered an injury after the physical exam, but prior to August 14, 2017. On August 17, 2017, the records from Physician Immediate Care document an injury to Petitioner's lower back. Px. 4. Thereafter, Petitioner continues to treat consistently for a back injury, without gaps in care, up until he is recommended surgery. There is no indication that throughout his care, Petitioner's suffers an intervening or non-work related aggravating injury. For these reasons, the Arbitrator is inclined to find "causal-connection" through a chain of events theory.

Furthermore, Dr. Koutsky opined that Petitioner suffers from L5-S1 radiculopathy. Px. 10 at 16. Dr. Koutsky based this on the EMG test that showed evidence of L5 radiculopathy, which was consistent with the pathology seen on the MRI. Px. 10 at 14. Dr. Koutsky opined that Petitioner's current condition is a result of the work-related injury occurring on August 14, 2017. Px. 10 at 16. Dr. Koutsky concluded conservative care and pain management failed, so he recommended decompression and stabilization with instrumentation at L5-S1. *Id.* Dr. Koutsky referred Petitioner to Dr. Lopez for a second opinion. Tr. at 46. Dr. Lopez reviewed the August 29, 2017 MRI, the July 18, 2018 MRI and the EMG. Px. 11 at 9. Dr. Lopez agreed with Dr. Koutsky's diagnosis and recommendation for surgery. *Id.*

On the other hand, Dr. Lieber opined that Petitioner had pre-existing, non-symptomatic degenerative lumbar disc disease. Px. 4. That the underlying degenerative disc disease became temporarily symptomatic as a result of the events of August 14, 2017. *Id.* That on April 25,

2018, the temporary symptom associated with the August 14, 2017 accident had resolved themselves, and that Petitioner's ongoing symptoms were now only related to his pre-existing underlying condition. Rx. 5.

The Arbitrator is inclined to agree with Dr. Koutsky and Dr. Lopez. Dr. Koutsky made a diagnosis and recommendation based on the MRI and EMG. Not only does Dr. Lopez agree with the findings on the MRI and EMG, but Dr. Lieber does as well. In the December 14, 2017 IME, Dr. Lieber reviewed the EMG and the MRI. Rx. 4. Dr. Lieber agreed they evidenced low back and left lower extremity abnormality. *Id.* Dr. Lieber recommended further pain management care. *Id.*

The Arbitrator is not persuaded by Dr. Lieber's opinion that the temporary symptoms associated with the August 14, 2017 accident had resolved themselves, and that Petitioner's ongoing symptoms were now only related to his pre-existing underlying condition. The Arbitrator takes note that even if Petitioner had an underlying condition, Petitioner remained asymptomatic until the injury of August 14, 2017. Thereafter, Petitioner's symptoms were consistent and without any other intervening accident or independent aggravation. The Arbitrator notes that it is not necessary to prove that the accident at work was the sole cause or the principal cause resulting in injury, but a causative factor in the ensuing injury.

The Arbitrator finds Dr. Koutsky and Dr. Lopez's opinions more persuasive, therefore, concludes that Petitioner's current condition of ill-being is causally related to the occurrence of August 14, 2017.

IV. What are Petitioner's earnings?

The parties stipulated that Respondent paid Petitioner earnings of $439.99 per week. Arb. Ex. 1. Petitioner testified he was working concurrently at Best Western. Tr. at 21-23. Petitioner asserts that he was earning on average $72.62 per week. Respondent disputes this.

Petitioner testified that the majority of Respondent's chauffeurs held concurrent employment. Tr. at 28. Petitioner informed Marisol Bucio, his Supervisor, he was working concurrently at Best Western. Tr. at 27. The Arbitrator finds Petitioner credible, and concludes Respondent was aware he held concurrent employment.

Although various pieces of evidence were submitted to prove or disprove wages earned at the Best Western, the Arbitrator finds the paystubs submitted into evidence more persuasive. Petitioner submitted into evidence ten paystubs from Best Western for 2017. Px. 2. The last pay stub represented hours worked from July 9, 2017 through July 22, 2017. Px. 2 at 10. The year to date earnings state $2,106.09. *Id.* Petitioner testified that he did not work for Best Western after August 14, 2017. Tr. at 64. In 2017, there were 29 weeks up to July 22, 2017. The year to date earnings over 29 weeks amounts to $72.62 per week. The Arbitrator concludes that Petitioner earned an average weekly wage from Best Western of $72.62, and therefore, Petitioner's AWW is $512.61.

Regarding Petitioner's earning statements from Best Western for 2017, the Arbitrator concludes that Petitioner continued to work at Best Western after his work accident with Respondent. That record strongly suggest that Petitioner was paid for 16 hours of work during the pay period between August 19, 2017 and September 2, 2017. The Arbitrator does not believe Petitioner's testimony that he did not work during this period, nor does he believe that this was "back pay" and while the Arbitrator acknowledges that this material misrepresentation damages

a portion of the claim, the Arbitrator still believes that an accident probably occurred with Respondent.

V. Are the medical services that were provided to the petitioner reasonable and necessary and did respondent pay all appropriate charges?

Under the Illinois Workers' Compensation Act, the "employer shall provide and pay . . . all necessary . . . medical . . . services . . . limited to that which is reasonably required to cure or relieve from the effect of the accidental injury[.]" 820 ILCS 305/8(a). In order for an employer to be liable for reasonably necessary medical services, it is implicit that those services be related to a work-related injury. Section 8(a) of the Act provides that the employer's liability to pay for medical services is limited to the following: (1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider." 820 ILCS 305/8(a).

On August 17, 2017, Respondent referred Petitioner for care at Physicians Immediate Care. Px. 4. Dr. Shital Shah referred Petitioner to Presence Advanced Imaging for x-rays of left hip and thoracic spine. Px. 5 at 11-12. Dr. Shah prescribed pain medication to Petitioner. Px. at 19.

Petitioner exercised his right to seek care with his own physician, so he began to treat at La Clinica. Px. 6. On August 18, 2017, Dr. Rushani of La Clinica treated Petitioner with physical therapy and referred him for an MRI, EMG, and a consult with Dr. Koutsky. Px. 6 at 12, 158 and Px. 10 at 24. Dr. Koutsky referred Petitioner to Dr. Glaser for pain management, Dr. Lopez for a second opinion and gave Petitioner a referral to continue physical therapy at RTP Sports Medicine and Physical Therapy. Px. 10 at 25 and Tr. at 46, 50-51.

Based on the medical records and testimony, the Arbitrator finds that all medical care rendered to Petitioner was either emergency treatment or within the chain of referrals from Petitioner's physician. As to whether the medical care was reasonable and necessary, the Arbitrator takes into account that at least up until April 25, 2018, Dr. Lieber agreed that Petitioner received appropriate treatment. In addition, the Arbitrator reiterates his prior conclusion in finding Dr. Koutsky and Dr. Lopez's opinions more persuasive. Accordingly, the Arbitrator finds medical care rendered to Petitioner was necessary and reasonable, and Respondent is liable for said medical services and outstanding charges.

VI. What, if any, temporary total disability is owed to Petitioner?

Petitioner alleges he is entitled to TTD from July 23, 2018 to present. Arb Ex. 1. Dr. Koutsky ordered Petitioner remain off work, despite the April 25, 2018 IME stating otherwise. Px. 10 at 16. On July 23, 2018, Petitioner returned to see Dr. Lopez and the doctor ordered he remain off work until after surgery. Px. 11 at 69.

As stated previously, the Arbitrator finds Petitioner credible and Dr. Koutsky and Dr. Lopez's recommendations more persuasive, and therefore, orders Respondent to pay TTD from July 23, 2018 to the date of the 19(b) hearing.

VII. Is the L5 to S1 laminectomy/TLIF/Fusion reasonable, necessary and causally connected to the work accident occurring on August 14, 2017?

Petitioner testified that on May 3, 2017, approximately three months prior to his accident, he underwent a physical exam at Concentra. Px. 3. Dr. O'Brian, took a medical history of noting no prior surgeries, neck or back problems. Px. 3 at 8-9. At the conclusion of the physical exam, Dr. O'Brian concluded abdomen, back/spine, extremities/joints, neurological system including reflexes, and gait were normal. Px. 3 at 10.

On August 14, 2017, Petitioner testified he sustained an injury when he swung a piece of luggage into the middle rack that stood approximately four to five feet from the floor. Tr. at 38. Petitioner felt immediate pain in his lower back. Tr. at 37. Three days later he sought care at Physicians Immediate Care. Px. 4.

On August 29, 2017, Petitioner underwent an MRI of his lumbar spine. Dr. Kuritza, the radiologists, interpreted the MRI to reveal L5-S1 disk herniation with extruded pulposus indenting the thecal sac with mild bilateral nueroforaminal narrowing. Px. 7 at 5.

On September 13, 2017, Petitioner underwent the EMG/NCV. Px. 6 at 124. Dr. Croxford concluded there was electrical evidence of left lumbar radiculopathy with denervation of the left paraspinals. *Id.*

Dr. Koutsky reviewed the EMG and the August 29, 2017 MRI films. Px. 10 at 25. Dr. Koutsky opined that the films revealed a disc herniation/annular tear at L5-S1, and diagnosed Petitioner with left L5-S1 radiculopathy. *Id.* Dr. Koutsky recommended decompression and stabilization with instrumentation at L5-S1. *Id.* Dr. Koutsky opined that Petitioner's current condition was a result of the work-related injury occurring on August 14, 2017. Px. 10 at 16.

Dr. Lopez ordered Petitioner undergo an updated MRI. Px. 11 at 9. Dr. Lopez reviewed the updated MRI and noted disk degeneration at L5-S1, severe foraminal stenosis bilaterally at L5-S1 and endplate modic changes at L5-S1. *Id.* Dr. Lopez diagnosed Petitioner with severe

low back pain and bilateral lumbar radiculopathy due to severe stenosis at L5-S1 with disk degeneration. *Id.* Dr. Lopez recommended L5-S1 laminectomy/TLIF/Fusion. *Id.*

Dr. Lieber, during a December 14, 2017 IME, reviewed Petitioner's EMG and the MRI from August 29, 2017. Rx. 4. Dr. Lieber noted evidence of low back abnormality and left lower extremity. *Id.* Dr. Lieber wrote in the IME that the MRI and EMG confirm abnormalities in the lower back. *Id.* Dr. Lieber recommended Petitioner continue with pain management and physical therapy. *Id.*

Based on the foregoing record, the Arbitrator finds that the L5 to S1 laminectomy/TLIF/Fusion is reasonable, necessary and causally connected to the work accident occurring on August 14, 2017.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AARRON THOMAS,

Petitioner,

20IWCC0619

vs. NO: 18 WC 28779

COFCO INTERNATIONAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

A. Background

Petitioner testified that on August 7, 2018, he worked as a laborer for Respondent. He stated that his job duties included landscaping, such as spreading out pallets of rocks, and cutting weeds. He also stated that he cleaned the basement and the parking lot. He further stated that he would clean out a pit where trains enter and unload grain from the trains. Petitioner explained that he would put a vibrator on a train which would shake grain out of the train cars. He added that he would open and close the grain car doors. In August 2018, Petitioner was 23 years old. Petitioner stated that in the prior months, he had been working full duty with some overtime hours.

20IWCC0619

B. Accident

Petitioner testified that on August 7, 2018, he was working in the pit where the grain was unloaded. According to Petitioner, he was operating the "gun machine," which works like a jackhammer to open and close the train doors. He explained that the end of the gun is like a key which enters a slot on the train car. Petitioner stated he was going to close a door and missed the slot. He stated that he reversed and was moving to catch up with the moving train when the top part of the gun broke and "launched," causing him to fall. Petitioner testified that he fell on his buttocks while trying to catch himself, immediately hurting his lower back and side. He stated that he sought medical treatment at Touchette Regional Hospital and Respondent sent him to Concentra for treatment.

C. Medical Treatment

On August 8, 2018, Petitioner was seen at Touchette Regional Hospital by Dr. Richard Schaffer, who noted:

> "[Petitioner] is a 23 y/o male reporting to the ED complaining of pain in his left lumbar region since last night following a fall at work. The associated pain is 6/10 of severity. It is exacerbated by inactivity, but lessened after bouts of walking. [Petitioner] is ambulatory, and denies penis drainage or urinary injuries. He does not indicate recent illness or fever."

The clinical impression was of low back pain and an acute sprain. Petitioner was prescribed ibuprofen and given a return-to-work date of August 11, 2018.

On August 9, 2018, Petitioner presented to Concentra. Dr. Thomas Spiro noted that Petitioner "[w]as operating a machine and the top of it broke and fell and hurt back. Self-reported." The doctor also noted that Petitioner had limited range of motion of the lumbar spine and pain primarily on the left side. Petitioner reported he had never injured his back before. The straight leg raise was negative. Dr. Spiro's assessment was of a lumbar contusion. The doctor ordered X-rays, hot and cold compresses, and physical therapy three times weekly for two weeks. The doctor also noted that Petitioner could return to modified activity the next day. Lumbosacral X-rays were taken on the same date; the interpreting radiologist found no misalignment or evidence of fracture.

On August 13, 2018, Petitioner was seen by Dr. Christine Jones at Concentra. Petitioner continued to complain of pain on the left side of his back, as well as pain at his left hip and cramping in the left thigh. Petitioner felt discomfort when sleeping and felt he needed more medication. Petitioner also reported that he was currently not at work because light duty was not available. The doctor noted that Petitioner was approximately 25 percent of the way toward

meeting the physical requirements of his job. Dr. Jones prescribed cyclobenzaprine and ordered continued therapy with "RTC in one week."

On August 23, 2018, Petitioner followed up with Dr. Spiro, who noted Petitioner could still hardly move and was not attending physical therapy regularly. The doctor referred Petitioner to a physiatrist for evaluation and treatment. Dr. Spiro released Petitioner to work his entire shift, but noted that Petitioner should be seated 70 percent of the time and change positions periodically to relieve discomfort.

Also, on August 23, 2018, Petitioner presented to the emergency room at Belleville Memorial Hospital, complaining of back pain that ran down his left leg, worse with movement or bending and better when laying on his right side. Petitioner's evaluation included a CT scan with no fracture or acute disease noted. The evaluation was noted as consistent with a soft tissue injury and not consistent with bony injury. Petitioner was prescribed cyclobenzaprine and meloxicam and instructed to follow up with his regular health care provider.

On September 14, 2018, Petitioner was seen by Dr. Boris Khariton at Concentra at Dr. Spiro's request. Petitioner summarized his injury and treatment, reporting that he had about three sessions of physical therapy which did not help very much. Petitioner also reported pain occasionally radiating to the lower extremities at the knee and calf level. Dr. Khariton also noted intermittent numbness and tingling in the lower extremities. The physical examination indicated that Petitioner was able to bend forward to about 40 to 45 degrees only, with extension of 10-15 degrees. The examination also revealed tenderness to palpitation over the left lumbar paraspinal muscles more than the right. Dr. Khariton's impression was of low back pain, bilateral lower extremity pain, and paresthesia. The doctor ordered a lumbar spine MRI and prescribed cyclobenzaprine and a Lidoderm patch.

On October 4, 2018, Petitioner saw Dr. Daniel Brunkhorst, D.C., summarizing the work incident and subsequent treatment. Petitioner rated his pain at 5/10, describing it as: continuous, sharp with movement, work activity, and prolonged standing; shooting with physical activity; and stabbing with physical activity and work activity. Petitioner also reported radiating symptoms in into the left leg down to the foot. Petitioner further reported his condition had worsened or exacerbated. Dr. Brunkhorst's assessments were of lumbar radiculopathy; lumbar disc displacement; lumbar ligament sprains; and strains of the fascia muscle and lumbar tendon. The doctor 's plan included myofascial release, electrical stimulation and hot packs. The doctor also referred Petitioner for a lumbar spine MRI.

On October 10, 2018, Dr. Brunkhorst additionally recommended specific spinal adjustments and exercises administered through at least March 7, 2019.

On October 26, 2018, Petitioner underwent a lumbar spine MRI at MRI Partners of Chesterfield. The interpreting radiologist, Dr. Matthew Ruyle, found no disc bulge or herniation, facet arthropathy, central canal or foraminal stenosis at the L1-2, L2-3, or L3-4 levels. However,

at the L4-5 level, Dr. Ruyle found a central hyperintense zone consistent with a central annular tear at the apex of a central broad-based protrusion that measured 3 to 3.5mm in maximal thickness with moderate left greater than right foraminal stenosis and no central canal stenosis. At the L5-S1 level, Dr. Ruyle found a central hyperintense zone consistent with a central annular tear at the apex of a central broad-based protrusion that measured 8.5 to 9mm from the S1 lower endplate. Facet arthropathy was present bilaterally at that level. Dr. Ruyle further found mild bilateral foraminal stenosis greater right than left but no central canal stenosis.

On October 29, 2018, Dr. Brunkhorst referred Petitioner to Dr. Matthew Gornet for further evaluation.

On February 12, 2018, Petitioner underwent a Section 12 medical examination by Dr. Robert Bernardi at Respondent's request, which is discussed further below.

On March 14, 2019, Petitioner was seen by Dr. Gornet, who noted that Petitioner was originally scheduled to visit in January but had to cancel due to automobile issues. Petitioner recounted the work incident and briefly summarized his treatment. Petitioner reported that he had been terminated from employment with Respondent. He also reported that his symptoms were constant and worse with bending, lifting, prolonged sitting or standing. He motioned to pain in his low back to both sides, both buttocks, both hips, and particularly the left buttock, left hip, and down his left leg.

Dr. Gornet's clinical findings were that lumbar spine films revealed normal hips and normal coronal alignment, well-preserved disc height at all levels, and stability in flexion and extension. The doctor's review of the October 26, 2018 MRI revealed to his viewing a central disc herniation more to the left with an annular tear at L5-S1, and an annular tear and subtle fragment of disc protrusion at L4-5.

Dr. Gornet told Petitioner that he sustained a disc injury. Dr. Gornet indicated that Petitioner was capable of working light duty with a 10-pound limit, no repetitive bending or lifting, alternating between sitting and standing as needed. Petitioner was prescribed cyclobenzaprine and meloxicam and referred to Dr. Helen Blake for a steroid injection on the left side at the L4-5 and L5-S1 levels. Dr. Gornet also recommended discontinuing treatment with Dr. Brunkhorst. Dr. Gornet further opined that Petitioner's current symptoms and requirement for treatment were causally connected to his work-related injury.

On April 2, 2019, Petitioner underwent an L5-S1 ILESI with fluoroscopy performed by Dr. Blake at the Orthopedic Ambulatory Surgery center of Chesterfield. The injection included Depo-Medrol and bupivacaine. The final post-procedural pain scores were 0/10. On April 16,

2019, Petitioner underwent an L4-5 ILESI with fluoroscopy, with final post-procedural pain scores of 6/10.

On May 30, 2019, Petitioner followed up with Dr. Gornet, who reported that the injections by Dr. Blake had helped substantially, but he continued to have pain and had not returned to baseline. Given Petitioner's age, Dr. Gornet recommended a return to full-duty work beginning June 3, 2019 to determine whether Petitioner's symptoms would abate enough to have a relatively normal life. The doctor noted that if this approach failed, Petitioner would require a discogram at L3-4 and L4-5. Dr. Gornet wrote that he already knew that L5-S1 would need to be treated, with the issue being whether the L4-5 level was part of the symptoms as he suspected. He opined that conservative measures were probably the best course of treatment and that Petitioner was not yet at maximum medical improvement.

On August 15, 2019, Petitioner returned to Dr. Gornet, who determined that Petitioner's next workup would be a CT discogram at L4-5, again noting that L5-S1 would need to be treated. Dr. Gornet also reiterated his causation opinion.

On September 16, 2019, Petitioner telephoned Dr. Gornet's office, complaining of increasing low back pain radiating into his bilateral hips and buttock and down into the left leg. Dr. Gornet's assistant noted that the office would attempt to facilitate the treatment, with the next treatment being the CT discogram at L4-5.

On November 11, 2019, Petitioner followed up with Dr. Gornet, who noted that Petitioner's symptoms continued and that he felt "miserable." Petitioner asked Dr. Gornet to review Dr. Bernardi's Section 12 report. Dr. Gornet noted that Dr. Bernardi gave no explanation as to why Petitioner had no problems prior to the accident and now continued to be symptomatic. He also noted that Dr. Bernardi did not correlate any of the objective pathology at L5-S1 with the current symptoms. He further noted that Dr. Bernardi implied Petitioner's symptoms were not related to his workers' compensation claim and non-physiologic factors were driving Petitioner's ongoing complaints. Dr. Gornet indicated his disagreement, adding: "While I respect Dr. Bernardi as a practitioner, his opinions are inconsistent with modern medical care and it is actually inconsistent with FDA clinical trials that I know Dr. Bernardi has participated in." After discussing the report with Petitioner, they agreed to move forward with the CT discogram at L4-5 and L5-S1 and further testing including MRI spectroscopy.

D. Section 12 Examination and Deposition Testimony by Dr. Robert Bernardi

On February 12, 2018, Petitioner underwent a Section 12 medical examination at Respondent's request. Petitioner related his work history, his account of the August 7, 2018 accident, and his lack of symptoms prior to the accident. Petitioner reported that his symptoms wax and wane but are slowly worsening. He characterized his low back pain as constant and his leg pain as intermittent. Petitioner reported pain in his left buttock, as well as pain that extends

down the posterior of his left thigh and calf. He generally characterized his prior treatment as not providing relief.

Dr. Bernardi reviewed Petitioner's treatment records from August 9, 2018 through November 5, 2018. The doctor also noted that Petitioner reported smoking approximately one pack of cigarettes a week. The doctor further noted that Petitioner rated his pain at 8/10, that his scores on the Zung Depression Index and Modified Somatic Perception Questionnaire were significantly elevated, and that Petitioner scored 119/150 on the Pain Disability Questionnaire.

Dr. Bernardi's physical examination did not reveal worsening symptoms with light cutaneous stimulation across the lower lumbar region. His inspection of Petitioner's back did not reveal any cutaneous abnormalities. The doctor did not detect any paralumbar spasms or trigger points. He found no tenderness over the greater trochanters, along the iliotibial bands or around the sciatic notches. Straight leg testing on the right provoked complaints of worsening low back pain, while on the left testing provoked complaints of worsening low back pain and left leg pain. Testing the range of motion of the hips provoked complaints of low back pain.

Dr. Bernardi also reviewed the October 26, 2018 lumbar spine MRI. Dr. Bernardi noted some very early degenerative disease at L4-5 manifested by slight bulging. At the L5-S1 level, Dr. Bernardi noted more prominent changes, with a central bulge associated with definite loss of hydration. He did not see any focal foraminal stenosis.

Dr. Bernardi diagnosed Petitioner with: (1) L4-5 and L5-S1 degenerative disc disease (spondylosis); and (2) low back and left leg pain of uncertain etiology. He opined that Petitioner's accident did not cause or contribute to the degenerative disc disease present at the lowest two segments of his spine. He explained that loss of hydration, loss of height and non-compressive bulging all evolve over the course of years and do not appear acutely. He stated that these conditions are not post-traumatic, that the role of occupational activities in their evolution is insignificant, and they are primarily driven by genetics.

Dr. Bernardi assumed that it would be argued that the MRI reveals evidence of disc injury. He then disagreed, stating that Dr. Ruyle's references to annular tears were misleading because they implied acuity and pain. Dr. Bernardi asserted that the proper term should be "annular fissure" and that such are like the cracks that develop in mud as it dries. As such, according to Dr. Bernardi, they are degenerative, and not caused or contributed to by Petitioner's work accident.

Dr. Bernardi also did not see any findings in the MRI of a broad-based protrusion at L4-5 in association with bilateral L4 foraminal stenosis that was worse on the left. He asserted that by definition, the base of a protrusion cannot extend beyond 25% of the circumference of the disc. In Dr. Bernardi's view, the MRI revealed a very slight displacement of disc material beyond the adjacent vertebral body borders at L4-5, involving nearly 50% of the circumference. Dr. Bernardi wrote that his review was much more consistent with annular bulging, which is a

degenerative finding. As to the L4 foraminal stenosis, Dr. Bernardi indicated that all of Petitioner's foramina were somewhat snug secondary to congenitally short pedicles, none of which were focally narrowed. The doctor also found Petitioner's complaints and examination were completely inconsistent with L4 root involvement.

Dr. Bernardi agreed that the MRI showed a disc protrusion at L5-S1. However, he explained that approximately 40-50% of the population harbors a disc herniation of which they are unaware and 100% of the population over 50 has degenerative disease. Therefore, according to Dr. Bernardi, such findings must correlate to the individual's symptoms. The doctor opined that the disc protrusion at L5-S1 did not produce any more nerve root displacement or compression and was lateralized to the right, not the left. He therefore concluded that the protrusion was an incidental finding that was part and parcel of Petitioner's degenerative disease.

Dr. Bernardi noted that it might seem like Petitioner was too young to have degenerative changes in his back, but compared Petitioner to some people who begin to go gray in their teens or twenties, or start balding early. He opined that it was simply not possible that Petitioner's four or five months of employment with Respondent contributed to his condition.

Based on Petitioner's mechanism of injury, lack of history of back issues, and consistent description of his accident, Dr. Bernardi opined that Petitioner's acute symptoms were causally related to the August 7, 2018 fall, but indicated that Petitioner's chronic and reportedly disabling condition was confounding. The doctor wrote that Petitioner could have suffered a myofascial sprain or strain but muscular injuries heal predictably within a matter of days to weeks. He noted that the MRI did not reveal ligamentous injury or skeletal trauma.

While Dr. Bernardi allowed that the disc protrusion at L5-S1 was potentially an acute or post-traumatic finding, he did not believe he could reach that conclusion with a reasonable degree of medical certainty for the reasons he already mentioned. Dr. Bernardi did not believe Petitioner had radiculopathy. He noted that Petitioner has much more than typical back pain, but no weakness, atrophy, or alterations of motor tone. He also noted that Petitioner's reflexes were normal and the disc disease was lateralized to the right while his symptoms were concentrated on the left.

Dr. Bernardi acknowledged that Petitioner's accident could have aggravated a pre-existing but previously asymptomatic degenerative disease. However, Dr. Bernardi opined that 90 percent of such cases recover within four to six weeks and any residual discomfort is mild and well-tolerated. He opined that the notion of a permanent aggravation of a degenerative disease in the low back is an oxymoron. He also opined that the persistent, severe and worsening pain Petitioner reported was incompatible with symptomatic lumbar spondylosis.

Dr. Bernardi further asserted that the transition from acute to chronic back pain is primarily driven by non-organic factors. The doctor noted that Petitioner was a smoker with a workers' compensation claim with markedly abnormal scores on his screening questionnaires

unsupported by physical, neurological or imaging findings. Accordingly, Dr. Bernardi concluded that he was unable to causally connect those factors to the work accident.

Dr. Bernardi additionally opined that Petitioner's diagnostic testing and treatment had been reasonable and necessary to address the effects of his fall. Dr. Bernardi noted that Petitioner reported that he had not responded well to the treatment and thus the doctor could not recommend more physical therapy or chiropractic treatment. The doctor also could not recommend further injections or surgical intervention, given his opinion that Petitioner did not have radiculopathy. Dr. Bernardi saw no objective basis for imposing work restrictions and found Petitioner to have reached maximum medical improvement on November 5, 2018.

On April 25, 2019, Dr. Bernardi authored an addendum to his Section 12 report after reviewing the record of Petitioner's March 14, 2019 visit with Dr. Gornet. Dr. Bernardi indicated his prior opinions were unchanged, adding: "While I do not agree with them, I do not find Dr. Gornet's diagnoses or recommendations in the least surprising."

On May 10, 2019, Dr. Bernardi, a board-certified neurosurgeon, testified by deposition on behalf of Respondent. Dr. Bernardi generally testified consistently with his Section 12 report and addendum. He did not think the disc protrusion at L5-S1 was related to Petitioner's accident because such a protrusion would be associated with pain in the buttocks and leg as opposed to back pain, Petitioner did not have weakness in the muscles innervated by that nerve root, the protrusion was lateralized to the right rather than the left, and there was no nerve compression or displacement. He additionally clarified that Petitioner had another non-organic factor, somatization, which takes psychological stress and turns it into a physical manifestation.

On cross-examination, Dr. Bernardi reiterated his disagreement with Dr. Ruyle's interpretation of the lumbar spine MRI. Dr. Bernardi opined that work accidents do not cause lumbar spine injury. He agreed that work accidents can aggravate lumbar spine pathology such as that seen in this case, but added "that diagnosis is easy to make and virtually impossible to disprove which is real convenient, but we do know a great deal about arthritic disease and degenerative changes in that back *** [a]nd this man's symptoms are not behaving like an aggravation of a degenerative disease." He also testified that he did not know the reason for Petitioner's continuing symptoms.

Dr. Bernardi further testified that there was not a direct relationship between the non-organic factors he identified and Petitioner's ongoing complaints. He added that it "makes absolutely no sense" that a history of tobacco use would cause chronic low back pain, but it was a "'sign post' suggesting lower socioeconomic class factors that lower job satisfaction."

Dr. Bernardi additionally testified that to know 100% whether Petitioner's accident could have caused a new pathology, he would have to have a pre-accident MRI. He then reiterated that in one study, the sort of findings Petitioner had were present before the onset of back pain.

Regarding his addendum, Dr. Bernardi testified that he and Dr. Gornet fundamentally disagree on the types of conditions that are amenable to treatment.

E. Deposition Testimony by Dr. Matthew Gornet

On August 29, 2019, Dr. Matthew Gornet, a board-certified orthopedic surgeon, testified by deposition on behalf of Petitioner. Dr. Gornet generally testified consistently with his treatment notes. He stated that in his physical examination, Petitioner had a mild decrease in EHL function at 4 to 4-/5 on the left side only, which indicated a subtle irritation of the L5 nerve root on the left side. Dr. Gornet identified a disc pathology at L5-S1, noting a white line at the back of the disc on the MRI image as a tear in the disc, and identifying disc material protruded outward. He testified that large prospective clinical trials indicate that this sort of structural pathology is the cause of Petitioner's pain.

Dr. Gornet opined that his recommended treatment, including a CT discogram, was causally connected to Petitioner's work injury. He also opined that the treatment that Petitioner had received to date was reasonable and necessary. He further opined that Petitioner had not reached maximum medical improvement. Dr. Gornet testified that he had Petitioner working full duty without restriction. Nevertheless, Dr. Gornet believed that Petitioner would require disc replacement surgery at L5-S1 and possibly L4-5, depending on the results of the discogram. He explained that the biggest predictor of returning to work after a work-related injury and surgery is the patient's pre-operative work status, so it was important for Petitioner to work as much as he was capable. He additionally testified that he had reviewed Dr. Bernardi's reports, which did not change his opinions regarding causation and the need for treatment.

On cross-examination, Dr. Gornet acknowledged that after he released Petitioner to full-duty work, he did not know what type of work Petitioner was performing. He did not recall whether Petitioner was still having radiating symptoms into either leg in August 2019. He did not have any information that suggested a return to work aggravated Petitioner's condition. When asked whether Petitioner might benefit from further injections, Dr. Gornet replied that as of August 2019, Petitioner was fairly adamant that he wanted to move forward with more definitive treatment.

Dr. Gornet disagreed with Dr. Bernardi's opinion that surgery would not help a patient of Petitioner's age, stating that evidence-based medicine showed that statistically, younger patients benefit more from surgery and return to work at a higher level than middle-aged patients. He also disagreed with Dr. Bernardi on whether the annular tearing was traumatic or degenerative. He stated that Dr. Bernardi was putting up "smoke screens," noting that Petitioner had no previous back problems, and had objective pathology at two levels of his spine which improved with injections. As someone involved in 44 FDA IDE clinical trials, Dr. Gornet opined that Petitioner would be a candidate who would be included in any FDA clinical trial for structural back pain. He did not understand why Dr. Bernardi could not see the obvious on the films.

F. Additional Information

Petitioner testified that while he was receiving chiropractic treatment with Dr. Brunkhorst, on approximately October 21 or 22, 2018, he was arrested for having no driver's license or insurance, slept on a metal cot while in custody, and ended up visiting an emergency room due to increased symptoms. He also acknowledged that he was convicted of mob action in 2013 and served a 16-month sentence. Upon a question from the Arbitrator, Petitioner explained that he and a friend got into a fight with two other men.

Petitioner testified that after Dr. Gornet released him to attempt full-duty work, he did not return to work for Respondent because his employment was terminated. He testified that he was unable to find work, though he looked for jobs at McDonald's and Family Dollar. He later acknowledged that when he told Dr. Gornet he was trying to work it did not mean that he was actually working. He stated that he attempted to increase his daily activities, such as cleaning his house and playing with his children. He also stated that if he washed the dishes and swept the floor, he would have to sit and take a break. He added that he would try to play with his children, but it was difficult to bend or move at a fast pace, so he would largely sit and have the children come to him. Petitioner indicated that this situation was why he re-contacted Dr. Gornet in September 2019 and followed-up with him in November 2019, at which time Dr. Gornet again imposed light duty work restrictions.

Regarding his current condition of ill-being, Petitioner testified that he continued to experience back pain. He indicated that when he moved, he would occasionally feel a pinch or ache in his side. He also testified that he sometimes has shooting pains down his leg, which he described as stabbing or almost inflamed. He stated that his symptoms had never resolved. He further stated that his goal was to have the treatment recommended by Dr. Gornet.

On cross-examination, Petitioner acknowledged that Respondent had offered him light duty work but stated that he was unable to perform it. Petitioner explained that Respondent wanted him to get up on a train, but he was unable to lift his leg enough to do so. He testified that on another occasion, Respondent offered a stepping stool for assistance, but he decided it was not worth the risk because the stool was unstable and sitting on a pile of rock. Petitioner stated that he was sent home by Respondent thereafter. He further explained that his employment was terminated due to failures in communication regarding his attendance at medical appointments.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Arbitrator found that there was no causal connection between Petitioner's work accident and his current condition of ill-being. Petitioner must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial*

Comm'n, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

The Arbitrator's findings regarding the medical evidence consisted entirely of Dr. Bernardi's testimony and findings and the conclusion relied on a number of Commission cases to assert that they "demonstrate the Commission's preference for the opinion of Dr. Bernardi over Dr. Gornet and that Dr. Gornet is known to diagnose disc injuries based on diagnostic testing interpretation with insufficient objective findings to substantiate his opinion." On review, Petitioner argues that these cases are distinguishable on their facts and also cites to decisions in which the Commission accepted the opinion of Dr. Gornet over that of Dr. Bernardi. Respondent agrees with Petitioner that the Commission's decision ultimately depends on a consideration of all the evidence in a given case as to which opinion is more persuasive.

In this case, it is undisputed that Petitioner had no prior back issues and suffered a work-related accident. Dr. Gornet and Dr. Ruyle both identified Petitioner as having suffered annular tears. Indeed, Dr. Ruyle found central annular tears and protrusions with moderate left greater than right foraminal stenosis at the L4-5 and L5-S1 levels.

Dr. Bernardi opined that Petitioner's symptoms were incompatible with L4 radicular pain because that would produce pain down the front of the leg rather than the back, would affect the knee reflex and would weaken the quadriceps. Dr. Bernardi did not analyze the L5-S1 pain in this manner, even though he acknowledged that the MRI showed a disc protrusion at L5-S1. He did not think the disc protrusion at L5-S1 was related to Petitioner's accident because such a protrusion would be associated with pain in the buttocks and leg as opposed to back pain, but ignored that Petitioner consistently complained of pain in his left buttock extending downward into the left leg. Similarly, Dr. Bernardi also did not see any findings in the MRI of a broad-based protrusion at L4-5, an opinion controverted by the interpreting radiologist, Dr. Matthew Ruyle, who found a central hyperintense zone consistent with a central annular tear at the apex of a central broad-based protrusion that measured 3 to 3.5mm in maximal thickness with moderate left greater than right foraminal stenosis and no central canal stenosis. Dr. Ruyle's opinion

corroborates Dr. Gornet's interpretation of the MRI as showing a subtle fragment of disc protrusion at L4-5 and undermines Dr. Bernardi's opinion.

Dr. Bernardi also could not recommend further injections or surgical intervention, given his opinion that Petitioner did not have radiculopathy. He was not sure whether Petitioner had received injections and would not have recommended them. Indeed, Dr. Bernardi opined that no epidural injection shows a proven therapeutic benefit. The doctor was apparently unaware that Petitioner had received significant relief from his injections and had not returned to his pre-accident baseline.

Elsewhere, the doctors talk past each other. Dr. Bernardi's points regarding the lack of weakness in the muscles innervated by the L5-S1 nerve root, and lack of nerve compression do not appear to be rebutted in this record. On the other hand, Dr. Bernardi did not address Dr. Gornet's finding of a mild decrease in EHL function at 4 to 4-/5 on the left side only, which indicated a subtle irritation of the L5 nerve root on the left side. Dr. Bernardi suggested that Petitioner had somatization, though there is no indication that Dr. Bernardi is qualified to make that psychiatric diagnosis.

The Arbitrator also relied on the fact that Dr. Gornet released Petitioner to full-duty work for months before recommending surgery. However, Dr. Gornet explained in his testimony that the biggest predictor of returning to work after a work-related injury and surgery is the patient's pre-operative work status, so it was important for Petitioner to work as much as he was capable.

In sum, Petitioner had no prior back issues and suffered an undisputed work-related accident. Dr. Gornet's major opinions regarding Petitioner's annular tears are corroborated by Dr. Ruyle, who also found left-sided foraminal stenosis. Dr. Bernardi allowed that the disc protrusion at L5-S1 was potentially an acute or post-traumatic finding, but he did not believe he could reach that conclusion with a reasonable degree of medical certainty. Petitioner's consistent complaints include pain the buttocks and leg that Dr. Bernardi opined would be associated with a protrusion causing symptoms from the L5-S1 level. Given the record as a whole, the Commission concludes the Decision of the Arbitrator was contrary to the weight of the evidence and finds a causal connection between Petitioner's work accident and his current condition of ill-being.

B. Medical Expenses

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also concludes that Petitioner is entitled to an award of his reasonable and necessary medical expenses. Respondent raised no specific objections to Petitioner's claimed expenses on review, and there is no persuasive evidence to suggest that the treatment has been unreasonable or unnecessary. Accordingly, the Commission awards the payment of Petitioner's unpaid medical expenses as summarized in Petitioner's Exhibit 9, subject to the fee schedule. Respondent is awarded a

credit for any medical expenses already paid. Respondent is also awarded a credit of $6,191.34 pursuant to Section 8(j) of the Act.

C. Prospective Medical Care

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also concludes that Petitioner is entitled to an award of the CT discogram and disc replacement surgery recommended by Dr. Gornet. However, the Commission does not find Dr. Gornet's recommendation for MRI spectroscopy to be reasonable or necessary. The Commission has found MRI spectroscopy recommended by Dr. Gornet to be not medically necessary in a number of prior cases. See, *e.g.*, *Schmitt v. Memorial Hospital*, 20 IWCC 0205; *Lewis v. Southern Illinois Healthcare, Inc.*, 20 IWCC 0013; *Tally-Glispie v. State of Illinois/Warren G. Murray Center*, 19 IWCC 0193; *Skelly v. Baine Roofing*, 18 IWCC 110. The reasoning, thus far, has been that the medical community has not accepted the modality as a necessary diagnostic procedure and the Commission finds no basis in this record, given the traditionally accepted diagnostic test results and clinical findings, to award such a test. Accordingly, the Commission denies Petitioner's request for an award of the MRI spectroscopy recommended by Dr. Gornet.

D. Temporary Total Disability

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also concludes that Petitioner is entitled to an award of additional temporary total disability (TTD) benefits. Petitioner argues he is due benefits from the accident date through the arbitration date because he is not at MMI, was unable to perform light duty for Respondent and terminated from employment due to problems with communications regarding his medical appointments. Petitioner later requests benefits from August 7, 2018 through June 3, 2019 and November 11, 2019 through the arbitration hearing date, which correlates to the Request for Hearing. Respondent argues that the Commission has no idea what Petitioner's functional capabilities are at this time and that Petitioner's complaints are unreliable given that Dr. Gornet released Petitioner to full-duty work.

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Id.* "The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) 'most importantly,' whether the injury has stabilized." *Id.* at 760 (citing *Beuse v. Industrial Comm'n*, 299 Ill. App. 3d 180, 183 (1998)). "[T]he fact that an employee can do some light duty work or

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other useful tasks does not mean that [he] is ineligible to receive TTD benefits." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 47.

In this case, the record indicates that on August 9, 2018, Petitioner was released to modified duty, but the medical record for August 13, 2018 contains Petitioner's report that that light duty work was unavailable. Petitioner testified without rebuttal that Respondent offered him modified duty work that he was unable to perform. On May 30, 2019, Dr. Gornet released Petitioner to full-duty work starting June 3, 2019. However, Petitioner testified that he re-contacted Dr. Gornet in September 2019 and followed up on November 11, 2019, reporting that he felt "miserable." Petitioner's testimony that Dr. Gornet again imposed light duty work restrictions at that time is unrebutted. At this juncture, Petitioner was no longer employed by Respondent and had sought alternate employment.

As noted above, Dr. Gornet released Petitioner to full-duty work, but the doctor explained that this was to assess Petitioner's pre-operative work status and prospects for returning to work. Dr. Gornet's recommendation for surgery, Petitioner's inability to find another job, and Petitioner's difficulties working around the house and playing with his children establish the severity of his injury and that his injury had not stabilized. Accordingly, the Commission awards TTD benefits from August 7, 2018 through June 3, 2019, and from November 11, 2019 through December 12, 2019. The Commission also awards Respondent a credit of $11,583.13 for TTD benefits it already paid.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved his current condition of ill-being is causally connected to the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 5, 2020, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable to pay Petitioner's outstanding reasonable and necessary medical expenses as summarized in Petitioner's Exhibit 9 under the fee schedule and pursuant to §§8(a) and 8.2 of the Act. Respondent is awarded a credit for any medical expenses already paid. Respondent is also awarded a credit of $6,191.34 pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED THAT Petitioner is awarded prospective medical care including the CT discogram and disc replacement surgery recommended by Dr. Gornet, and the cost of related treatment, excluding MRI spectroscopy, pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $429.17 per week for the period from August 7, 2018 through June 3, 2019, and from November 11, 2019 through December 12, 2019, a period of 47 and 4/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $37,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 21 2020
o: 10/8/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

THOMAS, AARRON
Employee/Petitioner

Case# **18WC028779**

20IWCC0619

COFCO INTERNATIONAL
Employer/Respondent

On 3/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

6296 JEROME SALMI & KOPIS LLC
RICHARD E SALMI
331 SALEM PL SUITE 260
FAIRVIEW HTS, IL 62208

0000 LAW OFFICE OF MICHAEL McDONALD
MATHIEU D BREGANDE
3636 S GUYER RD SUITE 250
ST LOUIS, MO 63127

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Aarron Thomas
Employee/Petitioner

v.

Cofco International
Employer/Respondent

Case # **18** WC **028779**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville, IL** on **12/12/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $13.641.50; the average weekly wage was $643.75.

On the date of accident, Petitioner was 23 years of age, single, with 2 dependent children.

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

Respondent shall be given a credit of $11,583.13 for TTD for a total credit of $11,583.13.

Respondent is entitled to a credit of $6,191.34 under Section 8(j) of the Act.

ORDER

Because the Petitioner has failed to meet its burden of proof that the current condition of ill being is related to the work accident, benefits are denied.

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

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

Signature of Arbitrator

3/3/20
Date

ICArbDec19(b)

MAR 5 - 2020

Findings of Fact and Rulings of Law

I. Petitioner's Testimony

Petitioner, 24, testified he was injured while working as a laborer for Respondent on August 7, 2018. His employment with Cofco began in April 2018. He testified he fell while attempting to close a door on a grain car, landing on his buttocks. He felt he injured his low back and his side. Per the medical records, he treated the following day (Saturday) at Touchette Hospital. The employer then referred him to Concentra, and he was paid TTD for his missed time from work by the compensation insurer. Petitioner refused to work the light duty work offered by Respondent. Petitioner subsequently missed a number of scheduled work days and was relieved of his employment. Though Respondent offered light duty work, Petitioner alleges it was beyond his physical capabilities.

Petitioner then treated with a chiropractor, Dr. Brunkhorst, for a period of months, for what he described as continued low back pain, with shooting pains down his left leg, with numbness into his foot. During this treatment, Petitioner spent a night in jail and slept on a metal bed, which he testified increased his symptoms. Petitioner has a felony record and served 16 months in prison for mob action prior to his employment with Respondent.

After months of chiropractic care, Dr. Brunkhorst referred Petitioner to Dr. Gornet. Dr. Gornet referred Petitioner to Dr. Blake for injections, which stopped the shooting pain for a while and relieved the lower back aching for a while. The injections, according to Petitioner, did not resolve his symptoms completely, though Dr. Gornet released him to full duty work on June 3, 2019.

Petitioner testified that he never returned to work and tried to increase his physical activities, but he continued to have low back pain. Petitioner testified he made Dr. Gornet aware of this in September 2019, but he did not return to Dr. Gornet until November 2019. Petitioner was unrestricted per Dr. Gornet between June 2019 and November 2019.

When Petitioner returned to Dr. Gornet in November 2019, Dr. Gornet imposed light duty restrictions again. These restrictions have remained imposed by Dr. Gornet.

According to Petitioner, Dr. Gornet currently wants to conduct a discogram to determine which disc is bothering him so he can determine if its "one or multiple discs that need to be repaired or replaced," though Petitioner was not certain. Petitioner believes Dr. Gornet has recommended surgery but wants to conduct the discogram to determine what procedure is necessary.

Presently Petitioner alleges achiness in his low back and side and shooting pains down his leg. He denies any back pain prior to the accident.

II. Cross-Examination

Petitioner acknowledged he is a smoker, and that he smokes 5-6 cigarettes per day, and 1 ½- 2 packs per week. He has been smoking for 2 ½- 3 years. He testified that Dr. Gornet wants him to stop smoking.

Petitioner acknowledged that Respondent offered him light duty and even offered him a stool to step on because he complained it hurt too much for him to lift his leg up high enough to step up onto

the trains. He admitted that he refused to use the stool to perform his work activities and because of this refusal to perform the light duty work as well as attendance and communication issues led to his termination.

Despite reference in Dr. Gornet's records of Petitioner "trying to work," Petitioner alleges he never returned to work and that he was only "looking for work."

Petitioner admitted the injections provided him relief "for months" but nevertheless Dr. Gornet recommended a discogram.

Petitioner is aware that Respondent's IME doctor, Dr. Bernardi does not believe he sustained a disc injury or that surgery is necessary and that Dr. Bernardi and Dr. Gornet disagree.

III. Medical Evidence

Respondent's IME doctor, Robert Bernardi, MD, testified that Petitioner was a healthy appearing 24 year- old male, who did not show any objective findings upon physical examination consistent with a disc injury, or an injury requiring medical attention.

Dr. Bernardi testified that when examined Petitioner he observed inconsistent non-physiological response which suggested less than full cooperation with the exam. Specifically, when Dr. Bernardi asked Petitioner to push against his hand, his hands gave way, which is not something a person with a genuine neurological weakness would do.

Dr. Bernardi also noted that Petitioner went to the ER the same day he went to Concentra, which seemed odd. Dr. Bernardi also noted that it was also odd that an MRI had been approved and Concentra was unable to contact Petitioner, purportedly because he lost his cell phone. Then Petitioner treated with chiropractor Brunkhorst and Brunhorst ordered an MRI.

Dr. Bernardi reviewed the MRI diagnostic study and observed "extremely mild degenerative disc disease at L4-5" and "slightly more pronounced degenerative disc disease but still quite mild at L5-S1." At L5-S1 Bernardi observed a loss of hydration in the disc and a "very small protrusion" which "did not produce any significant nerve root compression."

Upon his review of the diagnostic, the medical records, and his physical examination of the Petitioner, Dr. Bernardi provided his opinion to a reasonable degree of medical certainty that the incident could have caused a backache and the injury was consistent with a muscular injury.

Thus, while Dr. Bernardi felt it was reasonable to conclude there was an acute injury, he was unable to conclude there was an injury which caused the chronic and severe pain Petitioner alleges currently, more than a year (more than 16 months) from the accident. In Dr. Bernardi's opinion, the injury should have healed within a matter of two or three months.

Dr. Bernardi disagreed with the radiologist's interpretation of the diagnostic as showing "annular tears" at L4-5 and L5-S1. This terminology implies trauma which is far from the truth. This sort of fissuring of the disc where there is a loss of hydration is seen in 50% of the adult population and is not a reliable marker for the presence of pain. Per Dr. Bernardi, this should be referred to as an annular fissure.

Dr. Bernardi also disagrees with the radiologist interpretation of a "broad-based protrusion" at L4-5. Per Dr. Bernardi, these terms are contradictory. If it is "broad-based," then it is a bulge. A protrusion by definition has to occupy less than 25% of the disc circumference.

Dr. Bernardi also does not see a foraminal stenosis at L4, and, testified that Petitioner's symptoms are "completely incompatible" with L4 radicular pain because that would produce pain down the front of the leg, and not down the back of the leg as Petitioner describes. If Petitioner had this, he would not have a knee reflex and he would have been weak in the quadriceps, neither of which he demonstrated upon physical examination.

Dr. Bernardi credibly explained why the Petitioner's accident history and physical examination were more important than the imaging study results. The disc protrusion shown at L5-S1 is not associated with a great deal of back pain. This is a common non-symptomatic finding in a large percentage of the population. The bilateral back pain described by Petitioner, per Dr. Bernardi, which at time would radiate up to his thoracic spine, is incompatible with a symptomatic disc rupture at L5-S1.

Dr. Bernardi noted no weakness in Petitioner's muscles innervated by that nerve root. The same nerve root controls the ankle reflex, which Petitioner demonstrated were normal and symmetric. Furthermore, the disc protrusion shown on Petitioner's MRI is lateralized to the right, and all of his symptoms are worse on the left. The protrusion does not produce nerve root compression or displacement and thus it cannot be concluded, per Dr. Bernardi, to a reasonable degree of medical certainty that the accident caused a symptomatic disc herniation.

Dr. Bernardi explains that there are people who have normal MRIs who have back pain and there are people with horrible MRIs who have no symptoms at all. The only time there is a correlation between an MRI and the actual presence of symptoms is when a disc extrusion causes displacement and compression of a nerve root, which can only be determined upon physical examination. Per Dr. Bernardi, Petitioner did not demonstrate such physical findings upon his physical examination at the IME.

Dr. Bernardi concludes that the changes shown in Petitioner's back on the MRI are degenerative, and not caused by trauma. He testified that Petitioner's symptoms would have resolved in about six months post- accident. Dr. Bernardi further expressed that even had Petitioner herniated a disc in the accident, which compressed the nerve root, he would have been better over time. Petitioner's description of six months of unrelenting and worsening pain is inexplicable.

Dr. Bernardi believes surgery "would be a horrible idea." He does not believe Petitioner requires any work restrictions and there is no objective basis for any. In Dr. Bernardi's opinion, Petitioner reached MMI when he completed his chiropractic sessions and he disagreed with Dr. Gornet's diagnosis of a disc injury.

On cross-examination, Dr. Bernardi explained that Petitioner's scores on pre-exam questionnaires showed there may be other factors contributing to his reported pain level. He also testified that Petitioner's presentation was "far more dramatic" than what he usually sees in people with pain he examines.

Dr. Bernardi maintained his opinion that despite there being no evidence of pre-accident symptoms, the MRI findings are not post-traumatic findings. Bernardi also explained why the MRI did not show a pathology amenable to surgery or injections. He emphasized that neither his neurological evaluation did not correlate with or substantiate the alleged physical symptoms. Thus, he stands by his opinion that Petitioner is not a candidate for surgery and that he reached MMI as of November 2018 upon completion of his chiropractic care.

IV. Conclusion

Dr. Bernardi disagrees with Dr. Gornet's diagnosis of a traumatically induced disc injury. He also disagrees that the described accident would have resulted in chronic pain of the nature described by Petitioner if this was an aggravation of a pre-existing degenerative condition. Dr. Bernardi believes surgery is a bad idea and there is no indication for it. On the other hand, Dr. Gornet believes there is a "disc injury" requiring surgery, perhaps at more than one level and, perhaps requiring surgical fusion and / or disc replacement.

The Petitioner is a young, healthy appearing individual. Dr. Bernardi credibly explained why Petitioner is not a surgical candidate, why he does not believe the accident caused a disc injury, and why he does not believe the alleged symptoms are objectively verifiable.

On the other hand, a well-known surgically pro-active Petitioner's physician, Dr. Gornet, who has a propensity to diagnose "disc injuries," recommends a discogram, and wants to perform surgery.

Dr. Gornet is known to this Commission and, in the past has been known to find "disc injuries" when other reputable physicians do not, recommend fusion and / or disc replacement surgery when this Commission later determined that surgery was neither reasonable, necessary, nor causally related to a work accident. *See eg* (*Grote v. Granite City Police Department*, 2017 Ill. Wrk. Comp. LEXIS 505.

There are numerous Commission opinions finding Dr.Gornet's surgical recommendation not medically necessary and reasonable, and decisions finding Dr. Bernardi's opinion more credible than Dr. Gornet on the specific issue at hand. Some of these such opinions follow:

In *Kelley v. Carlinville Rehabilitation*, 2019 Ill. Wrk. Comp. LEXIS 126, the Commission upheld the arbitrator's 19(b) decision denying Petitioner's request for surgery recommended by Dr. Gornet. It found that Dr. Gornet's diagnosis of disc pathology was "simply unreasonable" when such was not seen by the radiologist and two other evaluating physicians.

In *Morris-Velazquez v. Brightstar*, 2012 Ill. Wrk. Comp. LEXIS 112, the Commission did not find Dr. Gornet's opinion persuasive and agreed with the arbitrator's 19(b) denial of surgery recommended by Dr. Gornet, noting that three other physicians provided opinions the Petitioner was not a surgical candidate.

In *Ayres v. Global Brass and Copper,* 2018 Ill. Wrk. Comp. LEXIS 112, the Commission affirmed the arbitrator's finding that Dr. Bernardi's opinion was more credible than Dr. Gornet's on the need for surgery and furthermore, that the surgery Dr. Gornet recommended was "not in the Petitioner's best interests."

In *Helens v. Global Brass*, 2018 Ill. Wrk Comp. LEXIS 1184, the Commission adopted the arbitrator's 19(b) decision that Dr. Bernardi's opinion was more credible than Dr. Gornet and that the disc replacement surgery recommended by Dr. Gornet was not necessary and reasonable.

In *Fatheree v. Pepsi Mid-America*, 2013 Ill. Wrk. Comp. LEXIS 612, the Commission affirmed the arbitrator's decision finding that Dr. Bernardi's opinion is more credible than Dr.Gornet's opinion, denying surgery.

These Commission decisions demonstrate the Commission's preference for the opinion of Dr. Bernardi over Dr. Gornet, and that Dr. Gornet is known to diagnose disc injuries based on diagnostic testing interpretation with insufficient objective findings to substantiate his opinion. In this case, we are dealing with an otherwise healthy appearing young man, who was released to full duty work by Dr. Gornet for months, before Dr. Gornet later recommended surgery based on alleged ongoing symptoms -despite the Petitioner's testimony he has not worked since the time of the accident.

In accord with this abundant precedent, I find the testimony of Dr. Bernardi more persuasive than the testimony of Dr. Gornet, and agree with Dr. Bernardi's opinion that the Petitioner reached MMI in November 2018, and that the surgery recommended by Dr. Gornet is not necessary to cure and relieve from the effects of the accident injury, which was a strain / contusion injury and not a disc injury.

As in the above-cited Commission opinions, I find that the surgery is not in the Petitioner's best interests, in accord with the opinion of Dr. Bernardi, and therefore deny the 19(b) Petition requesting additional TTD and medical.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TORI RUNDBERG,

Petitioner,

vs.

NO: 17 WC 18640
17 WC 30596

GENERAL MILLS,

20IWCC0620

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's award of 5% loss of use of the left arm and 3% loss of use of the right arm and finds that Petitioner sustained 15% loss of use of the left arm and 12.5% loss of use of the right arm.

The Commission adopts the Arbitrator's analysis of Section 8.1(b) but disagrees with the weight assigned in subsections (iii) and (v) and its impact on the resulting permanency awards. The Commission assigns greater weight to subsection (iii). The Petitioner was 23-years old at the time of her injury. Because of her age, Petitioner has a lengthy work career remaining whereby she can experience the effects of her injury. The Commission finds that this factor supports an increase in the permanency award. The Commission also assigns significant weight to subsection (v). The Petitioner underwent bilateral ulnar nerve decompression. Due to ongoing issues, Petitioner underwent a left ulnar nerve revision. While the Petitioner testified that she made a full recovery, the Commission finds that an increase in the permanency award is warranted based upon the nature of the injury and the resulting three surgeries. Therefore, the Commission finds that

20IWCC0620

Petitioner sustained 15% loss of use of the left arm and 12.5% loss of use of the right arm. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed December 20, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $410.67 per week for a period of 47-5/7 weeks, June 9, 2017 through May 8, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $369.60 per week for a period of 69.575 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 15% loss of use of the left arm and 12.5% loss of use of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses (as listed in Petitioner's exhibit 6) incurred in connection with the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid including credit for payments made under Section 8(j) of the Act and shall hold Petitioner harmless for said payments, if made.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $49,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 21 2020

D. Douglas McCarthy

DDM/tdm
O: 10/7/20
052

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUNDBERG, TORI
Employee/Petitioner

Case# **17WC018640**
17WC030596

GENERAL MILLS
Employer/Respondent

20IWCC0620

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2489 BLACK & JONES ATTY AT LAW
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2542 BRYCE DOWNEY & LENKOV LLC
TIMOTHY ALBERTS
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

20 IWCC0620

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tori Rundberg

Case # 17 WC 18640 consol w
17 WC 30596

Employee/Petitioner

v.

General Mills
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On the date of accidents, **October 6, 2016 and March 1, 2017,** Respondent *was* operating under and subject to the provisions of the Act.

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

On these dates, Petitioner did sustain accidents in the form of repetitive trauma type injury that that arose out of and in the course of her employment and manifested on these dates.

Timely notice of her accidents ***was*** given to Respondent.

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

In the year preceding the injuries, Petitioner earned $32,032.00, yielding an average weekly wage of **$616.00.**

On the dates of accident of October 6, 2016 and March 1, 2017, Petitioner was **23** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **410.67** /week for **47- 5/7** weeks, from **June 9, 2017 through May 8, 2018**, as provided in Section 8(b) of the Act.

- The Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. PX 6. Respondent shall receive credit for amounts paid including credit for payments made under Section 8(j) of the Act and shall hold Petitioner harmless for said payments, if made.

- The Respondent shall pay the Petitioner the sum of **$369.60** / week for a period of **20.24** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused **3%** **loss of use of the right arm and 5% loss of use of the left arm.**

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

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

Carolyn M. Wheesy

Signature of Arbitrator

12/17/19
Date

ICArbDec

DEC 20 2019

FINDINGS OF FACT

At trial, the parties stipulated that Petitioner was an employee of Respondent on October 6, 2016 and March 1, 2017. The parties stipulated that Petitioner's average weekly wage was $616.00 and that Petitioner was 23 years of age, single, with 0 dependent children at the time of her alleged injuries. The parties stipulated that Petitioner provided timely notice of her alleged injuries under pursuant to the Act. ARB EX 1.

Petitioner testified that she began working for Respondent on February 10, 2015. (Tr. p. 7). Petitioner worked on a full-time basis as an operator. (Tr. pp. 7-8). In general, her job was to run a cereal line, packaging cereal into bowls, which included loading materials, clearing jams in the machines, and cleaning. Petitioner testified that her tasks varied. One task was loading bowl boxes from a pallet and setting them on a lift 5-10 feet away, where the bowls were loaded into the machine. (Tr. p. 9). The boxes Petitioner lifted weighed 30-40 lbs. (Tr. p. 9). She would load the bowls into the machine, then break down the box and grab another, doing so approximately every 5-10 minutes. (Tr. p. 9). Petitioner also described loading "shippers" with finished products. She would grab stacks of 10-20 and load them onto the line, doing about 200 per hour. (Tr. p. 10). Petitioner described pushing totes of product, weighing 400-500 pounds. (Tr. p. 10). The totes are on rollers and Petitioner pushed across the totes using her body weight approximately 4 times an hour. (Tr. p. 11). Petitioner explained that 10-12 times a shift, she would lift a roll of film, or plastic paper, weighing 50 or 60 lbs., and load that onto the machine. (Tr. p. 12). Petitioner indicated she is doing all of these activities concurrently throughout her 8-hour shift. (Tr. pp 11-12). On top of the regular duties in loading and packaging materials, Petitioner would also clear jams on the line when necessary. (Tr. p. 15). Boxes, casings, and bowls would get jammed and need to be cleared. (Tr. p. 15). At times, this was a simple removal. Other times, a case would get smashed in and she must physically tear the cardboard case apart to pull the wedged portion out of the machine. (Tr. p. 16). She estimated removing jammed products approximately 100-200 times a night. (Tr. p. 16).

Petitioner also testified to maintenance of the line. She would clean the line every shift which required her to use a scraper, which she compared to a putty knife, to scrape cinnamon and sugar from the scales and feeds. She stated they have 4 Ishidas, or scales, which each have roughly 60 parts that have to be scraped clean. (Tr. p. 13). She testified to vigorously scraping for a solid hour each shift. (Tr. p. 13). She testified to scraping using both arms. (Tr. p. 14). Petitioner described using an air hose to pressure wash the lines. (Tr. p. 20). This was similar to a garden hose, with a nozzle compressed to push air out to clean the line. (Tr. p. 20). Petitioner testified to gripping an air hose approximately 80 percent of her shift on changeover days and 10 percent on a regular day. (Tr. p. 43).

Respondent provided two separate job descriptions at hearing. (Rx. 1, 2). There was a job description for Cereal Operator, Lines C & D and a job description for Cereal Changeover. Petitioner reviewed each job description. Respondent's Exhibit #2 was a job description for a Cereal Operator on lines C & D. Petitioner testified she had been on those lines since she had started for Respondent. The job description noted various requirements of the job, including pushing up to 45 pounds, and doing so between 16-32 times a shift. (Rx. 2). It noted lifting 20 lbs., pulling liners, and gripping 20 lbs. between and occasional and frequent basis. (Rx. 2). The job demand of loading cereal bowls, breaking down boxes, and discarding boxes was noted to be done an average of 30 times and hour. That tasks requirements included lifting and carrying 40 lbs., lifting 2 lbs. stacks of bowls, pushing 50 lbs. bowl carts, and gripping 20 lbs. Loading rolls of film was noted to be done approximately 8 times a shift, requiring pulling/tilting 30 lb rolls of film. (Rx. 2). Loading of shippers was described, being done approximately 15 times an hour, and requiring lifting of 15 lbs. Removing of damaged cases or repairing product jams was included in the description, noted to be

done occasionally. (Rx. 2). Petitioner testified that the job descriptions were generally a fair description of her work activities on lines C & D. (Tr. p. 39). The "Summary" included lifting 40 lbs. up to 33% of the day, lifting 15 lbs. between 34-66% of the day; pushing and pulling 45 lbs. up to 33% of the day and 20 pounds 34-66% of the day. (Rx. 2). She did disagree with the grip and push/pull requirements on the "summary", indicating that each should be in the "Continuous" category, having done those activities approximately 75% of her shifts. (Tr. p. 41). She estimated "pushing and pulling" is performed approximately 70% of her shift. (Tr. p. 44).

Respondent's Exhibit #1 was a job description for the Cereal Changeover job. (Rx. 1). Petitioner testified that she did the changeover duties every Saturday and 1-2 times a week, for 6-8 hours, aside from Saturdays. (Tr. p. 47). The job description noted various job tasks for the changeover position. It noted removal of material from the line, being done for 45 minutes, and requiring pushing 45 lbs. totes, pushing and pulling 40 lbs. carts; pulling 15 lbs., lifting 15 lbs. magnets, and gripping 40 lbs. to dislodge/remove chutes, funnels, hoppers. (Rx. 1). The job description noted disassembling equipment for 2-3 hours with lifting 35 lbs. to 70 lbs. It noted dry cleaning the system, using brushes, brooms, vacuums, and/or air blowers for 3-4 hours, with gripping and pinching of 7-10 lbs. It noted wet wash procedures for 2-4 hours, with pinching and gripping 7-10 lbs. (Rx. 1). The "Summary" noted continuous hand coordination but noted lifting and carrying of 35 lbs. for up to 33% of the day, pushing and pulling of 30 lbs. for up to 33% of the day, and gripping of 40 lbs. for up to 33% of the day. (Rx. 1). Petitioner agreed with the job description in general but felt the gripping should be in the continuous column regarding the "changeover" activities. (Tr. p. 48). She estimated that she performed gripping for 80% of her time performing the changeover job, with 70% gripping the air hose and 10% gripping a tool or material that couldn't be dislodged by the air hose. (Tr. pp. 48-49).

Petitioner agreed that her tasks varied at each position, however, all her activities required use of her hands, whether for lifting, pushing, pulling, or gripping. She estimated that 1-2 % of her day did not involve her lifting, pushing, pulling, or gripping. (Tr. p. 60).

Respondent called Ryan Stelzer to testify. Mr. Stelzer testified that he has been the Cereal Operations Manager for the last 2 years. (Tr. p. 62). Prior to that, he was the manager of Frozen Operations with Respondent. (Tr. p. 62). Mr. Stelzer testified he has known Petitioner for approximately 2 years, since he became manager of Cereal Operations. (Tr. pp. 62-63). Mr. Stelzer testified there was a lot of variance in the job duties from day to day, but that the Job Descriptions in RX 1 and 2 appeared to be accurate. (Tr. p. 67). Mr. Stelzer agreed that Petitioner likely operated an air hose approximately 20% of her shift. (Tr. p. 68). Mr. Stelzer agreed that the operator position is a busy job, noting the operators spend the majority of the time moving around, handling materials, and cleaning jams. (Tr. p. 71). He estimated that 80% of the day is spent "loading materials, doing checks, clearing jams, stuff like that" and that each of those activities involve use of the hands. (Tr. pp. 71, 73).

Petitioner testified that she due to her work activities she developed pain in her right wrist around August or September of 2016. (Tr. p. 17). She initially attempted to work through the pain. (Tr. p. 17). When it didn't resolve on its own, she sought treatment at OSF Medical Group. Petitioner testified that she was noticing most of her pain with the cleaning activities and grabbing boxes full of bowls, indicating those involve a lot more hand strength. (Tr. p. 17). She was initially seen on October 6, 2016. (Rx. 3). At that time, she reported right wrist pain and tingling. She reported pain for several months, with tingling for the last 3 weeks. (Rx. 3). The records also contain a notation that Petitioner stated she lifts 200 boxes per day at work. (Rx. 3).

Petitioner continued at work. (Tr. p. 18). She followed up at OSF on December 27, 2016, complaining of worsening right wrist pain. (Px. 1). At that time, she indicated she could not hold a phone or book for very long due to the pain. It was noted that she does repetitive work with both hands at work and an EMG was recommended. (Px. 1). She was also referred to an orthopedic. (Px. 1).

Petitioner was seen at Ortho IL on January 5, 2017. (Px. 2). An EMG was recommended at that time as well. Petitioner returned to Ortho IL on March 1, 2017 with complaints of pain in the right wrist as well as the left. It was noted that Petitioner had been using an air hose at work and has just been using her left hand. (Px. 2). Petitioner testified that she had been limiting use of her right wrist as much as possible due to the pain. With use of her left hand for much of the work she would normally do with her right hand, she developed pain in the left wrist. (Tr. p. 19). After her right-hand symptoms began, she started to lift the rolls with just her left arm, she started scraping with only her left hand instead of switching between the two as she normally would. (Tr. pp. 19-20). She believed the left-hand symptoms started approximately one month after she started limiting use of her right hand at work. (Tr. p. 19).

An EMG was performed on the right arm on March 23, 2017, revealing moderate right cubital tunnel syndrome. (Px. 2). She was recommended and underwent physical therapy from April 13, 2017 through May 22, 2017. (Px. 3). Petitioner testified that the therapy did not alleviate the numbness and tingling in her hand. Dr. Foster, at Ortho IL, recommended EMG of the left hand on May 23, 2017. (Px. 2). On June 9, 2017, Respondent stopped accommodating Petitioner's restrictions. Petitioner underwent the left-hand EMG on June 28, 2017. (Px. 2, Px. 4). The EMG was interpreted to demonstrate mild left cubital tunnel syndrome. On July 11, 2017, surgery was recommended regarding the right elbow and restrictions were placed to avoid forceful gripping with the right hand or lifting greater than 15 lbs. bilaterally.

Right ulnar nerve decompression was performed on August 25, 2017. (Px. 2). At the follow up visit, on September 7, 2017, the left elbow surgery was recommended. (Px. 2). Petitioner underwent the left elbow surgery on September 15, 2017. (Px. 2). Surgery improved symptoms in both arms. However, Petitioner continued to experience catching of the nerve on the left elbow postoperatively. (Tr. p. 24). On November 30, 2017, Dr. Foster noted that she was experiencing a snapping sensation over the medial left elbow with motion/flexion and soft tissue gets stuck. (Px. 2). Revision surgery was recommended. Petitioner underwent left ulnar nerve revision decompression at the elbow with anterior subcutaneous transposition on December 4, 2017. (Px. 2). Petitioner was continued under restrictions which were not accommodated, and she continued in physical therapy from February 13, 2018 through May 3, 2018. (Tr. p. 25, Px. 2).

On May 8, 2018, Petitioner was released to return to work without restrictions. (Px. 2). Petitioner was not paid temporary total disability benefits while off work from June of 2017 through May of 2018. (Tr. p. 28). Petitioner returned to work at the same position. She did have some additional treatment to the left hand to treat De Quervain's tenosynovitis, including injections followed by a left wrist first dorsal compartment release and tenosynovectomy on December 21, 2018. (Px. 2). She was again released without restrictions on January 31, 2019. (Px. 2). Petitioner has required no additional treatment to either hand since January 31, 2019. (Tr. p. 27).

Petitioner was seen by Dr. Jeffrey Coe, on October 17, 2017, at her attorney's request. PX 5, p. 8. Petitioner informed Dr. Coe that she worked as a line operator for 2.5 years. She described working 40-50 hours a week. She reported that the job required continuous, nonstop upper extremity movements that she described as repetitive and forceful. P. 9. She explained that she continuously lifted, pushed and pulled

material, gripped and pinched. She explained that she held and manipulated air hoses, and moved totes and boxes weighing about 40 lbs. approximately 100 times a day. P. 10. She described use of an air hose with a grip handle that required forceful, awkward twisting and pushing and pulling to manipulate the hose into position to blow off the line. P. 10. Dr. Coe asked Petitioner if she had any prior conditions in either her right or left upper extremities and she denied any significant problems arising from either the right or left upper extremity prior to working in her capacity for Respondent. P. 21. Petitioner denied having any medical condition to be considered a risk factor in the development of upper extremity nerve entrapments. P. 21. Based upon his exam of Petitioner and the review of her medical records, Dr. Coe agreed with the diagnosis of bilateral cubital tunnel syndrome. P. 25. He opined that her job duties as she described them, were a causative factor in the development of bilateral cubital tunnel syndrome. PX 5, p. 26. On cross exam, Dr. Coe testified that he had only Petitioner's description of her job duty and did not review job analysis reports or videos demonstrating Petitioner's job activities for Respondent. P. 30. He did not review the EMG study but only the reports. P. 35.

Respondent had Petitioner examined by Dr. Bryan Neal on January 15, 2018. Dr. Neal testified that he reviewed all of Petitioner's treating records and the narrative report from Dr. Coe. RX 5, p. 10. He performed an examination of Petitioner and received a history from Petitioner. P. 14. Dr. Neal agreed that Petitioner was status post bilateral cubital tunnel syndrome resolved. He agreed that the treatment she had undergone had been reasonable and necessary to treat her bilateral cubital tunnel syndrome. P. 32. He agreed that restrictions were appropriate for a period of time, and that she was not at MMI as of his initial evaluation on January 15, 2018. P. 15. He testified that Petitioner could work without restrictions with her right arm but that a 10 pound restriction was necessary for the left arm. P. 16.

Dr. Neal reviewed two job function descriptions in May 2018, additional treatment records and the deposition of Dr. Coe and the issued an additional report. Based on his review of these additional items in addition to the previously reviewed records and examinations, Dr. Neal opined that Petitioner's bilateral conditions were not work related. P. 20. He based his opinion on his experience as an orthopedic surgeon treating ulnar nerve conditions; Petitioner's lack of an acute injury at work; the simultaneous start of her bilateral symptoms; Petitioner's weight and age contributed, and that Petitioner likely has "systemic medical illnesses" that contribute to the condition. P. 20-24. He further testified his belief that "medical literature really does not support that there is an occupational relationship between cubital tunnel syndrome and occupational activities." He did not cite any specific medical literature in support of his opinion but just his recollection of general reports he read over the years. P. 36. He opined that evidence of a relationship would be to work that Petitioner "did not do" which is either "simultaneous forceful work and repetition or forceful work and posturing." He testified that these are the types of jobs that some evidence suggests that there could be an occupational relationship. He testified that Petitioner did not describe this type of job to him. P. 25. He opined that Petitioner "...has an idiopathic and/or systemic medically-induced cubital tunnel syndrome condition bilaterally, and not from any occupational activity or duties that she did." P. 26. He found Petitioner to be at MMI in May 2018 without need for work restrictions or further treatment. P. 28. Lastly, he testified that he felt Dr. Coe's opinion on causation was inaccurate in that Petitioner did not provide Dr. Coe and Dr. Neal with the same description of her activities. Dr. Coe believed Petitioner had a "tremendously repetitive or constantly repetitive job where there was forceful gripping" and Dr. Neal believed that "at times she did repetitive activity and at times she did some gripping." P. 30.

He noted that for an occupation to be a dominant or only cause, it must require a significant element of elbow flexion. P. 37. He agreed that it is possible for repetitive elbow flexion to be a causative factor in the development of cubital tunnel syndrome. P. 38. He further agreed that the AMA notes there is some

evidence that a combination of occupational risk factors such as force, repetition, and posture can be causative. P. 38. Dr. Neal agreed that Petitioner's age, 24 years old, is not associated with being a risk factor for development of cubital tunnel syndrome.

Following his deposition, Dr. Neal prepared an addendum report, offering the opinion that Petitioner' De Quervain's tenosynovitis was unrelated to her job duties based on his review of Petitioner's medical records which "do not support any occupationally induced De Quervain's disease." RX 6.

Petitioner testified that she is currently doing her regular job without limitation. She has no complaints relative to her right or left hands. (Tr. p. 27). She has no ongoing symptoms and has been able to perform her job without problem. (Tr. p. 32).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? F. Is Petitioner's current condition of ill-being causally related to the injury?

Based on Petitioner's credible and detailed testimony regarding her job duties, the job descriptions submitted at trial and on the opinion of Dr. Coe, the Arbitrator finds that Petitioner sustained repetitive trauma type injury to her right arm manifesting on October 6, 2016 and to her left arm manifesting on March 1, 2017, arising out of in the course of her employment for Respondent. The Arbitrator further finds that Petitioner's bilateral cubital tunnel is causally related to the repetitive work performed for Respondent.

Again, the Arbitrator finds Petitioner's detailed trial testimony regarding the highly repetitive, forceful gripping pushing and pulling required of her job duties to be most persuasive. Petitioner's initial treatment records at OSF documented her work activities of lifting 200 boxes per day at work and that she performs repetitive work activities with her hands. (Rx. 3, Px. 1). Petitioner testified to self-limiting use of her right hand at work thereafter with increased symptoms in the left hand. By March 1, 2017, when seen at Ortho IL, she was experiencing significant symptoms in the left hand as well. She described increased pain with use of an air hose at that time. Petitioner credibly testified to her repetitive, though varied, work activities for Respondent. Some of her work activities, such as scraping, lifting, pushing of heavy totes, grasping jammed materials, were described as being particularly strenuous bilaterally. Petitioner testified that a mere 1 to 2% of her day was not spent using her hands for lifting, pushing, pulling, or gripping while working on a cereal production line.

The job descriptions provided by Respondent and the testimony of Mr. Stelzer, Petitioner's supervisor, were consistent with Petitioner's testimony. The job description notes varied job duties. However, each of the activities required significant lifting, gripping, grasping, pushing, or pulling. Similar work activities were described to Dr. Coe and Dr. Neal. Given the sufficient bilateral upper extremity usage, Petitioner has satisfied her burden of proof that she sustained repetitive trauma accidents that arose out of and in the course of her employment with Respondent and that the work related repetitive trauma resulted in the bilateral cubital tunnel.

In finding causal connection for Petitioner's bilateral cubital tunnel, the Arbitrator further notes that more weight is placed on the opinion of Dr. Coe than of Dr. Neal given Petitioner's credible testimony at trial regarding her job duties as described above and in the job descriptions noted below.

Respondent's job descriptions provided significant information regarding Petitioner's work activities which support the Arbitrator's finding of causal connection in this case. The Cereal Operator Line C and D description noted loading the cereal hopper which required pushing totes up to 45 pounds frequently on line C averaging 4 totes per hour up to 32 totes per shift and 16-24 totes per shift on line D. Petitioner also removed liners and broke down totes, a process requiring lifting and gripping up to 20 pounds and pulling up to 10 pounds frequently on line C. RX 2. The job demand of loading cereal bowls, breaking down boxes, and discarding boxes was noted to be done an average of 30 times an hour. That task's requirements included lifting and carrying 40 lbs., lifting 2 lbs. stacks of bowls, pushing 50 lbs. bowl carts, and gripping 20 lbs. Loading rolls of film was noted to be done approximately 8 times a shift, requiring pulling/tilting 30 lb rolls of film. (Rx. 2). Loading of shippers was described, being done approximately 15 times an hour, and requiring lifting of 15 lbs. RX 2. Removing of damaged cases or repairing product jams was included in the description, noted to be done occasionally. Petitioner testified that the job descriptions were generally a fair description of her work activities on lines C & D. (Tr. p. 39). The "Job Function Demand Summary" included lifting 40 lbs. up to 33% of the day, lifting 15 lbs. between 34-66% of the day; pushing and pulling 45 lbs. up to 33% of the day and 20 pounds 34-66% of the day. (Rx. 2). Petitioner disagreed with the grip and push/pull requirements on the "summary", indicating that each should be in the "Continuous" category, having done those activities approximately 75% of her shifts. (Tr. p. 41). She estimated "pushing and pulling" is performed approximately 70% of her shift. (Tr. p. 44).

The Cereal Changeover job was noted to be performed once a shift to once per week. The total time needed was noted was 30 minutes to 10 hours. RX 1. The job description noted various job tasks for the changeover position. It noted necessary removal of material from the line, performed for 45 minutes and requiring pushing 45 lbs. totes, pushing and pulling 40 lbs. carts, pulling 15 lbs., lifting 15 lbs. magnets, and gripping 40 lbs. to dislodge/remove chutes, funnels, hoppers. The job description noted disassembling equipment for 2-3 hours with lifting 35 lbs. to 70 lbs on the bulk line. It noted dry cleaning the system, using brushes, brooms, vacuums, and/or air blowers for 3-4 hours, with gripping and pinching of 7-10 lbs over that 3-4 hour period. It noted wet wash procedures for 2-4 hours, with pinching and gripping of 7-10 lbs. (Rx. 1). The "Summary" noted continuous hand coordination and noted lifting and carrying of 35 lbs. for up to 33% of the day, pushing and pulling of 30 lbs. for up to 33% of the day, and gripping of 40 lbs. for up to 33% of the day. (Rx. 1). Petitioner agreed with the job description in general but felt the gripping should be in the continuous column regarding the "changeover" activities. (Tr. p. 48). She estimated that she performed gripping for 80% of her time performing the changeover job, with 70% gripping the air hose and 10% gripping a tool for material that couldn't be dislodged by the air hose.

Respondent's witness, Mr. Stelzer did not substantially contradict Petitioner's testimony. He noted the job descriptions appeared to be accurate. He agreed that the operator position is a busy job, noting that the operators spend the majority of their time moving around, handling materials, and cleaning jams. He estimated that 80% of the day is spent "loading materials, doing checks, clearing jams, stuff like that" and that each of those activities involve use of the hands.

The Arbitrator finds Petitioner's testimony describing her job duties to be a credible source of her cubital tunnel. The Arbitrator finds that Petitioner was credible in describing the onset of her symptoms with her repetitive work activities. She had no prior bilateral arm problems. While Petitioner's job duties were somewhat varied, nearly all the job duties per shift required strenuous use of the upper extremities, including heavy lifting, pushing, pulling, scraping and manipulation. Dr. Neal agreed that a combination of occupational risk factors such as force, repetition, and posture can be causative. With no prior elbow issues, a consistent history of onset of symptoms with consistently described work activities, and Dr. Coe's opinion supporting causation, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to the repetitive trauma she sustained through October 6, 2016 and March 1, 2017 for Respondent.

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

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. PX 6.

Respondent shall receive credit for amounts paid including credit for payments made under Section 8(j) of the Act and shall hold Petitioner harmless for said payments, if made.

K. What temporary benefits are in dispute?

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Petitioner was temporarily and totally disabled for a period of 47-5/7 weeks commencing June 9, 2017 through May 8, 2018, the date she was released to work without restrictions following the completion of her post surgical therapy.

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

In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." No impairment rating was offered by either party and this factor is given no weight.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately a year and a half prior to her October 6, 2016 onset of symptoms. She returned to her regular job, as a machine operator as of May 9, 2018 when released to return to work. Petitioner has continued in her regular position, without restriction relative to her elbows, since that time. Petitioner continues to work in her same repetitive capacity performing the same repetitive duties for Respondent which is of some concern given her long work life remaining. The Arbitrator places some weight on this factor.

3) The age of the employee at the time of the injury. Petitioner was 23 years old at the time of her injuries. Petitioner's age is given little weight.

4) The employee's future earning capacity. Petitioner has been able to return to full-time employment at Respondent as of May 9, 2018. She has not required any additional treatment as of the hearing date and no additional treatment was anticipated. Petitioner testified to no loss in earnings since her return to work for Respondent. The Arbitrator gives some little weight to this factor.

5) Evidence of disability corroborated by the treating medical records. The Arbitrator notes that Petitioner underwent right ulnar nerve decompression on August 25, 2017, left ulnar nerve decompression on September 15, 2017, and revision decompression with anterior subcutaneous transposition on the left on December 4, 2017. After her surgeries, Petitioner presented to physical/occupational therapy showing gradual improvement post surgery. During post surgical treatment, Petitioner expressed her concern to the therapists regarding the need to gain endurance with her arm use "because she has to return to a job where she performs a lot of repetitive activity." PX 2, p. 188. In April 2018, Petitioner reported continued fatigue in the elbow muscles after repetitive lifting at PT but noted strength improvement. On 5/3/18, Petitioner reported that she had some residual tenderness over the medial elbow scar with palpation and that she felt she could return to work but for 8 hour shifts instead of 12. P. 172. As of 5/8/18, she was returned to work for 8 hour shifts full duty for 4 weeks and then return to normal hours. It was noted that Petitioner was to continue to work on range of motion, scar massage and desensitization at home. P. 170. The Arbitrator places greater weight on this factor.

The Arbitrator notes that at trial, Petitioner testified that she has no formal work restrictions and has returned to her full duty position. She testified that she is able to perform her job functions without difficulty. She did not testify to any difficulty with every day activities. Based upon the factors analysis, the nature of Petitioner's continued occupation, the significant extent of Petitioner's treatment as combined with Petitioner's forthright trial testimony regarding the extent and current success of her recovery, the Arbitrator finds Petitioner has sustained 3% loss of use of the right arm and 5% loss of use of the left arm in under Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RUNDBERG, TORI
Employee/Petitioner

Case# **17WC030596**

17WC018640

GENERAL MILLS
Employer/Respondent

20IWCC0620

On 12/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2489 BLACK & JONES ATTY AT LAW
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2542 BRYCE DOWNEY & LENKOV LLC
TIMOTHY ALBERTS
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

20 IWCC0620

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tori Rundberg

Case # **17 WC 30596 consol w**
17 WC 18640

Employee/Petitioner

v.

General Mills
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On the date of accidents, **October 6, 2016 and March 1, 2017,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

On these dates, Petitioner did sustain accidents in the form of repetitive trauma type injury that that arose out of and in the course of her employment and manifested on these dates.

Timely notice of her accidents ***was*** given to Respondent.

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

In the year preceding the injuries, Petitioner earned $32,032.00, yielding an average weekly wage of **$616.00.**

On the dates of accident of October 6, 2016 and March 1, 2017, Petitioner was **23** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **410.67** /week for **47- 5/7** weeks, from **June 9, 2017 through May 8, 2018**, as provided in Section 8(b) of the Act.

- The Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. PX 6. Respondent shall receive credit for amounts paid including credit for payments made under Section 8(j) of the Act and shall hold Petitioner harmless for said payments, if made.

- The Respondent shall pay the Petitioner the sum of **$369.60** / week for a period of **20.24** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused **3%** **loss of use of the right arm and 5% loss of use of the left arm.**

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

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

Carolyn M. Doherty

Signature of Arbitrator

12/17/19
Date

ICArbDec

DEC 20 2019

FINDINGS OF FACT

At trial, the parties stipulated that Petitioner was an employee of Respondent on October 6, 2016 and March 1, 2017. The parties stipulated that Petitioner's average weekly wage was $616.00 and that Petitioner was 23 years of age, single, with 0 dependent children at the time of her alleged injuries. The parties stipulated that Petitioner provided timely notice of her alleged injuries under pursuant to the Act. ARB EX 1.

Petitioner testified that she began working for Respondent on February 10, 2015. (Tr. p. 7). Petitioner worked on a full-time basis as an operator. (Tr. pp. 7-8). In general, her job was to run a cereal line, packaging cereal into bowls, which included loading materials, clearing jams in the machines, and cleaning. Petitioner testified that her tasks varied. One task was loading bowl boxes from a pallet and setting them on a lift 5-10 feet away, where the bowls were loaded into the machine. (Tr. p. 9). The boxes Petitioner lifted weighed 30-40 lbs. (Tr. p. 9). She would load the bowls into the machine, then break down the box and grab another, doing so approximately every 5-10 minutes. (Tr. p. 9). Petitioner also described loading "shippers" with finished products. She would grab stacks of 10-20 and load them onto the line, doing about 200 per hour. (Tr. p. 10). Petitioner described pushing totes of product, weighing 400-500 pounds. (Tr. p. 10). The totes are on rollers and Petitioner pushed across the totes using her body weight approximately 4 times an hour. (Tr. p. 11). Petitioner explained that 10-12 times a shift, she would lift a roll of film, or plastic paper, weighing 50 or 60 lbs., and load that onto the machine. (Tr. p. 12). Petitioner indicated she is doing all of these activities concurrently throughout her 8-hour shift. (Tr. pp 11-12). On top of the regular duties in loading and packaging materials, Petitioner would also clear jams on the line when necessary. (Tr. p. 15). Boxes, casings, and bowls would get jammed and need to be cleared. (Tr. p. 15). At times, this was a simple removal. Other times, a case would get smashed in and she must physically tear the cardboard case apart to pull the wedged portion out of the machine. (Tr. p. 16). She estimated removing jammed products approximately 100-200 times a night. (Tr. p. 16).

Petitioner also testified to maintenance of the line. She would clean the line every shift which required her to use a scraper, which she compared to a putty knife, to scrape cinnamon and sugar from the scales and feeds. She stated they have 4 Ishidas, or scales, which each have roughly 60 parts that have to be scraped clean. (Tr. p. 13). She testified to vigorously scraping for a solid hour each shift. (Tr. p. 13). She testified to scraping using both arms. (Tr. p. 14). Petitioner described using an air hose to pressure wash the lines. (Tr. p. 20). This was similar to a garden hose, with a nozzle compressed to push air out to clean the line. (Tr. p. 20). Petitioner testified to gripping an air hose approximately 80 percent of her shift on changeover days and 10 percent on a regular day. (Tr. p. 43).

Respondent provided two separate job descriptions at hearing. (Rx. 1, 2). There was a job description for Cereal Operator, Lines C & D and a job description for Cereal Changeover. Petitioner reviewed each job description. Respondent's Exhibit #2 was a job description for a Cereal Operator on lines C & D. Petitioner testified she had been on those lines since she had started for Respondent. The job description noted various requirements of the job, including pushing up to 45 pounds, and doing so between 16-32 times a shift. (Rx. 2). It noted lifting 20 lbs., pulling liners, and gripping 20 lbs. between and occasional and frequent basis. (Rx. 2). The job demand of loading cereal bowls, breaking down boxes, and discarding boxes was noted to be done an average of 30 times and hour. That tasks requirements included lifting and carrying 40 lbs., lifting 2 lbs. stacks of bowls, pushing 50 lbs. bowl carts, and gripping 20 lbs. Loading rolls of film was noted to be done approximately 8 times a shift, requiring pulling/tilting 30 lb rolls of film. (Rx. 2). Loading of shippers was described, being done approximately 15 times an hour, and requiring lifting of 15 lbs. Removing of damaged cases or repairing product jams was included in the description, noted to be

done occasionally. (Rx. 2). Petitioner testified that the job descriptions were generally a fair description of her work activities on lines C & D. (Tr. p. 39). The "Summary" included lifting 40 lbs. up to 33% of the day, lifting 15 lbs. between 34-66% of the day; pushing and pulling 45 lbs. up to 33% of the day and 20 pounds 34-66% of the day. (Rx. 2). She did disagree with the grip and push/pull requirements on the "summary", indicating that each should be in the "Continuous" category, having done those activities approximately 75% of her shifts. (Tr. p. 41). She estimated "pushing and pulling" is performed approximately 70% of her shift. (Tr. p. 44).

Respondent's Exhibit #1 was a job description for the Cereal Changeover job. (Rx. 1). Petitioner testified that she did the changeover duties every Saturday and 1-2 times a week, for 6-8 hours, aside from Saturdays. (Tr. p. 47). The job description noted various job tasks for the changeover position. It noted removal of material from the line, being done for 45 minutes, and requiring pushing 45 lbs. totes, pushing and pulling 40 lbs. carts; pulling 15 lbs., lifting 15 lbs. magnets, and gripping 40 lbs. to dislodge/remove chutes, funnels, hoppers. (Rx. 1). The job description noted disassembling equipment for 2-3 hours with lifting 35 lbs. to 70 lbs. It noted dry cleaning the system, using brushes, brooms, vacuums, and/or air blowers for 3-4 hours, with gripping and pinching of 7-10 lbs. It noted wet wash procedures for 2-4 hours, with pinching and gripping 7-10 lbs. (Rx. 1). The "Summary" noted continuous hand coordination but noted lifting and carrying of 35 lbs. for up to 33% of the day, pushing and pulling of 30 lbs. for up to 33% of the day, and gripping of 40 lbs. for up to 33% of the day. (Rx. 1). Petitioner agreed with the job description in general but felt the gripping should be in the continuous column regarding the "changeover" activities. (Tr. p. 48). She estimated that she performed gripping for 80% of her time performing the changeover job, with 70% gripping the air hose and 10% gripping a tool or material that couldn't be dislodged by the air hose. (Tr. pp. 48-49).

Petitioner agreed that her tasks varied at each position, however, all her activities required use of her hands, whether for lifting, pushing, pulling, or gripping. She estimated that 1-2 % of her day did not involve her lifting, pushing, pulling, or gripping. (Tr. p. 60).

Respondent called Ryan Stelzer to testify. Mr. Stelzer testified that he has been the Cereal Operations Manager for the last 2 years. (Tr. p. 62). Prior to that, he was the manager of Frozen Operations with Respondent. (Tr. p. 62). Mr. Stelzer testified he has known Petitioner for approximately 2 years, since he became manager of Cereal Operations. (Tr. pp. 62-63). Mr. Stelzer testified there was a lot of variance in the job duties from day to day, but that the Job Descriptions in RX 1 and 2 appeared to be accurate. (Tr. p. 67). Mr. Stelzer agreed that Petitioner likely operated an air hose approximately 20% of her shift. (Tr. p. 68). Mr. Stelzer agreed that the operator position is a busy job, noting the operators spend the majority of the time moving around, handling materials, and cleaning jams. (Tr. p. 71). He estimated that 80% of the day is spent "loading materials, doing checks, clearing jams, stuff like that" and that each of those activities involve use of the hands. (Tr. pp. 71, 73).

Petitioner testified that she due to her work activities she developed pain in her right wrist around August or September of 2016. (Tr. p. 17). She initially attempted to work through the pain. (Tr. p. 17). When it didn't resolve on its own, she sought treatment at OSF Medical Group. Petitioner testified that she was noticing most of her pain with the cleaning activities and grabbing boxes full of bowls, indicating those involve a lot more hand strength. (Tr. p. 17). She was initially seen on October 6, 2016. (Rx. 3). At that time, she reported right wrist pain and tingling. She reported pain for several months, with tingling for the last 3 weeks. (Rx. 3). The records also contain a notation that Petitioner stated she lifts 200 boxes per day at work. (Rx. 3).

Petitioner continued at work. (Tr. p. 18). She followed up at OSF on December 27, 2016, complaining of worsening right wrist pain. (Px. 1). At that time, she indicated she could not hold a phone or book for very long due to the pain. It was noted that she does repetitive work with both hands at work and an EMG was recommended. (Px. 1). She was also referred to an orthopedic. (Px. 1).

Petitioner was seen at Ortho IL on January 5, 2017. (Px. 2). An EMG was recommended at that time as well. Petitioner returned to Ortho IL on March 1, 2017 with complaints of pain in the right wrist as well as the left. It was noted that Petitioner had been using an air hose at work and has just been using her left hand. (Px. 2). Petitioner testified that she had been limiting use of her right wrist as much as possible due to the pain. With use of her left hand for much of the work she would normally do with her right hand, she developed pain in the left wrist. (Tr. p. 19). After her right-hand symptoms began, she started to lift the rolls with just her left arm, she started scraping with only her left hand instead of switching between the two as she normally would. (Tr. pp. 19-20). She believed the left-hand symptoms started approximately one month after she started limiting use of her right hand at work. (Tr. p. 19).

An EMG was performed on the right arm on March 23, 2017, revealing moderate right cubital tunnel syndrome. (Px. 2). She was recommended and underwent physical therapy from April 13, 2017 through May 22, 2017. (Px. 3). Petitioner testified that the therapy did not alleviate the numbness and tingling in her hand. Dr. Foster, at Ortho IL, recommended EMG of the left hand on May 23, 2017. (Px. 2). On June 9, 2017, Respondent stopped accommodating Petitioner's restrictions. Petitioner underwent the left-hand EMG on June 28, 2017. (Px. 2, Px. 4). The EMG was interpreted to demonstrate mild left cubital tunnel syndrome. On July 11, 2017, surgery was recommended regarding the right elbow and restrictions were placed to avoid forceful gripping with the right hand or lifting greater than 15 lbs. bilaterally.

Right ulnar nerve decompression was performed on August 25, 2017. (Px. 2). At the follow up visit, on September 7, 2017, the left elbow surgery was recommended. (Px. 2). Petitioner underwent the left elbow surgery on September 15, 2017. (Px. 2). Surgery improved symptoms in both arms. However, Petitioner continued to experience catching of the nerve on the left elbow postoperatively. (Tr. p. 24). On November 30, 2017, Dr. Foster noted that she was experiencing a snapping sensation over the medial left elbow with motion/flexion and soft tissue gets stuck. (Px. 2). Revision surgery was recommended. Petitioner underwent left ulnar nerve revision decompression at the elbow with anterior subcutaneous transposition on December 4, 2017. (Px. 2). Petitioner was continued under restrictions which were not accommodated, and she continued in physical therapy from February 13, 2018 through May 3, 2018. (Tr. p. 25, Px. 2).

On May 8, 2018, Petitioner was released to return to work without restrictions. (Px. 2). Petitioner was not paid temporary total disability benefits while off work from June of 2017 through May of 2018. (Tr. p. 28). Petitioner returned to work at the same position. She did have some additional treatment to the left hand to treat De Quervain's tenosynovitis, including injections followed by a left wrist first dorsal compartment release and tenosynovectomy on December 21, 2018. (Px. 2). She was again released without restrictions on January 31, 2019. (Px. 2). Petitioner has required no additional treatment to either hand since January 31, 2019. (Tr. p. 27).

Petitioner was seen by Dr. Jeffrey Coe, on October 17, 2017, at her attorney's request. PX 5, p. 8. Petitioner informed Dr. Coe that she worked as a line operator for 2.5 years. She described working 40-50 hours a week. She reported that the job required continuous, nonstop upper extremity movements that she described as repetitive and forceful. P. 9. She explained that she continuously lifted, pushed and pulled

material, gripped and pinched. She explained that she held and manipulated air hoses, and moved totes and boxes weighing about 40 lbs. approximately 100 times a day. P. 10. She described use of an air hose with a grip handle that required forceful, awkward twisting and pushing and pulling to manipulate the hose into position to blow off the line. P. 10. Dr. Coe asked Petitioner if she had any prior conditions in either her right or left upper extremities and she denied any significant problems arising from either the right or left upper extremity prior to working in her capacity for Respondent. P. 21. Petitioner denied having any medical condition to be considered a risk factor in the development of upper extremity nerve entrapments. P. 21. Based upon his exam of Petitioner and the review of her medical records, Dr. Coe agreed with the diagnosis of bilateral cubital tunnel syndrome. P. 25. He opined that her job duties as she described them, were a causative factor in the development of bilateral cubital tunnel syndrome. PX 5, p. 26. On cross exam, Dr. Coe testified that he had only Petitioner's description of her job duty and did not review job analysis reports or videos demonstrating Petitioner's job activities for Respondent. P. 30. He did not review the EMG study but only the reports. P. 35.

Respondent had Petitioner examined by Dr. Bryan Neal on January 15, 2018. Dr. Neal testified that he reviewed all of Petitioner's treating records and the narrative report from Dr. Coe. RX 5, p. 10. He performed an examination of Petitioner and received a history from Petitioner. P. 14. Dr. Neal agreed that Petitioner was status post bilateral cubital tunnel syndrome resolved. He agreed that the treatment she had undergone had been reasonable and necessary to treat her bilateral cubital tunnel syndrome. P. 32. He agreed that restrictions were appropriate for a period of time, and that she was not at MMI as of his initial evaluation on January 15, 2018. P. 15. He testified that Petitioner could work without restrictions with her right arm but that a 10 pound restriction was necessary for the left arm. P. 16.

Dr. Neal reviewed two job function descriptions in May 2018, additional treatment records and the deposition of Dr. Coe and the issued an additional report. Based on his review of these additional items in addition to the previously reviewed records and examinations, Dr. Neal opined that Petitioner's bilateral conditions were not work related. P. 20. He based his opinion on his experience as an orthopedic surgeon treating ulnar nerve conditions; Petitioner's lack of an acute injury at work; the simultaneous start of her bilateral symptoms; Petitioner's weight and age contributed, and that Petitioner likely has "systemic medical illnesses" that contribute to the condition. P. 20-24. He further testified his belief that "medical literature really does not support that there is an occupational relationship between cubital tunnel syndrome and occupational activities." He did not cite any specific medical literature in support of his opinion but just his recollection of general reports he read over the years. P. 36. He opined that evidence of a relationship would be to work that Petitioner "did not do" which is either "simultaneous forceful work and repetition or forceful work and posturing." He testified that these are the types of jobs that some evidence suggests that there could be an occupational relationship. He testified that Petitioner did not describe this type of job to him. P. 25. He opined that Petitioner "...has an idiopathic and/or systemic medically-induced cubital tunnel syndrome condition bilaterally, and not from any occupational activity or duties that she did." P. 26. He found Petitioner to be at MMI in May 2018 without need for work restrictions or further treatment. P. 28. Lastly, he testified that he felt Dr. Coe's opinion on causation was inaccurate in that Petitioner did not provide Dr. Coe and Dr. Neal with the same description of her activities. Dr. Coe believed Petitioner had a "tremendously repetitive or constantly repetitive job where there was forceful gripping" and Dr. Neal believed that "at times she did repetitive activity and at times she did some gripping." P. 30.

He noted that for an occupation to be a dominant or only cause, it must require a significant element of elbow flexion. P. 37. He agreed that it is possible for repetitive elbow flexion to be a causative factor in the development of cubital tunnel syndrome. P. 38. He further agreed that the AMA notes there is some

evidence that a combination of occupational risk factors such as force, repetition, and posture can be causative. P. 38. Dr. Neal agreed that Petitioner's age, 24 years old, is not associated with being a risk factor for development of cubital tunnel syndrome.

Following his deposition, Dr. Neal prepared an addendum report, offering the opinion that Petitioner' De Quervain's tenosynovitis was unrelated to her job duties based on his review of Petitioner's medical records which "do not support any occupationally induced De Quervain's disease." RX 6.

Petitioner testified that she is currently doing her regular job without limitation. She has no complaints relative to her right or left hands. (Tr. p. 27). She has no ongoing symptoms and has been able to perform her job without problem. (Tr. p. 32).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? F. Is Petitioner's current condition of ill-being causally related to the injury?

Based on Petitioner's credible and detailed testimony regarding her job duties, the job descriptions submitted at trial and on the opinion of Dr. Coe, the Arbitrator finds that Petitioner sustained repetitive trauma type injury to her right arm manifesting on October 6, 2016 and to her left arm manifesting on March 1, 2017, arising out of in the course of her employment for Respondent. The Arbitrator further finds that Petitioner's bilateral cubital tunnel is causally related to the repetitive work performed for Respondent.

Again, the Arbitrator finds Petitioner's detailed trial testimony regarding the highly repetitive, forceful gripping pushing and pulling required of her job duties to be most persuasive. Petitioner's initial treatment records at OSF documented her work activities of lifting 200 boxes per day at work and that she performs repetitive work activities with her hands. (Rx. 3, Px. 1). Petitioner testified to self-limiting use of her right hand at work thereafter with increased symptoms in the left hand. By March 1, 2017, when seen at Ortho IL, she was experiencing significant symptoms in the left hand as well. She described increased pain with use of an air hose at that time. Petitioner credibly testified to her repetitive, though varied, work activities for Respondent. Some of her work activities, such as scraping, lifting, pushing of heavy totes, grasping jammed materials, were described as being particularly strenuous bilaterally. Petitioner testified that a mere 1 to 2% of her day was not spent using her hands for lifting, pushing, pulling, or gripping while working on a cereal production line.

The job descriptions provided by Respondent and the testimony of Mr. Stelzer, Petitioner's supervisor, were consistent with Petitioner's testimony. The job description notes varied job duties. However, each of the activities required significant lifting, gripping, grasping, pushing, or pulling. Similar work activities were described to Dr. Coe and Dr. Neal. Given the sufficient bilateral upper extremity usage, Petitioner has satisfied her burden of proof that she sustained repetitive trauma accidents that arose out of and in the course of her employment with Respondent and that the work related repetitive trauma resulted in the bilateral cubital tunnel.

In finding causal connection for Petitioner's bilateral cubital tunnel, the Arbitrator further notes that more weight is placed on the opinion of Dr. Coe than of Dr. Neal given Petitioner's credible testimony at trial regarding her job duties as described above and in the job descriptions noted below.

Respondent's job descriptions provided significant information regarding Petitioner's work activities which support the Arbitrator's finding of causal connection in this case. The Cereal Operator Line C and D description noted loading the cereal hopper which required pushing totes up to 45 pounds frequently on line C averaging 4 totes per hour up to 32 totes per shift and 16-24 totes per shift on line D. Petitioner also removed liners and broke down totes, a process requiring lifting and gripping up to 20 pounds and pulling up to 10 pounds frequently on line C. RX 2. The job demand of loading cereal bowls, breaking down boxes, and discarding boxes was noted to be done an average of 30 times an hour. That task's requirements included lifting and carrying 40 lbs., lifting 2 lbs. stacks of bowls, pushing 50 lbs. bowl carts, and gripping 20 lbs. Loading rolls of film was noted to be done approximately 8 times a shift, requiring pulling/tilting 30 lb rolls of film. (Rx. 2). Loading of shippers was described, being done approximately 15 times an hour, and requiring lifting of 15 lbs. RX 2. Removing of damaged cases or repairing product jams was included in the description, noted to be done occasionally. Petitioner testified that the job descriptions were generally a fair description of her work activities on lines C & D. (Tr. p. 39). The "Job Function Demand Summary" included lifting 40 lbs. up to 33% of the day, lifting 15 lbs. between 34-66% of the day; pushing and pulling 45 lbs. up to 33% of the day and 20 pounds 34-66% of the day. (Rx. 2). Petitioner disagreed with the grip and push/pull requirements on the "summary", indicating that each should be in the "Continuous" category, having done those activities approximately 75% of her shifts. (Tr. p. 41). She estimated "pushing and pulling" is performed approximately 70% of her shift. (Tr. p. 44).

The Cereal Changeover job was noted to be performed once a shift to once per week. The total time needed was noted was 30 minutes to 10 hours. RX 1. The job description noted various job tasks for the changeover position. It noted necessary removal of material from the line, performed for 45 minutes and requiring pushing 45 lbs. totes, pushing and pulling 40 lbs. carts, pulling 15 lbs., lifting 15 lbs. magnets, and gripping 40 lbs. to dislodge/remove chutes, funnels, hoppers. The job description noted disassembling equipment for 2-3 hours with lifting 35 lbs. to 70 lbs on the bulk line. It noted dry cleaning the system, using brushes, brooms, vacuums, and/or air blowers for 3-4 hours, with gripping and pinching of 7-10 lbs over that 3-4 hour period. It noted wet wash procedures for 2-4 hours, with pinching and gripping of 7-10 lbs. (Rx. 1). The "Summary" noted continuous hand coordination and noted lifting and carrying of 35 lbs. for up to 33% of the day, pushing and pulling of 30 lbs. for up to 33% of the day, and gripping of 40 lbs. for up to 33% of the day. (Rx. 1). Petitioner agreed with the job description in general but felt the gripping should be in the continuous column regarding the "changeover" activities. (Tr. p. 48). She estimated that she performed gripping for 80% of her time performing the changeover job, with 70% gripping the air hose and 10% gripping a tool for material that couldn't be dislodged by the air hose.

Respondent's witness, Mr. Stelzer did not substantially contradict Petitioner's testimony. He noted the job descriptions appeared to be accurate. He agreed that the operator position is a busy job, noting that the operators spend the majority of their time moving around, handling materials, and cleaning jams. He estimated that 80% of the day is spent "loading materials, doing checks, clearing jams, stuff like that" and that each of those activities involve use of the hands.

The Arbitrator finds Petitioner's testimony describing her job duties to be a credible source of her cubital tunnel. The Arbitrator finds that Petitioner was credible in describing the onset of her symptoms with her repetitive work activities. She had no prior bilateral arm problems. While Petitioner's job duties were somewhat varied, nearly all the job duties per shift required strenuous use of the upper extremities, including heavy lifting, pushing, pulling, scraping and manipulation. Dr. Neal agreed that a combination of occupational risk factors such as force, repetition, and posture can be causative. With no prior elbow issues, a consistent history of onset of symptoms with consistently described work activities, and Dr. Coe's opinion supporting causation, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to the repetitive trauma she sustained through October 6, 2016 and March 1, 2017 for Respondent.

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

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. PX 6.

Respondent shall receive credit for amounts paid including credit for payments made under Section 8(j) of the Act and shall hold Petitioner harmless for said payments, if made.

K. What temporary benefits are in dispute?

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Petitioner was temporarily and totally disabled for a period of 47-5/7 weeks commencing June 9, 2017 through May 8, 2018, the date she was released to work without restrictions following the completion of her post surgical therapy.

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

In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." No impairment rating was offered by either party and this factor is given no weight.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately a year and a half prior to her October 6, 2016 onset of symptoms. She returned to her regular job, as a machine operator as of May 9, 2018 when released to return to work. Petitioner has continued in her regular position, without restriction relative to her elbows, since that time. Petitioner continues to work in her same repetitive capacity performing the same repetitive duties for Respondent which is of some concern given her long work life remaining. The Arbitrator places some weight on this factor.

3) The age of the employee at the time of the injury. Petitioner was 23 years old at the time of her injuries. Petitioner's age is given little weight.

4) The employee's future earning capacity. Petitioner has been able to return to full-time employment at Respondent as of May 9, 2018. She has not required any additional treatment as of the hearing date and no additional treatment was anticipated. Petitioner testified to no loss in earnings since her return to work for Respondent. The Arbitrator gives some little weight to this factor.

5) Evidence of disability corroborated by the treating medical records. The Arbitrator notes that Petitioner underwent right ulnar nerve decompression on August 25, 2017, left ulnar nerve decompression on September 15, 2017, and revision decompression with anterior subcutaneous transposition on the left on December 4, 2017. After her surgeries, Petitioner presented to physical/occupational therapy showing gradual improvement post surgery. During post surgical treatment, Petitioner expressed her concern to the therapists regarding the need to gain endurance with her arm use "because she has to return to a job where she performs a lot of repetitive activity." PX 2, p. 188. In April 2018, Petitioner reported continued fatigue in the elbow muscles after repetitive lifting at PT but noted strength improvement. On 5/3/18, Petitioner reported that she had some residual tenderness over the medial elbow scar with palpation and that she felt she could return to work but for 8 hour shifts instead of 12. P. 172. As of 5/8/18, she was returned to work for 8 hour shifts full duty for 4 weeks and then return to normal hours. It was noted that Petitioner was to continue to work on range of motion, scar massage and desensitization at home. P. 170. The Arbitrator places greater weight on this factor.

The Arbitrator notes that at trial, Petitioner testified that she has no formal work restrictions and has returned to her full duty position. She testified that she is able to perform her job functions without difficulty. She did not testify to any difficulty with every day activities. Based upon the factors analysis, the nature of Petitioner's continued occupation, the significant extent of Petitioner's treatment as combined with Petitioner's forthright trial testimony regarding the extent and current success of her recovery, the Arbitrator finds Petitioner has sustained 3% loss of use of the right arm and 5% loss of use of the left arm in under Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TERESA VALENCIA,

Petitioner,

vs.

NO: 15 WC 05950

STATE OF ILLINOIS-ILLINOIS
DEPARTMENT OF TRANSPORTATION,

20IWCC0621

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2020, is hereby affirmed and adopted.

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

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

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013)*. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

20 IWCC0621

DATED: OCT 2 1 2020
KAD/bsd
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Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALLENCIA, TERESA
Employee/Petitioner

Case# **15WC005950**

STATE OF ILLINOIS-ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

20IWCC0621

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

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1816 LAW OFFICE OF FRDERICK NESSLER
MATTHEW V KENNEDY
536 N BURNS LN SUITE 1
SPRINGFIELD, IL 62702

0502 STATE EMPLOYEES RETIREMENT
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PO BOX 19255
SPRINGFIELD, IL 62704-9255

6079 ASSISTANT ATTORNEY GENERAL
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CHICAGO, IL 60601

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

1430 CMS BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

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

FEB - 4 2020

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

20IWCC0621

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Teresa Valencia
Employee/Petitioner

v.

State of Illinois-Illinois Department of Transportation
Employer/Respondent

Case # **15** WC **005950**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **June 25, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/27/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,362.00**; the average weekly wage was **$1,122.35**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,955.96** for other benefits, for a total credit of **$3,955.96**.

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

ORDER

THE ARBITRATOR FINDS THAT PETITIONER'S INJURY DID NOT ARISE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT. THE ARBITRATR FINDS THAT PETITIONER'S CURRENT CONDITION OF ILL-BEING IS NOT CAUSALLY RELATED TO HER WORK DUTIES. ALL BENEFITS ARE DENIED.

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

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

Signature of Arbitrator

February 3, 2020
Date

FEB 4 - 2020

STATEMENT OF FACTS

This matter was tried before Arbitrator Hemenway on June 25, 2019. Arbitrator Hemenway departed the Illinois Workers' Compensation Commission before a Decision was authored. The Illinois Workers' Compensation Commission re-assigned this matter to Arbitrator Glaub for the purpose of drafting this Decision. Both parties agreed to Arbitrator Glaub drafting this Decision based on his review of the Transcript and evidence.

Petitioner's Testimony

Petitioner testified that she was employed by Respondent from 1984 through her retirement in 2016. Petitioner testified that she started out as a Clerk 2 where she collated and prepared the hospital records for review and payment by the Comptroller's Office. She stated that she "got the bill ready for the State to pay...and it was a lot of data entry." T. 16. She further testified that she had to pick up heavy boxes to file them in the proper place.

Petitioner testified that her repetitious work with data entry and typing were the hardest on her each day. Petitioner testified that there was an ergonomic evaluation done on her work station and that the recommendations, gel pad for her wrists; more supportive chair; document holder;, did help with some of her pain.

After her surgery Petitioner did return to work and testified that she continued to lift heavy boxes as part of her job duties while complaining that she unable to do the work as assigned.

Petitioner testified that she accurately described her job duties to Dr. Brian Russell when she treated with him. Petitioner testified that she attended a Section 12 examination with Dr. Patrick O'Leary where she also accurately described her job duties and current symptoms. T. 28.

Petitioner testified that she still feels tingling every day and that she is still experiencing symptoms. Petitioner further testified that she believes the weather plays a factor in how she feels each day. T. 29-30.

On cross-examination Petitioner testified that her work days were filled with filing, doing computer work, and answering phones. Petitioner further stated she the only break she received each day was her one hour for lunch. T. 31.

Petitioner testified that she has no hobbies outside of work besides reading. Petitioner was asked about her guitar playing that was noted by the IME doctor and she stated, "I don't really play it much...[m]aybe a couple hours a week." T. 32.
Petitioner testified that she a computer at home but she has never experienced pain while on that computer because she stands and is not on it that much.

In regards to the amount of phone calls Petitioner answered each day while employed by Respondent she stated she answered 100 phone calls a day and that each phone call was 10-15 minutes in length. T. 34.

Medical Records

Petitioner treated with Dr. Russell on January 27, 2015 where he diagnosed her with cervical disk disease C5 to C7 and since conservative measures have failed he recommended surgery. He noted that it would be a 2 level cervical disk replacement.

Petitioner underwent surgery with Dr. Russell on June 1, 2015 and it was successful but there was postoperative pain noted which gradually improved. Petitioner returned to Dr. Russell for follow up appointment in June, July and August of 2015 with complaints of numbness and tingling in both arms.

Petitioner was seen for a physical therapy evaluation in September of 2015 at Springfield Clinic where she mentions that her symptoms have worsened over the past two weeks. However, the therapist noted that her strength was improving after the surgery.

Petitioner also treated for her back and neck issues as far back as 2007 when she went to the ER for neck pain. She had an orthopedic evaluation done by Dr. Vanfleet in September of 2013 and an MRI in 2014 after continued complaints of neck pain.
Dr. Russell's Causation Letter

Dr. Brian Russell wrote a letter to opposing counsel on December 25, 2015 where he discusses her treatment and the cause of her cervical disc disease. Dr. Russell notes that her job duties include a significant amount of computer work, data entry and also lifting and sorting of mail. Dr. Russell notes that he does not believe that Petitioner work caused her cervical disc disease but that a chronic position of the neck can aggravate such changes and can cause pain in the neck and some arm symptoms. PX 8.

Section 12 Examination by Dr. Patrick O'Leary

Petitioner presented to Dr. Patrick O'Leary for a Section 12 Examination on April 21, 2016. Petitioner told Dr. O'Leary that she felt her cumulative work caused her condition of ill-being, specifically her neck symptoms. RX 1.

Petitioner noted that certain activities such as answering the phone aggravate her symptoms. She also noted that her chair was not very good and caused her pain as well.

Dr. O'Leary diagnosed her with cervical spondylosis and lumbar spondylosis. He further notes that there are no objective findings and that she seems to have a high level of pain for someone with a relatively normal neurologic exam. RX 1.

When asked whether there was a causal relationship between the current objective findings and Petitioner's work with the State of Illinois Dr. O'Leary noted that "she has degeneration, that is, "wear and tear" in the neck and low back which could be considered age appropriate and could have occurred independent of her job." RX 1. Dr. O'Leary noted that he did not believe this to be a work related injury or even a work accelerated injury as her work duties were not something that had a strong association that is supported by medical literature. Id.

CONCLUSIONS OF LAW

As an initial matter the Arbitrator notes Petitioner has the burden of proving all of his case by a preponderance of the evidence. Chicago Rotoprint v. Industrial Comm'n, 157 Ill.App.3d 996, 1000, 509 N.E.2d 1330, 1331(1st Dist. 1987).

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner alleged she sustained an accidental injury of degenerative disc disease to her neck and back due to her alleged repetitive work activities that arose out of and in the course of her employment by Respondent, Illinois Department of Transportation, and manifested itself on January 27, 2015.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission 115 Ill.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, (1987), the Supreme Court held that "the purpose behind the Worker's Compensation Act is best serviced by allowing

compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc.

In the present case Petitioner did not meet her burden of proving that her work activities were repetitive in nature or that those activities caused her injury. On cross-examination Petitioner testified that she answered 100 phone calls per day and that those phone calls lasted from 10 to 15 minutes each. The Arbitrator notes that for that to be true then Petitioner would need to work between 16 and 25 hours per day. Petitioner testified that she worked for 7.5 hours per day with a 1 hour lunch break.

Dr. Russell never goes in to detail in his causation letter about how Petitioner's work duties could have caused this injury. Nor does he talk about her specific job related duties such as how often she answered the phone or how often she did data entry. This part is essential because the burden is on Petitioner to show specific evidence in regard to this connection.

"To recover benefits under Workmen's Compensation Act, claimant has burden of proving all elements of his case, including extent and permanency or injury, by a preponderance of the evidence, and liability cannot rest on mere conjecture." *City of Chicago v. Industrial Comm'n*, 41 Ill.2d 143, 145-146 (1968). An employee claiming a repetitive trauma injury still must show "that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 530.

Petitioner's treating doctor, Dr. Russell, noted that her cervical disc disease was not caused by her work activities but could have been aggravated by a chronic position of the neck. This opinion from Dr. Russell does not specifically address her work duties or whether those specific work duties caused or contributed to her neck and back injury.

Respondent's Section 12 examiner, Dr. Patrick O'Leary, noted in his report that Petitioner's injury was the result of normal wear and tear and was not caused by her work activities. In his report Dr. O'Leary notes that Petitioner complained of pain from her work activities, such as answering the phone or carrying files and boxes, but he says that there is no supporting literature or objective findings that connect Petitioner's injuries with her work activities. Dr. O'Leary also notes that this is the natural history of a degenerative disease process and it occurred independent of her job duties.

Respondent's Section 12 examiner is of the opinion that this is injury is from the normal degenerative aging process and Petitioner's treating doctor did not offer specific evidence to

show that this is not true. The Arbitrator finds the Section 12 examiner to be more persuasive as his report is more detailed in regards to what job duties Petitioner complained about and the degenerative issues that Petitioner has dealt with.

Since Respondent's Section 12 examiner is the more persuasive report then the Arbitrator finds that Petitioner did not meet her burden of proving her case by a preponderance of the evidence. As such the Arbitrator finds that this injury did not arise out of and in the course of Petitioner's job duties and the Petitioner's current condition of ill-being is not related to the claimed work injury.

The Arbitrator notes petitioner was suffering from a degenerative condition involving disc osteophyte complexes, spurring and stenosis at multiple levels in her cervical spine based on a cervical MRI performed December 11, 2014. The petitioner testified she did not suffer any traumatic injury. All medical providers agree that the petitioner's job duties did not cause her underlying cervical condition. The petitioner told Dr. Russell on January 5, 2015 that she had a long history of neck pain and bilaterally radiating arm symptoms. Petitioner also said she had numbness and tingling in both of her hands for over a year. (Px 1) A post-operative CT Scan dates September 15, 2017 contains a history that the petitioner complains of upper and lower back pain for 30 years following an accident of riding a horse. (PX 3) A medical record labeled "SC PT Evaluation note Amended Final" contains a reference "Yellow Flags: Chronic pain x 10 years". Further petitioner reported having pain for probably at least 10 years. Again, petitioner tenders a history that she fell off a horse when she was young and fractured her spine and back. (Px 3) An initial evaluation on January 19, 2015 with physical therapist, Stacy Curtis, contains a history that petitioner tendered of a condition that began 20+ years ago and has progressed and further that a surgical recommendation was made 10 years ago but petitioner was trying to avoid surgery. (Px 5)

Neither party chose to take any depositions. The Arbitrator's Decision from a medical causation perspective is based on narrative reports and medical records. Petitioner relied solely upon the report of Dr. Russell. As indicated above, Dr. Russell does not believe the petitioner's underlying condition was caused by her job activities as an executive secretary and administrative assistant, but that "certainly chronic position of your neck can aggravate such changes and can cause some neck pain aggravation and sometimes some arm symptoms". The Arbitrator does not believe this statement alone is sufficient to prove up medical causation. Specifically, there is no reference to what is actually aggravated from an anatomical perspective and how the petitioner's job activities could have aggravated this condition. The Arbitrator believes that certain activities of the petitioner at work could have aggravated petitioner's symptoms related to her condition. However, the medical records contain multiple references to activities away from work that also aggravated her symptoms. The Arbitrator does not believe the statement of Dr. Russell, which is not under oath and contains no reference that it is made with any degree of medical and surgical

certainty, is sufficient to prove that her job activities as an Executive Secretary aggravated or worsened her actual underlying medical condition or that it accelerated her need for treatment or surgery.

Compensation is denied. Based on the above, all further issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TYLER HURTADO,

Petitioner,

vs.

NO: 11 WC 13271

20IWCC0622

GREEN MACHINE LAWN & LANDSCAPING; LEROY TATE, UNDER AND DOING BUSINESS AS GREEN MACHINE LAWN & LANDSCAPING; AND THE ILLINOIS TREASURER as EX OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND-(IWBF),

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2020, is hereby affirmed and adopted.

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

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

20IWCC0622

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 21 2020
KAD/bsd
O090120
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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

HURTADO, TYLER
Employee/Petitioner

Case# **11WC013271**

GREEN MACHINE LAWN & LANDSCAPING
LeROY TATE UNDER AND DOING BUSINESS AS
GREEN MACHINE LAWN & LANDSCAPING AND
THE ILLINOIS TREASURER AS EX OFFICIO
CUSTODIAN OF THE INJURED WORKERS'
BENEFIT FUND
Employer/Respondent

20IWCC0622

On 3/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the

4463 GALANTI LAW OFFICE
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E ALTON, IL 62024

0000 GREEN MACHINE LAWN &
LANDSCAPING
7513 CHURCH
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0000 LEROY TATE D/B/A GREEN MACHINE
LAWN & LANDSCAPING
4700 STATE ST
EAST ST LOUIS, IL 62205

0000 ASSISTANT ATTORNEY GENERAL
CAITLIN FIELLO
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

20 IWCC0622

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Tyler Hurtado
Employee/Petitioner

v.

Case # **11** WC **13271**

Consolidated cases: _____

Green Machine Lawn & Landscaping; Leroy Tate under and doing business as Green Machine Lawn & Landscaping; and the Illinois Treasurer as Ex officio Custodian of the Injured Workers' Benefit Fund - (IWBF)
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **January 29, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3/21/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,840.00**; the average weekly wage was **420.00**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **2** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$286.00(Min. rate)/week** for **1-3/7ths** weeks, commencing **March 22, 2011** through **March 31, 2011**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$2,388.03**, equating to **$662.00** due and owing to MedStar Ambulance, Inc., **$1,622.53** due and owing to Memorial Hospital, **$103.50** due and owing to Petitioner for reimbursement of payment to Mercy Burn and Plastic Surgery, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner is not entitled to any disfigurement benefits as Petitioner's injuries were not serious or permanent.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2/29/20
Date

MAR 4 - 2020

20 I W CC0622

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TYLER HURTADO, Employee/Petitioner, v. GREEN MACHINE LAWN & LANDSCAPING, STATE TREASUER AND EX OFFICIO-CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND, and LEROY TATE UNDER AND DOING BUSINESS AS GREEN MACHINE LAWN & LANDSCAPING, Employer/Respondent.	)	Case No.: 11 WC 13271

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 29, 2020, pursuant to Section 9(b) of the Act. The parties dispute all issues. Petitioner filed an Amended Application on February 3, 2016 to add the Injured Workers' Benefit Fund as a Respondent. On January 30, 2020, Investigator Michael S. Cummins of the Illinois Workers' Compensation Commission confirmed he has investigated this claim and according to the National Council on Compensation Insurance, Respondent Green Machine Lawn & Landscaping did not have a workers' compensation insurance policy on 3/21/11. The Proof of Coverage database reflects Respondent Green Machine obtained a workers' compensation insurance policy on 3/22/11, the day after Petitioner's accident. Respondent Green Machine's previous insurance policy lapsed on 10/25/10. The exhibits reflecting no insurance were added as Arbitrator's Exhibit 4 and will go with the record. Proofs remained open until the submission of a statement from the insurance compliance officer as to coverage. Said statement was received by the Arbitrator on 2/19/20 at which time proofs were closed.

MEDICAL HISTORY

Petitioner received emergency treatment at Belleville Memorial Hospital. He was diagnosed with 1st degree burns to his face and 1st and 2nd degree burns to his right arm. He was

provided Vicodin and a topical cream and ordered to return to work in three days with no restrictions.

On 3/24/11, Petitioner was treated at Mercy Hospital St. Louis Burn and Plastic Surgery where he was diagnosed with 1st and 2nd degree burns to the right side of his face and lips, as well as 1st and 2nd degree burns to the right forearm and dorsum of the right hand. He provided a history that on 3/21/11 he was at work when a co-worker asked him to light a pile of brush on fire. The co-worker had already poured gasoline on the brush. When Petitioner lit the brush, fire flashed up in his face and right arm. Petitioner is right-handed. Petitioner was ordered to take Ibuprofen for pain, apply topical cream, and remain off work until his follow up appointment scheduled on 3/31/11.

Petitioner presented the following medical bills into evidence as Petitioner's Exhibit 3:

MedStar Ambulance:	$ 662.00
Memorial Hospital:	$ 1,622.53
Mercy Burn and Plastic Surgery:	$ 0.00
Out of Pocket:	$ 103.50

TESTIMONY

Petitioner, Tyler Hurtado, was 22 years old on March 21, 2011 when he was injured while working for Respondent, Green Machine Lawn & Landscaping ("Respondent"). Petitioner testified he was single, with one child, and a second child "on the way" at the time of the accident. On the date of accident, Petitioner was instructed to burn a pile of brush that had been previously prepared. Petitioner had not been notified that Mr. Leroy Tate, owner of Green Machine, had already poured five (5) gallons of gas on the brush pile. Petitioner testified the brush pile exploded resulting in him being blown back approximately 10 feet. Petitioner noticed skin hanging over his fingertips and was immediately taken to Memorial Hospital via ambulance.

Petitioner began working for Respondent in 2008. Petitioner worked five days a week from 7 AM to 5 PM during the spring and summer seasons, earning $9.00 per hour for an average weekly wage of $420.00. Petitioner testified he was paid cash and did not receive a W-2, nor were taxes withheld. Petitioner testified he received no other benefits from Respondent, but Respondent provided all required equipment and controlled where Petitioner worked each day. Petitioner testified he did not return to work after his March 21, 2011 work accident.

Petitioner testified his arm is better but he covered his scars with tattoos. The worse part of the burn was below the elbow up to the wrist. The Arbitrator observed that 90% of Petitioner's right forearm was covered by tattoos. Petitioner testified that 100% of his burn scars are now covered by tattoos. He testified that he got tattoos because of the scars and did not intend to get tattoos prior to his injuries. Petitioner began getting tattoos immediately following the healing process and continued getting tattoos over the next nine years until no scarring was visible on his

forearm. Prior to covering his injuries with tattoos, Petitioner testified his scars were very visible and could be seen from at least ten (10) feet away. Petitioner testified he has no scarring on his face. Petitioner testified he does not have any symptoms related to his injuries.

Respondent did not call any witnesses and did not offer any exhibits into evidence.

CONCLUSIONS OF LAW

ISSUES (A) & (B): Was Respondent operating under and subject to the Illinois Workers' Compensation Act; Was there an employee-employer relationship?

The Arbitrator finds Petitioner provided unrebutted testimony of the relationship between Respondent and himself and in doing so established Respondent was subject to the Act and an employee-employer relationship existed. Petitioner testified that Respondent supplied the equipment and materials necessary to perform his work duties. Petitioner testified he wore a shirt identifying himself as an employee of "Green Machine".

The Arbitrator finds Respondent retained the right to control the manner in which the work was performed, retained the right to discharge, owned the equipment necessary to the work, and the relationship of the work performed conformed to the employer's purpose. The Arbitrator finds an employee-employer relationship and finds Respondent was subject to the Workers' Compensation Act.

ISSUES (C), (D), and (E): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? What was the date of the accident? Was timely notice of the accident given to Respondent?

An injury is an accident when it is traceable to a definite time, place and cause and occurs in the course of employment, unexpectedly, and without affirmative act or design of the employee. *Matthiessen and Haegler Zinc Co. v. Industrial Commission,* 284 Ill. 378, 120 N.E.2d 249 (1918).

Petitioner provided unrebutted testimony that on March 21, 2011 he was injured while igniting a brush pile resulting in burns to Petitioner's face and right arm and hand. He was directed to light the brush fire by his boss and owner of Respondent and was immediately taken to the emergency room by ambulance.

The Arbitrator finds Petitioner sustained an accident that arose out of and in the course of his employment by Respondent that occurred on March 21, 2011, and timely notice of the accident was given to Respondent.

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

Petitioner's unrebutted testimony that he sustained significant burns on the right side of his body and the medical evidence presented at trial corroborates his testimony. The medical evidence

establishes Petitioner provided a consistent history of accident and symptoms. The Arbitrator finds Petitioner's current condition of ill-being is causally related to the injury.

ISSUES (G), (H), and (I): What were Petitioner's earnings? What was Petitioner's age at the time of the accident? What was Petitioner's marital status at the time of the accident?

Petitioner provided unrebutted testimony that he earned "at least" $420.00 per week while working for Respondent, working five days a week from 7 AM to 5 PM during the spring and summer seasons at $9.00 per hour. Petitioner testified he was 22 years old on the date of accident Petitioner testified he was not married, with one dependent at the time of accident. The Arbitrator finds Petitioner presented evidence of that his average weekly wage was $420.00; he was 22 years old, and single on the date of accident.

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

Based on the above findings regarding causal connection and the unrebutted testimony that the medical expenses were reasonable and necessary in the care and treatment of Petitioner for his injuries, the Arbitrator finds that Petitioner is entitled to medical benefits itemized in Petitioner's Exhibit 3. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care. As a result, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$2,388.03**, equating to **$662.00** due and owing to MedStar Ambulance, Inc., **$1,622.53** due and owing to Memorial Hospital, **$103.50** due and owing to Petitioner for reimbursement of payment to Mercy Burn and Plastic Surgery, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ISSUE (K): Is Petitioner entitled to receive TTD benefits?

The medical evidence presented at arbitration reflects Petitioner was taken off work through his follow up appointment with Mercy Hospital St. Louis Burn and Plastic Surgery on March 31, 2011. The Arbitrator finds Petitioner is entitled to 1-3/7th weeks of temporary total disability benefits for the period between March 22, 2011 through March 31, 2011.

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

While Petitioner sustained significant scarring to his right arm as a result of his injuries, the scars could not be considered serious as is required under section 8(c) of the Workers' Compensation Act. *Superior Mining vs. Industrial Commission*, 141 N.E. 165 (1923) set the standard for the determination of whether disfigurement is compensable by requiring that the disfigurement be serious as well as permanent. To be serious, the disfigurement must be injurious to the appearance and otherwise render the petitioner unsightly. The Commission cases thereafter

establish that in order for the disfigurement to be serious, it must detract for the general appearance of the petitioner (*Aldworth vs.Knickerbocker Roofing*, 83 IIC 433; *Betinski vs. Ekco Products*, 85 IIC 555; *Lewandowski vs. A.W. Cash*, 86 IIC 309). To be so serious to detract from the appearance of the petitioner, the scarring must be visible or observable from a distance. This is usually considered to be six to eight feet from the petitioner. (*Superior Mining, supra.; Palmer vs. Berkley-Davis*, 85 IIC 493; *Ruiz vs. Moline Corp.* 83 IIC 450).

In the instant case, Petitioner sustained significant scarring to the right forearm. While he testified his scarring was very visible following the accident, Petitioner testified, and the Arbitrator observed, that 100% of his scars are now covered by tattoos and no scarring is visible on his forearm. Petitioner testified he has no scarring on his face. Petitioner testified he does not have any symptoms related to his injuries.

Therefore, the Arbitrator finds that Petitioner is not entitled to any disfigurement benefits.

ISSUE (O): Insurance Coverage

Petitioner filed an Amended Application on February 3, 2016 to add the Injured Workers' Benefit Fund as a Respondent. On January 30, 2020, Investigator Michael S. Cummins of the Illinois Workers' Compensation Commission confirmed he has investigated this claim and according to the National Council on Compensation Insurance, Respondent Green Machine Lawn & Landscaping did not have a workers' compensation insurance policy on 3/21/11. The Proof of Coverage database reflects Respondent Green Machine obtained a workers' compensation insurance policy on 3/22/11, the day after Petitioner's accident. Respondent Green Machine's previous insurance policy lapsed on 10/25/10. The exhibits reflecting no insurance were added as Arbitrator's Exhibit 4 and will go with the record. Proofs remained open until the submission of a statement from the insurance compliance officer as to coverage. Said statement was received by the Arbitrator on 2/19/20 at which time proofs were closed.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

2/29/20

DATE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TONYA A. KINDER,

Petitioner,

20IWCC0623

vs. NO: 18 WC 23092

STATE OF ILLINOIS – MURRAY DEVELOPMENT CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, average weekly wage, temporary total disability, medical expenses, the chain of referral, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes made below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability (TTD) benefits because the Decision of the Arbitrator and the Request for Hearing do not specify a claimed TTD period but merely refer to underpayment as an issue.

With regard to the alleged TTD underpayment, the parties' dispute centers on Petitioner's average weekly wage (AWW). A claimant has the burden of proving by a preponderance of the evidence the elements of her claim, including her average weekly wage. *Zanger v. Industrial Comm'n*, 306 Ill. App. 3d 887, 890 (1999). Section 10 of the Act explicitly states that overtime is to be excluded in calculating the average weekly wage. 820 ILCS 305/10 (West 2016). However, the Act makes no mention of precluding compensation for overtime hours at straight

20IWCC0623

time. *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 1096 (1996). Where the employer hired the claimant expecting overtime work and the claimant actually worked overtime on a consistent and regular basis, then the overtime becomes part of the usual hours of employment and the extra hours can be included in the wage calculation at the regular hourly rate. See, *e.g.*, *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666 (1990).

Respondent argues that Petitioner volunteered to work most of her overtime hours and that the varying overtime earnings outlined in the wage statement demonstrate that the overtime pay should be excluded. However, Petitioner testified that she volunteered to work overtime because if she did not volunteer, it would be assigned most of the time, and she sought to control the overtime shift she would work. Respondent's witness, Ms. Hodge, acknowledged that overtime is mandated at Respondent and that employees volunteer for overtime to avoid being put on a shift they otherwise do not want to work. Ms. Hodge also testified that 20 of Petitioner's 24 pay periods during the year prior to the accident included overtime. Thus, the evidence establishes that Petitioner's calculation of AWW is appropriate.

Accordingly, the Commission affirms and adopts the Arbitrator's finding that Petitioner's AWW was $780.80. Petitioner is entitled to an award of any underpaid TTD benefits based on a rate of $520.33 per week. Respondent is entitled to a credit for TTD benefits already paid.

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

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

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's average weekly wage was $780.80.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay Petitioner's reasonable and necessary outstanding medical bills relating to Petitioner's treatment and submitted into evidence, if previously unpaid and not written off, pursuant to the fee schedule and §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the surgery recommended by Dr. George Paletta.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any underpayment of temporary total disability benefits based on the rate of $520.33 per week, pursuant to §8(b) of the Act. Respondent is awarded a credit for temporary total disability benefits already paid.

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

20IWCC0623

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

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

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

DATED: OCT 21 2020
o: 10/8/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

KINDER, TONYA A
Employee/Petitioner

Case# **18WC023092**

ST OF IL-MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

20IWCC0623

On 1/17/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4689 HASSAKIS & HASSAKIS PC
JAMES A HUMBRECHT
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MT VERNON, IL 62864

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

JAN 17 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0623

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

Tonya A. Kinder
Employee/Petitioner

v.

State of Illinois-Murray Developmental Center
Employer/Respondent

Case # 18 WC 023092

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Edward Lee, Arbitrator of the Commission, in the city of Mt. Vernon, on October 11, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Has Petitioner exceeded her choice of treaters?

FINDINGS

On the date of accident, May 7, 2018, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being related to her left shoulder ***is*** causally related to the accident of May 7, 2018.

In the year preceding the injury, Petitioner earned $40,605.75 (including regular earnings of $33,235.66 at her regular rate and $7,370.10 in overtime earnings at her straight-time rate); the average weekly wage was $780.80.

On the date of accident, Petitioner was 47 years of age, with 0 dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit for all TTD paid at the lower calculated AWW ($639.15) and shall pay to Petitioner underpaid TTD representing the difference between TTD payments under Respondent's AWW of $639.15 and Petitioner's calculated AWW of $780.80.

ORDER

In light of the Arbitrator's finding on the issue of causation and prospective medical care, Respondent shall authorize and pay for the surgery recommended by Dr. George A. Paletta.

Respondent shall pay the reasonable, necessary, related and outstanding charges pursuant to the Illinois' Workers Compensation Fee Schedule.

Respondent shall pay underpaid TTD benefits to Petitioner based on the Arbitrator's finding that Petitioner's AWW at the time of injury $780.80.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

1/16/20
Date

ICArbDec19(b)

JAN 17 2020

STATEMENT OF FACTS

Petitioner, Tonya A. Kinder, filed her Application for Adjustment of Claim alleging she sustained injuries to her neck, thumb, back, neck, hip and shoulder while employed with Respondent on May 7, 2018. For the purpose of this 19(b) the only medical in issue is Petitioner's injury to her left shoulder. At the time of the injury, Petitioner had been employed with the Murray Center for approximately 4 1/2 years and was assigned to Fir cottage. Petitioner testified that her job duties required her to care for the residents of Murray Center, including all aspects of daily living.

On the date of the occurrence, Petitioner was assisting an ambulatory resident with diapering in the shower area when the resident began to fall backwards. At the time, both Petitioner and the resident were standing. As the resident began to fall, Petitioner reached out to grab the patient to break her fall and was able to ease the resident's fall. Both individuals fell to the ground with Petitioner landing onto her left-side. Petitioner described the flooring as a concrete floor. A co-worker, Cassie Belcher, came into the shower area and assisted. The resident was not injured in the fall, but Petitioner had a number of complaints immediately following the incident.

On the date of the occurrence Petitioner was assessed by an onsite nurse. The nursing note describes that Petitioner had complaints of, "tightness in mid back and neck, headache & pain in left shoulder." (Px. 8). That same day, Petitioner was assessed at the SSM Health Express Clinic by Donna Jewell, APRN-CNP. Ms. Jewell noted the mechanism of injury and onset of pain. She recorded that Petitioner had immediate pain in her neck and thumb and that since the incident her left shoulder pain had worsened/stiffened. (Px. 3). The physical examination revealed a positive drop arm test and empty can test on Petitioner. (Px. 3). Petitioner was provided with muscle relaxers and anti-inflammatory medications. She was taken off-work and instructed to follow-up on May 11, 2018. (Px. 3).

Petitioner's incident report that she authored was also placed into evidence which noted her mechanism of injury and body parts that were impacted. (Px. 8).

At her return appointment with Ms. Jewell on May 11, 2018, Petitioner noted she had been taking her medication with minimal relief. She again had pain with passive forward flexion greater than 90 degrees. Petitioner was eager to see an orthopedic specialist as she had concerns about her symptoms. She was advised she was unable to see an orthopedic surgeon until her MRI was completed. In light of the continued complaints and pain, Ms. Jewell recommended an MRI of the left shoulder. Petitioner was provided with Norco for the pain. (Px. 3).

As of May 16, 2018, Ms. Jewell reported that Petitioner continued to have pain and reduced range of motion in her left shoulder. The previously ordered MRI had not been approved as of that date. In addition to the MRI, Petitioner was provided with an order to initiate physical therapy which was focused on her spinal complaints. She was instructed to return on May 30, 2018. (Px. 3).

Petitioner's MRI of her left shoulder was authorized and performed on May 24, 2018. (Px. 3). The radiologist's interpretation was, "full thickness tear at the anterior margin of the supraspinatus tendon at its insertion. Subacromial-subdeltoid bursal fluid noted. No evidence of labral tear. Hypertrophic changes at the AC joint space." (Px. 3 & 5)

At her follow-up appointment on May 30, 2018, Ms. Jewell reviewed Petitioner's MRI results of her left shoulder. Upon review of the same, Ms. Jewell referred Petitioner for an evaluation with an orthopedic specialist, Dr. Craig Beyer. (Px. 3).

Petitioner was assessed by Dr. Beyer on June 14, 2018 related to her left shoulder and left thumb. He reported a history of the injury and her care to date. Dr. Beyer noted her shoulder pain was subacromial and upper arm in nature and was increased with overhead activity. Physical examination revealed intact range of motion but she demonstrated positive Neer and Hawkin's testing as well as a positive adduction test. Dr. Beyer's impression of the MRI noted reactive changes at the greater tuberosity with supraspinatus compromise. (Px. 4). His note reflects that he believed Petitioner had a longstanding inflammatory condition that was asymptomatic and that the injury had aggravated that inflammatory condition. (Px. 4). Dr. Beyer recommended a rehab program and a subacromial injection which was performed on June 14, 2018. Petitioner was instructed to follow-up in 6 weeks. (Px. 4).

At her June 22, 2018 physical therapy appointment, she was provided the beginning of phase 2 for her home exercise program related to her shoulder that involved pulley, cane and isometrics. (Px. 5, p. 137). It was noted she would need to be assessed by "Brent." On June 26, 2018, Petitioner had her physical therapy evaluation related to her left shoulder with Brent Swartzlander, PT. (Px. 5, 143-144) He noted pain levels ranging from 1 to 8 to Petitioner's left shoulder. Petitioner's physical assessment by the therapist documented decreased range of motion, decreased strength and positive impingement signs. His treatment plan included continuing the phase 2 protocol previously initiated on June 22, 2018. (Px. 5, pp. 143-144).

Petitioner elected to pursue care with a different orthopedic doctor. She testified that she simply did not like Dr. Beyer's bedside manner and found him to be condescending. On July 9, 2018, Petitioner was assessed by Dr. George A. Paletta at the Orthopedic Center of St. Louis. She reported a consistent mechanism of injury and history of treatment to Dr. Paletta. She reported ongoing pain related to her left shoulder since the incident. She noted the injection provided little relief. As of the date of Dr. Paletta's evaluation Petitioner was working light-duty. Her physical examination revealed painful range of motion to her left shoulder. She had 5-/5 testing to her supraspinatus with pain on resisted manual testing. Positive impingement signs were noted. Her O'Brien's sign was positive for pain in both the thumbs up and thumbs down position. Dr. Paletta personally reviewed her May 24, 2018 MRI which he interpreted to reveal evidence of a full thickness tear of the supraspinatus with minimal retraction and fluid in the subacromial space. His impression was full thickness tear of her supraspinatus tendon. He commented that it appeared to be a recent or acute injury as there was no significant retraction and no atrophy of the supraspinatus muscle belly. (Px. 2).

Dr. Paletta noted it was his opinion that the left shoulder condition is causally related to Petitioner's injury on May 7, 2018. He commented that the mechanism of injury with sudden onset of symptoms would be consistent with a rotator cuff tear. Her MRI revealed a tear which appeared recent and acute. In light of the lack of improvement in her symptoms and the full thickness tear, he recommended she consider surgical repair. He continued her restrictions. (Px. 2).

Petitioner was seen for an IME related to her left shoulder with Dr. Michael Nogalski. Dr. Nogalski opined that the findings on the MRI were longstanding inflammatory processes. His written report

alleged that Petitioner's mechanism of injury was not well defined, that she misrepresented that she had therapy and that physical abuse from a male may be the cause of her many complaints. He also opined that he did not appreciate the full thickness tear identified by the radiologist and Dr. Paletta. He believed Petitioner was not at MMI and that she required further rehabilitation and consideration of an injection into her AC joint.

Dr. Nogalski's testimony was placed into evidence via his evidence deposition. On direct examination, Dr. Nogalski opined consistent with his IME report. He reported his review of Petitioner's MRI demonstrated long-standing changes, but also noted in regards to her supraspinatus that there was "incomplete attachment of the rotator cuff on the bursal side of the supraspinatus insertion, but I did not see a full thickness tear." (Rx. 5, p. 13:204). Dr. Nogalski also claimed that the examination by Dr. Beyer in June, 2018 documented "solid shoulder findings and function." (Rx. 5, p. 17). This is at odds with Dr. Beyer's own treatment note in which Dr. Nogalski conceded on cross-examination documented positive Neer and a positive Hawkins testing. (Rx. 5, p. 23). Dr. Nogalski also alleged that Petitioner made a number of representations at the time of her IME that he found to be untrue. Specifically, he stated that Petitioner "represented she had therapy when she apparently did not." (Rx. 5, p. 29). When questioned about whether he had records from June, 2018, he advised he did not. (Rx. 5, 32-33) There is no question Petitioner was assessed for and provided instructions on an HEP related to her left shoulder. Dr. Nogalski's claim is wrong. (Rx. 5, p. 34) (Px. 5, p. 137, 143-144) He claimed Petitioner misled him by stating that there was a witness when there was not. (Rx. 5, p. 29-30). However, clearly Ms. Belcher was a post-occurrence witness to the incident and confirmed that the resident was on the ground. (Rx. 5, 30-33) Dr. Nogalski also alleged that Petitioner suffering a black eye on July 20, 2018 following a physical assault also included medical records that documented an injury to her left shoulder on 7/20/18. However, in reviewing that record during testimony, he conceded his report was wrong and that there was no injury to the left shoulder on 7/20/18. (Rx. 5, p. 37-38)

Dr. Nogalski's testimony is clear that despite what he authored in his IME report, Petitioner's history and mechanism of injury was consistent throughout the medical records. There was a post-occurrence witness to the incident in Ms. Belcher. Petitioner did undergo physical therapy despite Dr. Nogalski's assertion to the contrary. Petitioner's medical records from July 20, 2018 do not support any type of injury to her left arm, despite Dr. Nogalski's assertion that they did in his report.

Dr. Paletta's testimony was presented as well via evidence deposition. Dr. Paletta testified that he evaluated Petitioner on July 9, 2018 related to her left shoulder. (Px. 1, p. 7) He testified that Petitioner provided him with an onset of her symptoms and a history of the mechanism of injury which was consistent with all prior medical records. (Px. 1, p. 7-8) Dr. Paletta personally reviewed the MRI of Petitioner's left shoulder and found that it showed a full thickness tear of her rotator cuff consistent with the radiologist's interpretation. He noted several findings on the MRI which he felt helped confirm that the rotator cuff tear identified on the MRI was recent. Specifically, he opined that the MRI revealed minimal retraction which is an indication that the tear to her supraspinatus was a more recent tear, not longstanding. (Px. 1, p. 12-14) Similarly, Dr. Paletta noted that there was no atrophy of the supraspinatus muscle belly which was an indication it was a more recent tear. Typically, in longstanding tears the muscle fibers are replaced with fatty tissues and that was not the case with Petitioner. Dr. Paletta opined that the treatment to date had been reasonable and necessary. (Px. 1, p. 15-16)

Dr. Paletta testified that her physical examination was positive for pain with motion. She had evidence of dyskinesia which meant her motion patterns were not entirely normal. She had pain and weakness when specifically isolating and testing Petitioner's supraspinatus (the tendon identified on MRI as being torn). He identified positive impingement signs at the time of examination. She also had positive O'Brien's testing which is confirmatory for rotator cuff pathology. She had no tenderness over her AC joint. Dr. Paletta noted that a positive O'Brien's test can identify AC joint pain, however that typically only happens with thumb up position. Petitioner had findings both thumb up and thumb down. (Px. 1, p. 11-12)

He also testified that the mechanism of injury was consistent with causing a rotator cuff tear. He noted that reaching out trying to stabilize a heavier individual with both people falling to the ground certainly can create the forces necessary to cause a rotator cuff tear. (Px. 1, p. 22) He believed that Petitioner through rest, restrictions, an injection, home therapy, steroids and other medications had underwent appropriate conservative treatment related to her left shoulder. (Px. 1, p. 34-35)

Dr. Paletta opined that in light of her subjective complaint, findings upon objective examination, her MRI and the mechanism of injury surgery was appropriate. (Px. 1, p. 18-19) He opined that due to the nature of the tear and its acuteness there was a low likelihood Petitioner's symptoms would spontaneously resolve. When asked, about spontaneous healing, he stated, "[t]he one thing that every provider could probably say with certainty is that a full thickness rotator cuff tear will not heal spontaneously on its own." (Px. 1, p. 23:20-23). Dr. Paletta opined to a reasonable degree of medical certainty that the rotator cuff tear was causally related to her incident on May 7, 2018 and that surgery to repair the tear was reasonable and necessary.

The issue of Petitioner's earnings and AWW calculation were put into dispute with Respondent alleging an AWW of $639.15 and Petitioner alleging an AWW of $780.80. On this issue, Petitioner testified that at Murray Center overtime is mandated, but that the employees, including herself, would volunteer for overtime to control the shift they worked the mandated overtime under. This was to avoid being assigned overtime during shifts that Petitioner typically would not work. Petitioner's testimony was that the vast majority of her overtime that she "volunteered" for was because it was otherwise going to be mandated to her. Submitted into evidence was a copy of Petitioner's regular and overtime hours earned in the 24 pay periods leading up to her incident. In those 24 pay periods, 21 of the 24 pay periods revealed Petitioner worked overtime.

Respondent's witness initially testified that Petitioner only worked 67 overtime hours in the 52 weeks before her accident with 50 hours being labeled as "voluntary" and 17 hours being labeled as "mandatory." On cross examination it became clear that Respondent's witness was wrong about the hours of overtime Petitioner worked. On redirect, Respondent's witness stated she was mistaken in her testimony on direct. She clarified that Petitioner worked 67 shifts which included overtime with 50 days being labeled as "voluntary" and 17 days labeled as "mandatory" internally. Respondent's witness confirmed Petitioner's testimony, specifically, that Murray Center employees are mandated overtime. She also confirmed Petitioner's testimony that employees at Murray volunteer for overtime to avoid being placed on a shift other than their regular shift for working overtime. Based on Petitioner and Respondent's witnesses testimony, there does not appear to be documentation inside Murray Center that

would show whether overtime hours designated as "voluntary" were volunteered for because they would have been mandated.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner's current condition of ill-being to her left shoulder is causally related to the work accident of May 7, 2018. Petitioner testified credibly and the record supports that Petitioner had an incident on May 7, 2018 that led to immediate complaints related to the left shoulder that persist as of the time of trial. On the date of the injury, Petitioner was assessed by an on-site nurse and then was sent to SSM Express Clinic. Both of those providers documented the mechanism of injury and the complaints referable to the left shoulder. Similarly, their physical examinations were positive for left shoulder dysfunction. The contemporaneous incident reports authored by Petitioner as well as Respondent's personnel all provide consistent histories of the incident and document that Petitioner had left shoulder problems following the incident. (Px. 8). The physical examinations by Ms. Jewell, Dr. Craig Beyer and Dr. Paletta all confirmed positive clinical findings. Petitioner's MRI on May 24, 2018, as interpreted by the radiologist and Dr. Paletta, identified a full thickness tear to her supraspinatus. Dr. Beyer appreciated more tendiopathic changes and went on to opine that Petitioner aggravated a preexisting condition. Similarly, Dr. Paletta, while maintaining that he believed Petitioner tore her supraspinatus on May 7, 2018, opined that if there were longstanding changes as stated by Dr. Nogalski (which Dr. Paletta did not appreciate upon his review of the MRI), the incident on May 7, 2018 aggravated her underlying preexisting condition. (Px. 1, p. 33-34)

In light of the immediate onset of symptoms, the clear documented mechanism of injury, the findings upon numerous clinical examinations by multiple providers and the findings on the MRI, the Arbitrator finds that Petitioner's current state of ill-being of her left shoulder is causally related to the incident on May 7, 2018.

WITH RESPECT TO ISSUE (G), WHAT WERE PETITIONER'S EARNINGS/PETITIONER'S AWW, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that Petitioner's earnings in the 52 weeks preceding the injury were $40,605.75 ($33,235.66 in regular earnings and $7,370.10 in overtime at her straight-time rate). Petitioner alleges and AWW of $780.80 (including overtime at Petitioner's straight-time rate) and Respondent (excluding overtime into its AWW calculation), alleges an AWW of $639.15.

Petitioner's testimony was clear in that she "volunteered" for overtime to avoid being mandated shifts that were different from regularly scheduled shifts. Respondent's witness confirmed that Petitioner's testimony regarding employees volunteering for overtime that would otherwise be mandated is a regular practice at Murray Center. Respondent's witness also confirmed that overtime was in fact mandated at Murray Center. Respondent's witness also confirmed that of the 67 times in which Petitioner worked overtime 17 of those were labeled as "mandatory" and the other 50 were labeled as "voluntary." In reviewing Petitioner's Exhibit 9, the Arbitrator notes that Petitioner's paystubs confirm that Petitioner's overtime was regular and continuous throughout her employment as 21 out of her 24 pay periods demonstrated overtime earnings.

In *Quick v. Murray Center*, 14 IL.W.C. 7597 (Ill.Indus.Com'n); 18 I.W.C.C. 0139, 2018 WL 1784869)(2018), the Commission was faced with similar testimony and proof regarding Petitioner's overtime at the Murray Center. In *Quick*, Petitioner alleged an AWW of $1,291.19 and Respondent $774.03. The Commission affirmed and adopted the Arbitrator's finding on this point and included Petitioner's overtime in its AWW wage calculation.

Without question, Petitioner has the burden of proof by a preponderance of the evidence. The Arbitrator notes that a "preponderance of the evidence" does not require absolute certainty, rather that the proposition to be proved was more probable than not. Given the testimony of Petitioner, the testimony of Respondent's witness and the amount of overtime, Petitioner was documented to have worked in the 52 weeks preceding her injury (see Px. 9), like the Commission's decision in *Quick*, the Arbitrator finds Petitioner's overtime be included in her AWW (at her straight-time rate) and that Petitioner's AWW was $780.80.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds based on the opinions of Dr. Nogalski in his IME report and Dr. Paletta during his testimony that the entirety of Petitioner's treatment related to her left shoulder to date has been reasonable and necessary. Based on this, the Arbitrator finds that Petitioner is entitled to payment of her medical bills that relate to the treatment submitted into evidence pursuant to Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (L), IS PETITIONER ENTITLED TO UNDERPAID TTD, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the Arbitrator's findings in regards to Petitioner's AWW, the Arbitrator notes the parties stipulated that in the event the Arbitrator awards a higher AWW figure, Respondent is to pay the underpaid benefits owed and due based on the difference in what was paid over the course of the claim and what should have been paid. To the extent Petitioner is entitled to ongoing TTD, Respondent shall pay TTD at a weekly rate of $520.79 and pay the underpaid benefits to Petitioner.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the conclusion on the issue of causation and Petitioner's ongoing complaints, the Arbitrator finds that Petitioner is entitled to further treatment as a result of her work-related injuries. Accordingly, Respondent shall authorize and pay for the arthroscopic surgery recommended by Dr. Paletta.

WITH RESPECT TO ISSUE (O), HAS THE PETITIONER EXCEEDED HER CHOICE OF TREATERS? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds SSM Health Express Clinic was Respondent's choice. Therefore, Petitioner has not exceeded her choice or treaters and is entitled to the treatment recommended by Dr. Paletta.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cindy McDanel,

Petitioner,

vs. NO: 19 WC 7028

Metrolink,

20IWCC0624

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, Respondent's entitlement to §8(j) credit by stipulation, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

20 IWCC0624

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 23 2020
TJT:yl
o 10/6/20
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
CORRECTED

McDANEL, CINDY
Employee/Petitioner

Case# **19WC007028**

METROLINK
Employer/Respondent

20IWCC0624

On 12/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0307 ELFENBAUM EVERS & AMARILIO
KAROLINA M ZIELINSKA
900 W JACKSON BLVD SUITE 3E
CHICAGO, IL 60607

0075 POWER & CRONIN LTD
LLOYD R McCUMBER
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

20 IWCC0624

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Cindy McDanel
Employee/Petitioner

v.

Metrolink
Employer/Respondent

Case # **19** WC **7028**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Rock Island**, on **10/07/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **01/25/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**55,465.80**; the average weekly wage was $**1,066.65**.

On the date of accident, Petitioner was **60** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit for medical expenses paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**711.10** / week for **26 5/7** weeks, commencing **04/04/2019** through **10/07/2019** as provided in Section 8(b) of the Act.

Respondent shall pay directly to Petitioner reasonable and necessary medical services of **$92,517.65**, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Medical expenses awarded are subject to the parties' stipulation regarding the applicability of Respondent's credit for medical expenses paid by Respondent's group health plan pursuant to Section 8(j) of the Act.

Respondent shall authorize and pay for reasonable and necessary post-operative care as prescribed by Dr. Hurbanek including Petitioner's physical therapy.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Gerald Granada

12/2/19
Date

20IWCC0624

FINDINGS OF FACT

This case involves Petitioner Cindy McDanel, who alleges injuries sustained while working for Respondent Metrolink on January 25, 2019. Respondent disputes Petitioner's claims with the following issues in dispute: 1) accident; 2) causation; 3) medical expenses; 4) TTD; and 5) prospective medical care.

Petitioner worked for Respondent for over ten years, starting on March 10, 2008. She had always been employed as a transit operator/bus driver for Respondent. Her job was to operate buses and she was assigned various routes and various buses throughout her career. She testified that on January 25, 2019, it was very cold at negative 27 degrees, with temperatures below zero for approximately two weeks prior to the alleged accident date. Petitioner was assigned route 70 which began at Centre Station in Moline, Illinois and involved a lot of turns. Petitioner testified that as soon as she pulled away from the platform at Centre Station with bus number 0217, she could tell the bus was very difficult to steer. By the time she got around to River Drive on her route, she knew there was something wrong with the steering. Petitioner called dispatch, advised them of the problem with steering, and asked for a bus trade.

Petitioner testified that the steering wheel was very resistant and stiff. She explained that she had to use a lot of force to turn the wheels and she knew that something was not right. Dispatch advised her that they would see what they could do about a bus trade and she continued her normal route with the same bus (bus number 0217). During her first complete run, while turning the wheel, Petitioner experienced a sharp, burning pain in the top of her right arm. She immediately lost all strength in her right arm and had to use her left arm instead to push down and deploy the air brake. Although Petitioner had a prior surgery on her left shoulder and had received an injection once for her right shoulder, she testified she had never before experienced the type of pain in her right shoulder that she sustained on January 25, 2019. Petitioner tried to finish her first complete run because she had passengers on board. When she came back to Centre Station, she was given a new bus with better steering so she finished the rest of her shift that day. Since her shift ended at 9:30pm, she went home that night, took ibuprofen, and iced her arm but her pain did not resolve.

When she woke up the next day on Saturday, January 26, 2019, her right shoulder was still hurting with burning pain, a gnawing ache, instability, and loss of strength. Knowing that on Saturdays she would be assigned a newer bus with easier steering, Petitioner reported to work. She was unable to complete her shift, however, even with the newer bus. At that point, Petitioner called her supervisor, Leon Lacy, to report her injury and she went to the district office to fill out an accident report. Petitioner was not scheduled to work for the next three days (Sunday, Monday and Tuesday). She tried to get in to see a doctor and called Dr. Mendel who previously operated on her left shoulder. When she told the doctor's office that she was injured at work, they told her they could not see her.

On March 1, 2019, Petitioner presented to Dr. Hurbanek. The medical records indicate that Petitioner was driving a bus on Jan 25, 2019, and due to the cold weather, the steering box had frozen up and she had to drive the bus for an hour and a half without any steering. Her right shoulder started bothering her and it has been progressively getting worse over time. Her pain is localized to the lateral aspect of the shoulder. Aggravating factors include: putting coat and clothes on, reaching above shoulder left and behind her back. She notes that she has stiffness in the shoulder. She has not had any treatment to date. On exam, Petitioner indicated positive for Neer's impingement, Hawkins impingement, Empty can, Speed's and Yergason's testing. Dr. Hurbanek ordered an MRI of the right shoulder. Petitioner was allowed to return to work pending the MRI. (Petitioner's

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Exhibit "Px" 2, pp. 5-8).

On March 11, 2019, Petitioner presented to Metro MRI Center in Moline, Illinois for an MRI of the right shoulder. There was no comparison imaging to review, as Petitioner had never undergone a right shoulder MRI prior to this injury. The radiologist, Dr. John A. Swanson, noted findings including "Full-thickness tear of the distal supraspinatus anteriorly. Partial thickness bursal surface tear of the distal infraspinatus. Intra-articular loose body. Severe degenerative changes. Possible labral tear anteriorly." (Px 2, pp. 9-10).

On April 4, 2019, Petitioner returned to Dr. Hurbanek for a follow up post MRI. Petitioner reported her right shoulder pain had worsened since her initial visit and she could barely tolerate driving. She noted more pain and weakness as well. Following his review of the MRI and physical exam, Dr. Hurbanek recommended total shoulder replacement surgery due to the rotator cuff tear and arthritis. Petitioner wished to proceed with surgery and Dr. Hurbanek took Petitioner off work pending surgery. (Px 2, pp. 14-16). Petitioner did not receive any TTD benefits from Respondent or its insurance carrier.

On April 5, 2019, Petitioner presented to Respondent's Section 12 examiner, Dr. Stephen F. Weiss. While Dr. Weiss agreed with Dr. Hurbanek's diagnosis and treatment plan, he opined that Petitioner's accident was not causally related to her right shoulder condition. (Rx 12).

As surgery was denied by workers' compensation, Petitioner proceeded with treatment using her own group insurance. (Px 5).

On June 27, 2019, Petitioner returned to Dr. Hurbanek for pre-operative clearance. She remained off work per Dr. Hurbanek pending surgery. (Px 2, pp. 21-23).

Petitioner underwent a successful right total shoulder replacement on July 24, 2019 and she was kept off work post-operatively. (Px 3 and Px 2, pp. 24-26).

On August 15, 2019, Petitioner followed up with Dr. Hurbanek for her first post-operative check-up. Her implant was in excellent position and her incision was healing well. She was kept off work and told to start therapy. (Px 2, pp. 27-29).

Petitioner started post-operative therapy on August 22, 2019 at Rock Valley Physical Therapy in Geneseo, Illinois. (Px 4).

Petitioner's last follow up with Dr. Hurbanek prior to the Arbitration hearing was on September 19, 2019. Petitioner noted some deep aching in her right arm, but reported she was using her right arm more. Dr. Hurbanek ordered additional therapy and kept Petitioner off work. (Px 2, pp. 36-38).

Petitioner has never received any benefits from workers' compensation or the Illinois Public Risk Fund. (Tr. 39). She continues treatment using her own private insurance. Petitioner testified that surgery has helped her and she feels improvements in her right shoulder. She no longer has a burning, stinging pain and she can tell her strength is coming back. She remains under the medical care of Dr. Hurbanek and also attends physical therapy twice a week, which she testified is helping her.

Testimony of Section 12 Examiner, Dr. Stephen F. Weiss

Dr. Weiss testified on July 30, 2019 via evidence deposition. Dr. Weiss drafted one report and only examined Petitioner on one occasion, April 5, 2019. (Rx 12, p. 7, Exh 2). Dr. Weiss opined that Petitioner's symptoms following her January 25, 2019 accident "represented a manifestation of her significant, pre-existing condition and cannot be considered a new injury." (Px 12, Exh 2, p. 7). Dr. Weiss relied on his understanding of the mechanism of injury and Petitioner's treatment prior to her January 25, 2019 accident (exclusively a right shoulder injection).

Dr. Weiss testified that he does not believe driving the bus with a frozen steering wheel on January 25, 2019 accelerated Petitioner's right shoulder condition because he believed Petitioner's driving duties were done at waist to chest height and not in a position to damage her rotator cuff. (Rx 12, pp. 19, 23). Dr. Weiss testified that steering wheels are in front of the driver and not overhead. He did not discuss with Petitioner how much force was necessary to move the steering wheel. (Rx 12, pp. 23-24).

With respect to Petitioner's treatment prior to her work injury on January 25, 2019, Dr. Weiss reviewed two treatment notes which included a November 28, 2018 office note from Dr. Camilla Frederick at Quad City Occupational Health where Petitioner presented for a Fit for Duty evaluation. Petitioner reported intermittent pain in her upper arms that was made worse by a full day of work driving the larger buses. (Rx 1, p. 1). Petitioner reported to Dr. Frederick that she was seeing a chiropractor for her neck and low back, who thought she had fibromyalgia. Dr. Frederick's records include a chart review from Petitioner's chiropractor, Dr. Rexroth. The chart review documents Petitioner's prior left shoulder surgery in February 2014 and documents Petitioner's various complaints such as headaches and pain to her right arm, neck, low back, right hip and hands. (Rx 1, pp. 3-4). Dr. Frederick performed a physical examination of Petitioner's thoracic, lumbar and cervical spine; shoulders, upper extremities and hips. For the right shoulder, Petitioner demonstrated full strength; normal range of motion; and negative crossover, Neer's, Yergason's and Hawkin's tests. (Rx 1, p. 5). Dr. Frederick noted his agreement with Dr. Rexroth that Petitioner may have fibromyalgia and recommended an MRI for her cervical spine as well as lab work up by her primary doctor. Petitioner was cleared to regular duty work. (Rx 1, p. 6).

Dr. Weiss also reviewed an October 31, 2018 letter from Dr. Rexroth noting Petitioner's difficulty with larger steering wheels at work as they result in intense arm and shoulder pain. (Rx 7, Exh 2; Px 6, p. 1).

During the Section 12 examination, Petitioner reported to Dr. Weiss that she had left shoulder surgery in 2014 with Dr. Tuvi Mendel from Orthopaedic Specialists and that she underwent an unsuccessful right shoulder injection in late 2018. Dr. Weiss writes in his report that he did not have access to Dr. Mendel's medical records. (Rx 7, Exh 2, p. 2). Although Dr. Weiss did not review Dr. Mendel's records prior to forming his opinions or testifying, they were admitted into evidence at hearing by Petitioner. (See Px 6).

Dr. Mendel's records show that Petitioner first presented to him in early February 2014 for her left shoulder and underwent a rotator cuff repair soon after on February 25, 2014. (Px 6, pp. 30, 36) She continued post-operative care for her left shoulder and there is no documentation of her right upper extremity with Dr. Mendel until November 7, 2016 when she reported locking in both biceps and stiffness in both shoulders. Physical examination showed full strength and Dr. Mendel stated Petitioner had normal range of motion in the right

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shoulder. Dr. Mendel assessed Petitioner for bilateral moderate shoulder degenerative changes with possible overlapping neck issues. Dr. Mendel gave Petitioner a glenohumeral injection on the left shoulder and possible treatment options included physical therapy, an MR arthrogram and further injections. (Px 6, pp. 22-24).

Petitioner returned to Dr. Mendel for additional treatment for the left shoulder including an MR arthrogram (showing a small re-tear of the rotator cuff) and a subacromial injection (Px 6, pp. 19-20). She complained of bilateral bicep and trapezius pain. (Px 6, p. 13). Petitioner did not receive any treatment with Dr. Mendel for the right shoulder until November 12, 2018 in which she reported bilateral shoulder pain (left greater than right). Having already given Petitioner two unsuccessful injections in the left shoulder, Dr. Mendel recommended an MRI for the left shoulder and for the cervical spine. For the right shoulder, Dr. Mendel administered a subacrominal injection for impingement syndrome. No follow up care was recommended for the right shoulder. (Px 6, pp. 15-18). Petitioner's last visit with Dr. Mendel was January 7, 2019 in which Petitioner complained of bilateral bicep pain (left worse than right) with radiating pain into her clavicle. Dr. Mendel administered a left shoulder injection and referred Petitioner to a cervical specialist. (Px 6, pp. 10-11).

Despite not being provided Dr. Mendel's treatment notes, Dr. Weiss testified that his opinions refuting causation are based on Petitioner's right shoulder injection in 2018 as it showed that "there's something going on." (Rx 12, p. 10). Dr. Weiss further testified that cortisone injections reduce inflammation but damage the tendons and articular cartilage. (Rx 12, pp. 9-10). Petitioner never had an order for an MRI of the right shoulder until after the work accident in January 2019. Dr. Weiss agreed that an MRI would have been ordered if there were positive test results on physical examination so that a rotator cuff tear could be ruled out. (See Rx 12, pp. 12-14).

Dr. Weiss agreed that two months prior to the January 25, 2019 work injury, Petitioner had a normal right shoulder exam when she saw Dr. Frederick on November 28, 2018 (Rx 12, pp. 17-18). Although Petitioner informed Dr. Weiss that the injection was not successful, he believed Petitioner's exam was normal on November 28, 2018 because the cortisone shot suppressed Petitioner's symptoms. (Rx 12, p. 22).

Regarding Petitioner's post work accident treatment, Dr. Weiss agreed that Petitioner's MRI revealed full thickness tearing of the distal supraspinatus, a partial thickness bursal surface tear of the distal infraspinatus, severe degenerative changes and a possible labral tear. (Rx 12, p. 19; see Px 2, pp. 9-19). Dr. Weiss also agreed that Petitioner needed surgery. (Rx 12, Exh 2, p. 8).

Testimony of Treating Orthopedic Surgeon, Dr. Jason Hurbanek

Dr. Hurbanek testified via evidence deposition on July 18, 2019. Dr. Hurbanek is an orthopedic surgeon with a certificate of added qualification in sports medicine. Approximately 50% of his practice relates to the treatment of the upper extremities/shoulders. He performs approximately 200 shoulder surgeries per year. Dr. Hurbanek does not perform any Independent Medical Examinations. (Px 1, pp. 5-6).

Dr. Hurbanek testified that Petitioner reported driving a bus on January 25, 2019 when the steering box froze due to cold weather making steering difficult as she continued to drive the bus for an hour and a half. Dr. Hurbanek explained that as a bus driver, Petitioner was required to drive a bus with a large steering wheel requiring a lot of reaching to turn the wheel. (Px 1, p. 7). Dr. Hurbanek opined that the January 25, 2019

accident aggravated Petitioner's pre-existing arthritis and quite possibly caused the rotator cuff tear as the rotator cuff tear was the result of a specific trauma at a specific point in time and that the mechanism of injury was viable for causing a rotator cuff tear. (Px 1, pp. 15-16, 22-23). Although Petitioner did not report a popping, Dr. Hurbanek explained that "a large steering wheel on a bus that requires significant force to turn that wheel with an outstretched arm, whether it's pushing or pulling or laterally moving the arm right or left, to me, that puts a lot of strain and stress on the rotator cuff, particularly if it's frozen or difficult to steer." (Px 1, pp. 16, 20).

Dr. Hurbanek explained that if Petitioner had a rotator cuff tear prior to her work accident, she should have had a specific complaint while steering the buses. He testified that patients with rotator cuff tears typically exhibit pain around the rounded part of their shoulders that sometimes radiates to the upper arm bone. (Px 1, p. 16).

While Dr. Hurbanek did not review any medical records prior to Petitioner's work accident, he was aware of Petitioner's left shoulder surgery and did not find that relevant to his opinions regarding the right shoulder. Dr. Hurbanek did not review Dr. Weiss' IME report and learned about Petitioner's right shoulder history prior to the deposition. (Px 1, pp. 18, 22).

Dr. Hurbanek testified that Petitioner's need for a shoulder replacement was causally related to her work activities and the incident of January 25, 2019 explaining that a rotator cuff repair was not the best surgical procedure given the amount of arthritis in the shoulder. (Px 1, pp. 13, 16).

Steering Issues on Bus Number 0217

Multiple witnesses testified at trial regarding the condition of buses. Two bus drivers, Christy DeLapo and Rhonda Bernal, testified on behalf of Petitioner while Veronica Griffin (a bus driver), William Sean Bateman (a mechanic), Matthew Simaytis (director of maintenance), and Donald Krueger (risk manager) testified on behalf of Respondent.

Petitioner (bus driver)

On January 25, 2019, Petitioner was assigned bus number 0217, a 17-year-old bus that was manufactured in 2002. Petitioner explained that the first two numbers of a bus represent the year it was manufactured or built (in this case 2002) and that the following numbers represent the number in that line of buses. Petitioner testified that bus number 0217 was really old and that the seats were in bad shape. Petitioner also provided and testified about photographs of bus number 0217 showing the driver's area and fare box (Px 7), the bus seat (Px 9), and the steering wheel (Px 8). Petitioner confirmed that the photographs were a true and accurate depiction of bus number 0217 when Petitioner drove it on January 25, 2019. Petitioner described the steering wheel at trial. She testified that it was a 20-inch steering wheel that was positioned more horizontally to her body than parallel to her body. When operating the bus, her hands would be at 10 o'clock and 2 o'clock with both of her arms almost straight out with only a slight bend at the elbow. When having to make a turn, Petitioner would extend her arms almost straight while rotating her arms to turn the wheel. She would pull down on the steering wheel with one arm while the other arm was outstretched in front of her. Petitioner weighs approximately 125 pounds and is about 5 feet and 1 inch tall. (Px 2, p. 5).

Christy DeLapo (bus driver)

Two bus drivers, Christy DeLapo and Rhonda Bernal, testified on behalf of Petitioner. Ms. DeLapo testified that she has been employed with Respondent for over 10 years as a transit operator/bus driver. Ms. DeLapo drove route 70 just like Petitioner did. She has driven bus number 0217 multiple times especially in January of 2019. Petitioner confirmed that bus number 0217 was 17 years old, extremely old, rusted out and had holes in the seats with no back support. Ms. DeLapo further testified that when it was really cold outside, the steering of bus number 0217 would get really stiff and it felt like you were driving without power steering. Ms. DeLapo confirmed that when the steering gets stiff, more force is required to move it. She stated that you have to use both hands to turn the wheel and you are pushing and pulling in order to turn it. She also explained that you had to use your upper and lower body strength in order to turn the steering wheel when it was stiff. Ms. DeLapo demonstrated how her arms were positioned while steering. Both arms were outstretched at shoulder level at the 10 and 2 o'clock position and one of her arms would help pull the wheel to turn using the hand-over-hand method. Ms. DeLapo stated that she had to call dispatch many times throughout her career to complain about steering wheels freezing up. She specifically recalled contacting dispatch in January of 2019 to get traded for a new bus.

Rhonda Bernal (bus driver)

Rhonda Bernal also testified on behalf of Petitioner. She recently retired from Respondent after working there as a bus driver for 29 years. She also drove route 70 in January of 2019, which she referred to as the "coldest month in history." Ms. Bernal also testified about driving bus number 0217 in the winter months. She testified that the steering wheel would freeze up when it got cold outside and that she would have to stand up and use her foot to prop herself in order to have more upper body strength to turn the bus. Ms. Bernal testified that she also operated the bus by positioning her arms at the 10 and 2 o'clock positions with her arms outstretched.

Veronica Griffin (bus driver)

Veronica Griffin testified on behalf of Respondent. She has been a bus driver for Respondent for 8 years. Ms. Griffin testified that she operated bus number 0217 from approximately 5:30am to 10am on January 25, 2019. Petitioner texted her that morning asking her how cold it was and which bus they were assigned. (Rx 10). Ms. Griffin responded that the bus was old and it was cold out. (Rx 10). Ms. Griffin claimed that she did not notice any problems with the bus prior to starting her shift and that she did not have any problems with steering that day. However, Ms. Griffin admitted on cross-examination that she picked up bus number 0217 at the start of her shift from a heated garage which was temperature controlled, whereas Ms. McDanel picked up bus number 0217 after it had been on the street for 5 hours.

William Sean Bateman (mechanic)

William Sean Bateman testified on behalf of Respondent. He has been employed as a mechanic for Respondent for approximately 18 years. Mr. Bateman was asked how old bus number 0217 was and he replied, "2002." He did not believe the age of the bus had anything to do with its operational condition so long as maintenance was kept up, and he stated it was. Mr. Bateman was called away on January 25, 2019 to do a bus trade for bus number 0217. He was advised in advance that there was a steering issue and he met the driver at Centre Station but did not specifically recall speaking with Petitioner. He checked the bus before driving it back to the garage

and claims he did not notice an issue with steering. He did, however, notice a problem with "a dip in the front." Mr. Bateman testified he did not need to use unusual or excessive force to steer the bus back to the garage. He is 6'5" tall and weighs 277 pounds. When he was back in the garage, Mr. Bateman examined the steering components and found that "the gear box was starting to weep" meaning that it started to leak around the seal. He testified this could eventually become an operation and safety issue so he ordered a steering gear for it but he did not take bus number 0217 out of service because it was not bad enough.

Petitioner testified that she was not sure if Mr. Bateman was the same mechanic that traded her bus on January 25, 2019. She described the individual that took her bus as 6'1"-6'2" tall with longer, curly blond hair and clean shaven. Mr. Bateman is 6'5" tall, 277 pounds with short hair and a full beard. (Tr. 149-150). Petitioner testified she spoke with the mechanic that took her bus and that the mechanic stated the buses have a tendency for the steering boxes to freeze up when it gets cold. (Tr. 151).

Matthew Simaytis (director of maintenance)

Matthew Simaytis testified on behalf of Respondent. He is the director of maintenance and has held the position since 2014. His duties include overseeing the maintenance of the buses and ensuring that the condition of the buses is in order. Mr. Simaytis testified that bus number 0217 is a reliable bus. He checked records going back to January of 2017 regarding steering issues and found none. He has never personally operated a bus on a route. On cross examination, Mr. Simaytis testified that freezing temperatures would not impact the force needed to steer buses in winter months unless there was a problem with the fluids and pumps. He further testified upon questioning by the Arbitrator that the 2002 buses had problems when moisture got into the steering block. He testified that when it was "super, super cold" the grease and moisture got cold and it was harder to steer. He did not think it would be more difficult for him to steer when the wheel froze because he is a bigger guy. While he initially testified that it was the 2002 buses with these issues, he later stated that bus number 0217 was a 2003 bus and not affected.

Donald Krueger (risk manager)

Donald Krueger testified for Respondent and has been employed as the risk manager for over 6 years. He prepared a risk manager's analysis with respect to Petitioner's complaint about steering on bus number 0217 which was introduced into evidence.

CONCLUSIONS OF LAW

With respect to issue "C," whether an accident did occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

After hearing the testimony of Petitioner, lay and expert witnesses, as well as reviewing the exhibits submitted, the Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent. To be compensable under the Act, an injury must arise out of and in the course of the claimant's employment. 820 ILCS 305/2 (2002). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. Accidental injuries sustained on an employer's premises within a reasonable

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time before and after work are generally deemed to arise in the course of the employment. Caterpillar Tractor Co. v. Industrial Com, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 667 (1989). An employee can satisfy the "arising out of" requirement if the risk of injury is connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. There are three categories of risk to which an employee may be exposed: risks distinctly associated with the employment; neutral risks which have no particular employment or personal characteristics; and personal risks. See Caterpillar Tractor Co., 129 Ill. 2d at 58-59; Young v. Illinois Workers' Compensation Comm'n (Doncasters), 2014 IL App (4th). Typically, a risk is distinctly associated with the employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by the employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. See Caterpillar Tractor Co., 129 Ill. 2d at 58.

In the present case, the Petitioner's injury to her right arm arose out of and in the course of her employment for Respondent. There was no evidence presented to rebut Petitioner's description of her mechanism of injury – that she felt pain in her arm while experiencing difficulty in turning the steering wheel of her bus, which she did not believe was properly functioning. Although Respondent presented evidence that might question the mechanical condition of the steering wheel in question, there was sufficient evidence substantiated by a number of the witnesses that the steering wheel of the particular bus Petitioner was driving has had a history of problems. Respondent's witness, Matthew Simaytis confirmed that busses from 2002 had problems when moisture got into the steering block and that when the temperature was cold, it would make it harder to steer the bus. Mechanic William Sean Bateman testified that when he examined the steering section of Petitioner's bus, he noticed the gear box had started to "weep" or leak around the seal. Batemen confirmed that Petitioner's bus 0217 was a 2002 model. Witnesses Christy DeLapo and Rhonda Bernal both testified that they drove bus 0217 and also experienced difficulty with steering when the weather was cold. The Arbitrator finds that preponderance of the evidence supports Petitioner's claim that she sustained an injury due to the difficulty of steering her bus as a result of the cold weather affecting the steering.

The Arbitrator notes that the Petitioner is petite in stature at just slightly over 5 feet tall and weighing approximately 125 lbs. as confirmed in the medical records (see Px 2, p.5). Her job as a bus driver requires her to operate a steering wheel that is 20" in diameter with both arms outstretched horizontally when her hands are at the position of 10 and 2 o'clock. When asked to demonstrate her hand and arm positions during the arbitration hearing, Petitioner had her arms almost at shoulder level as she described how turning the steering wheel would require using her upper body to make any turns. The Arbitrator also viewed the photos of Petitioner's bus seat and steering wheel (Px 7 - 9), which show a seat that is missing a large section of cushioning and a large steering wheel that comports with Petitioner's description of the same. Taking these facts into consideration, it would be reasonably foreseeable to conclude that any difficulty with the bus' steering mechanism would make the act of turning the steering wheel an increased risk of injury for Petitioner.

For the above reasons, the Arbitrator finds that Petitioner has met her burden proving that she sustained an accident on January 25, 2019 that arose out of and in the course of her employment with Respondent.

With respect to issue "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her January 25,

2019 work accident. In support of this finding, the Arbitrator relies on Petitioner's unrebutted testimony and the evidence from her treating medical providers – all of which show that Petitioner sustained an injury to her right arm that resulted in an aggravation of Petitioner's pre-existing arthritis and a rotator cuff tear on the right side. Employers take their employees as they find them. St. Elizabeth's Hosp. v. Workers' Comp. Comm'n (Nichols), 371 Ill. App. 3d 882, 888 (Ill. App. Ct. 5th Dist. 2007). Evidence of a preexisting condition does not prevent recovery if the preexisting condition was aggravated or accelerated by a work-related injury. Tower Auto. v. Ill. Workers' Comp. Comm'n, 407 Ill. App. 3d 427, 434 (Ill. App. Ct. 1st Dist. 2011). The claimant's injury need not be the sole factor which aggravates a preexisting condition, so long as it is a factor which contributes to the disability. International Vermiculite Co. v. Industrial Com., 77 Ill. 2d 1, 3 (Ill. 1979). An employee who suffers a repetitive-trauma injury must meet the same standard of proof as one who suffers a sudden injury. Durand v. Industrial Comm'n (RLI Insurance Co.), 224 Ill. 2d 53, 55, 862 N.E.2d 918, 919 (2006). Further, causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. Gano Electric Contracting v. Industrial Comm'n, 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994).

In the present case, the Arbitrator finds persuasive the opinions of Petitioner's treating physician, Dr. Hurbanek on this issue. Dr. Hurbanek opined that the January 25, 2019 incident described by the Petitioner aggravated any pre-existing arthritis in Petitioner's shoulder and was a viable mechanism for causing Petitioner's rotator cuff tear. He further explained that it would require significant force to turn a large steering wheel on a bus with an outstretched arm that would put a lot of strain and stress on the rotator cuff, particularly if the steering wheel is frozen or difficult to steer. Although Respondent relies on the opinion of its IME, Dr. Weiss on defending its dispute on this issue, it did not appear that Dr. Weiss had clear understanding of the mechanism of Petitioner's injury. Instead, Dr. Weiss focused on Petitioner's prior medical history of arthritis in her shoulder and the injection she received for that condition - upon which he based his opinion that Petitioner's shoulder condition was not related to her alleged work accident. The Arbitrator notes that Dr. Weiss did not address how much force was required for Petitioner to turn the bus steering wheel or how operating a bus steering wheel was much different from operating the steering wheel for a normal car. Dr. Weiss also confirmed that Petitioner's November 18, 2018 right shoulder exam was normal and that there were no MRI's taken of Petitioner's right shoulder until after the January 25, 2019 incident. Petitioner testified that she was working full duty and had no physical limitations to her right arm prior to the January 25, 2019 incident. There was no evidence of Petitioner experiencing any other injuries to her right shoulder or intervening accidents following the January 25, 2019 incident. Based on the preponderance of the medical evidence, the Arbitrator concludes that the Petitioner's current condition of ill-being in her right shoulder is causally related to her January 25, 2019 work accident.

With respect to issue "J," whether the medical services provided to Petitioner are reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Consistent with the Arbitrator's conclusions regarding accident and causation, the Arbitrator further finds that Petitioner's medical care was reasonable and necessary in addressing her work-related right shoulder condition. Following her work accident in January 2019, Petitioner treated with Hinsdale Orthopaedics (Dr. Hurbanek), underwent an MRI at Metro MRI, underwent physical therapy at Rock Valley Physical Therapy and underwent the recommended shoulder replacement with Dr. Hurbanek at the Center for Minimally Invasive Surgery using Anesthesia Management Partner. Dr. Hurbanek testified that Petitioner's need for a shoulder replacement was causally related to her work activities and the incident of January 25, 2019 explaining that simply repairing

Petitioner's rotator cuff tear was not the best surgical procedure given the amount of arthritis in the shoulder. Dr. Weiss did not dispute Petitioner's MRI findings or the need for surgery. Petitioner's exhibit 5 shows medical charges from the date of accident through date of service September 13, 2019. Respondent did not submit any utilization reviews disputing the reasonableness and necessity of said bills. Therefore Respondent is liable for all of Petitioner's medical care and expenses as set forth above and contained in Petitioner's exhibit 5 showing a total invoiced amount of $92,517.65. Respondent shall pay said medical charges pursuant to fee schedule and Section 8a of the Act directly to Petitioner. Medical expenses awarded are subject to the parties' stipulation regarding the applicability of Respondent's credit for medical expenses paid by Respondent's group health plan pursuant to Section 8(j) of the Act.

With respect to issue "K," whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Having awarded Petitioner past medical services including a shoulder replacement, the Arbitrator awards reasonable and necessary prospective post-operative care. The Arbitrator notes that although Respondent's expert, Dr. Weiss, disputed causation, he confirmed that Petitioner needed surgery and was silent as to any post-operative care.

Based on the Arbitrator's prior finding of accident, causal connection and past medical services as described above as well as the medical records and testimony from Dr. Hurbanek and Dr. Weiss, the Arbitrator awards prospective medical care for Petitioner's post-operative treatment including continued physical therapy and related post-operative care as recommended by Dr. Hurbanek.

With regard to issue "L," whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Petitioner alleges 26-5/7 weeks of temporary total disability ("TTD") from April 4, 2019 through date of hearing, October 7, 2019. The medical records show that Petitioner was placed on "off work" status by Dr. Hurbanek as of April 4, 2019 pending her surgery. She remains in post-operative care and off work per Dr. Hurbanek. Dr. Hurbanek has evaluated Petitioner on a consistent basis and kept her off work.

Consistent with the Arbitrator's findings above and based on the medical records and work status reports of Dr. Hurbanek, the Arbitrator finds that Petitioner's medical condition has not stabilized and she remains temporarily totally disabled due to her work-related injury. As such, the Arbitrator finds Petitioner was temporarily totally disabled from April 4, 2019 through the date of hearing on October 7, 2019, for a period of 26-5/7 weeks and Respondent shall pay Petitioner TTD benefits for this time period.

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Walter D. Schubert,

Petitioner,

vs. NO: 18 WC 29523

Inspector Training, Inc., d/b/a
Dunsing Inspections,

20IWCC0625

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, any and all issues raised at trial, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

20IWCC0625

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 23 2020
TJT:yl
o 10/6/20
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SCHUBERT, WALTER D
Employee/Petitioner

Case# **18WC029523**

INSPECTOR TRAINING INC D/B/A DUNSING INSPECTIONS
Employer/Respondent

20IWCC0625

On 1/13/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0152 LINN CAMPE & RIZZO LTD
JACK M LINN
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

2542 BRYCE DOWNEY & LENKOV LLC
TIMOTHY A FURMAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

20 IWCC0625

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Walter D. Schubert
Employee/Petitioner

v.

Inspector Training, Inc. d/b/a Dunsing Inspections
Employer/Respondent

Case # **18** WC **29523**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **October 2, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **5/21/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**74,430.72**; the average weekly wage was $**1,431.36**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**50,029.04** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**50,029.04**.
Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

- Respondent shall authorize and pay the reasonable and necessary costs associated with the surgery prescribed by Dr. Vora, as provided in Section 8(a) and 8.2 of the Act. Respondent shall authorize and pay the reasonable and necessary costs associated with the work conditioning program and FCE prescribed by Dr. Chams, as provided in Section 8(a) and 8.2 of the Act.

- Respondent shall pay, pursuant to the fee schedule, $655.21 for reasonable and necessary medical services as determined and contained in Petitioner's Exhibit 1 as provided in Section 8(a) and 8.2 of the Act.

- Respondent shall pay Petitioner temporary total disability benefits of $954.24 per week for a period of 59 weeks, from 8/15/18 – 10/2/19 (date of arbitration), as provided in Section 8(b) of the Act.

- Respondent shall be given a credit of $50,029.04 for TTD benefits paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Susan A. Mertz

Signature of Arbitrator

1-9-20
Date

ICArbDec19(b)

JAN 13 2020

day. In the weeks following the accident he continued to experience symptoms in his left shoulder and right ankle.

On 6/28/18 Petitioner presented for initial evaluation at Illinois Bone and Joint Institute in Libertyville, Illinois where Roger Chams, MD, an orthopedic surgeon who noted a 5/21/18 history of injury when Petitioner fell about 8 feet from a roof when he tucked and rolled onto his shoulder (PX2). Following the accident, Petitioner noticed weakness, pain and instability in his left shoulder. He denied any prior left shoulder treatment (Id.). A left shoulder MRI was recommended and Dr. Chams referred Petitioner to Dr. Anand Vora for consultation regarding his right ankle. Petitioner was released to full duty work at his request (Id.).

On 7/6/18 Petitioner presented for initial consult to Anand Vora, MD, an orthopedic surgeon specializing in conditions of the foot and ankle at Illinois Bone and Joint Institute. Dr. Vora noted a history of ankle pain after falling approximately 10 feet sustaining an inversion injury to his right ankle (Id.). He diagnosed Petitioner with a right ankle sprain, chronic lateral ligament injury, and peroneal tendon injury. A right ankle MRI was ordered and Petitioner was instructed to utilize a brace and modify his activity as tolerated (Id.).

On 7/14/18 a right ankle MRI noted the following:

- Intact ATFL, with slightly attenuated appearance suggesting prior sprain. No evidence of acute ligamentous rupture;
- Patchy regions of signal abnormality involving both medial and lateral portions of the talar dome, which may reflect degenerative findings, post traumatic findings, possibly findings related to previous osteochondritis dissecans lesions. No discrete unstable osteochondral fragment formation;
- Mild to moderate tibiotalar, talonavicular degenerative changes. No Acute fracture;
- Mild insertional posterior tibialis tendinopathy. Diffuse mild flexor tenosynovitis; and
- Minimal focal fraying of peroneus longus tendon. Mild peroneal tenosynovitis. No discrete tear.

Dr. Vora, upon review of the MRI, noted a large talar bone bruise indicative of a possible osteochondral talus lesion of the talus. The doctor also noted articular incongruity and significant edema in the periarticular region. (Id.)
On 7/17/18 Petitioner underwent a left shoulder MRI that noted:

- A 3 cm maximum diameter full-thickness tear involving the majority of the supraspinatus tendon with no muscular atrophy. Otherwise normal rotator cuff;

- Extensive tear of the labrum including a SLAP component and involvement of the posterior superior and posterior inferior quadrants; and

- Moderate subacromial encroachment secondary to severe acromioclavicular joint degenerative changes.

On 7/24/18 Dr. Chams, pursuant to his exam and review of the left shoulder MRI, recommended surgery which Petitioner underwent on August 15, 2018 at Hawthorn Surgery Center. The operative report detailed the following procedures were performed:

- Left shoulder arthroscopy with SLAP reconstruction;
- Bankart reconstruction;
- Reverse Bankart reconstruction;
- Subacromial decompression & distal clavicle resection;
- Global rotator cuff repair and open subpectoral longhead of the biceps tenodesis;
- PRP injection (PX 2).

On 8/30/18 the Petitioner followed up post-operatively with Dr. Chams and began a course of physical therapy. He remained restricted from working and continued to follow up with Dr. Chams monthly (Id.).

On 9/12/18 Petitioner followed up regarding his right ankle with Dr. Vora, who pursuant to his exam and review of the 7/13/18 MRI, noted Petitioner had a "right ankle bone contusion, talus, possible developing osteochondral lesion, talus" (*Id.*). Dr. Vora recommended Petitioner go to physical therapy for at least two months before considering any surgical intervention for the talar edema (Id.).

Petitioner continued to treat with Dr. Chams for his left shoulder complaints and injuries recommending continued/additional therapy on 8/30/18, 10/2/18, 11/8/18, and 12/13/18 (Id.).

On 12/19/18 Dr. Vora noted Petitioner's complaints of pain, discomfort, and chronic swelling in his right ankle. He recommended a repeat right ankle MRI of to reassess the joint (Id.).

The Petitioner continued to follow up with Dr. Chams monthly for his left shoulder injury. On 3/19/19, Dr. Chams noted that Petitioner had progressed to a home exercise program, reporting that his shoulder was doing "great". Dr. Chams recommended a work conditioning program for three weeks followed by and FCE. Petitioner was to continue off of work (Id.).

On 4/29/19 Petitioner underwent a right ankle MRI which demonstrated:

- Slight increased conspicuity/progression of medial and lateral talar dome osteochondritis dissecans. No unequivocal chondral or osteochondral loose bodies are seen. These foci cannot be further characterized on today's examination;

- Mild worsening/progression of tibialis posterior tendinosis and tenosynovitis. Milder flexor digitorum longus and flexor halluces longus tenosynovitis, unchanged; and

- No evidence of ligament pathology stable appearance of ligaments is seen on 2 examinations over a 9-month interval.

On 5/1/19 Dr. Vora noted Petitioner's persistent complaints of right ankle pain. Pursuant to his exam and the repeat MRI, he diagnosed an ATFL tear and progressing OCD lesions of the medial and lateral talar dome for which, he recommended surgery. The surgical request was submitted to Respondent's workers compensation insurance carrier on 5/8/19 (Id.).

IME Dr. Bryan Neal

On 3/7/19, orthopedic surgeon, Dr. Bryan Neal examined Petitioner regarding his left shoulder pursuant to Respondent's Section 12 request (RX3). Dr. Neal noted Petitioner's complaints of stiffness, lack of range of motion, and pain in the left shoulder and the inability to sleep on his left side (Id.). Dr. Neal opined that a causal relationship existed between the Petitioner's left shoulder condition and the work accident of 5/21/18. Dr. Neal noted the Petitioner's subjective complaints correlated with the doctor's objective findings, and that treatment thus far had been reasonable and necessary. The doctor believed Petitioner was not yet at maximum medical improvement with respect to his left shoulder condition, and should follow up with Dr. Chams for 1-2 additional visits before being released from care at MMI. Dr. Neal felt that the Petitioner would not benefit from further therapy and that the Petitioner could return to work full duty with respect to his left shoulder (Id.).

IME Samuel Vinci, DPM

On 2/26/19 the Petitioner was seen by Samuel Vinci, DPM, for a right ankle Section 12 evaluation. Dr. Vinci opined the Petitioner suffered only a right ankle sprain/strain, which was causally related to the work injury and any ongoing treatment on the Petitioner's right ankle would be unrelated to the work injury. In his opinion, Petitioner was suffering from pre-existing degenerative arthritis (RX 1).

The Petitioner's TTD benefits were terminated as of March 21, 2019.

On 8/12/19 Dr. Vinci authored a second IME report noting the Petitioner's right ankle symptoms were related to a "long, slow degenerative process". Dr. Vinci acknowledged the surgery recommended by Dr. Vora would be the "recommended procedure" to treat the Petitioner's right ankle symptoms, which he stated were exhibited on diagnostic testing (RX2).

The Petitioner testified that as of the date of arbitration neither the right ankle surgery nor left shoulder work conditioning had been approved. The Petitioner further testified that he had not received TTD benefits from 3/22/19 through the date of arbitration despite being fully restricted from working by his treating physicians.

The Petitioner testified he had no prior left shoulder or right ankle injuries, symptoms, or treatment prior to the date of the work accident nor did he sustain any new left shoulder or right ankle injuries following the date of the accident.

As of the date of arbitration he continued to experience pain, weakness, and a loss of range of motion in his left shoulder and pain and weakness in his right ankle, along with difficulty walking up and down stairs and walking on uneven ground.

CONCLUSIONS OF LAW:

(C.) Accident; (F.) Causal Connection; (K.) Prospective Medical Care

As an initial matter, the Arbitrator acknowledges that Respondent submitted into evidence an office note from Dr. Chams which stated that the date of the accident was in April of 2018 however, Dr. Chams issued a corrected office note which stated the accident date was indeed 5/21/18. Further, the accident report authored by Petitioner's supervisor Jamie Dunsing that memorializes Petitioner's contemporaneous account of the incident noting an accident date of 5/21/18 which is consistent with Petitioner's testimony and all medical reports subsequent to that initial office note of Dr. Chams. The Arbitrator concludes Dr. Chams initial note contained a typo regarding the accident date.

Regarding the disputed issues of accident and causal connection, Petitioner's unrebutted testimony that he fell 9 feet from a ladder on 5/21/18, landing awkwardly on his right ankle and using his left arm to brace his fall, while performing a home roof inspection is unrebutted. Although he did not seek medical attention until 6/28/18, a contemporaneous history of the accident was reported to Supervisor Jamie Dunsing who completed a Illinois Form 45 accident report that corroborates Petitioner's testimony. Petitioner's testimony of prior good health is unrebutted and corroborated by the medical records. Furthermore, the treating medical records indicate that after the accident, Petitioner had significant complaints, impaired motion and objective testing documented pathology in the left shoulder and right ankle.

The Arbitrator found Petitioner presented at the hearing as exceedingly credible. His overall demeanor including his tone of voice and body language left the Arbitrator with the impression that he was simply telling his story.

Petitioner's treating surgeon and Respondent's IME physician opined that a causal connection existed between the work accident at issue and Petitioner's left shoulder condition. Dr. Neal's Section 12 report noted that the Petitioner's subjective complaints correlated with the doctor's objective findings and Petitioner was not yet at MMI and should continue to follow up with his treating surgeon.

Respondent offered two reports from Samuel Vinci, DPM, who opined the Petitioner's symptoms were related to a "long, slow degenerative process" despite any evidence of right ankle symptoms prior to falling 9 feet onto his right ankle on the accident date and pathology evident in objective testing after the accident.

On April 2, 2019 treating orthopedic surgeon, Dr. Vora opined:

> *Certainly, the MRI findings are not degenerative. These findings are posttraumatic related to osteochondral injury of the tibiotalar joint. Degenerative arthritis of the ankle is not a real entity that would occur in a patient of this demographic and further degenerative arthritis of the ankle is simply not a diagnosis that occurs in the ankle. Based on evidence-based medicine and literature, ankle arthritis is a result of either trauma, inflammatory arthropathy, or other conditions and degenerative arthritis in unrelated and does not occur as it would in other joints. This should be well known by the independent medical examiner… these changes are not degenerative and are clearly traumatic based on evidence based literature and medical rationale, and the findings of the independent medical examiner are incorrect.*

In his second addendum report Dr. Vinci did agree the surgery recommended by Dr. Vora would be the "recommended procedure" to treat the Petitioner's right ankle symptoms, which he acknowledged were exhibited on MRI.

The Arbitrator notes that Dr. Vinci made no attempt to address Dr. Vora's April 2, 2019 statements regarding the medical literature as it pertains to degenerative ankle arthritis.

The Arbitrator found Dr. Vora more credible than Respondent's section 12 examiner Dr. Vinci, whose opinion are conclusory, unsubstantiated, and fail to address or contradict Dr. Vora's medical opinion.

Based on the above, including Petitioner's credible, unrebutted testimony, the medical records that do not indicate any cause of pain and pathology in Petitioner's shoulder and ankle, other than the work injury at issue, and the medical opinions of Petitioner's treating orthopedic surgeons and, to a certain extent, the Section 12 examiners, the Arbitrator finds Petitioner has sustained his burden as to accident and causal connection between the 5/21/18 incident and the subsequent conditions of ill-being involving Petitioner's left shoulder and right ankle.

Regarding prospective medical treatment, the Petitioner testified that as of the date of arbitration he continued to experience pain, weakness, and a loss of range of motion in his left shoulder. He further testified he continued to experience pain and weakness in his right ankle, along with difficulty walking up and down stairs and walking on uneven ground.

The Petitioner testified that as of the date of arbitration the left shoulder work conditioning prescribed by Dr. Chams had not been approved, despite the ongoing complaints noted in his March 2019 office visit with Dr. Chams and Dr. Neal's opinion that the petitioner had not yet reached maximum medical improvement regarding his left shoulder. Notably, Dr. Neal did state that the Petitioner would benefit from multiple additional follow up visits with Dr. Chams, and agreed that the Petitioner's subjective complaints were consistent with his objective findings.

The Petitioner testified that as of the date of arbitration the right ankle surgery prescribed by Dr. Vora had not been approved, despite Dr. Vinci stating in his section 12 addendum that the surgery

prescribed by Dr. Vora would be the "recommended procedure" to treat the Petitioner's right ankle symptoms, and the fact that the Petitioner had experienced no right ankle symptoms or injuries prior to the date of the accident.

The Petitioner further testified that he had not received TTD benefits from March 22, 2019 through the date of arbitration despite being fully restricted from working by his treating physicians.

Based on the credible testimony of the Petitioner, the opinions and medical records of Dr. Chams and Dr. Vora, the Arbitrator finds Petitioner is entitled to the prospective medical care prescribed by Dr. Chams and Dr. Vora. Accordingly, Respondent shall authorize and pay the reasonable and necessary costs associated with the left shoulder work conditioning prescribed by Dr. Chams and the right ankle surgery and any related treatment prescribed by Dr. Vora, as provided in Section 8(a) and 8.2 of the Act.

(J.) Medical expenses

The Arbitrator's above findings regarding accident and causal connection as noted above are incorporated herein.

Petitioner submitted outstanding medical bills totaling $655.21 in Petitioner's Exhibit 1 from Illinois Bone and Joint, supported by the medical records introduced in Petitioner's Exhibit 2.

Based on the Arbitrator's finding of causal connection, the Arbitrator finds Respondent liable to pay the reasonable and necessary medical expenses of $655.21, as provided in Section 8(a) and subject to the fee schedule of Section 8.2 of the Act.

(L.) TTD

The Arbitrator's above findings are incorporated herein.

Based on the credible testimony of the Petitioner and the records of Dr. Chams and Dr. Vora, the Arbitrator finds the Petitioner was temporarily and totally disabled from August 15, 2018 through October 2, 2019 (date of Arbitration), a period of 59 weeks.

Respondent shall pay to the Petitioner temporary total disability benefits of $954.24 per week for a period of 59 weeks, as provide in Section 8(b) of the Act.

Respondent shall be given a credit of $50,029.04 for TTD benefits paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Haste,

Petitioner,

vs.

No. 15 WC 42149

City of Peoria,

Respondent.

20IWCC0626

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and prospective medical care, and being advised of the facts and law, affirms with changes the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Arbitrator found Petitioner's condition of ill-being is causally related to the work accident and ordered "Respondent to pay for the left shoulder replacement; and reasonable, necessary, related medical care and treatment related to the Petitioner's left shoulder and cervical spine." The Commission clarifies the decision of the Arbitrator to reflect two components of the award—past medical expenses and prospective medical care. For past medical expenses, the Commission awards the medical bills in evidence for treatment of the left shoulder and cervical spine conditions, pursuant to sections 8(a) and 8.2 of the Act. For prospective medical care, the Commission awards the recommended left shoulder replacement surgery, pursuant to sections 8(a) and 8.2 of the Act.

20IWCC0626

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 24, 2020, is hereby affirmed with changes.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

OCT 23 2020

DATED:
o-08/26/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

DISSENT

I, respectfully, dissent. I view the medical evidence differently than the Majority. I afford greater weight to the opinions of Dr. Lieber which are, in fact, supported by those of Dr. Garst. I find Petitioner reached maximum medical improvement as of August 15, 2016, and the currently recommended treatment- a shoulder replacement- is not causally related to Petitioner's accident of November 4, 2015.

Petitioner sustained an undisputed accident wherein he fell on tree root injuring his right shoulder. T. 26-27. On December 15, 2015, Petitioner sought treatment from Dr. Garst who reviewed an MRI which evidenced impingement, arthritis, a tear of the biceps tendon, and an intact rotator cuff. PX5, p. 8-9. At Dr. Garst's direction, Petitioner underwent conservative treatment consisting of physical therapy and cortisone injections. PX5, p. 11. On August 15,

20IWCC0626

2016, Dr. Garst evaluated Petitioner and provided an additional cortisone injection and released Petitioner with permanent lifting restrictions. PX5, p. 18. Dr. Garst's medical records note the following: "I am going to hold off on surgery. I think some day he may need a shoulder replacement, but I do not think he is ready for that yet." PX2. Dr. Garst reaffirmed during his evidence deposition that at no time during Petitioner's treatment did he perform or recommend surgery. PX5, p. 28,

At Respondent's request on May 9, 2016, Dr. Lieber evaluated Petitioner pursuant to Section 12 of the Act. Dr. Lieber opined Petitioner's shoulder condition was degenerative in nature which was neither caused nor aggravated by Petitioner's accident. RX7, p. 18. Dr. Lieber explained Petitioner's accident likely caused transient pain complaints. RX7, p. 35. On January 28, 2019, Dr. Lieber reevaluated Petitioner and reiterated his opinion that Petitioner's need for treatment was due to his degenerative arthritis which was neither caused nor aggravated by his accident. RX5.

It is well settled that an injured employee may recover benefits if an accident aggravates or accelerates his underlying pre-existing condition. See *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, ¶ 28 ("A claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. [citation omitted]."). "Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones." *Long v. Industrial Commission*, 76 Ill. 2d 561, 565, 394 N.E.2d 1192 (1979). As the Court noted in *County of Cook v. Industrial Commission*:

> Every employee whose disease or preexisting condition disables him while at work is not automatically entitled to recovery under the Workmen's Compensation Act... In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. 68 Ill. 2d 24, 31-32, 368 N.E.2d 1292 (1977).

Petitioner sustained an accident which aggravated his underlying arthritic condition. Petitioner underwent a course of conservative treatment which lead to a resolution of his symptoms. At no time during his initial treatment was surgery recommended. On August 15, 2016, Dr. Garst released Petitioner from care. Petitioner sought no medical treatment for over 10 months eventually being seen by Dr. Garst on June 20, 2017 where a shoulder replacement is recommended. I find Petitioner's current condition of ill-being and need for surgery is due to his degenerative condition and is unrelated to his accident of November 4, 2015.

For above stated reasons, I dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HASTE, DAVID
Employee/Petitioner

Case# **15WC042149**

CITY OF PEORIA
Employer/Respondent

20IWCC0626

On 1/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5354 STEPHEN P KELLY
ATTORNEY AT LAW
2710 N KNOXVILLE AVE
PEORIA, IL 61604

0980 HASSELBERG GREBE SNODGRASS
KEVIN D DAY
401 MAIN ST SUITE 1400
PEORIA, IL 61602-1320

STATE OF ILLINOIS)SS.
COUNTY OF PEORIA)

20 IWCC0626

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Haste
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **15** WC **42149**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Peoria** on **October 15, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **11/4/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**90,800.00**; the average weekly wage was $**1,900.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

1. **The Arbitrator finds that Petitioner's condition of ill-being is causally related to the November 4, 2015, accident.**
2. **The Arbitrator orders the Respondent to pay for the left shoulder replacement; and reasonable, necessary, related medical care and treatment related to the Petitioner's left shoulder and cervical spine.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

January 2, 2019
Date

JAN 24 2020

STATEMENT OF FACTS

The Petitioner was employed by the Respondent for thirty years. (A.T. 22-23) The Petitioner's job included working in the streets of the highway department. (Id) The year preceding November 4, 2015, the Petitioner was employed as a street supervisor. (A.T. 23).

Prior to November 4, 2015, the Petitioner had no injuries to his left shoulder or cervical spine. (A.T. 23-24) The Petitioner received no care or medical treatment to the left shoulder or cervical spine pre-dating November 4, 2015. (Id.) The Petitioner was able to perform his job for the Respondent with no limitations up to November 4, 2015. (A.T. 23-24)

On November 4, 2015, the Petitioner was working for the Respondent out in the field. (A.T. 25) The Petitioner was stepping back while working and tripped over a tree root. (A.T. 26-27) The Petitioner fell onto his left side, including his elbow. (Id.) The Petitioner noticed immediate pain in his cervical spine, left arm, and headaches. (A.T. 28)

The Petitioner testified that he notified the City of Peoria of the accident immediately. (A.T.27) The Respondent sent the Petitioner to OSF Occupational Health, their company doctor. (Id)

The Petitioner testified that he had continued complaints of left shoulder pain. (A.T. 45-48) The Petitioner testified that this pain never went away since the injury. (Id) The Petitioner testified that he did wish to undergo the left shoulder replacement. (Id)

On November 4, 2015, the Petitioner was seen at OSF Occupational Health. Those records establish the Petitioner's complaints of bifrontal headaches, neck stiffness, and pain in the left shoulder. The records of OSF Occupational Health note that the Petitioner had no prior issues to these body parts. The diagnosis from OSF Occupational Health of November 4, 2015, was a strain to the left shoulder, strain to the cervical spine, X-rays were performed.

On November 9, 2015, the Petitioner was seen by Dr. Pena at OSF Occupational Health. (Respondent's Ex 10) The Petitioner provided a history of having continued complaints of the left shoulder and cervical spine. Recommendations were that of physical therapy and conservative care. Dr. Pena felt that the Petitioner had sustained an aggravation to his neck and shoulder degenerative joint disease. (Id)

The Petitioner underwent an MRI to his left shoulder on December 1, 2015. On December 13, 2015, the Petitioner followed up with OSF Occupational for a follow-up of the MRI study. (Petitioner's Ex.2)

The MRI study of December 1, 2015 revealed the Petitioner had a tear of his bicipital tendon, suspected rotator cuff tear, also inflammation in the Petitioner's shoulder joint. (Respondent's Ex. 13)

The Petitioner was recommended to see and consult with an orthopedic specialist. On December 3, 2015, the Petitioner was recommended to see OSF Orthopedics. The Petitioner testified that he first saw Dr. Garst on or about December 15, 2015. (Petitioner's Ex. 2)

The records of Dr. Garst indicate that the Petitioner was seen on December 15, 201 5. Dr. Garst's records indicate the MRI showed impingement, rotator cuff inflamed, and tear along the head of the biceps. Dr. Garst recommended conservative care at that time and had taken the Petitioner off work. (Petitioner's Ex. 2)

On January 9, 2016, the Petitioner went back to OSF Orthopedics. The Petitioner was seen by Dr. Orlevitch. Dr. Orlevitch performed an injection on the Petitioner's shoulder. The records reveal that Dr. Orlevitch felt the Petitioner sustained an aggravation of a pre-existing condition as a result of the work injury. (Petitioner's Ex. 2)

On April 8, 2016, the Petitioner followed up with OSF Orthopedics with Dr. Garst. At that time, surgery was discussed to the Petitioner's left shoulder. Dr. Garst opined and recommended that the Petitioner undergo a left shoulder replacement. The Petitioner was placed on restrictions as of that date of no away from body work. (Petitioner's Ex. 2)

On April 27, 2016, the Petitioner was seen at OSF Occupational Health. At that time, it was noted that Dr. Bell did an epidural steroid injection of the Petitioner's cervical spine. The physical examination revealed that the Petitioner had break away of the left shoulder. Dr. Braun classified the Petitioner's pain as chronic in nature. (Respondent's Ex. 19)

On August 15, 2016, the Petitioner was seen by Dr. Garst. At that time, the left shoulder recommendation was still in place. Dr. Garst put the Petitioner on permanent restrictions of no lifting overhead with the left arm, no above shoulder lifting with the left, and no work away from the body with the left arm. (Petitioner's Ex. 2)

Dr. Garst testified that the Petitioner presented to his facility for treatment at the recommendation of Dr. Moody. The Petitioner gave a history to Dr. Garst that prior to the work injury his shoulder was fine, and he could lift it all the way up, and that therapy was not helping much. (Petitioner's Ex. 5, pg. 7)

Dr. Garst testified that the Petitioner had loaded motion. The Petitioner couldn't lift his arm above his head, only shoulder level. Dr. Garst noted positive impingement sign, and pain at the extremes of motion, Dr. Garst reviewed X-ray, which revealed glenohumeral arthritis, and an MRI that revealed inflammation and arthritis at the acromioclavicular joint, overhang of the bone, the rotator cuff was inflamed, thickening of the tendon, and a tear of the long head of the biceps. (Petitioner's Ex. 5, pg. 8-9)

Dr. Garst testified that he recommended conservative and continued therapy. Throughout the Petitioner's care with Dr. Garst he had continued pain to the left shoulder and limited motion. (Petitioner's Ex. 5, pg. 13)

On Mary 16, 2016, Dr. Garst noted that the Petitioner's complaints were still the same. Dr. Garst put the Petitioner on work restrictions of no lifting, pulling or carrying more than 11 to 25 lbs., no over chest, above shoulder, or away from body work. (Petitioner's Ex. 5, pg. 18)

On August 15, 2016, Dr. Garst gave the Petitioner permanent restrictions of no lifting, pulling or carrying more than 11 to 25 lbs., no over chest, above shoulder, or away from body work and recommended a left shoulder replacement. (Petitioner's Ex. 5, pg. 20)

Dr. Lieber performed an examination of Petitioner under section 12 of the Act at the request of the Respondent. Dr. Lieber first saw the Petitioner on May 9, 2016. The Petitioner gave a history to Dr. Lieber of consistent left shoulder pain with limited motion and neck pain. The Petitioner had no prior history of shoulder or neck problems. (Respondent's Ex. 7, pg. 9)

On direct-examination, Dr. Lieber testified that the Petitioner had a pre-existing condition to his left shoulder and cervical area, and the Petitioner's condition of ill-being was not related to the work injury of November 4, 2015. Dr. Lieber testified that he felt the Petitioner was at maximum medical improvement as of his May 9, 2016 exam. (Respondent's Ex.7, pg. 17)

On cross-examination, Dr. Lieber testified that he believed the Petitioner's presentation of complaints and symptoms. Dr. Lieber testified that there was no evidence of any complaints, treatment, nor diagnostic treatment to the Petitioner's left shoulder and neck area prior to November 4, 2015. Dr. Lieber confirmed that the evidence in this case established that the Petitioner sustained a work injury on November 4, 2015. Additionally, Dr. Lieber testified that the work accident aggravated the Petitioner's condition of ill-being and made his left shoulder and cervical area symptomatic. (Respondent's Ex. 7, pg. 24)

Dr. Lieber testified that the Petitioner underwent multiple tests that had positive findings. These tests included Speeds Test, O'Brien's Test, and Lift Strength Test. Dr. Lieber confirmed that there was no evidence that these positive findings existed prior to November 4, 2015. (Respondent's Ex. 7, pg. 32)

Dr. Lieber did not have any evidence that the Petitioner's pain ever went away after the accident. Dr. Lieber testified that he had no criticisms of the medical care, treatment, nor physicians the Petitioner has treated with for the work injury. (Respondent's Ex. 7, pg. 39)

Dr. Moody confirmed that he had no evidence of any pre-existing condition as it relates to the Petitioner's cervical spine or left shoulder. (Respondent's Ex. 8, pg. 50-51) Dr. Moody had no evidence of the Petitioner having any low back complaints prior to the work injury. (Respondent's Ex. 8, pg. 51) Dr. Moody was of the opinion that the described work injury the Petitioner sustained exacerbated his cervical condition. (Respondent's Ex. 8, pg. 52) Dr. Moody testified that the November 2015 described work accident aggravated the Petitioner's left shoulder condition. (Respondent's Ex. 8, pg. 52) Dr. Moody further testified that the described work injury aggravated the Petitioner's cervical condition. (Respondent's Ex. 8, pg. 52)

Dr. Moody testified he that he last saw the Petitioner on December 3, 2015. Dr. Moody confirmed that the Petitioner was not at maximum medical improvement. (Respondent's Ex. 8, pg. 53)

Dr. Moody confirmed that Dr. Garst recommended a left shoulder replacement for the Petitioner. (Respondent's Ex. 8, pg. 55) Dr. Moody testified on cross-examination that he was not in a position to offer an opinion as to whether or not the shoulder replacement was related to the work injury as he had not seen the Petitioner for some time. (Respondent's Ex. 8, pg. 56)

Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that based on the above, the Petitioner's condition of ill-being is causally related to the work injury of November 4, 2015. The basis of this decision is that Dr. Garst and Dr. Moody provided opinions that the work accident contriburted to the Petitioner's current condition of ill-being. Additionally, the Petitioner's complaints to his left shoulder and cervical spine never completely went away after the work accident. There is no evidence of any pre-existing pain or treatment to the Petitioner's cervical spine or left shoulder.

Wherefore, the Petitioner has met his burden establishing a causal connection between his current condition of ill-being and the described work injury.

Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the Respondent is responsible for the medical treatment recommended by Dr. Garst to the Petitioner's left shoulder. Specifically, Dr. Garst testified that the Petitioner is in need of a left shoulder replacement. The Arbitrator finds that the Respondent is responsible for the care and treatment of the Petitioner's condition of ill-being established at the time of trial.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES RAYBORN,

Petitioner,

20IWCC0627

vs. NO: 14 WC 40898

WABASH CUSD #348,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission observes Respondent filed a Reply Brief. Commission Rule 9040.70 governs the briefing process on Review and it provides the appellant shall file a Statement of Exceptions and Supporting Brief no later than 30 days from the Return Date on Review, and the appellee may submit a response within 15 days from the last day allowed for the filing of appellant's Statements of Exceptions. 50 Ill Admin. Code §9040.70(c). To be clear, there is no provision in Rule 9040.70 which permits an appellant to file a reply brief, and the Commission has held a party seeking to file a reply brief must first seek leave from the Commission and demonstrate why such a departure from the Rules is necessary: "The Commission grants Respondent's Motion to Strike Petitioner's reply brief as the rules do not provide for the filing of reply briefs and Petitioner filed his reply brief without first seeking leave to do so." *Richard Cole v. First Midwest Bank Amphitheater/Clear Channel*, 10 IWCC 0677 (Emphasis added). See also, *Gerald Weaver v. Decatur Overhead Door*, 2010 Ill. Wrk. Comp. LEXIS 212. Respondent filed a Reply Brief without first seeking the requisite permission from the Commission and without making a showing of any unusual circumstances which require such an extraordinary filing. While we have elected to consider the Reply Brief in this instance, the Commission admonishes

20IWCC0627

Counsel to obtain the necessary leave to file in the future, as the consequence for failure to do so will be the brief will be stricken.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that as a result of medical charges incurred after December 31, 2014, Respondent shall pay reasonable and necessary medical services of $21,539.51 equating to $283.05 for a subrogation interest held by Blue Cross Blue Shield; $2,301.76 for a subrogation interest held by petitioner's Medicare supplemental health insurer; $18,562.88 for a conditional payment lien held by Medicare; $336.42 for reimbursement of petitioner's out-of-pocket medical expenses; and $55.40 for an outstanding medical charge due and owing to Deaconess Hospital, as provided in §8(a). Respondent shall be given a credit of $63,714.72 for medical expenses paid that were incurred on or before December 31, 2014. Respondent shall hold Petitioner harmless from any claims by providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $300.03 per week for a period of 210 weeks, representing January 23, 2014 through January 31, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $16,280.04 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $270.02 per week for a period of 150 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 30% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Stephen J. Mathis

Stephen Mathis

D. Douglas McCarthy

D. Douglas McCarthy

20IWCC0627

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its award of temporary total disability benefits. I would vacate the benefits awarded from January 1, 2015 through November 20, 2017 and award benefits as follows: 1) January 23, 2014 through December 31, 2014 (49 weeks) and 2) November 21, 2017 through January 31, 2018 (10 2/7 weeks).

"The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement. [citation omitted]. Once an injured employee's physical condition has stabilized, the employee is no longer eligible for TTD benefits because the disabling condition has become permanent. [citation omitted]." *Mechanical Devices v. Industrial Commission (Johnson)*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (2003). "The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) 'most importantly,' whether the injury has stabilized. [citations omitted]." *Id.* at 759.

As the Majority correctly finds on December 31, 2014, Dr. Grimm placed Petitioner at maximum medical improvement with permanent restrictions of no repetitive lifting, bending, stooping, climbing, pushing, pulling, twisting, overhead work; no prolonged overhead work; no lifting over 10 pounds. PX6. Normally, the analysis would to turn to whether maintenance benefits are appropriate, but here, Petitioner's attorney expressly waived entitlement to these benefits. T. 41-42. Moreover, Petitioner removed himself from the labor market as he advised Dr. Grimm, he was qualified and approved for social security disability benefits. PX6.

As such, the question is when Petitioner was next restricted from work for non-palliative care. While Petitioner continued to see Dr. Jani for medication management, the medical records fail to evidence that Dr. Jani authorized Petitioner off work. PX7. Rather, the medical records evidence Petitioner was authorized off work as of November 21, 2017 when he underwent his revision surgery. PX8.

For the above stated reasons, I respectfully dissent as to the award of temporary total disability benefits.

DATED: OCT 23 2020

L. Elizabeth Coppoletti

LEC/mck

O: 8/26/2020

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAYBORN, JAMES
Employee/Petitioner

Case# **14WC040898**

WABASH CUSD #348
Employer/Respondent

20IWCC0627

On 7/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1724 HASSAKIS & HASSAKIS PC
JAMES RUPPERT
PO BOX 706
MT VERNON, IL 62864

2965 KEEFE CAMPBELL BIERY & ASSOC
NATHAN S BERNARD
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

20IWCC0627

STATE OF ILLINOIS)
)SS.
COUNTY OF **Jefferson**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES RAYBORN
Employee/Petitioner

v.

WABASH CUSD # 348
Employer/Respondent

Case # **14** WC **040898**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mount Vernon**, on **April 4, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?

FINDINGS

On **1/22/14**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$23,402.98**; the average weekly wage was **$450.04**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$16,280.04** for TTD, $0 for TPD, **$0** for maintenance, and **$63,724.72** for other benefits, for a total credit of **$80,004.76**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

As a result of medical charges incurred after December 31, 2014, Respondent shall pay reasonable and necessary medical services of **$21,539.51** equating to **$283.05** for a subrogation interest held by Blue Cross Blue Shield, **$2,301.76** for a subrogation interest held by petitioner's Medicare supplemental health insurer, **$18,562.88** for a conditional payment lien held by Medicare, **$336.42** for reimbursement of petitioner's out-of-pocket medical expenses and **$55.40** for an outstanding medical charge due and owing to Deaconess Hospital, as provided in Section 8(a) of the Act. Respondent shall be given a credit of **$63,714.72** for medical bills it paid that were incurred on or before December 31, 2014 per stipulation of the parties. Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$300.03**/week for **210** weeks, commencing **January 23, 2014** through **January 31, 2018**, as provided in Section 8(b) of the Act. See attached. Respondent shall be given a credit of **$16,280.04** for TTD benefits per stipulation of the parties.

Based on the factors cited is Section 8(1)(b) of the Act and the record taken as a whole, the Arbitrator awards Petitioner 150 weeks at a rate of $270.02/week because the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **30%** loss of use pursuant to §**8(2)(d)** of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Earl Lee — Signature of Arbitrator

6/23/19 — Date

JUL 1 - 2019

STATE OF ILLINOIS)
)SS 20 IWCC0627
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
PETITIONER'S PROPOSED ARBITRATION DECISION

JAMES RAYBORN **Case #: 14 WC 040898**
Employee/Petitioner

v. **Consolidated Cases: None**

WABASH CUSD #348
Employer/Respondent

FINDINGS OF FACT

The parties stipulated that petitioner was working for respondent on January 22, 2014. Petitioner testified that his job title on January 22, 2014 was custodian (Tr. 10). Petitioner's job duties required him to mop, clean, move furniture, remove snow, perform plumbing, complete electrical work and perform other general maintenance (Tr. 10-11). The petitioner began this job in 2004 and performed it until January 22, 2014 (Tr. 9).

The petitioner testified that on January 22, 2014 he was picking up a 5 or 6 gallon bucket of water to dump and felt a stabbing pain in the back of his neck (Tr. 11). The petitioner testified that shortly thereafter his pain went from his neck, down to his left shoulder and then all the way down his left arm (Tr. 12). The petitioner testified that he reported his injury and completed an accident report (Tr. 12). The petitioner testified that the accident report accurately reflected how he was injured on January 22, 2014 (Tr. 13 and See PX 2).

The petitioner briefly testified as to his medical care (See Tr. 13-16). Petitioner testified that he went to the emergency room on the date of injury (Tr. 13). Respondent then sent petitioner to see a Dr. Slater, and Dr. Slater referred petitioner to Dr. Grimm. (Tr. 13-14). Dr. Grimm performed injections in his neck, and on August 22, 2014 Dr. Grimm performed a fusion surgery at C5-7 (Tr. 14). Dr. Grimm then released petitioner with permanent restrictions on December 31, 2014 (Tr. 14). The petitioner testified that after his surgery he continued to have neck and left arm symptoms (Tr. 15). The petitioner testified that he continued to see his family doctor, Dr. Jani, for his neck and left arm issues and that Dr. Jani ultimately referred him to Dr. David Eggers (Tr. 15). Dr. Eggers advised the petitioner that his fusion at C6-7 did not fuse and thus, Dr. Eggers performed a second surgery on November 21, 2017 to address the failed fusion (Tr. 15-16). The petitioner testified that he was released by Dr. Eggers on January 31, 2018 without restrictions (Tr. 16). The petitioner testified that the second surgery made him feel "somewhat better" in that it help his left arm symptoms. (Tr. 16-17).

As to post-accident medical records admitted into evidence, they reflect that petitioner presented to Wabash General Hospital's emergency department on January 22, 2014 complaining of neck pain, pain down the left arm and tingling in fingers 4 and 5 after he "lifted mop bucket" at work (PX 4, p. 4-9). Dr. Andy Brit diagnosed cervical strain, prescribed Ultram, Orphenadrine and Naprosyn, placed petitioner on light duty restrictions and referred him to his family doctor, Dr. S.B. Jani (PX 4, p. 8-9).

Mr. Rayborn was next examined by Dr. Karsten Slater on January 23, 2014. Dr. Slater noted his symptoms started after lifting a mop bucket at work, pain in the neck radiating down petitioner's left arm and numbness in petitioner's left fingers (PX 5, p. 5). Dr. Slater stated his examination indicated "nerve irritation in the cervical spine and left brachial plexus which could be related to a disk protrusion or traction injury of the brachial plexus" (PX 5, p. 8). Dr. Slater ordered a MRI of petitioner's cervical spine and left brachial plexus and took petitioner off of work (PX 5, p. 8 and 14).

The January 30, 2014 cervical spine MRI showed annular disc bulging and spinal canal narrowing at C5-7, anterior wedging of the C5-T3 vertebral bodies, and degenerative changes that caused bilateral neural foraminal stenosis at C5-7 that was worse on the right than the left and right-sided foraminal stenosis at C4-5. (PX 4, p. 19-20). The February 1, 2014 MRI of the left brachial plexus was unremarkable (PX 4, p. 25). Mr. Rayborn returned to Dr. Slater on February 6, 2014 (PX 5, p. 17). After reviewing the MRIs, Dr. Slater referred the petitioner to Dr. John Grimm, an orthopedic spine specialist at Tri-State Orthopedics, and kept the petitioner off of work (PX 5, p. 19-20).

Dr. Grimm first examined the petitioner on February 27, 2014. Dr. Grimm noted that Mr. Rayborn was in a "state of asymptomatic spinal health until January 22nd at which time, while on the job, he lifted a bucket of mop water and then developed some neck pain" (PX 6, p. 24). Dr. Grimm reviewed all of petitioner's prior x-ray and MRI films and diagnosed "subacute left cervical-radicular syndrome" (PX 6, p. 25). Dr. Grimm recommended physical therapy, prescribed Neurontin and Mobic and imposed light duty work restrictions (PX 6, p. 25). Mr. Rayborn completed five (5) physical therapy sessions from March 4 through March 12, 2014, at which time Dr. Grimm ordered that petitioner's therapy be placed on hold (PX 4, p. 29-38).

Dr. Grimm reexamined the petitioner on April 2, 2014 and noted ongoing neck pain, left arm pain, tingling/numbness in his fingers and headaches (PX 6, p. 27). Dr. Grimm diagnosed "subacute left C6 and C7 radiculopathy secondary to job-related aggravation of a pre-existing cervical spondylotic foraminal stenosis left C5-6 and C6-7" (PX 6, p. 27). Dr. Grimm recommended cervical epidural steroid injections (ESIs) (PX 6, p. 27). Dr. Grimm also commented on surgery by stating that he might perform an anterior cervical decompression and fusion at C5-7 because petitioner has "subtle neurologic findings compatible with at least a C7 radiculopathy and ... some neurocompression at C5-6 as well and so I would include both levels" (PX 6, p. 27).

Mr. Rayborn attended an IME with Dr. Frank Petkovich on April 16, 2014 which is discussed in detail below (RX 1). Mr. Rayborn underwent a left C5-6 interlaminar ESI on May 14, 2014, left C5-7 transforaminal ESIs on July 9, 2014 and a left C6-7 ESI on July 23, 2014 (PX

6, p. 29, 32 and 34). The petitioner followed up with Dr. Grimm on June 3 and August 7, 2014 (PX 6, p. 31 and 36). Dr. Grimm noted that the injections only provided transient relief and that petitioner's symptoms persisted (PX 6, p. 36). Dr. Grimm thus recommended attempting surgical intervention (PX 6, p. 36).

On August 22, 2014 Dr. Grimm performed a microscopic 2-level anterior cervical discectomy and interbody fusion using a tricortical iliac crest bone and anterior Danek Zephir plate fixation at C5-C7. Dr. Grimm's post-operative diagnosis was chronic cervical radiculopathy (left C6 and C7) secondary to cervical spondylosis (PX 6, p. 37).

Mr. Rayborn had post-operative follow-ups with Dr. Grimm on September 16, October 9, November 19 and December 31, 2014 (PX 6, p. 40-46). Dr. Grimm's post-operative notes reflect the petitioner had relief of his headaches and some neck pain, yet he continued to have left arm weakness, pain, tingling and numbness (PX 6, p. 40-43). He also had difficulty with swallowing post-operatively (PX 6, p. 40). Dr. Grimm kept petitioner off of work or on light duty through December 31, 2014 and continued to prescribe Percocet to the petitioner (PX 6, p. 40-44). On December 31, 2014 the petitioner continued to complain of neck pain that radiated into his left trapezius, restrictions with cervical extension and flexion and numbness/tingling in his left upper extremity (PX 6, p. 45). On December 31, 2014 Dr. Grimm changed his Percocet prescription to Ultram and started to wean the petitioner off of Gabapentin (PX 6, p. 45). Dr. Grimm placed petitioner at maximum medical improvement and imposed permanent restrictions consisting of no repetitive lifting, bending, stooping, climbing, pushing/pulling, twisting or overhead work as well as no prolonged walking/sitting or riding/driving and no lifting more than 10 lbs (PX 6, p. 45 and 55).

After being released from Dr. Grimm on December 31, 2014, the petitioner saw his family doctor, Dr. Jani, for cervical spine care (See PX 7 generally). Dr. Jani examined Mr. Rayborn for spinal care on six (6) occasions from February 2, 2015 through February 19, 2016 (PX 7, p. 27-51). Dr. Jani referred petitioner back to Dr. Grimm. The petitioner returned to Dr. Grimm on March 17, 2016 (PX 6, p. 47). Dr. Grimm noted ongoing complaints of neck pain that Mr. Rayborn was treating with cyclobenzaprine and a Butrans patch (PX 6, p. 47). Mr. Rayborn also had a left hand tremor (PX 6, p. 47). Dr. Grimm obtained cervical spine x-rays that he thought showed solid fusions. Dr. Grimm diagnosed chronic intension left hand tremor and "query of cervical myelopathy with solid anterior fusion C5 to C7 with chronic neck pain – on chronic pain management" (PX 6, p. 47). Dr. Grimm made no care recommendations.

Dr. Jani examined petitioner another five (5) times from June 20, 2016 through April 21, 2017 concerning his neck and left arm symptoms (PX 7, p. 52-70). From February 2, 2015 through April 21, 2017, Dr. Jani noted neck pain, left upper extremity numbness/tingling, cervical spine muscle spasms, left shoulder pain, a left hand tremor and cervical spine tenderness (PX 7, p. 27-70). Dr. Jani ultimately referred the petitioner to Dr. David Eggers on April 21, 2017 and ordered a cervical spine MRI. (PX 7, p. 69 and 71). The cervical spine MRI was completed on May 4, 2017, and petitioner returned to Dr. Jani on June 9, 2017 (PX 7, p. 71-78).

Dr. Eggers first examined the petitioner on June 19, 2017 (PX 8, p. 12). Dr. Eggers noted that Mr. Rayborn had neck pain and left shoulder pain with numbness going into his left thumb

and index finger (PX 8, p. 12). Dr. Eggers recorded that the fusion surgery fixed petitioner's headaches but did not cure the left upper extremity symptoms (PX 8, p. 12). Dr. Eggers reviewed the May, 2017 cervical spine MRI and opined that it showed an excellent fusion at C5-6 and is more questionable at the C6-7 level (PX 8, p. 15). Dr. Eggers recommended a CT scan of petitioner's cervical spine to determine whether a failed fusion, also known as pseudoathrosis, existed at C6-7 (PX 8, p. 15). Dr. Eggers commented that if the fusion at C6-7 was solid, then he could not offer the petitioner any care and further opined that his left hand tremor was not related to his cervical spine condition.

The petitioner underwent the CT scan of his cervical spine on June 19, 2017 at Deaconess Hospital (PX 8, p. 19). Per Dr. Eggers' June 21, 2017 "view & call note", the CT scan showed a solid fusion at C5-6, but that the "C6-7 did not fuse properly, and there is some air in the fusional area suggesting abnormal motion there" (PX 8, p. 21). Dr. Eggers opined that a revision surgery at the C6-7 level could be considered to help petitioner's neck symptoms (PX 8, p. 21). Dr. Eggers' August 2, 2017 note states that the "CT scan shows a non-union at C6-7" and again recommended a revision surgery at C6-7 (PX 8, p. 22). Following petitioner's appointment with Dr. Eggers on October 30, 2017, Mr. Rayborn decided to proceed with the revision surgery (PX 8, p. 25).

On November 21, 2017 Dr. Eggers performed a removal of hardware, including screws and plate, at C5-7, a C6-7 micro anterior cervical disc excision with takedown of a nonunion fusion, a C6-7 interbody fusion grafting and a placement of C6-7 Skyline titanium plate instrumentation. (PX 8, p. 31). Dr. Eggers' post-operative diagnosis was C6-7 fusion nonunion, and the petitioner was discharged from the hospital on November 22, 2017 (PX 8, p. 31-33).

Mr. Rayborn returned to Dr. Eggers post-operatively on December 18, 2017 and January 31, 2018 (PX 8, p. 35-37). Dr. Eggers commented that petitioner's neck symptoms had improved but that he was having some difficulty with swallowing (PX 8, p. 35-37). Dr. Eggers released petitioner on a p.r.n. basis on January 31, 2018 (PX 8, p. 37).

Dr. Frank O. Petkovich Testimony

On May 11, 2017 Dr. Frank Petkovich testified via evidence deposition (RX 3). Dr. Petkovich testified he has worked as a board certified orthopedic surgeon since 1980 and that 50% of his practice is dedicated to general orthopedics with the other 50% being dedicated to orthopedic spine surgery (RX 3, p. 7). Dr. Petkovich testified he performed an independent medical evaluation of Mr. Rayborn on April 16, 2014 (RX 3, p. 10). Dr. Petkovich testified that petitioner reported to him neck and left shoulder pain after lifting buckets of water (RX 3, p. 11). Dr. Petkovich's physical examination on April 16, 2014 revealed tenderness to palpation and muscle spasms in the left paracervical area and tenderness in the left supraclavicular area (RX 3, p. 15). Dr. Petkovich also found left-sided upper-extremity deficits in terms of reflexes, sensation and weakness compared to the right side (RX 3, p. 15-16). Dr. Petkovich testified that he reviewed the imaging the petitioner provided to him which included a MRI taken on January 30, 2014, the brachial plexus MRI taken on February 1, 2014 and a CT-myelogram taken on April 2, 2014 (RX 3, p. 17). Based on his examination on April 16, 2014 and review of medical records, Dr. Petkovich diagnosed cervical strain, left shoulder strain and degenerative disc disease at C5-

7 and opined that the strains were related to his work injury (RX 3, p. 18). At that time, Dr. Petkovich believed petitioner required epidural injections at C5-7 and further diagnostic testing and that further care would depend on the results of the injections and diagnostic studies (RX 3, p. 19).

Dr. Petkovich testified that he performed a second IME concerning petitioner on December 10, 2015 (RX 2 and RX 3, p. 20). Dr. Petkovich noted that he learned from petitioner about the injections and surgery that Mr. Rayborn underwent (RX 3, p. 21-22). Dr. Petkovich testified that he reviewed the operative report concerning the petitioner surgery by Dr. Grimm (RX 3, p. 22). Dr. Petkovich testified that the petitioner stated his 2014 surgery alleviated his headaches and left upper extremity pain but that he still had residual numbness along the dorsal aspect of his left thumb and index finger (RX 3, p. 24-25). Dr. Petkovich's physical examination on December 10, 2015 showed limited cervical spine range of motion, discomfort at the extremes of cervical spine motion and decreased sensation in the left thumb and index finger (RX 3, p. 26-27). Dr. Petkovich obtained cervical spine x-rays on December 15, 2010 that he opined showed a solid fusion at C5-7 (RX 3, p. 28).

Dr. Petkovich testified that he believed "the incident of January 22, 2014 did cause some aggravation of those pre-existing degenerative conditions in the cervical spine" (RX 3, p. 28-29). Dr. Petkovich opined that the petitioner had reached maximum medical improvement as of December 10, 2015 and did not require further care (RX 3, p. 29). Dr. Petkovich was also of the opinion that petitioner could return to work without restrictions as of December 10, 2015 (RX 3, p. 30). Dr. Petkovich testified that he performed an impairment rating in conjunction with the AMA Guides to the Evaluation of Permanent Impairment Sixth edition, and it showed Mr. Rayborn had sustained an 8 percent whole person impairment as a result of his work injury (RX 3, p. 31). On cross-examination Dr. Petkovich admitted that the petitioner had some atrophy of his left upper extremity from his injury (RX 3, p. 38-39). Dr. Petkovich admitted that petitioner had residual sequelae from the nerve root irritation radiculopathy caused by the work injury (RX 3, p. 60).

Dr. Petkovich testified via evidence deposition a second time on November 26, 2018. (RX 3, 2nd Dep, p. 1). Dr. Perkovich testified that he authored a February 12, 2018 records review report concerning the petitioner (RX 3, 2nd Dep, p. 6). For his February 12, 2018 report, Dr. Petkovich testified that he reviewed medical records from Dr. Jani, Dr. Eggers and Dr. Grimm (RX 3, 2nd Dep, p. 10-11). Dr. Petkovich also reviewed the CT scan and MRI films obtained of petitioner's cervical spine in 2017 (RX 3, 2nd Dep, p. 12). Dr. Petkovich opined that the 2017 radiology showed a solid fusion at C5-7 (RX 3, 2nd Dep, p. 12). Dr. Petkovich also reviewed Dr. Eggers' operative report but critiqued the report as not providing "much information" (RX 3, 2nd Dep, p. 13). Dr. Petkovich opined that there "may have been some areas of C6-7 that were not completely ossified or were at a fibrous state" and further stated that this fibrous portion at C6-7 "was just part of the healing process and over time that would have continued to ossify" (RX 3, 2nd Dep, p. 14-15). Dr. Petkovich testified that he did not believe the surgery performed by Dr. Eggers was necessary because he believed petitioner had a solid fusion (RX 3, 2nd Dep, p. 16). Dr. Petkovich testified that his impairment rating did not change based on his review of additional information (RX 3, 2nd Dep, p. 20).

On cross-examination Dr. Petkovich testified that Dr. Eggers' operative report listed a pre- and post-operative diagnosis of "C6-7 fusion, non-union" (RX 3, 2nd Dep, p. 22). Dr. Petkovich was critical of Dr. Eggers' operative report because it did not specify whether petitioner's C6-7 level was a non-union, delayed union or fibrous union (RX 3, 2nd Dep, p. 23-24). Dr. Petkovich admitted that a reasonable care option for a non-union is redo the fusion at that level (RX 3, 2nd Dep, p. 24). Dr. Petkovich testified that he was "not really sure exactly what [Dr. Eggers] did because it's not detailed in his operative report (RX 3, 2nd Dep, p. 25). Dr. Petkovich admitted that by his review of the records the petitioner's subjective pain complaints were "doing better" after the second surgery (RX 3, 2nd Dep, p. 27). Dr. Petkovich testified that he had not reviewed any intra-operative photographs taken during Dr. Eggers' surgery (RX 3, 2nd Dep, p. 27). On cross-examination, Dr. Petkovich testified that the "gold standard" to determine whether a fusion is fused or not it a CT scan because it will give the move information (RX 3, 2nd Dep, p. 30). Dr. Petkovich opined that a CT scan would give more information on whether a fusion is fused than the information a surgeon learns intraoperatively when repairing a non-fused fusion (RX 3, 2nd Dep, p. 30). Dr. Petkovich yet testified that when revising a fusion "You remove the plate and screws and then you're – and then in this case you're looking at an interspace, and if there's obvious motion there, then that would be obvious" (RX 3, 2nd Dep, p. 31). Dr. Petkovich acknowledged that a known complication of fusion surgery is a non-union (RX 3, 2nd Dep, p. 34).

Dr. David Eggers' Testimony

On January 23, 2019 Dr. Eggers testified via evidence deposition (PX 1). Dr. Eggers testified that he has been a board certified neurosurgeon in private practice for 35 years (PX 1, p. 3 and 5). Dr. Eggers testified that about 20 percent of the surgeries he performs are on the brain while the other 80 percent are spine surgeries (PX 1, p. 4). Dr. Eggers testified that he performs approximately 12 spine surgeries each week (PX 1, p. 4). Dr. Eggers testified that he has been performing fusion operations on the cervical spine for 39 years and has performed over 6,000 cervical fusions (PX 1, p. 6 and 41).

Dr. Eggers testified that he interpreted Mr. Rayborn's June 19, 2017 CT scan as showing a solid fusion at C5-6 but that the "fusion attempt at C6-7 did not fuse properly, and there was air in the fusional area suggesting abnormal motion there." (PX 1, p. 7-8). Dr. Eggers testified that a CT scan is very sensitive to air (PX 1, p. 9). Dr. Eggers explained that when there is air in the fusional area it means there has been a vacuum phenomenon and that there must be motion there (PX 1, p. 9). Dr. Eggers testified that if there was no motion, a vacuum could not form and air would not be present in the fusion area (PX 1, p. 9). Dr. Eggers testified that the air present in Mr. Rayborn's C6-7 fusion area indicated it was a non-union (PX 1, p. 9). Dr. Eggers testified that he believed a likely cause of Mr. Rayborn's complaints when he saw him was the non-union at C6-7 (PX 1, p. 8). Dr. Eggers testified that he believed a revision surgery at C6-7 was appropriate to try to give the petitioner some relief (PX 1, p. 10).

Dr. Eggers testified that a non-union generally causes neck pain and that Mr. Rayborn had persistent neck pain since his fusion operation (PX 1, p. 8 & 11). Dr. Eggers testified that Mr. Rayborn's complaints of left-sided neck pain, left shoulder pain and numbness into his first and second fingers were consistent with a non-union issue at C6-7 because the C6-7 level is

where the C7 nerve is located and its distribution traditionally goes to the index finger and adjacent fingers (PX 1, p. 13). Dr. Eggers testified that when he performed his revision surgery he actually saw the non-union of C6-7 (PX 1, p. 13 and 15). Dr. Eggers also testified that he found motion at C6-7 intra-operatively and that a successful fusion would create no motion (PX 1, p. 13). Dr. Eggers testified that a surgeon can obtain the best evidence on whether a fusion is fused intra-operatively but acknowledged that a CT scan can be used to support a diagnosis (PX 1, p. 19). Dr. Eggers testified that intra-operatively a surgeon would judge whether a fusion is fused by applying torque to the interspace and see if there is any motion as there would be a lack of motion with a proper fusion (PX 1, p. 19). Dr. Eggers testified that his operative report reflects that Mr. Rayborn had motion at C6-7 and that his finding of motion was an objective finding (PX 1, p. 19 and 45). Dr. Eggers testified that psuedoarthrosis is synonymous with non-union (PX 1, p. 16). Dr. Eggers testified that petitioner would have been on light duty restrictions from November 21, 2017 through his final appointment on January 31, 2018 (PX 1, p. 17). Dr. Eggers testified that he did not believe the petitioner would have any more bony union of his fusion at C6-7 after six months passed following his first surgery (PX 1, p. 18). Dr. Eggers testified the three and one quarter years between the petitioner's first surgery and second surgery made it less likely the petitioner would have any additional bony union of his fusion at C6-7 (PX 1, p. 18).

Dr. Eggers testified that his final diagnosis was non-union at C6-7 that was symptomatic and responded to a revision (PX 1, p. 17). Dr. Eggers testified that the non-union at C6-7 caused the need for petitioner's revision surgery (PX 1, p. 20). Dr. Eggers testified that his non-union opinion was support by petitioner's persistent pain, the CT scan not showing clear-cut bony bridging and showing air in the interspace, direct surgical observation and petitioner's improvement after his revision surgery (PX 1, p. 20). Dr. Eggers testified that all of petitioner care from the January 2014 work injury was reasonable and necessary (PX 1, p. 21). Dr. Eggers testified that al of petitioner's cervical spine care was related to his 2014 work injury (PX 1, p. 21). Dr. Eggers also testified that all of the medical bills stemming from petitioner's cervical spine care were related to the 2014 work injury (PX 1, p. 21). Dr. Eggers testified that the petitioner's second surgery was directly related to his first surgery (PX 1, p. 47). Dr. Eggers found petitioner to be credible when speaking to him (PX 1, p. 21-22).

On cross-examination, Dr. Eggers testified that there is a very high success rate for his cervical fusions and that he performs less than one cervical fusion revision surgery a year (PX 1, p. 23-24). Dr. Eggers testified that he had not reviewed Dr. Grimm's medical records or Dr. Grimm's operative report (PX 1, p. 28). Dr. Eggers testified that he did not believe Dr. Grimm's medical records would change his opinions because he found a non-union radiographically and intra-operatively (PX 1, p. 29-30). Dr. Eggers testified that he reviewed the actual CT films from the June 19, 2017 scan (PX 1, p. 33). Dr. Eggers testified that the presence of air at C6-7 in this setting would always mean there is a non-union (PX 1, p. 38). Dr. Eggers testified that he reviewed the films from the 2017 MRI of petitioner's cervical spine which he thought showed a "questionable" fusion at C6-7, which why he recommended a CT scan (PX 1, p. 38-40).

Further Testimony by Petitioner

The petitioner testified that he talked to the principal after receiving his permanent restrictions, and the principal stated he did not know what petitioner would do if he came back to

work (Tr. 16-17). The petitioner testified that he has not worked since January 22, 2014 (Tr. 17-18). The petitioner testified that his goal in being treated was to get back to normal if possible (Tr. 18). The petitioner testified that he did not have any long-standing neck or arm pain prior to January 22, 2014.

As to his current complaints, the petitioner's left arm was better but he continued to have numbness in his index finger and thumb (Tr. 19). The petitioner stated he has pressure in his neck that causes pain if he does not lay down or take Ibuprofen, and he can work overhead minimally (Tr. 20). The petitioner described his neck pain as dull and achy and commented he has a lot less arm strength and endurance in his left arm (Tr. 20-21). The petitioner testified that he uses his right arm for chores mostly (Tr. 21). The petitioner testified that his symptoms are worse when the weather is cold or rainy (Tr. 22). The petitioner testified that staying seated or riding in a car for a long time will cause him neck pain because the pressure will build (Tr. 17-22). The petitioner testified that his neck pain interferes with his ability to travel and he does not visits his family as often as he would because of his neck symptoms (Tr. 23). The petitioner testified that he has given up and limited hobbies, like deer hunting, mushroom hunt, ginseng hunt and antiquing with his wife, because of his neck symptoms (Tr. 23-25). The petitioner testified that he could only lift 40 lbs and could not work too long out in front of his body because left hand is without much strength and it strains his neck (Tr. 25). The petitioner also testified that he continues to have swallowing issues from the first surgery by Dr. Grimm (Tr. 26). Mr. Rayborn testified that his injuries have had a mental toll on him because he is not able to do the things that he normally would like to (Tr. 26). The petitioner tries to limit his symptoms with medication, by supporting his neck and by limiting his actions (Tr. 27).

On cross-examination, petitioner stated nothing worsened his condition after lifting the bucket at work (Tr. 28-29). The petitioner admitted that he had some neck complaints years prior to his work injury that he had treated by a chiropractor (Tr. 19 and 31). The petitioner testified that Dr. Grimm told him there was nothing more that he could do for the petitioner (Tr. 34). The petitioner testified that Dr. Grimm took x-rays and did not see anything wrong, and that Dr. Grimm suggested a stimulator (Tr. 35). The petitioner testified that he saw Dr. Jani for neck issues prior to his work injury but that his symptoms were not as severe as what he felt after his work injury and that he still worked up until January 22, 2014. (Tr. 36-37). The petitioner testified that he has not sought further neck care since January 31, 2018 (Tr. 39).

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

As an initial matter, the Arbitrator finds the petitioner to be a credible witness as his testimony was consistent with the exhibits admitted at trial. Dr. Eggers also opined petitioner was credible and his reporting of the accident and his symptoms was consistent to the treating and examining doctors.

As to the issue of accident, the Arbitrator finds that petitioner's January 22, 2014 work accident was documented in an accident report created shortly after the incident occurred, and

the accident report was consistent with the history provided in medical records, Dr. Petkovich's reports and petitioner's testimony. All the evidence reflects that petitioner sustained an acute accident/injury to his neck after lifting buckets of water, which was part of his job duties, and that the incident caused the development of neck and left upper extremity symptoms thereafter. Respondent did not offer any evidence to contradict petitioner's testimony or the accident report as to how his injury occurred. Respondent also received notice of the accident on the date it occurred, meaning it had ample opportunity to investigate petitioner's accident. There is also no evidence to support that petitioner sustained a second accident or injury to his cervical spine after the January 22, 2014 incident, and petitioner's testimony indicates there was no intervening incident. As a result, the Arbitrator finds that an accident occurred on January 22, 2014 that arose out of and in the course of petitioner's employment by respondent.

F. Is Petitioner's current condition of ill-being causally related to the injury?

As to the issue of causation, Dr. Grimm's medical records and Dr. Petkovich's testimony support that petitioner aggravated a pre-existing cervical disc condition as a result of the January 22, 2014 work accident. All experts' opinions are in agreement that petitioner's care through December 31, 2014 was causally related to the January 22, 2014 work injury. Dr. Grimm's medical records and Dr. Petkovich's testimony also acknowledged that petitioner had residual symptoms from his work injury following his fusion surgery in 2014. The only true dispute is whether petitioner's care after December 31, 2014 was causally related to the work injury.

Petitioner's care after December 31, 2014 included treatment with Dr. Jani, a sole follow-up with Dr. Grimm, a MRI and CT scan of his cervical spine and care by Dr. Eggers. All of this care was directed at neck and left upper extremity symptoms that petitioner continued to have after December 31, 2014, and which were consistently documented in petitioner's care records after December 31, 2014. Dr. Eggers later determined that petitioner's fusion surgery at C6-7 had failed as the bone never fused at that level. The arbitrator finds it reasonable to conclude that all of petitioner's care after December 31, 2014 was directed at symptoms petitioner was experiencing from the failed fusion at C6-7 and symptoms resulting from the January 22, 2014 work accident.

Although Dr. Petkovich was of the opinion that there was a solid fusion at C6-7, the Arbitrator finds Dr. Eggers' testimony more compelling on this subject. Dr. Eggers testified that he viewed the non-union and motion at C6-7 intra-operatively during the revision surgery in 2017. Dr. Petkovich did not review any operative photographs of the revision surgery, meaning his opinion was not as well based as Dr. Eggers'. Dr. Eggers also testified that the intra-operative findings were the most objective and definitive evidence a surgeon could rely upon to make a determination whether a non-union was present because the surgeon could actually see the motion present if there was a non-union at the level in question. Dr. Petkovich's testimony that intra-operative findings were not as definitive as the CT scan findings was based on being unable to view the fusion three-dimensionally intra-operatively, but Dr. Eggers explained that a surgeon need not even view the fusion three-dimensionally because a simply application of torque to the cervical spine will reveal motion if it is present. Dr. Eggers stated that he found motion at C6-7 while applying torque to petitioner's spine during surgery. The Arbitrator notes that Dr. Petkovich indicated there were portions of the fusion at C6-7 in a "fibrous" state, meaning not

ossified. Based on the uncontradicted opinion of Dr. Eggers that all ossification of a fusion should occur within six months following a fusion surgery, the Arbitrator believes this evidence supports a conclusion of a failed fusion at C6-7.

The Arbitrator also acknowledges that Dr. Grimm stated the petitioner fusion was solid at C6-7 in his March 17, 2016 treatment note. However, the record reflects that Dr. Grimm only reviewed x-rays of petitioner's cervical spine to assess the fusion. Dr. Petkovich acknowledge that a CT-scan was the "gold standard" of radiological testing to assess whether a fusion was actually fused. For this reason, the Arbitrator finds Dr. Eggers' opinion more credible than Dr. Grimm's opinion because he viewed the non-union intra-operatively and felt the CT scan showed air at the C6-7 level, which is only present if a non-union and motion at that level is present. The Arbitrator is also convinced that petitioner had a non-union at C6-7 due to Dr. Eggers' testimony that petitioner's symptoms following December 31, 2014 were consistent with a non-union at C6-7 in that he had neck pain and symptoms in his left index finger and thumb, which are consistent with an irritation of the C7 nerve root, the nerve root located at the C6-7 level.

With the foregoing conclusion that there was a non-union of the fusion at C6-7, since all expert opinions agree that the first fusion operation was caused by the January 22, 2014 work injury and the unrebutted evidence that petitioner had no long standing neck or upper extremity symptoms prior to January 22, 2014, the Arbitrator finds that all of petitioner's care from January 22, 2014 through January 31, 2018 is causally related to his work injury. The Arbitrator likewise finds all of petitioner's current cervical spine and left upper extremity symptoms, except his left hand tremor, are causally related to his work injury.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The evidence submitted at trial solely supports that all medical care through December 31, 2014 was reasonable and necessary. For reasons listed hereinbefore, the Arbitrator concludes that the petitioner had a non-union at C6-7 following his 2014 surgery. Dr. Petkovich and Dr. Eggers opined that the revision surgery at C6-7 that Dr. Eggers performed was a reasonable care option if there was a non-union present at C6-7. Dr. Eggers also testified that all of petitioner's care was reasonable and necessary to address his cervical spine injuries. As a result, the Arbitrator finds that the 2017 cervical spine surgery was reasonable and necessary care as was all pre-operative and post-operative treatment for this second surgery. Although Dr. Grimm and Dr. Petkovich placed petitioner at maximum medical improvement prior to petitioner's second surgery, these determinations were based upon the incorrect belief that petitioner had a solid fusion at C6-7. For these reasons, the Arbitrator finds all of petitioner's medical care from January 22, 2014 through January 31, 2018 was reasonable and necessary care.

As a result of medical charges incurred after December 31, 2014, Respondent shall pay reasonable and necessary medical services of $21,539.51, equating to $283.05 for a subrogation interest held by Blue Cross Blue Shield, $2,301.76 for a subrogation interest held by petitioner's Medicare supplemental health insurer, $18,562.88 for a conditional payment lien held by

Medicare, $336.42 for reimbursement of petitioner's out-of-pocket medical expenses and $55.40 for an outstanding medical charge due and owing to Deaconess Hospital, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $63,714.72 for medical bills it paid that were incurred on or before December 31, 2014 per stipulation of the parties. Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

K. Is Petitioner entitled to temporary total disability benefits?

Based on the medical records in evidence and petitioner's testimony that he has not worked for respondent since January 22, 2014, it is clear that from January 23, 2014 through December 31, 2014 the petitioner's treating doctors ordered petitioner to remain off of work or for petitioner to be on light duty work restrictions which respondent could not accommodate. Dr. Petkovich also agreed that petitioner should have been restricted to light duty from January 23, 2014 through December 31, 2014. For this reason, the Arbitrator awards TTD benefits from January 23, 2014 through December 31, 2014, a total of 49 weeks.

On December 31, 2014 Dr. Grimm imposed permanent restrictions on the petitioner's ability to work. Per petitioner's testimony, the respondent could not accommodate these permanent restrictions. These permanent restrictions remained in place until Dr. Eggers performed the revision surgery on November 21, 2017. Following the November 21, 2017 surgery, Dr. Eggers ordered that petitioner remain on light duty work restrictions until he was released to full duty on January 31, 2018. There is no evidence in the record that respondent offered petitioner any light duty employment following the November 21, 2017 surgery.

Although Dr. Petkovich was of the opinion that petitioner did not require any restrictions at any point after petitioner was released by Dr. Grimm on December 31, 2014, it appears this opinion was based on Dr. Petkovich's belief that the fusion at C6-7 had properly fused. This was simply an incorrect belief as previously discussed. As a result, the Arbitrator finds Dr. Petkovich's opinion on work restrictions following December 31, 2014 unpersuasive, and that the petitioner was temporarily and totally disabled from January 1, 2015 through January 31, 2018, a period of 161 weeks.

It is not lost on the Arbitrator that Dr. Grimm placed petitioner at MMI on December 31, 2014, but the reality is that petitioner's condition had not stabilized by December 31, 2014. Temporary total disability compensation is to be awarded for the period of time between the injury and the date the employee's condition has stabilized. Caterpillar Tractor Co. v. Indus. Comm'n, 97 Ill. 2d 35, 44 (1983). Temporary disability is a condition which exists until the injured worker is as far restored as the permanent character of his injury will permit. Howard v. Indus. Comm'n, 81 Ill. 2d 50, 57 (1980). If the employee recovers from the injury as much as can be brought about by medical, surgical, and hospital means, any disability remaining thereafter being classifiable as either partial or total permanent disability. W. Cartridge Co. v. Indus. Comm'n, 357 Ill. 29, 31 (1934). The Arbitrator finds that the petitioner did not recover as much as he could until January 31, 2018 as his first fusion surgery resulted in a non-union at C6-7. The petitioner recovered further after his second surgery as he was released without any restrictions

and petitioner testified his condition improved as a result of the second surgery, a fact that Dr. Perkovich acknowledged

For the foregoing reasons, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $303.03/week for 210 weeks, commencing January 23, 2014 through January 31, 2018, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $16,280.04 for TTD benefits per stipulation of the parties.

L. What is the nature and extent of the injury?

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 8% of the body as a whole as determined by Dr. Petrkovich, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (RX 2). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. Dr. Petkovich noted that the petitioner had residuals symptoms as a result of his spine injury consisting of decreased sensation in his left upper extremity, neck pain, left arm atrophy and restricted cervical spine range of motion. However, the Arbitrator also notes that Dr. Petkovich's impairment rating was based on petitioner's condition as it was prior to his second surgery. Because the impairment rating was based on petitioner's condition before petitioner reached maximum medical improvement, the Arbitrator gives some weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a custodian at the time of the accident and that he would be able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that even though petitioner has not worked since his work injury, he has not be restricted from working in his former capacity since being released by Dr. Eggers. The Arbitrator also notes that petitioner's occupation is one that involves strenuous activity which petitioner may have had difficulty performing if he had returned to his former occupation. Because of petitioner's ability to return to work and difficulties he would likely encounter performing his former job, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident. Because petitioner was older it is likely harder for him to fully recover yet he also will not have to live as long with his permanent injuries, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there was no evidence in the record addressing petitioner's future earning capacity. Because of neither party submitted such evidence, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the petitioner's medical records reflect consistent symptoms of neck, left shoulder and left hand symptoms following his two two-level fusion

surgeries. The Arbitrator takes particular notice that petitioner had atrophy of his left arm from his injury per Dr. Petkovich. The petitioner testified that he continues to have some neck pain and pressure and ongoing left hand thumb and index finger numbness. The petitioner testified that he takes over the counter medication and that his injuries limits his hobbies, ability to travel and interaction with his family members. The Arbitrator specifically notes that petitioner's ongoing symptoms are consistent with the complaints found in his medical records and the more than four (4) years it took for petitioner to reach MMI. The Arbitrator yet also notes that Dr. Eggers' final records indicate the petitioner was doing well and that petitioner readily admitted he was improved compared to how he felt prior to his 2017 cervical spine surgery. Because of the ongoing symptoms petitioner continues to experience and the improvement he had from the second spine surgery, the Arbitrator therefore gives greater weight to this factor.

Based on the factors cited is Section 8(1)(b) of the Act and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of the BAW pursuant to §8(2)(d) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMBER WHITE,

Petitioner,

20IWCC0628

vs.

NO: 16 WC 3925

STATE OF ILLINOIS,
MURRAY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issue of permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 29, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.13 per week for a period of 123 1/7 weeks, representing November 29, 2015 through April 8, 2018, as provided in §8(b) of the Act. Respondent shall have credit of $65,004.59 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses identified in Petitioner's Exhibit 1 incurred for treatment of Petitioner's lumbar spine condition, pursuant to §8(a) and subject to §8.2 of the Act.

20IWCC0628

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $455.51 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 40% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: OCT 23 2020

L. Elizabeth Coppoletti

LEC/mck

O: 10/20/2020

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L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHITE, AMBER
Employee/Petitioner

Case# **16WC003925**

16WC003913

STATE OF IL/MURRAY CENTER
Employer/Respondent

20IWCC0628

On 10/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

OCT 29 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0628

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Amber White
Employee/Petitioner

v.

State of IL/Murray Center
Employer/Respondent

Case # 16 WC 03925

Consolidated cases: 16 WC 03913

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on September 5, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On November 12, 2015, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $39,478.10; the average weekly wage was $759.19.

On the date of accident, Petitioner was 34 years of age, married with 3 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $65,004.59 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $65,004.59.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, for her lumbar spine condition, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $506.13 per week for 123 1/7 weeks, commencing November 29, 2015, through April 8, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $455.51 per week for 200 weeks because the injuries sustained caused the 40% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

October 28, 2019
Date

ICArbDec p. 2

OCT 29 2019

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained accidental injuries arising out of and in the course of her employment by Respondent. In case 16 WC 03913, the Application alleged that on October 22, 2015, Petitioner was "Assisting patient" and sustained an injury to her "Left Shoulder, Neck, Body as a Whole." (Arbitrator's Exhibit 2). In case 16 WC 03925, the Application alleged that on November 12, 2015, Petitioner was "Lifting patient" and sustained an injury to her "Back, Body as a Whole" (Arbitrator's Exhibit 3). Respondent stipulated Petitioner sustained work-related accidents on both occasions, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 128 3/7 weeks, commencing November 29, 2015, through May 15, 2018. Respondent disputed Petitioner's entitlement to temporary total disability benefits for the aforestated period of time and claimed Petitioner was entitled to temporary total disability benefits of 62 2/7 weeks, commencing November 29, 2015, through February 6, 2017. Respondent also claimed there was an overpayment of temporary total disability benefits and was entitled to a credit (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Mental Health Technician. On October 22, 2015, Petitioner was escorting a patient and pushing a wheelchair at the same time. The patient Petitioner was escorting stumbled and began to fall. When he did so, the patient pulled on Petitioner's left arm in an effort to break his fall.

Petitioner initially sought medical treatment from Dr. Matthew Palm, a chiropractor, on October 26, 2015. When seen by Dr. Palm, Petitioner informed him of the accident of October 22, 2015, and complained of neck and left shoulder pain as well as numbness in her left finger tips. Dr. Palm provided some conservative treatment and referred Petitioner to Dr. Niranjan Shrestha (Petitioner's Exhibit 3).

Dr. Shrestha saw Petitioner on October 27, 2015, and evaluated her for a number of health issues including left shoulder pain. When Dr. Shrestha saw Petitioner on November 2, 2015, Petitioner complained primarily of neck and left shoulder pain and he ordered MRI scans of Petitioner's cervical spine and left shoulder (Petitioner's Exhibit 4).

MRI scans of Petitioner's left shoulder and cervical spine were performed on November 11, 2015. According to the radiologist, both MRI scans were negative (Petitioner's Exhibit 6).

On November 12, 2015, Petitioner was moving a patient in a wheelchair and the patient had a seizure. Petitioner bent over to assist the patient and was helped by a co-worker. Both Petitioner and the co-worker had to remain in a bent over position holding the patient in place until the seizure ended. As a result of this accident, Petitioner reinjured her neck and left shoulder and injured her low back.

Petitioner was seen by Dr. Shrestha on November 13, 2015. He reviewed the MRIs of Petitioner's left shoulder and cervical spine and noted they were both normal. He noted Petitioner also complained of low back pain. Dr. Shrestha diagnosed Petitioner with cervical spondylosis and fibromyalgia which he treated primarily with medication (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. Aiping Smith, an orthopedic surgeon, on January 6, 2016. At that time, Petitioner complained of low back pain extending into the buttocks which she attributed to the November, 2015, accident. Dr. Smith ordered physical therapy and authorized Petitioner to work light duty (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Dr. Matthew Gornet, an orthopedic surgeon, on February 1, 2016. Petitioner advised Dr. Gornet of the accidents of October 22, 2015, and November 12, 2015. At that time, Petitioner complained of neck pain, pain in both shoulders/trapezius with radiating pain in the left arm extending into her elbow/hand. Petitioner also complained of low back pain on both sides going into the buttocks. Dr. Gornet diagnosed Petitioner with discogenic pain in both the cervical and lumbar spine which he related to Petitioner's work injuries. He ordered MRI scans of Petitioner's lumbar and cervical spine as well as the left shoulder (Petitioner's Exhibit 7).

The MRI scans were performed on February 9, 2016. According to the radiologist, the MRI of Petitioner's cervical spine revealed disc herniations at C3-C4, C4-C5 and C6-C7 with foraminal encroachment but without cord compression. According to the radiologist, the MRI scan of Petitioner's lumbar spine revealed an annular fissure and central disc herniation at L5-S1 and a small disc herniation at L4-L5. According to the radiologist, the MRI scans of Petitioner's left shoulder revealed acromioclavicular arthropathy and mild cuff tendinopathy without tear (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on February 9, 2016, and reviewed the MRI scans. His interpretation of the MRIs was consistent with that of the radiologist. Dr. Gornet referred Petitioner to Dr. Stephen Granberg for steroid injections at L5-S1, C4-C5 and C5-C6. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 7).

Petitioner was seen by Dr. Granberg on February 23, 2016, March 25, 2016 and April 20, 2016. On those occasions, Dr. Granberg administered steroid injections at L5-S1, C4-C5 and C5-C6, respectively (Petitioner's Exhibit 9).

Dr. Gornet saw Petitioner on April 25, 2016. At that time, Petitioner advised the injections only gave her minimal relief. He recommended Petitioner undergo disc replacement surgery at C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 7).

On July 19, 2016, Dr. Gornet performed surgery which consisted of disc replacements at C4-C5, C5-C6 and C6-C7. Following surgery, Dr. Gornet saw Petitioner on August 4, 2016, and noted her neck pain had improved as well as the symptoms in her left arm/hand. Petitioner still had low back and bilateral buttocks pain, but treatment for that condition was on hold. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on August 11, 2016. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Chabot's examination was limited to Petitioner's lumbar spine condition. He opined Petitioner had sustained a low back strain and disc degeneration/bulging at L5-S1. Dr. Chabot opined Petitioner had a back condition since the injury of November 12, 2015, and it was possible a portion of the disc pathology was associated with the work injury of November 12, 2015. He recommended Petitioner undergo a lumbar discogram to determine if the disc pathology at L5-S1 was responsible for Petitioner's ongoing back complaints (Respondent's Exhibit 3).

Dr. Gornet continued to see Petitioner in regard to both her cervical and lumbar spine conditions. When he saw Petitioner on November 7, 2016, she still had some discogenic neck pain (Petitioner's Exhibit 7).

When Dr. Gornet saw Petitioner on February 6, 2017, her neck condition had improved. Dr. Gornet ordered a CT discogram at L4-L5 and L5-S1 as well as an MRI spectroscopy (Petitioner's Exhibit 7).

The CT discogram was performed on March 10, 2017. It revealed a non-provocative disc at L4-L5 and a provocative disc L5-S1. When Dr. Gornet saw Petitioner on March 25, 2017, he recommended Petitioner undergo disc replacement surgery at L5-S1, but recommended she undergo another MRI scan (Petitioner's Exhibit 7).

At the direction of Respondent, Dr. Steven Milos, an orthopedic surgeon, performed a utilization review in regard to Dr. Gornet's ordering an MRI spectroscopy. Dr. Milos reviewed medical records provided to him by Respondent and opined the MRI spectroscopy was not medically necessary or appropriate (Respondent's Exhibit 6).

Dr. Gornet saw Petitioner on May 25, 2017, and reviewed Dr. Milos' utilization review at that time. Dr. Gornet contacted Dr. Milos' office by telephone and determined Dr. Milos was a sports medicine specialist who did not perform lumbar disc replacement surgeries. He indicated he would proceed with the lumbar disc replacement surgery once Petitioner was at MMI in regard to her cervical spine (Petitioner's Exhibit 7).

When Dr. Gornet saw Petitioner on July 27, 2017, he opined she was at MMI in regard to the cervical spine and would proceed with the surgery on the low back. Dr. Gornet performed surgery on August 29, 2017, and the procedure consisted of an anterior decompression and disc replacement at L5-S1 (Petitioner's Exhibit 7).

Dr. Gornet continued to see Petitioner following the lumbar disc replacement surgery. He ordered physical therapy and directed Petitioner to gradually increase her activities. He authorized Petitioner to return to work without restrictions effective April 9, 2018 (Petitioner's Exhibit 7).

Again, at the direction of Respondent, Dr. Chabot examined Petitioner on April 6, 2018. At that time, he reviewed medical records and diagnostic studies provided to him by Respondent. In regard to Petitioner's lumbar spine condition, he opined it was related to the accident of November 12, 2015, and the disc replacement surgery performed by Dr. Gornet was reasonable and necessary. In regard to Petitioner's cervical spine disc replacement surgery, he did not attribute the need for it to the accident of November 12, 2015; however, he did not opine as to whether it was related to the accident of October 22, 2015. He opined Petitioner could return to work with the restriction of occasional lifting up to 50 pounds, frequent lifting of 10 to 15 pounds and Petitioner could not tolerate work duties that would require her to subdue or control combative individuals (Respondent's Exhibit 4).

Dr. Gornet last saw Petitioner on August 20, 2018. At that time, he opined Petitioner was at MMI and advised her to follow up on and on an as needed basis (Petitioner's Exhibit 7).

Dr. Chabot was deposed on October 19, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to Petitioner's cervical spine condition, Dr. Chabot testified the disc replacement surgery was performed for symptoms that predated the accident of November 12, 2015. Dr. Chabot stated the lifting limits he imposed were related to the low back condition and he did not impose any restrictions at all in regard to the cervical spine (Respondent's Exhibit 5; pp 12-13).

On cross-examination, Dr. Chabot stated he made reference to Petitioner's cervical spine condition because information regarding it was included in the records he reviewed. However, he said he did not make any conclusions or opine regarding causality or the need for treatment in his report of August 11, 2016 (Respondent's Exhibit 5; pp 15-16).

Dr. Gornet was deposed on April 1, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony regarding his diagnosis and treatment he provided to Petitioner was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to Petitioner's cervical spine injury, Dr. Gornet testified it was caused by the accident of October 22, 2015, and subsequently aggravated by the accident of November 12, 2015 (Petitioner's Exhibit 17; p 13).

Petitioner testified the cervical spine surgery resulted in a complete resolution of her arm/hand symptoms, but that she still continues to have stiffness in her cervical spine which is exacerbated by lifting/turning. Petitioner stated she has a reduced range of motion in her low back as well as stiffness. Petitioner also acknowledged she is not as physically active as she was prior to the accidents and has gained 60 pounds. Petitioner no longer works for Respondent and moved to Idaho to be closer to her family. She presently works in a retirement home and her job consists primarily of cooking/cleaning. The work Petitioner presently does is not as physically demanding as the work she performed while employed by Respondent.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is, in part, causally related to the accident of November 12, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained an accident on November 12, 2015, in which she sustained an injury to her lumbar spine and reinjured her cervical spine and left shoulder.

There was no dispute Petitioner's lumbar spine condition was related to the accident of November 12, 2015.

Petitioner's primary treating physician, Dr. Gornet, opined the accident of November 12, 2015, aggravated her cervical spine and left shoulder condition.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical bills for services which were tendered into evidence for medical services provided to Petitioner were reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner for her lumbar spine condition as identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The only disputed bill for medical services for treatment provided to Petitioner in connection with her lumbar spine condition was the MRI spectroscopy; however, the bill for this medical service was not tendered into evidence at trial so Respondent's liability for same is moot.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 123 1/7 weeks commencing November 29, 2015, through April 8, 2018.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work until Dr. Gornet released her to return to work effective April 9, 2018.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner had sustained permanent partial disability to the extent of 40% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time of the accidents, Petitioner was employed as a Mental Health Technician. As the circumstances of both accidents clearly revealed, Petitioner's job involved lifting/moving patients. Petitioner is presently employed in a job is less physically demanding. The Arbitrator gives this factor significant weight.

Petitioner was 34 years old at the time of the accidents and 38 years old at the time of trial. Petitioner has approximately 30 years before she will reach normal retirement age and will have to live with the effects of her cervical and lumbar spine conditions for the remainder of her natural and working life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner sustained injuries to her cervical and lumbar spine. The cervical spine injury required disc replacement surgery at three levels and the lumbar spine injury required disc replacement surgery at one level. Petitioner continues to have complaints of stiffness referable to both the cervical and lumbar spine, difficulties lifting/turning and is no longer as physically active as she was prior to sustaining the accidents. While Dr. Gornet authorized Petitioner to return to work without restrictions, Respondent's Section 12 examiner, Dr. Chabot, imposed lifting restrictions and opined Petitioner could not return to work to a position where she would have to subdue combative individuals. This, in effect, made Petitioner's return to work at the job she had the time of the accidents impossible. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMBER WHITE,

Petitioner,

20IWCC0629

vs.

NO: 16 WC 3913

STATE OF ILLINOIS,
MURRAY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issue of permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 29, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses identified in Petitioner's Exhibit 1 incurred for treatment of Petitioner's cervical spine condition, excluding Dr. Shrestha's charges for dates of service of October 28, 2015; April 4, 2016; and April 20, 2016, pursuant to §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that temporary total disability benefits and permanent partial disability benefits are awarded in companion case 16 WC 3925.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

20IWCC0629

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: OCT 23 2020

L. Elizabeth Coppoletta

Stephen Mathis

D. Douglas McCarthy

LEC/mck

O: 10/20/2020

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHITE, AMBER
Employee/Petitioner

Case# **16WC003913**

16WC003925

STATE OF IL/MURRAY CENTER
Employer/Respondent

20IWCC0629

On 10/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

OCT 29 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0629

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Amber White
Employee/Petitioner

v.

State of IL/Murray Center
Employer/Respondent

Case # 16 WC 03913

Consolidated cases: 16 WC 03925

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on September 5, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On October 22, 2015, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $39,478.10; the average weekly wage was $759.19.

On the date of accident, Petitioner was 34 years of age, married with 3 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, for her cervical spine condition excluding the charges of Dr. Shrestha of October 28, 2015, April 4, 2016, and April 20, 2016, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Based upon the Conclusion of Law attached hereto, temporary total disability benefits and permanent partial disability benefits are awarded in case number 16 WC 03925.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher

William R. Gallagher, Arbitrator
ICArbDec p. 2

October 28, 2019
Date

OCT 29 2019

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained accidental injuries arising out of and in the course of her employment by Respondent. In case 16 WC 03913, the Application alleged that on October 22, 2015, Petitioner was "Assisting patient" and sustained an injury to her "Left Shoulder, Neck, Body as a Whole." (Arbitrator's Exhibit 2). In case 16 WC 03925, the Application alleged that on November 12, 2015, Petitioner was "Lifting patient" and sustained an injury to her "Back, Body as a Whole" (Arbitrator's Exhibit 3). Respondent stipulated Petitioner sustained work-related accidents on both occasions, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 128 3/7 weeks, commencing November 29, 2015, through May 15, 2018. Respondent disputed Petitioner's entitlement to temporary total disability benefits for the aforestated period of time and claimed Petitioner was entitled to temporary total disability benefits of 62 2/7 weeks, commencing November 29, 2015, through February 6, 2017. Respondent also claimed there was an overpayment of temporary total disability benefits and was entitled to a credit (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Mental Health Technician. On October 22, 2015, Petitioner was escorting a patient and pushing a wheelchair at the same time. The patient Petitioner was escorting stumbled and began to fall. When he did so, the patient pulled on Petitioner's left arm in an effort to break his fall.

Petitioner initially sought medical treatment from Dr. Matthew Palm, a chiropractor, on October 26, 2015. When seen by Dr. Palm, Petitioner informed him of the accident of October 22, 2015, and complained of neck and left shoulder pain as well as numbness in her left finger tips. Dr. Palm provided some conservative treatment and referred Petitioner to Dr. Niranjan Shrestha (Petitioner's Exhibit 3).

Dr. Shrestha saw Petitioner on October 27, 2015, and evaluated her for a number of health issues including left shoulder pain. When Dr. Shrestha saw Petitioner on November 2, 2015, Petitioner complained primarily of neck and left shoulder pain and he ordered MRI scans of Petitioner's cervical spine and left shoulder (Petitioner's Exhibit 4).

MRI scans of Petitioner's left shoulder and cervical spine were performed on November 11, 2015. According to the radiologist, both MRI scans were negative (Petitioner's Exhibit 6).

On November 12, 2015, Petitioner was moving a patient in a wheelchair and the patient had a seizure. Petitioner bent over to assist the patient and was helped by a co-worker. Both Petitioner and the co-worker had to remain in a bent over position holding the patient in place until the seizure ended. As a result of this accident, Petitioner reinjured her neck and left shoulder and injured her low back.

Petitioner was seen by Dr. Shrestha on November 13, 2015. He reviewed the MRIs of Petitioner's left shoulder and cervical spine and noted they were both normal. He noted Petitioner also complained of low back pain. Dr. Shrestha diagnosed Petitioner with cervical spondylosis and fibromyalgia which he treated primarily with medication (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. Aiping Smith, an orthopedic surgeon, on January 6, 2016. At that time, Petitioner complained of low back pain extending into the buttocks which she attributed to the November, 2015, accident. Dr. Smith ordered physical therapy and authorized Petitioner to work light duty (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Dr. Matthew Gornet, an orthopedic surgeon, on February 1, 2016. Petitioner advised Dr. Gornet of the accidents of October 22, 2015, and November 12, 2015. At that time, Petitioner complained of neck pain, pain in both shoulders/trapezius with radiating pain in the left arm extending into her elbow/hand. Petitioner also complained of low back pain on both sides going into the buttocks. Dr. Gornet diagnosed Petitioner with discogenic pain in both the cervical and lumbar spine which he related to Petitioner's work injuries. He ordered MRI scans of Petitioner's lumbar and cervical spine as well as the left shoulder (Petitioner's Exhibit 7).

The MRI scans were performed on February 9, 2016. According to the radiologist, the MRI of Petitioner's cervical spine revealed disc herniations at C3-C4, C4-C5 and C6-C7 with foraminal encroachment but without cord compression. According to the radiologist, the MRI scan of Petitioner's lumbar spine revealed an annular fissure and central disc herniation at L5-S1 and a small disc herniation at L4-L5. According to the radiologist, the MRI scans of Petitioner's left shoulder revealed acromioclavicular arthropathy and mild cuff tendinopathy without tear (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on February 9, 2016, and reviewed the MRI scans. His interpretation of the MRIs was consistent with that of the radiologist. Dr. Gornet referred Petitioner to Dr. Stephen Granberg for steroid injections at L5-S1, C4-C5 and C5-C6. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 7).

Petitioner was seen by Dr. Granberg on February 23, 2016, March 25, 2016 and April 20, 2016. On those occasions, Dr. Granberg administered steroid injections at L5-S1, C4-C5 and C5-C6, respectively (Petitioner's Exhibit 9).

Dr. Gornet saw Petitioner on April 25, 2016. At that time, Petitioner advised the injections only gave her minimal relief. He recommended Petitioner undergo disc replacement surgery at C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 7).

On July 19, 2016, Dr. Gornet performed surgery which consisted of disc replacements at C4-C5, C5-C6 and C6-C7. Following surgery, Dr. Gornet saw Petitioner on August 4, 2016, and noted her neck pain had improved as well as the symptoms in her left arm/hand. Petitioner still had low back and bilateral buttocks pain, but treatment for that condition was on hold. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on August 11, 2016. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Chabot's examination was limited to Petitioner's lumbar spine condition. He opined Petitioner had sustained a low back strain and disc degeneration/bulging at L5-S1. Dr. Chabot opined Petitioner had a back condition since the injury of November 12, 2015, and it was possible a portion of the disc pathology was associated with the work injury of November 12, 2015. He recommended Petitioner undergo a lumbar discogram to determine if the disc pathology at L5-S1 was responsible for Petitioner's ongoing back complaints (Respondent's Exhibit 3).

Dr. Gornet continued to see Petitioner in regard to both her cervical and lumbar spine conditions. When he saw Petitioner on November 7, 2016, she still had some discogenic neck pain (Petitioner's Exhibit 7).

When Dr. Gornet saw Petitioner on February 6, 2017, her neck condition had improved. Dr. Gornet ordered a CT discogram at L4-L5 and L5-S1 as well as an MRI spectroscopy (Petitioner's Exhibit 7).

The CT discogram was performed on March 10, 2017. It revealed a non-provocative disc at L4-L5 and a provocative disc L5-S1. When Dr. Gornet saw Petitioner on March 25, 2017, he recommended Petitioner undergo disc replacement surgery at L5-S1, but recommended she undergo another MRI scan (Petitioner's Exhibit 7).

At the direction of Respondent, Dr. Steven Milos, an orthopedic surgeon, performed a utilization review in regard to Dr. Gornet's ordering an MRI spectroscopy. Dr. Milos reviewed medical records provided to him by Respondent and opined the MRI spectroscopy was not medically necessary or appropriate (Respondent's Exhibit 6).

Dr. Gornet saw Petitioner on May 25, 2017, and reviewed Dr. Milos' utilization review at that time. Dr. Gornet contacted Dr. Milos' office by telephone and determined Dr. Milos was a sports medicine specialist who did not perform lumbar disc replacement surgeries. He indicated he would proceed with the lumbar disc replacement surgery once Petitioner was at MMI in regard to her cervical spine (Petitioner's Exhibit 7).

When Dr. Gornet saw Petitioner on July 27, 2017, he opined she was at MMI in regard to the cervical spine and would proceed with the surgery on the low back. Dr. Gornet performed surgery on August 29, 2017, and the procedure consisted of an anterior decompression and disc replacement at L5-S1 (Petitioner's Exhibit 7).

Dr. Gornet continued to see Petitioner following the lumbar disc replacement surgery. He ordered physical therapy and directed Petitioner to gradually increase her activities. He authorized Petitioner to return to work without restrictions effective April 9, 2018 (Petitioner's Exhibit 7).

Again, at the direction of Respondent, Dr. Chabot examined Petitioner on April 6, 2018. At that time, he reviewed medical records and diagnostic studies provided to him by Respondent. In regard to Petitioner's lumbar spine condition, he opined it was related to the accident of November 12, 2015, and the disc replacement surgery performed by Dr. Gornet was reasonable and necessary. In regard to Petitioner's cervical spine disc replacement surgery, he did not attribute the need for it to the accident of November 12, 2015; however, he did not opine as to whether it was related to the accident of October 22, 2015. He opined Petitioner could return to work with the restriction of occasional lifting up to 50 pounds, frequent lifting of 10 to 15 pounds and Petitioner could not tolerate work duties that would require her to subdue or control combative individuals (Respondent's Exhibit 4).

Dr. Gornet last saw Petitioner on August 20, 2018. At that time, he opined Petitioner was at MMI and advised her to follow up on and on an as needed basis (Petitioner's Exhibit 7).

Dr. Chabot was deposed on October 19, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to Petitioner's cervical spine condition, Dr. Chabot testified the disc replacement surgery was performed for symptoms that predated the accident of November 12, 2015. Dr. Chabot stated the lifting limits he imposed were related to the low back condition and he did not impose any restrictions at all in regard to the cervical spine (Respondent's Exhibit 5; pp 12-13).

On cross-examination, Dr. Chabot stated he made reference to Petitioner's cervical spine condition because information regarding it was included in the records he reviewed. However, he said he did not make any conclusions or opine regarding causality or the need for treatment in his report of August 11, 2016 (Respondent's Exhibit 5; pp 15-16).

Dr. Gornet was deposed on April 1, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony regarding his diagnosis and treatment he provided to Petitioner was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to Petitioner's cervical spine injury, Dr. Gornet testified it was caused by the accident of October 22, 2015, and subsequently aggravated by the accident of November 12, 2015 (Petitioner's Exhibit 17; p 13).

Petitioner testified the cervical spine surgery resulted in a complete resolution of her arm/hand symptoms, but that she still continues to have stiffness in her cervical spine which is exacerbated by lifting/turning. Petitioner stated she has a reduced range of motion in her low back as well as stiffness. Petitioner also acknowledged she is not as physically active as she was prior to the accidents and has gained 60 pounds. Petitioner no longer works for Respondent and moved to Idaho to be closer to her family. She presently works in a retirement home and her job consists primarily of cooking/cleaning. The work Petitioner presently does is not as physically demanding as the work she performed while employed by Respondent.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is, in part, causally related to the accident of October 22, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on October 22, 2015, in which she sustained an injury to her cervical spine and left shoulder.

Petitioner's primary treating physician, Dr. Gornet, opined the accident of October 22, 2015, caused the condition and Petitioner's cervical spine which was subsequently aggravated by the accident of November 12, 2015.

Respondent's Section 12 examiner, Dr. Chabot, did not opine whether Petitioner's cervical spine condition was related to the accident of October 22, 2015.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner for her cervical spine condition was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith, excluding the charges of Dr. Shrestha of October 28, 2015, April 4, 2016 and April 20, 2016.

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner for her cervical spine condition as identified in Petitioner's Exhibit 1, excluding the charges of Dr. Shrestha of October 28, 2015, April 4, 2016 and April 20, 2016, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

There were no medical records tendered into evidence pertaining to Dr. Shrestha's charges of October 28, 2015, April 4, 2016 and April 20, 2016, so it is not possible for the Arbitrator to determine what medical services were provided to Petitioner on those occasions.

In regard to disputed issues (K) and (L) the Arbitrator has awarded temporary total disability and permanent partial disability benefits in case 16 WC 03925.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LISA HARTLINE,

Petitioner,

vs. NO: 18 WC 23086

STATE OF ILLINOIS/CHOATE MENTAL HEALTH,

20IWCC0630

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, intervening accident, medical expenses, prospective medical, and temporary total disability (TTD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

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The Commission affirms and adopts the Arbitrator's findings and conclusions with respect to the left knee medial meniscus tear, but reverses the Arbitrator's Decision as to Petitioner's alleged right knee injury. The Commission finds that Petitioner's current condition of ill-being for the right knee is not causally related to the February 9, 2018 work accident.

Petitioner did not sustain any specific injury to the right knee on February 9, 2018. She testified that symptoms in her right knee first appeared about two weeks prior to undergoing left knee surgery on July 16, 2018. Respondent's Section 12 examiner, Dr. Michael Nogalski, testified that Petitioner reported first having right knee pain about one day after the surgery. The first complaints of right knee pain appear in the therapy records of September 25, 2018. Petitioner argues that her subsequent injury to the right knee was the result of overcompensation following the undisputed work injury to the left knee.

The Commission notes the discrepancy between Petitioner's testimony and the medical evidence as to the onset of right knee complaints, and finds that the preponderance of the evidence does not support Petitioner's overuse or overcompensation theory for the right knee. There was no evidence that Petitioner was overusing her right leg. She had substantial restrictions as of February 12, 2018, which included no walking for more than five minutes, no standing for more than 10 minutes, no climbing, and Petitioner was allowed to sit for extended periods of time with the left leg elevated. By the date of her left knee surgery and through the date of arbitration, Petitioner was off work. Most significantly, both Dr. Richard Lehman, Petitioner's treating physician, and Dr. Nogalski testified against the overuse or overload theory.

Dr. Nogalski testified that Petitioner's symptoms correlated with pre-existing osteoarthritic problems as demonstrated by the findings on the right knee MRI dated October 30, 2018. The MRI revealed mild-to-moderate degenerative fraying of the medial meniscus, but no tear. There was small joint effusion that could have been reactive, as well as mild chondromalacia of the patella and a 9-mm ganglion cyst arising from the proximal tibiofibular joint. Dr. Nogalski opined that Petitioner's right knee condition was neither caused nor aggravated by the February 9, 2018 accident. He further testified: "I do not believe that someone with a specific contralateral problem could work themselves hard enough to create a situation where they had to overcompensate or overuse the other knee. The left knee would reasonably limit them. If so, would not cause some problem with the right knee." (RX6, pgs. 27-28).

Petitioner relied on Dr. Lehman's opinions with respect to causal connection and need for surgery on the right knee. However, Dr. Lehman acknowledged that Petitioner had preexisting degenerative arthritis, and agreed with Dr. Nogalski's position on overcompensation: "So in general I agree with that. I don't think most people have overload to the point of having objective pathology in the affected joint or unaffected joint, depending on how you look at it." (PX10, pg. 25). Notwithstanding this, Dr. Lehman determined that Petitioner's right knee condition was causally related to the February 9, 2018 work injury based on the MRI findings, specifically the noted reactive effusion. Dr. Lehman diagnosed Petitioner with right knee torn medial meniscus and degenerative arthritis and recommended arthroscopic surgery.

20IWCC0630

The Commission finds Dr. Lehman's opinion on causal connection and his recommendation for surgery without sufficient basis. In addition to Dr. Lehman's testimony in regards to the overload theory, the October 30, 2018 MRI indicated no evidence of a tear. Dr. Lehman could not state with certainty the nature of Petitioner's injury. He testified on cross-examination that according to the MRI, Petitioner's right knee complaints and symptoms could either be a meniscal or arthritic condition. He further testified that the noted small joint effusion was in fact an inconclusive finding.

Based on the totality of the evidence, the Commission finds that Petitioner failed to prove that the original work injury sustained on February 9, 2018 was a causative factor in the subsequent condition to her right knee. The evidence did not demonstrate that Petitioner overused her right knee at or around the time alleged by Petitioner, both Drs. Lehman and Nogalski testified against the overuse or overload theory, and the MRI findings did not support Dr. Lehman's causation opinion nor his recommendation for surgery. As such, the Commission reverses the Arbitrator's Decision with respect to the alleged right knee injury.

The Commission also seeks to correct and clarify page 2, paragraph 4 of the Arbitrator's Decision; the June 13, 2018 MRI pertained to Petitioner's "left" knee and not her "right" knee; and, page 9, paragraphs 1, 2, and 3 incorrectly state Dr. Nogalski instead of Dr. Lehman. The following sentences should read:

> Paragraph 1: During his deposition, "Dr. Lehman" also expressed surprise that Dr. Nogalski . . .
>
> Paragraph 2: On cross-examination, "Dr. Lehman" testified that reactive effusion . . .
>
> Paragraph 3: She testified that she remains under the restrictions of "Dr. Lehman . . ."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed December 27, 2019, is hereby modified as indicated herein. The remainder of the Arbitrator's Decision is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current condition of ill-being with respect to the right leg is not causally related to the February 9, 2018 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current condition of ill-being with respect to the left leg is causally related to the February 9, 2018 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall only pay reasonable and necessary medical services related to the left leg, and as evidenced in Petitioner's Exhibit 1 in the amount of $101,410.63, pursuant to Sections 8(a) and 8.2 of the Act.

20IWCC0630

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to Section 8(j) of the Act, Respondent is entitled to a credit for those amounts paid under its group plan that are related to the treatment of injuries found compensable by this Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective treatment for the right leg is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $472.64 per week for 70 1/7 weeks, commencing February 18, 2018 through June 23, 2019, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $47,293.69 for TTD previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED: OCT 26 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 10/20/2020
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

HARTLINE, LISA
Employee/Petitioner

Case# **18WC023086**

SOI/CHOATE MENTAL HEALTH
Employer/Respondent

20IWCC0630

On 12/27/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.57% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
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1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
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SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

DEC 27 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LISA HARTLINE
Employee/Petitioner

v.

SOI/CHOATE MENTAL HEALTH
Employer/Respondent

Case # 18 WC 23086

Consolidated cases:

20IWCC0630

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville,** on **October 1, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **February 9, 2018**, Respondent ***was*** operating under and subject to the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$36,866.16**; the average weekly wage was **$708.96**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **4** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all medical services.

Respondent shall be given a credit of **$47,293.69** for TTD, $- for TPD, $- for maintenance, and for other benefits, for a total credit of **$47,293.69.**

Respondent is entitled to a credit of **$any benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) and § 8.2 of the Act.

Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit. Respondent shall authorize and pay for the treatment recommended by Dr. Lehman.

Respondent shall pay Petitioner temporary total disability benefits of **$472.64**/week for ***further period*** of **14 2/7** weeks, as provided in Section 8(b) of the Act, for Petitioner's continued period of disability from June 24, 2019, beyond of the period of disability for which Respondent has paid and received credit.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Edward Lee
Signature of Arbitrator

12/16/19
Date

ICArbDec19(b)

DEC 27 2019

The Arbitrator finds the following facts:

This matter was presented for Arbitration on October 1, 2019 on Petitioner's motion pursuant to Sections 19(b) and 8(a) of the Act. Respondent disputed causal connection, temporary total disability, medical expenses, and prospective medical.

Petitioner is employed as a Mental Health Technician II for Respondent's Choate Mental Health and Development Center for five years and was 43 years of age at the time of trial. The parties stipulated that Petitioner suffered an accidental injury on February 9, 2018, while working for Respondent. (AX 1). Petitioner testified that on that date she was escorting a group of residents on a shopping outing and while boarding a van, she asked a patient to switch seats, and while she was getting into the van, the resident turned and bumped into her, causing Petitioner to twist to her right while her weight was on her left leg. (T. 11, 48, PX 3). When Petitioner twisted, she heard a loud pop and felt immediate severe pain in her left knee. *Id.* Petitioner had difficulty walking after that time and was brought to tears while riding in the van. *Id.*

Petitioner testified that prior to February 9, 2018 she never had any left knee injuries or received any treatment for her left knee. Id. She indicated though that she had problems with her right knee before her work accident on February 9, 2018. *Id.* In 2003, she suffered a right knee meniscal injury while working as a physical therapist assistant. (T. 12). Her prior injury required surgery but she returned to full duty after six weeks. (T. 12-13). Following her 2003 right knee injury, she did not suffer any other injuries to her knees or miss any work because of her knees for 15 years. (T. 13).

Following the left knee injury on February 9, 2018, Petitioner initially self-treated with rest, "icy hot," ice, compression, elevation, and ibuprofen. However, she did not get any relief from her symptoms and her pain kept her up at night. On February 12, 2018, Petitioner presented to Union County Hospital with left knee pain after a work injury on February 9, 2018. A physical examination was recorded and noted tenderness of the biceps femoris tendon and x-rays were obtained. Physician's Assistant Russell Kinsey diagnosed Petitioner with a hamstring strain and left knee pain. Pain medication and physical therapy were prescribed. *Id.* She was to remain off work the rest of the day and to return on February 13, 2018 with restrictions of no walking more than five minutes, no standing more than ten minutes, no climbing, and she was to elevate her leg after sitting for extended periods. (PX 3.).

On February 19, 2918, Petitioner began physical therapy at Rehab Unlimited in Anna, Illinois. (PX 5).

On February 22, 2018, Petitioner followed up with Russell Kinsey, PA and he noted that her hamstring had improved but she still had pain localized to the medial aspect of the left knee. It was noted that she had two physical therapy sessions and the first session caused her a lot of pain. She was scheduled for two sessions a week for four weeks. Petitioner stated that it was painful to

walk and she had severe pain if she "turned the wrong way." She was to continue with physical therapy. (PX 3).

On March 14, 2018, Petitioner returned to Russell Kinsey, PA. She finished physical therapy but continued to have left knee pain and swelling. She was referred to an orthopedic surgeon for further evaluation. (*Id.*).

On May 3, 2018, Petitioner was seen by board certified orthopedic surgeon, Dr. Richard Lehman. Petitioner testified that she wanted to treat with Dr. Lehman because she treated his patients when she worked in physical therapy and saw good results. (T. 15). Dr. Lehman noted that Petitioner's chief complaint was left knee pain since a work injury when she was accompanying a group of inviduals on a shopping outing. She reported to Dr. Lehman that when she was entering the rear of a passenger van, she was inadvertently pushed by an individual and she twisted her left knee as she pushed off to step up into the van. She heard a loud pop and felt significant discomfort in her left knee at that time. She had anti-inflammatories, physical therapy, and muscle relaxants but continued to have pain. It was noted that she never any prior injuries to her left knee but previously injured her right knee. Since the accident she was unable to walk up stairs and had pain with any type of walking. (PX 4).

Dr. Lehman performed a physical examination and noted his findings. He noted that hyperflexion was painful, she had tenderness over the medial joint line, and mild popping over the medial joint line was noted. She had soreness to palpation medially and discomfort medially. Dr. Lehman noted breakdown over the medial joint with patellofemoral overpressure. Her IT band was moderately tight and effusion was noted. Dr. Lehman also reviewed Petitioner's medical records from Union County Hospital and physical therapy notes. He indicated that her left knee soreness and discomfort had been unchanged for three months. Petitioner was working at the time and Dr. Lehman recommended she continue to work while an MRI was ordered. (PX 4).

On June 13, 2018 an MRI was obtained of Petitioner's right knee at Diagnostic Imaging Center of Carterville. It revealed a nondisplaced horizontal tear through the posterior horn and body of the medial meniscus and a large reactive joint effusion and mild to moderate degenerative changes of the medial tibiofemoral joint. (PX 6).

On July 10, 2018, Petitioner returned to Dr. Lehman with continued left knee pain. He reviewed the MRI and diagnosed her with an acute medial meniscus tear of the left knee. He recommended surgery. (PX 4).

On July 16, 2018, Petitioner underwent surgery with Dr. Lehman at Landmark Surgery Center. He performed a left knee arthroscopy consisting of partial medial meniscectomy, debridement of the medial femur and trochlea, and articular cartilage reconstruction. (PX 4 and PX 7).

On July 26, 2018, Petitioner followed up with Dr. Lehman. He was pleased with her progress and noted that she was doing a great job with her home exercise program. She was to hold off on therapy until after she started weightbearing exercises in two weeks. She was to follow up in four weeks. (PX 4).

On August 15, 2018, Petitioner initiated post-operative physical therapy at Rehab Unlimited. It was noted that she started bearing weight on her left leg on August 13, 2018 and the previous night was the first night she did not take pain medication to get to sleep. However, she woke up in pain. Her injury history was consistent with her testimony and the history given to Union County Hospital and Dr. Lehman. It was noted that conservative treatment prior to surgery did not give her any improvement in her condition. Her physical therapy was to consist of modalities for pain relief, therapeutic exercises to improve range of motion, strength training, and manual therapy. (PX 5).

Petitioner returned to Dr. Lehman on September 4, 2018 for reevaluation of her left knee. She had great motion in her knee and did not have any tenderness. Petitioner had full extension of the knee but still experienced some popping. Dr. Lehman ordered a new brace and physical therapy. (PX 4).

On October 10, 2018, Petitioner presented to Rehab Unlimited for her scheduled physical therapy. Petitioner's right knee was bothering her more than her left knee on that date. It was noted that she had been compensating and using her right side since surgery. Climbing stairs and leading with her right leg aggravated her pain. She was using a lot of ice on her bilateral knees and rated her right knee pain as 6/10 and her left knee as 1-2/10. She had frequent popping in the left knee and even had popping in her right knee now. She was instructed to notify Dr. Lehman of her right knee pain. (PX 5).

On October 17, 2018, Petitioner was revaluated by Dr. Lehman for left knee pain and right knee pain. Overall, her left knee was good, she did not have a lot of pain, but did experience some popping. She was wearing a brace for her left knee and undergoing physical therapy. Dr. Lehman noted that Petitioner now had right knee pain which was rated as 5-6/10 and inhibiting her rehab for her left knee. Upon physical examination, Dr. Lehman noted grinding and popping. She had pain over her medial joint line and had pain with over pressure. She had crepitus and positive McMurray's test. Dr. Lehman noted that her right knee was compensatory for her left knee because she was overloading her right knee since the beginning of her injury. It was inhibiting her ability to get through rehab for the left. He recommended an MRI of the right knee. He did not believe she could return to work until she got her strength back. (PX 4).

An MRI of Petitioner's right knee was obtained on October 30, 2018 at the Diagnostic Imaging Center of Carterville. It revealed mild-to-moderate degenerative fraying of the medial meniscus, joint effusion, mild chondromalacia of the patella, and a 9 mm ganglion cyst arising from the posterior tibiofibular joint. (PX 6).

On November 8, 2018, Petitioner reported to her physical therapist that her right knee was worse that morning than her left. She aggravated her right knee by trying to do more at home. She reported that she was trying to cook dinner at home the previous night, which she had been unable to do previously. She had to take pain medication in the morning though because of the right knee pain. Her physical therapist noted that she was starting to compensate with her left leg due to right leg pain and her left leg was weak. (PX 5).

Petitioner returned to Dr. Lehman on November 20, 2018 for reevaluation of the left and right knees. Her left knee was improving but she had pain and swelling when she over did it. Dr. Lehman noted that her right knee was "killing her." He reviewed her MRI and noted a complex tear of the medial meniscus. He further noted that his physical examination findings were consistent with this diagnosis as she had tenderness over the medial joint line. He wanted her to continue strengthening her left knee before addressing her right knee. He believed they could address right knee surgery when her left knee was strong. She was given pain medication on that date. She was also to remain off work for another four to six weeks and continue physical therapy. (PX 4).

On December 18, 2018, Petitioner returned to Dr. Lehmann. She had been attending physical therapy multiple times per week and diligently performing at-home exercises and stretches as directed. She reported good improvement in her range of motion and strength from treatment. Dr. Lehmann noted that her knees were looking better and he believed her swelling would decrease with continued quad strengthening. He believed she could return to light duty work with restrictions of no squatting, no kneeling, and no lifting patients. She was to return in four weeks. (PX 4).

On January 9, 2019, Petitioner was evaluated by Dr. Michael Nogalski at the request of Respondent pursuant to Section 12 of the Act. Dr. Nogalski evaluated Petitioner's right and left knees. Petitioner described to Dr. Nogalski an accident history consistent with the history given to Union County Hospital, Dr. Lehman, and the physical therapists at Rehab Unlimited. He noted that her left knee pain began after an incident at work on February 9, 2018 when she was pushed by an individual while boarding a passenger van. It was noted that her left foot was on the ground and pointed to the right when something snapped in her left knee as she tried to catch herself. He noted that she began to experience right knee pain a day before her left knee surgery. Dr. Nogalski recorded her treatment history upon his review of the medical records and outlined his records review in his report. (RX 5).

Dr. Nogalski performed a physical examination obtained x-rays of both knees. Upon examination of her left knee he noted trace effusion, full active knee extension, flexion to 140 degrees, tenderness along the medial joint line, mild patellofemoral crepitus, 5-/5 extension strength, 5/5 flexion strength. Upon examination of the left knee, Dr. Nogalski noted tenderness along the medial joint line, full active knee extension, grade 5-/5 extension and flexion strength, mild tenderness along the medial and anteromedial joint line with resisted knee extension. Apley's

grind test was positive and McMurray's test was negative. Ligament stability was intact and hip range of motion was relatively normal with pain. He noted that her gait was normal. (RX 5).

Respondent took the deposition of Dr. Nogalski on June 24, 2019. (RX 6). He testified that he believed Petitioner suffered from status post left knee arthroscopy and debridement and right knee pain likely related to chondromalacia without mechanical right knee findings. *Id.* at 15. He believed there was no objective documentation regarding a left knee injury in Dr. Lehman's May 3, 2018 report, and no objective evidence of injury within the left knee MRI report. *Id.* at 17. He stated that the impression documented "a non-displaced degenerative horizontal degenerative horizontal tear through the posterior horn and body of the medial meniscus and a large reactive joint effusion and mild to moderate degenerative change to the medial tibiofemoral joint. As well as mild degenerative change to the patellar cartilage with mild chondromalacia." *Id.* at 17. He believed that all those findings were degenerative, and stated that Petitioner's denial of prior left knee problems did coincide with said findings. *Id.* at 17-18. He also did not believe that Petitioner's condition was aggravated by the February 9, 2018 injury, even though he acknowledged that Petitioner reported a "twisting injury, causing her knee to pop according to the supervisor's report of injury." *Id.* at 18-19. He stated:

> The arthroscopy of the knee did not identify a meniscal tear. The treatment had been relatively predicated on a twisting injury causing a meniscal tear, which was not observed. The only thing that was found were some degenerative issues within the knee. On top of that, the activity Ms. Hartline described, that of a twisting injury, wasn't correlated with any specific witness reports in this matter. And in the context of this situation where she had an arthroscopy for a degenerative knee condition, which was treated, the facts and the conditions for which she underwent treatment don't correlate with an event or unusual activity. *Id.* at 20-21.

Dr. Nogalski further testified that he felt that more conservative care was warranted prior to Petitioner's surgery and that her medical treatment might have skipped one or two steps. *Id.* at 21-22. He testified he would have recommended an injection and possibly even an unloader brace to "help alleviate symptoms from a degenerative knee condition. *Id.* at 22. He then stated that if "the right type of meniscal tear was present on the MRI, then it would be reasonable to try to move forward with a more aggressive form of treatment. *Id.* at 22-23. He stated that "there wasn't a tear observed by Dr. Lehman at the time of surgery;" but that the intra-meniscal degeneration and the MRI which "suggested a possible tear" ultimately lead to the assessment of a degenerative tear. *Id.* at 23-24. He felt that Petitioner was at MMI during his appointment in January of 2019. *Id.* at 24.

With respect to Petitioner's right knee, Dr. Nogalski likewise believed there was no objective evidence of injury in the records or diagnostic studies, and he did not believe that Petitioner suffered an aggravation to her preexisting condition as a result of overcompensation from the injury *Id.* at 24-25, 27. He stated:

> I do not believe that someone with a specific contralateral problem could work themselves hard enough to create a situation where they had to overcompensate or overuse the other

> knee. The left knee would reasonably limit them. If so, would [sic] not cause some problem with the right knee. It does not make common sense. I believe it's a very awkward and unusual argument that while is used at times, doesn't make common sense from a physiologic standpoint. *Id.* at 27-28.

He did not believe that Petitioner was a surgical candidate with respect to her right knee. *Id.* at 28.

On cross-examination, Dr. Nogalski testified that any treatment beyond the MRI of February 9, 2018 ordered by Dr. Lehman was not reasonable, necessary, or related to the February 9th work accident. *Id.* at 42. He acknowledged that he has testified to give his medical/legal opinion 350 times over the last 9 years, but denied that these were given almost exclusively at the request of a defense party or insurance carrier. *Id.* at 43-45. He admitted that there was no evidence that Petitioner was malingering or exaggerating her symptoms. *Id.* at 47-48. He admitted that Petitioner's MRIs revealed objective evidence of knee pathology. *Id.* at 48. He acknowledged that there was no prior MRI of either knee for comparison available. *Id.* at 48. But he maintained that Petitioner's objective pathology was in no way caused, aggravated, or made symptomatic by her work injury. *Id.* at 48. He also believed that Petitioner's current symptoms were unrelated to her work injury, even though Petitioner's symptoms have not returned to baseline since the injury occurred. *Id.* at 49.

Petitioner returned to Dr. Lehmann on January 31, 2019, with complaints of left and right knee pain. Petitioner was undergoing physical therapy which was improving her symptoms; however, she had not been able to undergo physical therapy because it was denied by the workers' compensation carrier. Dr. Lehman recommended she get back to physical therapy as soon as possible. (PX 4).

On March 14, 2019, Petitioner followed up with Dr. Lehman for evaluation of her bilateral knees. She complained of right knee soreness. Her left knee was not as bad but she had difficulty going down steps. She returned to physical therapy and was working on strengthening her left knee. Dr. Lehman recommended right knee arthroscopy after the left knee was sufficiently stronger. She was to continue with physical therapy. (PX 4).

Petitioner followed up with Dr. Lehman on May 2, 2019. Her right knee was worse and the pain had made it difficult for her to continue participating in physical therapy. Her pain was medial and underneath her knee cap. She was taking Percocet to deal with the pain. Dr. Lehman administered a steroid injection on that date. She was to follow up in four weeks. (PX 4).

On July 9, 2019, Dr. Lehman reevaluated Petitioner. He noted that her primary complaint was right knee pain. The cortisone injection did not help her with the inflammation. She had not gone back to work. He again recommended surgery and refilled her prescription for pain medication. (PX 4).

Dr. Lehman testified by way of deposition on July 23, 2019. (PX 10). He is a board-certified sports medicine specialist licensed in California and Missouri. *Id.* at 4. In the past, he performed IMEs on behalf of the State of Illinois. *Id.* at 6. After testifying to the findings documented in his medical records, including the MRI showing a complex meniscal tear, Dr.

Lehman stated, "My opinion is that her history and the episode occurring on two thousand – or on 2-9-2018 contributed to her medial meniscus tear. *Id.* at 11. When asked to explain his rationale, he stated:

> I think there's a couple things. On her MRI it also showed some degenerative changes in the joint surfaces – as noted on the MRI, some breakdown of the patellofemoral joint and the medial joint space, and – but she also had this reactive effusion, and an effusion is swelling, and a reactive fusion effusion generally occurs after some type of trauma or something acute, and based on that, that was my opinion, that because of the large reactive effusion, that without a doubt she has some preexisting degenerative arthritis in her knee, but that the tear – meniscal tear component was acute and that the reactive effusion was a direct result of the meniscal tear component. *Id.* at 11-12.

He further testified that the mechanism of injury provided to him – the history of a pop with twisting – is consistent with a meniscal tear. *Id.* at 12. He stated that the fact that Petitioner had no prior problems with her left knee in the past further buttressed his opinion. *Id.* at 13-14.

Dr. Lehman testified that as a result of the condition and course of treatment in her left knee, Petitioner began developing problems with her right knee. *Id.* at 15. As her right knee became more problematic, an MRI was obtained that showed degenerative changes and fraying of the medial meniscus along with thinning of the articular cartilage, effusion, and breakdown of the patellofemoral articulation. *Id.* at 15. As attempts to resolve this condition with conservative care failed, Dr. Lehman indicated that the only option left for Petitioner was surgery. He stated that Petitioner's right knee problems have "slowed down the whole process" and impeded his ability to rehabilitate Petitioner and return her to work. *Id.* at 16-17. He opined that she suffers from reactive effusion and meniscal pathology in her right knee as well, and that her condition was aggravated by overuse as a result of the injury to her contralateral knee. *Id.* at 17-18. He stated:

> Well, she's had surgery on her right knee before, and really what I think's going on is she – as she's not really been able to unload her right knee, she's gotten – had progressive symptoms in her right knee. I don't think the work injury tore her right medial meniscus, but I do think – she's a little bit of a bigger girl, and I think that based on overload she's continued to stress her right knee to the point of now having this active effusion, this swelling and progressive pain. . . . I don't really think she had any problems with the right knee. Even right after this surgery, I don't think really she had any problems with her right knee, so I think this is all subsequent to just overload. Four, five months into it, she started to have some swelling and pain in her knee. *Id.* at 17-18.

Dr. Lehman testified that Petitioner's condition of ill-being in her bilateral knees, her past and prospective care and treatment, and her work restrictions and time off work, were the result of her work injury on February 9, 2018. *Id.* at 20-21, 27.

Dr. Lehman authored an extensive letter to Respondent thoroughly outlining his disagreement with Dr. Nogalski's opinions. *Id.* at 19-21. He indicated that Petitioner suffered a "well-defined injury when she was accompanying a group of male individuals on a shopping

outing" and was "pushed by an individual and had a twisting of her left knee" and an accompanying "large pop" followed by discomfort. (PX4, 2/28/19). With respect to causation on Petitioner's left knee, he stated:

> Dr. Nogalski noted there was no causal connection between current objective findings and the claimed injury of 2/9/2018. The patient had a documented medial meniscus tear after hearing a loud pop in the left knee, was identified to have a meniscus tear consistent with the MRI and her physical examination and has progressed well subsequent to her surgery. Dr. Nogalski states that the incident was not witnessed and notes he did not feel that the pop in her knee was problematic after having a twisting injury of her knee. This is somewhat ridiculous. I believe that having twisted a knee and a pop in the knee is basically textbook for meniscal pathology found both on the MRI and on the arthroscopic evaluation, and again she has done quite well subsequent to surgery and continues to improve. *Id.*

With respect to Petitioner's right knee, he stated:

> The patient's right knee has been problematic. She has been walking with an externally rotated gait and has continued to have more and more discomfort in her knee. She notes that she has pain on the inside of her knee if she catches her toe and swings her foot outward. This is a classic symptom for meniscal pathology on the right knee and notes that she has pain and swelling with repetitive stress to her knee, i.e., walking. Again, she notes that she has never had right knee problems in the past. She has had ongoing soreness in her knee. She denies any problems with the right and left knees prior to 2/9/2018. Does not specifically recall any problems with the right knee until about five months after her injury, as her external rotation gait has been problematic and she does continue to have symptoms in her knee and medial joint line tenderness as well as pain with stress to the medial joint line consistent with a meniscus tear.

His impression was as follows:

1. At this juncture that a cortisone injection, which has been repetitively discouraged in orthopedic literature would not be reasonable care and treatment for her right knee.
2. Physical therapy was halted so would [sic] be unreasonable to expect that physical therapy at this juncture would be beneficial in the fact that she is not allowed to continue her physical therapy. Most importantly she has continued swelling in her knee and reactive changes in the join noted on her MRI. The MRI tells us that there is reactive effusion suggesting that there is overload consistent with her externally rotated gait, pain over her medial joint line and fraying and breakdown of the medial meniscus. I do believe that she is a candidate for arthroscopic evaluation. She has done very well on the left knee. I would expect her to have a similar outcome on the right knee and again reactive changes on her MRI are objective and it is hard to discount those in evaluating her pathology. I would recommend outpatient arthroscopy. I would not recommend a cortisone injection again. This does not appear to be well supported in the literature, and lastly, further physical therapy may have been an avenue. It was not certainly Lisa's fault that the physical therapy was discontinued.

   If you have any questions, please do not hesitate to contact me. I do believe it is compensable based on overload, gait mechanics and problems as related to her knee. *Id.*

During his deposition, Dr. Nogalski also expressed surprise that Dr. Nogalski testified that no meniscal tear was identified during the left knee arthroscopy, and stated he clearly documented a "horizontal cleavage component tear" on page two of his operative report. (PX 10, p.26) He remarked, "Really? . . . I don't know how to respond to that, I'm sorry;" but confirmed his clear disagreement. *Id.* at 26.

On cross-examination, Dr. Nogalski testified that reactive effusion was an indication of acute injury. *Id.* at 37. He stated:

> Well, I think most people have no fluid in their knee, so I think when you have fluid in your knee, that's an abnormal finding. And as the radiologist characterized it as reactive, it would be based on an acute process versus a long-term process. *Id.* at 37.

He stated that the reactive effusion in Petitioner's right knee was caused by the overload of her joint space. *Id.* at 39. He testified that reactive effusion was differentiable from chronic/degenerative effusion, because chronic effusion is "loculated off, it's been there a long time, and something that is more acute or more inflammatory would be characterized as reactive, obviously reacting to the stress or reacting to something more acute, as opposed to something that's been long-term and chronic." *Id.* at 39-40. He testified that this can occur from overuse in a knee that is already experiencing degenerative issues. *Id.* at 40. He acknowledged that Petitioner had a prior right knee surgery in 2003, but stated that she had no history of problems since 2003 until her left knee injury. *Id.* at 41.

Petitioner testified at Arbitration that her right knee pain has continued to worsen as her left knee was recovering, and it inhibited her ability to perform a lot of her strengthening exercises. (T.17-18). She stated that she was using a brace for her left knee and couldn't bear weight for a month following her left knee surgery; hence, she put all of her weight on her right knee, and it began hurting more. (T.18). She stated that she was advised that it would hopefully calm down with time as she was able to begin using her left leg again, but it did not. (T.19). Her condition persisted while in therapy for her left knee, and she specifically reported to her physical therapist that if she externally rotated her right knee or leg, it would cause additional pain. (T.22-24). She reported that when she was going to sit down and prop her knee up to ice it at home, she caught her toe on the foot rest and it externally rotated her foot out, which caused her pain. (T.24). She testified that she remains under the restrictions of Dr. Nogalski and has not been released to perform any type of work. (T.19). She testified that she suffered no intervening trips, falls, or injuries since February 9, 2018. (T.21). On cross-examination she testified that she had to suddenly move after her injury, but had the help of her family and didn't do anything she was not permitted to do. (T.39).

CONCLUSION

In regard to disputed issue "F," the Arbitrator makes the following conclusions of law:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her accidental work injuries on February 9, 2018.

In support of this finding, the Arbitrator notes the following:

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665 (Ill. 2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The record is clear that Petitioner suffers from preexisting conditions in her left and right knees. However, Petitioner was able to work without any restrictions and was not under the care of any physician at the time of the February 9, 2018. Petitioner's MRI plainly showed reactive effusion evidencing acute injury superimposed upon her condition of ill-being. As a result, Dr. Lehman logically concluded that Petitioner's work injury aggravated her condition and that her symptoms were causally related to same. The Arbitrator does not find the opinion of Dr. Nogalski persuasive, as it does not comport with the circumstantial or the objective medical evidence in the record.

With respect to Petitioner's right knee, Courts of Illinois have consistently held that the chain of causation is not broken if the work injury itself causes a subsequent injury. *See International Harvester v. Industrial Comm'n*, 263 N.E.2d 49, 53 (Ill. 1970); *Fermi National Accelerator Laboratory v. Industrial Comm'n*, 586 N.E.2d 750, (2nd Dist., 1992). However, compensation for a subsequent injury is awarded only when the existing employment-connected condition is a causative factor. *Harvester at 54.* Whether the injury is a new injury or an aggravation of a previous injury, is compensable if it is a direct and natural result of the primary

injury. *Id.* "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Indus. Comm'n,* 821 N.E.2d 807, 813 (2nd Dist. 2005).

In *International Harvester,* an employee suffered an initial work-related head injury that weakened his skull. Four years later, the same employee was struck in the head by his wife. This subsequent injury exacerbated the prior work-related injury and the employee was permanently disabled. The Supreme Court affirmed the Commission's award of compensation based upon the clear chain of causation between the work-related injury and the subsequent injury, and the lack of an independent intervening cause to disrupt the chain of causation. The Supreme Court agreed with the Arbitrator, the Commission, and the Circuit Court in that the employee would not have been permanently disabled but for the weakened condition of his skull caused by his work-related injury. *Harvester supra.*

In *Fermi National Accelerator Lab,* an employee who was on crutches due to an industrial accident slipped and fell, injuring his knee and thumb during a return trip from medical treatment for the work-related injury. The Commission determined, and the Circuit Court affirmed, that "but for" the initial injury, the claimant would not have been using crutches and injured himself further. The Appellate Court held that both injuries constituted a single accident and both injuries were thus compensable. *Fermi National Accelerator Lab,* 586 N.E.2d 750 (2nd Dist., 1992).

The Commission has long followed the above precedent and held that overuse injuries due to favoring a contralateral extremity are compensable. In *Janice Farrell v. Noodles & Co.*, the parties stipulated that the claimant injured her left shoulder when she was carrying a tub and felt a pop in her left shoulder followed by immediate pain. *Janice Farrell v. Noodles & Co.*, 14 I.W.C.C. 0262 (2014). She was diagnosed with a rotator cuff tear and began physical therapy. *Id.* In the course of her left shoulder treatment, the claimant began complaining of right shoulder pain which the therapist noted was "bothering her while she compensated for her left arm." *Id.* Imaging studies of the right shoulder revealed a right shoulder rotator cuff tear which ultimately required surgery. *Id.* In awarding compensation, the Commission reversed the Arbitrator's denial of benefits and noted that the claimant "relied upon her dominant right arm in order to baby her left arm" - even though the claimant had pre-existing arthritis in both shoulders and multiple other areas of her body and a prior right shoulder injury during which a box of cups fell and hit her right shoulder. *Id.* The Commission found it persuasive that the claimant did not previously miss any work for her right shoulder, the recent complaints "arose in the months following the [left shoulder] injury," and her surgeon testified that she developed an overuse injury related to the accident because "initially she had the work injury on the left side and she started using her right side more at work and in therapy that started to cause pain on the right side." *Id.*

Similarly, in *Gabriel Garcia v. Midas Int'l*, the claimant sustained undisputed injuries to his right upper extremity and a disputed overuse injury to his left shoulder. *Gabriel Garcia v. Midas Int'l*, 13 I.W.C.C. 0125 (2013) In finding that the overuse injury to the left shoulder was compensable, the Commission stated: "If the work injury itself causes a subsequent injury, for purposes of recovering workers' compensation benefits, the chain of causation has not been broken.

'Clear illustrations of this chain of causation relationship are cases where a second injury occurs due to treatment for the first ....' *International Harvester v. Industrial Comm'n*, 46 I11.2d 238, 245 (1970)." The Commission also found the opinion of the claimant's treating physician, who noted that when patients have surgery on one extremity they habitually resort to overuse of the contralateral side because they are unable to use the injured extremity, to be persuasive. *Id.*

In *Michael Healey v. University of Illinois*, the Commission found a claimant's left shoulder condition was compensable because it had developed due to overuse compensating for the work-related right shoulder injury. *Michael Healey v. University of Illinois*, 09 I.W.C.C. 1267 (2009). The Commission held, "The standard to be applied to a second disability alleged to flow from an original compensable accident is that the first work-related disability must be shown to be a causative factor in producing the subsequent condition." *Id.* Similarly, in *Dee v. Boyd Elec. Co.*, the Commission expressly stated that it "has seen many instances where the contra-lateral side has developed symptomology which requires more aggressive treatment simply because the claimant has had to bear weight or rely on it almost exclusively." *Dee v. Boyd Elec. Co.*, 03 I.I.C. 0640 (2003) (*aff'd* by *Boyd Elec. Co. v. Dee*, 356 Ill.App.3d 851 (1st Dist. 2005)).

The Commission reached similar conclusions in *Steven Benyon v. Perillo BMW*, 08 I.W.C.C. 1212 (wherein the petitioner was forced to compensate for his right wrist disability by relying on his left wrist for performance of all daily life activities. Emphasizing that consequential injuries are compensable under the Act, the Commission found the claimant's left wrist condition of ill-being was causally connected to his right wrist injury) and *Peggy Hubner v. Useco-Uselton Oil Co.*, 09 I.W.C.C. 0510 (2009) (wherein the claimant sustained a right knee fracture and left knee meniscus tear, underwent right ankle open reduction and left knee arthroscopy with debridement and partial meniscectomy, and subsequently developed a symptomatic/aggravated left knee osteoarthritis that needed total knee replacement from overuse of the left leg while compensating for the right ankle fracture. Even though the claimant sustained a new fall/hyperflexion event after the work injury, in reliance on *Vogel v. Indus. Comm'n*, 821 N.E.2d 807, 813 (2nd Dist. 2005), the Arbitrator found that the claimant's total knee replacement was due to the swelling and inflammation caused by the overuse of the left knee).

Given the aforementioned precedent, the Arbitrator finds the causation opinion of Dr. Lehman more persuasive than the opinion of Dr. Nogalski and finds that Petitioner met her burden of proof on the issue of causal connection with respect to her bilateral knees.

In regard to disputed issues "J," "K," and "L" the Arbitrator makes the following conclusion of law:

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary; that Petitioner is entitled to prospective medical care, specifically the surgery recommended by Dr. Lehmann; and that Petitioner is entitled to further TTD benefits.

In support of this finding, the Arbitrator notes the following:

Petitioner has established by a preponderance of the evidence that her condition is causally related to her employment. Upon establishing such connection, employers are to provide all care

reasonably required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Petitioner testified that she remains temporarily and totally disabled and off work per Dr. Lehman given her condition of ill-being. Dr. Lehman testified that Petitioner has failed conservative care with respect to her right knee and that the only reasonable means to provide Petitioner relief is the proposed surgery to her right knee.

Respondent is therefore ordered to pay the medical expenses contained in Petitioner's group exhibit and shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit. Respondent shall further authorize and pay for the treatment recommended by Dr. Lehman, including but not limited to the proposed surgery for her right knee, and shall pay temporary total disability benefits for the disputed period beginning June 24, 2019.

This award shall in no instance be a bar to a further hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL GREGORY,

Petitioner,

20IWCC0631

vs.

NO: 17 WC 25743

NATHAN BIRKNER D/B/A
PRECISION PROPERTY MANAGEMENT LLC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, permanent partial disability, and whether Petitioner should be classified as a traveling employee, and being advised of the facts and law, changes the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner was employed by Respondent mowing areas in a pipeline right-of-way. He used a Polaris Ranger to do the mowing. The Polaris Ranger is an ATV which is also known as a skid steer or side by side. On May 16, 2017 they were working in the Arkansas Missouri border area. Respondent paid them for their travel to the location and they were staying at a motel arranged and paid for by Respondent. Petitioner testified that they worked 12-hour days and would have to leave the pipeline right-of-way to get food and drink. They could also get provisions "if you stopped somewhere if you [were] on your way to move locations."

20IWCC0631

However, on cross, Petitioner agreed that when he was hired he was told he was responsible for bringing his own food and drink in the morning. He did not ask the boss, Mr. Birkner, for permission to stop for provisions, and he was not told it was OK for him to stop for provisions on the particular job at the location he was.

Petitioner testified that he had finished working at a location and was instructed to move the ATV to another location where he was to meet co-worker, Mr. Poore. He and another co-worker decided to go to a gas station to get food. The gas station was closed and they traveled to another store, which was not on a direct route to the other work location. He felt a pop, lost control of the vehicle, and it flipped over.

Nathan Birkner testified he owned Respondent company. On the instant job, he instructed Petitioner to take the ATV to the area where Mr. Poore was working. The ATVs were not supposed to be driven anywhere besides the right-of-way. His workers were informed that they had a five-gallon cooler of water and if they wanted anything else they had to bring it with them. He would not have given Petitioner permission to stop for food "because it was out of the scope of work."

Kyle Poore was the foreman of the operation. He testified he instructed Petitioner on how to get to the various jobsites. Employees were not allowed to drive the ATVs on the highway or to use them for personal errands. He had never been aware of any employee using an ATV to get food or drinks; "we can't be just taking off with the equipment and going where we're not supposed to go." The crash site was about ½ mile from the site he was working and was not on a direct route from the previous work site.

The Arbitrator found that Petitioner was not a traveling employee at the time of the accident. He reasoned that Petitioner was not injured in the course of traveling to the location of the work site. The Arbitrator also found Petitioner's accident was non-compensable because his actions constituted a significant personal deviation from his work activities which brought him out of his employment at the time of the accident. The Commission disagrees with the Arbitrator's determination that Petitioner was not a traveling employee at the time of the accident.

A traveling employee is a traveling employee from the time he leaves to get to the distant jobsite to the time he returns from it. The designation of traveling employee does not only apply to the period the claimant actually traveled to and from the worksites. Here, Respondent directed Petitioner to work out of state, paid Petitioner for the time traveling, and arranged and paid for motel accommodations. Therefore, the Commission finds that Petitioner was a traveling employee at the time of the accident. Nevertheless, the Commission agrees with the ultimate conclusion of the Arbitrator, that Petitioner's actions constituted a significant deviation from his work activities to take him out of his employment, and accordingly his accident is not compensable.

20IWCC0631

Even when a claimant is designated a traveling employee, the claimant must still prove that his accident and injuries occurred in the course of, and arose out of, his/her employment. The Commission finds that Petitioner's diversion to get provisions constituted a deviation from his work activities and took him outside of his employment. Petitioner acknowledged that he did not have permission to deviate from his designated route in order to get provisions. In addition, the Commission finds that his deviation from assigned work activities were not reasonable nor foreseeable under the instant circumstances. Here, both Mr. Birkner and Mr. Poore testified that employees were not permitted to use the ATVs for personal errands or to be driven on highways. Notwithstanding his prior testimony, Petitioner acknowledged that he was informed that he was responsible to bring his own provisions at the beginning of the day. Therefore, the Commission finds that Petitioner's actions in disregarding Respondent's instructions were not reasonable, it was not foreseeable on the part of Respondent that Petitioner would disobey direct instructions, and the accident is non-compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that with the changes noted above, the Decision of the Arbitrator dated September 10, 2019 is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that because Petitioner failed to prove he sustained an accident which arose out of and in the course of his employment with Respondent, benefits are denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 27 2020

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
O-9/3/20
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0631

GREGORY, MICKEY
Employee/Petitioner

Case# **17WC025743**

NATHAN BIRKNER D/B/A PRECISION PROPERTY MAINTENANCE LLC
Employer/Respondent

On 9/10/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4617 HOFFEE LAW FIRM
HEIDI HOFFEE
109 W MAIN ST
FAIRFIELD, IL 62837

2999 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 110
ST LOUIS, MO 63105

20IWCC0631

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mickey Gregory
Employee/Petitioner

v.

Nathan Birkner d/b/a Precision Property Maintenance, LLC
Employer/Respondent

Case # 17 WC 25743

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **8/9/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **5/16/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**4,117.5**; the average weekly wage was $**452.26**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Because Petitioner failed to prove he sustained an accident which arose out of and in the course of his employment for Respondent, benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Michael K. Nowak, Arbitrator

9/4/19
Date

FINDINGS OF FACT

On May 16, 2017, Petitioner was employed by Respondent as a laborer. His job duties involved mowing along a pipeline right-of-way. (T. 16). Several individuals worked on the mowing crew to which Petitioner was assigned. The crew worked on a portion of the pipeline from Arkansas to Indiana. (T. 18).

Respondent's shop is located in McLeansboro, Illinois. Due to the location of the pipeline, the crew is required to travel outside of the McLeansboro area to maintain the right-of-way. (T. 19). The crew traveled to the pipeline right-of-way via company vehicles and stayed overnight in motels. (T. 19-20). The typical work day was twelve hours and ran from dawn to dark. There were no set times for breaks during the shift. (T. 20).

Respondent made the hotel arrangements and owned all of the equipment used to mow the right-of-way. The equipment consisted of skid steers, ATVs, a Polaris Ranger (also called an ATV or "side-by-side"), trailers and weed eaters. (T. 20-21). Petitioner did not supply any of his own equipment.

Petitioner testified that when he was hired by Respondent in March, 2017, he had an understanding of how to operate the Ranger. (T. 22). He testified that Respondent did not provide any information about the operation of the Ranger or any of the other equipment. (T. 22). Petitioner testified that the crew moved from one area of the pipeline right-of-way to another by either loading the equipment onto a trailer or, if the distance was short, by driving the Ranger or the skid steer to the mowing site. (T. 23). Petitioner testified that the equipment would be driven through fields or over public roads to get from one mowing site to another. (T. 23-24).

Petitioner testified that there are no restaurants along the right-of-way, and to get something to eat during the shift required leaving the right-of-way. (T. 26).

Petitioner testified that prior to beginning work each day, the crew stopped on the way to get food and drinks. (T. 27). Petitioner testified that food and drinks were available during the day as a result of that stop. (T. 27). Petitioner testified that if the crew was changing mowing locations and the line of travel to the new location took them by a location where food was available, the crew would stop to replenish their supplies. (T. 27). Petitioner testified that the crew would travel to restaurants or gas stations by pick-up truck or trailer. (T. 28). If the gas station or restaurant was close, they would take the Ranger. (T. 28).

Petitioner testified that he has been around ATVs his entire life and has ridden and worked on them since he was four or five years old. (T. 31). Petitioner testified that he has made hundreds of repairs to side-by-sides and ATVs, and is familiar with their mechanical systems. (T. 31-33).

Petitioner testified that the Ranger that he was operating at the time of his accident had problems with the power steering that caused it to occasionally lock up. (T. 33). Petitioner recalled three instances of the power steering locking up when he operated the Ranger. (T. 33-34). Petitioner testified that repairs were made to the Ranger's axles and clutch at Respondent's shop in McLeansboro. (T. 35). Petitioner testified that despite

repairs, the steering did not work properly. (T. 36). Petitioner testified that the overall mechanical condition of the Ranger was poor. (T. 37).

Petitioner testified that on May 16, 2017, the date of his accident, the crew was working near Fagus, Missouri, which is approximately 181 miles from McLeansboro. (T. 38). Petitioner testified that Respondent provided transportation to the work area and made motel arrangements. (T. 38).

Petitioner testified that on the date of the accident, he stopped at a gas station prior to starting work to obtain food and drink. (T. 39).

Petitioner testified that at around 5:00 p.m., Nathan Birkner, Respondent's owner, instructed him to move to a different location to weed eat. (T. 40). Petitioner testified that he and another employee got on the Ranger and that he drove it down the road to get to the new mowing location. (T. 40).

Petitioner testified that he did not drive directly to the new work site because he and the other employee were hungry. They traveled approximately 1 to 1 1/2 miles down the road to get something to eat at a nearby gas station. (T. 42).

Petitioner testified that as he was traveling down the road at approximately 35 miles per hour, he heard a pop, the vehicle "locked up", left the road, and rolled over. (T. 45-46). Petitioner testified that he sustained a broken collar bone as a result of the accident. He also experienced pain in his hip, back, shoulders, ankles, and neck. (T. 47).

Petitioner was taken by ambulance to Poplar Bluff Medical Center where he was diagnosed with a fractured clavicle, cervical strain, and ankle strain. (T. 51, P. 7).

Petitioner began treating with Dr. Freehill on May 19, 2017. She diagnosed a non-displaced right medial fracture of the clavicle. Dr. Freehill excused Petitioner from work. (P. 9). Dr. Freehill treated Petitioner through August 4, 2017. On that date, Dr. Freehill noted that Petitioner's pain level was zero and that he was anxious to go back to work. She commented that Petitioner performed home exercises and did not undergo formal physical therapy. Examination revealed no tenderness of the medial clavicle and full shoulder range of motion with no pain. Dr. Freehill released Petitioner from care and instructed him to return on an as needed basis. (P. 9).

Petitioner testified that following Dr. Freehill's release, he returned to work for a farmer. He did not return to work for Respondent. (T. 54).

Petitioner testified that he continues to experience right shoulder pain. (T. 55). He has not received any additional medical treatment since Dr. Freehill's release on August 4, 2017. (T. 55).

On cross-examination, Petitioner confirmed that the statement that he signed on May 18, 2017 (P. 8) was accurate. (T. 58).

Petitioner agreed that Respondent's Exhibit 3 is an expanded version of Petitioner's Exhibit 4, which shows the Fagus, Missouri area where the accident occurred. (T. 59, 56). Petitioner marked Respondent's Exhibit 3 with a #1 to indicate the area where he was working when Nathan Birkner instructed him to move to a

new area to work. (T. 60). Petitioner marked Respondent's Exhibit 3 with a #2 to indicate the closed gas station where he and the other employee first went to get food. (T. 61). Petitioner testified that he drove the Ranger down County Road 320 to reach the closed gas station, which was at the intersection of Road 320 and Highway 51. (T. 61). Petitioner testified that the distance between #1 and #2 is approximately 1.1 miles to 1.3 miles. (T. 62). Petitioner testified that upon discovering that the gas station was closed, he traveled North on Highway 51 toward Fagus. (T. 62-63). Petitioner testified that had the accident not occurred, he would have traveled into Fagus. (T. 62-63). Petitioner marked Respondent's Exhibit 3 with a #3 to indicate the accident location. (T. 63). Petitioner estimated that the distance between the closed gas station and the accident site was approximately half a mile. (T. 64). Petitioner testified that the path he took from where he was initially working to the accident site did not take him past the area where Nathan Birkner reassigned him. (T. 64-65). Petitioner testified that he would have had to either double back or circle around to get to the new work location. (T. 64-65).

Petitioner testified that there was very short interval between the "pop" and crash. (T. 67). He testified that he did not examine any of the components of the Ranger after the accident. (T. 67). Petitioner did not ask Nathan Birkner for permission to travel to the gas station at the intersection of County Road 320 and Highway 51 to get food. (T. 67). Petitioner did not ask permission to travel North on Highway 51 into Fagus to get food. (T. 68). Petitioner testified that at no time after beginning work at the right-of-way on May 15, 2017 did either Nathan Birkner or Kyle Poore authorize him to travel to the gas station or any other location to get food. (T. 68-69).

Petitioner testified that since Dr. Freehill's release in August 2017, he has worked as a laborer performing various types of work including mechanical and operating semis. He is able to lift 100 pound seed bags without assistance. He has not received any medical treatment since Dr. Freehill's discharge. (T. 70).

Petitioner testified that when he was hired, he was advised that he was responsible for bringing his own lunch to the work site, and that if he did not do so he was not going to eat. (T. 70-71). Petitioner confirmed that on the morning of the accident, he stopped at a gas station/convenience store and purchased food and drink. (T. 70). Petitioner testified that he had some of that food and drink with him during the course of the day. (T. 71).

On redirect examination, Petitioner testified that had the accident not occurred, he planned to go the area where Kyle Poore was working after obtaining the food and drink. (T. 72).

TESTIMONY OF NATHAN BIRKNER

Nathan Birkner is the operator of Precision Property Maintenance. He started the business in 2012. Petitioner began working for Respondent in March 2017 as a laborer. Birkner testified that his business performs pipeline right-of-way maintenance. (T. 74). He testified that Petitioner's job duties primarily involved running a weed eater. (T. 75).

Birkner testified that on the date of the accident, he instructed Petitioner to leave the Fagus station where he was working (#1 on Respondent's Exhibit #3) and go to an area approximately half a mile away where Kyle Poore was working. (T. 76). Birkner testified that he gave Petitioner specific instructions on the path of travel he should take from Fagus Station to the area where Poore was working. (T. 76-77). Birkner testified "We instructed him where to go, go out of the Station, turn down the field road and back to where Kyle was". (T.

76). Birkner marked Respondent's Exhibit 3 with a #4 to indicate the location where Poore was working. (T. 78). Birkner testified that the distance from the location that Petitioner was working at Fagus Station to Poore's location was approximately half a mile. (T. 76). Birkner explained that because Petitioner was unfamiliar with the area, he gave Petitioner instructions as to the specific route he was to take from Fagus Station to the area where Poore was working. (T. 76). Birkner testified that he instructed Petitioner to take County Road 320 up to the first field road and then take a left. (T. 78). Birkner marked Respondent's Exhibit #3 with a #5 to show the line of travel that he instructed Petitioner to take from Fagus Station to the area where Poore was working. (T. 78). Birkner testified that had Petitioner traveled directly from Fagus Station to the new work site, the route would not have taken him past the gas station at the intersection of Highway 51 and Route 320, nor would it have taken him into the town of Fagus. (T. 79).

Birkner testified that Petitioner never requested permission to use the Ranger for anything other than travel along the right-of-way. (T. 80). Birkner testified that had Petitioner asked, he would not have been given permission to go to the gas station because it was out of the scope of the work area. (T. 81). Birkner testified that Petitioner's work area was the right-of-way and that employees were informed that a water cooler is provided, but if they want anything more they need to bring it along in the morning as there would be no travel off the job site to get something. (T. 81).

TESTIMONY OF KYLE POORE

Kyle Poore testified that he has worked for Respondent for approximately five years. He is a job site foreman. (T. 85).

Poore testified that he first worked with Petitioner a few weeks prior to May 16, 2017 at another location along the pipeline. (T. 85). Poore testified that there were multiple discussions involving Petitioner about the rules that apply to ATV usage. (T. 86). He testified that Petitioner was never given authorization to use the ATV for personal errands. (T. 86). Had Petitioner asked permission to use the ATV for a personal errand, it would not have been authorized.

Poore confirmed that the area marked #4 on Respondent's Exhibit #3 showed the approximate location where he was working on May 16, 2017. (T. 88). He estimated that the distance between Fagus Station and the area he was working was half a mile. (T. 88). He testified that the travel route marked on Respondent's Exhibit 3 as #5 was the route that would lead from Fagus Station to the area where he was working. (T. 88).

Poore testified that at no time prior to May 16, 2017 was he ever aware that employees were using the ATV on this job or any other job to get food or drink during the course of a shift. (T. 89). He testified that had he been aware that employees were using the ATV for personal use, it would not have been approved. (T. 89).

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

For an accident to be compensable, it must "arise out of" and occur "in the course of" the employment. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131Ill.2d 478, 546 N.E.2d 603 (1989). "Arising out of employment" refers to the required causal connection between the accident and the employment. "In the course

of employment" refers to the time, place, and circumstances of the accident. *Technical Tape Corp. v. Industrial Comm'n*, 58 Ill.2d 226, 317 N.E.2d 515 (1974). For an accident to arise out of the employment, there must be a causal connection between the employment and the accidental injury, in that the injury must originate in a risk that is connected with or incidental to the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 541 N.E.2d 665 (1989).

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been performing his duties, and while the claimant is at work, or within a reasonable time before and after work are generally deemed to have been received in the course of the employment. *id.* The accident must occur within the period of employment and where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or some tasks incidental to the actual duties. *Segler v. Industrial Comm'n*, 81 Ill.2d 125, 406 N.E.2d 542 (1980). The controlling factor is whether the employee was in the "orbit, area, scope, or sphere of employment". *Danville, U. & C. Ry. Co. v. Industrial Comm'n*, 307 Ill 142, 138 N.E. 289. (1923). The actions the employee is performing do not have to be directly connected with the employment, but it must be reasonable to act as the employee was acting within the time of the employment. *id.*

When the work task creates a necessity to travel, the employee is still in the course of employment while completing that task. *Olson Drilling Co. v. Industrial Comm'n*, 386 Ill 402, 54 N.E.2d 452 (1944). If the course of employment or method of travel is not determined by the demands and exigencies of the job, injuries associated with such travel do not occur "in the course of" the employment. The *Venture-Newberg-Perini, Stone & Webster v Illinois Workers' Compensation Comm'n*, 2013 IL 115728 ¶28-34. An employee injured under circumstances showing he substantially deviated from the course of his duty is not compensable. *Public Service Co. of Northern Illinois v. Industrial Comm'n*, 395 Ill.2d 238, 240, 69 N.E.2d 875, 876 (1946). If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the course of his employment unless the employer had knowledge of or acquiesced in such unreasonable conduct. *Sekora v. Industrial Comm'n*, 198 Ill.App.3d 584, 590, 556 N.E.2d 285 (1990).

The Arbitrator finds that Petitioner's accident, "arose out of" his employment activities. It was uncontroverted that employees utilized the Ranger for traveling along the right-of-way. Nathan Birkner's testimony confirmed that the Ranger was used on and off the road as the employees moved from one work area to another. There was evidence that the Ranger Petitioner operated was involved in a previous roll-over accident. The risk of an accident while operating the Ranger is clearly connected with and incidental to Petitioner's employment.

However, the Arbitrator finds that Petitioner's accident did not occur "in the course of" his employment. The uncontroverted evidence is that Petitioner did not travel directly from Fagus Station to the area where Poore was working when directed to do so by Birkner. Also uncontroverted is that Birkner gave Petitioner specific directions as to the route that he was to take from Fagus Station to the area where Poore was working. Instead, Petitioner traveled at least one mile east on County Road 320 to the gas station. Finding the station closed, he traveled north on Highway 51 with the intention to go into Fagus to obtain food. Petitioner testified that had the accident not occurred, his trip would have taken him into Fagus. It is clear from the testimony of all of the witnesses and the locations marked by Petitioner and Birkner on Respondent's Exhibit #3 that Petitioner's

travel from Fagus Station to the gas station and then north on Route 51 was a significant deviation from the route that Birkner directed Petitioner to take to the area where Poore was working. Had Petitioner gone to the work site as directed to by Birkner, he would not have traveled past the gas station at the intersection of County Road 320 and Highway 51, nor would he have traveled on Highway 51.

Petitioner testified that he did not request permission to travel to the gas station or into Fagus. Birkner and Poore testified that Petitioner was not authorized to travel to the gas station or into Fagus. There was no evidence that Petitioner's travel to the gas station or on Highway 51 was to perform an activity that benefitted Respondent, nor was there evidence that Respondent had knowledge of, authorized, or acquiesced to use of the Ranger for a personal errands by any employees. All of the evidence indicates that Petitioner's deviation from the route assigned by Birkner was entirely for personal reasons and was not connected with or incidental to the performance of his job duties. The Arbitrator finds that Petitioner's deviation was not incidental to his employment and was an entirely personal errand. Moreover, the Arbitrator finds that Petitioner voluntarily, and in an unexpected manner, exposed himself to a risk outside any reasonable exercise of his job duties.

The Arbitrator also finds that Petitioner is not a "traveling employee". A 'traveling employee" is one who is required to travel away from his employer's premises in order to perform his job. *Jensen v. Industrial Comm'n*, 305 Ill.App.3e 274, 711 N.E.2d 1129 (1989). Although the work crews traveled from McLeansboro, Illinois to wherever they were working and stayed in hotels, the transportation to the work site was provided to the crew in company vehicles. Petitioner's injury did not occur during travel from McLeansboro to the job site or from the hotel to the job site. The job site was the right-of-way where Petitioner was assigned to work. His work on the right-of-way on May 16, 2017 did not require him to travel to the gas station store or into Fagus.

Because the Arbitrator finds that Petitioner's accident did not occur "in the course of" his employment, Petitioner's claim for benefits is denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify: Causation	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARDIS PARSON,

Petitioner,

20IWCC0632

vs.

NO: 19 WC 10090

THE DELIVERY NETWORK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and prospective care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

I. Findings of Fact

Petitioner, a forklift driver, alleged a low back injury after boxes of product fell onto the forklift he was driving on March 5, 2019. On direct examination, Petitioner did not testify as to the specific details of his alleged accident except to say that it transpired as depicted on the surveillance video, which was admitted into evidence as PX 14. On cross examination, Petitioner testified that he was protected by a cage around the entire forklift, but the product bundles had hit the side of his forklift and caved the whole side in.

Petitioner testified that he reported to work the day after the accident, but his back had worsened overnight. Steve Workman, Respondent's general manager, testified that the day after the accident, Petitioner told him that he needed to see a doctor. Mr. Workman directed Petitioner to where Respondent sent all its workers' compensation claims, Gateway Hospital. Mr. Workman testified that he did not tell the doctors that Petitioner had taken time off work to move, but he knew that Petitioner had left work early to move on February 27.

Petitioner testified that although he had left work early with the intention of getting a rental truck and moving to his daughter's house, his mother was attacked shortly after he left work and he thereafter stayed with her at the hospital during visiting hours for several days. Petitioner testified that although he had originally taken some days off to participate in the move, he did not help with the move in any way. Alexandria Ybarra, Petitioner's daughter, testified that she and her husband moved everything for Petitioner while he stayed at the hospital. Ms. Ybarra testified that Petitioner did not help to lift, push, pull, or move any object during this move.

On March 6, 2019, Petitioner presented to Gateway Regional Occupational Health Services with complaints of back pain with numbness in both legs. Petitioner reported that when the boxes hit the side of his forklift the day before, he was not thrown out of the forklift nor hit directly by the falling product. Nevertheless, he stated that the impact shook the forklift. Dr. Christopher Knapp indicated that there was no significant damage in the pictures of the forklift that Petitioner showed him. He also noted that Petitioner had been off work for five days before the pain developed moving household goods. Dr. Knapp diagnosed Petitioner with low back pain and opined, after looking at pictures of the product that fell onto the forklift, that there was no physical causation attributing Petitioner's level of pain and disability to the mishap at work. Instead, Dr. Knapp believed Petitioner's pain was related to his time off work for personal reasons and to a preexisting back condition that was aggravated by his nonoccupational activities over the weekend.

Also on March 6, 2019, an accident report was filled out by "Derek S.," whose position with Respondent and last name were not disclosed. Derek S. wrote that on March 5, Petitioner was moving pulp when two stacks fell and hit his lift. He noted that it did not hit Petitioner, but Petitioner had to move his leg suddenly to prevent injury and pulled his back.

Petitioner next presented to Dr. Michael Adams on March 8, 2019 and was diagnosed with low back pain. On exam, Petitioner walked without a limp and had good lumbar range of motion with negative straight leg raise bilaterally. Dr. Adams also noted a little spasm in the lumbar musculature. On the same day, a lumbar X-ray revealed mild degenerative disc disease, facet arthropathy, and lumbosacral transitional vertebrae.

On March 9, 2019, Petitioner saw Dr. Matthew Gornet of The Orthopedic Center of St. Louis and reported working with bells of solid blocks of wood pulp that weighed 600 pounds and were stacked 12-high at the time of the accident. Petitioner stated that one of the stacks fell and struck his forklift, denting it and suddenly jarring him and the forklift. Petitioner clarified that the bells did not strike him directly. Petitioner also indicated that he had a history of low back pain from falling ten feet in 2001, but he had since recovered and returned to full duty work after that incident. Dr. Gornet obtained lumbar X-rays, which showed a first moveable segment at L4-L5 or L5-S1 depending on the convention. Dr. Gornet opined that an accident like Petitioner described could have easily injured a disc or aggravated his underlying condition and found that Petitioner had suffered a causally related disc injury. A lumbar MRI also taken on March 9, 2019 further revealed an annular tear at the apex of a central broad-based protrusion that extended into the foramina and resulted in moderate right greater than left foraminal stenosis.

Petitioner thereafter began a short course of physical therapy on March 11, 2019. When he returned to Dr. Gornet on April 5, 2019, Dr. Gornet found that Petitioner's low back pain

complaints were indicative of discogenic pain and interpreted the recent MRI as showing obvious structural disc pathology at L4-L5 with subtle disc pathology at L3-L4. Petitioner then underwent an L4-L5 epidural steroid injection on May 14, 2019 followed by a L5-S1 epidural steroid injection on May 28, 2019.

On July 8, 2019, Dr. Gornet noted that Petitioner had improvement after the injections, but his ability to walk and sleep were still affected. Dr. Gornet recommended a CT discogram at the first two movable segments, which he called L3-L4 and L4-L5 by his convention with a sacralized L5-S1 segment. Dr. Gornet's working diagnosis was a disc injury at the first movable segment L4-L5 with a clear objective annular tear.

Petitioner underwent the discogram with X-ray interpretation at L3-L4 and L4-L5 with sacralized L5-S1 and facet block injections at L3-L4 and L4-L5 on July 24, 2019. The discogram found a non-provocative disc at L3-L4 and a provocative disc at L4-L5 with an annular tear. The X-ray interpretation further showed a normal nucleogram at L3-L4 and a degenerative nucleogram at L4-L5 with a posterior annular tear. On the same date, a lumbar CT also revealed a L5-S1 annular tear and protrusion resulting in dural displacement and mild bilateral foraminal stenosis, as well as a L4-L5 small left foraminal contrast-filled tract that was likely a needle insertion tract but could be a small left foraminal annular tear.

On August 29, 2019, Dr. Gornet reported that Petitioner also had an MRI spectroscopy that showed no significant chemicals at L2-L3, L3-L4, or L4-L5. Dr. Gornet stated that Petitioner's options at that time were a fusion versus a single level disc replacement. However, he advised Petitioner that he needed to first lose weight or else there might be little he could do.

Petitioner last treated with Dr. Gornet on November 14, 2019. At that time, Dr. Gornet reported that Petitioner had actually gained ten pounds since his last visit. Dr. Gornet again noted Petitioner's surgical options but stated that Petitioner first had to participate in his own care.

The parties deposed Dr. Gornet on November 12, 2019. Dr. Gornet testified that assuming Petitioner's history was factually correct and he had been working without any back treatment at the time of the accident, the work accident had caused Petitioner's condition. He testified that Petitioner's condition was an aggravation or an additional injury to the disc at the first moveable segment. Dr. Gornet further testified that Petitioner told him the bundles that fell weighed 600 pounds, and if this weight was factually correct and the bundles dented the forklift, it was a substantial amount of weight that could cause an instantaneous load. He explained that if one is not prepared for it, it is the type of sudden jarring that could cause a disc injury. He further testified that people with a history of low back pain denoting preexisting degeneration were more susceptible to a mechanical load. Regardless of Petitioner's weight, Dr. Gornet testified that Petitioner would not have been in the same situation as to his need for surgery if not for the accident, because it had altered his disc's chemical and inflammatory aspect.

Dr. Gornet further clarified that his opinion assumed that the bundles involved weighed what Petitioner said they did and that Petitioner moved suddenly. He explained that in these types of accidents, it was the sudden, quick movement that a person is not prepared for that matters.

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At Respondent's request, Petitioner also presented for a §12 examination with Dr. Timothy VanFleet on August 20, 2019. In his report of the same date, Dr. VanFleet opined that Petitioner had obesity, lumbar degenerative disc disease, and facet tropism that was not work-related and was instead consistent with Petitioner's underlying preexisting conditions. Dr. VanFleet did not feel that the mechanism he saw on the surveillance video would have either caused or contributed to Petitioner's back pain. Instead, he stated that Petitioner likely had a preexisting condition that was aggravated during his extended time off work prior to the accident date.

Dr. VanFleet's report states that Petitioner said he was trying to move 450-pound boxes of pulp when the boxes fell toward the left side of his forklift and knocked the forklift across the pavement. Petitioner described the incident as similar to a motor vehicle accident in terms of the amount of force. Dr. VanFleet was shown the video of the accident and pictures on Petitioner's phone of the forklift. He also noted that the information provided to him said that Petitioner was off work from February 27, 2019 until the date of injury to participate in a move; however, Petitioner's daughter, who was present at the §12 examination, stated that she had moved all of the objects without Petitioner's assistance.

When the parties later deposed Dr. VanFleet on November 27, 2019, he testified that the video of the accident showed Petitioner move himself to the right to avoid the falling boxes. Dr. VanFleet testified that it was significant that Petitioner moved prior to the boxes striking, because it indicated that Petitioner saw it coming, had time to react, and tried to move out of the way. He testified that the forklift also did not appear to move at all across the rear wheels and did not slide across the floor as Petitioner had described. He testified that the only movement that was evident was when Petitioner moved to his right and then sat back down, which appeared to be voluntary in anticipation of the boxes he saw coming.

Dr. VanFleet testified that the accident depicted on the video was in no way related to the cause of Petitioner's current pain. In support of that opinion, he testified that Petitioner had no physical exam findings and significant magnification. Regarding his nonorganic pain manifestations, Dr. VanFleet testified that Petitioner methodically and dramatically emulated across the floor with an antalgic gait favoring his right leg while his back was not moving. He testified that Petitioner also had no spasm but had superficial tenderness to palpation diffusely and pain with simulated truncal rotation. Dr. VanFleet further testified that Petitioner's annular tear did not correlate with his symptoms.

At the time of the hearing, Petitioner continued to complain of sharp back pain shooting into his hip. He testified that he also gets tingling in his feet and cannot sleep due to muscle spasms. Petitioner noted that he had some low back problems prior to March 5, 2019; however, he testified that at the time of the accident, he was working full duty and not taking any prescription medication for his back. Petitioner testified that the last time he treated for his low back prior to the accident date was in 2001.

II. Conclusions of Law

Following a careful review of the entire record, the Commission affirms the Arbitrator's finding that Petitioner sustained an accident that arose out of and in the course of his employment

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on March 5, 2019. The surveillance video in PX 14 and RX 5 shows that a work event did occur in which boxes fell onto a forklift that Petitioner was operating. However, the Commission finds that Petitioner failed to prove by a preponderance of the evidence that his current condition was causally related to the work accident, because the surveillance video does not depict the same version of the accident that Petitioner told his treating doctors and the §12 examiner.

Petitioner told Dr. Knapp on March 6, 2019 that the impact shook the forklift and Dr. VanFleet on August 20, 2019 that the impact knocked the forklift across the pavement. Petitioner also testified at the hearing that the impact of the boxes caved the whole side of the forklift in. However, the surveillance video does not depict any such movements or damage to the forklift. Petitioner even compared the amount of force from the impact to a motor vehicle accident; however, the impact depicted on the video does not appear to be that devastating or significant. Instead, the video shows Petitioner causally walking away from the incident without any apparent limp, pain, or discomfort. As such, the Commission finds that Petitioner exaggerated the impact to both himself and the forklift. This, in turn, diminishes the reliability of Petitioner's treating doctors' opinions, because they were advised as to an exaggerated version of the accident.

Petitioner also told Dr. Gornet that the boxes that hit the forklift weighed 600 pounds and Dr. VanFleet that they had weighed 450 pounds. Regardless of their weight, these boxes did not hit Petitioner directly and their impact did not visibly move the forklift. Dr. Knapp further noted that there was no significant damage to the forklift in the pictures that Petitioner showed him. Likewise, Dr. VanFleet suggested that the video of the boxes falling on the forklift was not consistent with the damage he saw on the pictures of the forklift. No pictures of the forklift were thereafter submitted into evidence at the arbitration hearing.

Since what is depicted on the video is inconsistent with Petitioner's description as to the movement and damage to the forklift, the Commission concludes that Petitioner exaggerated the impact of the accident. Dr. VanFleet's nonorganic pain manifestation findings also influence Petitioner's credibility. Dr. VanFleet testified that at his exam, Petitioner methodically and dramatically emulated across the floor with an antalgic gait favoring his right leg, despite not moving his back. However, in the video of the accident, Petitioner is seen immediately walking away from the accident with no limp and in no apparent discomfort.

Dr. Gornet indicated that his opinion relied on Petitioner providing factually correct information regarding the weight of the boxes and the boxes denting the forklift. However, for the reasons noted above, the record suggests that Petitioner did not provide all factually accurate details to his doctors and the video does not show any significant damage to the forklift. Additionally, in the video, Petitioner did not seem to be suddenly jarred by the impact of the boxes as Dr. Gornet suggests. Instead, he appeared to voluntarily move himself in anticipation of the boxes falling as Dr. VanFleet suggests. This is consistent with the accident report's statement that Petitioner had to move his leg suddenly to prevent injury. For the preceding reasons, the Commission finds Dr. VanFleet's opinion to be more reliable than Dr. Gornet's opinion.

In consideration of the inconsistencies that exist between Petitioner's retelling of the accident and the surveillance video, the Commission finds that Petitioner failed to prove there was a causal connection between his work incident and current low back condition. As a result, the

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Commission denies all compensation and benefits under the Illinois Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2020 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator as to the finding that Petitioner sustained an accident that arose out of and in the course of his employment on March 5, 2019.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove by a preponderance of the evidence that the current condition of his low back is causally related to the March 5, 2019 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is hereby denied all compensation and benefits under the Illinois Workers' Compensation Act related to the March 5, 2019 accident, including but not limited to prospective medical care, temporary total disability benefits, and all medical expenses.

The party commencing proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: OCT 27 2020

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

DLS/met
O- 9/3/20
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DISSENT

I respectfully dissent from the Majority's Decision and would affirm and adopt the well-reasoned Decision of the Arbitrator. In modifying the Arbitrator's Decision, the Majority concludes that Petitioner proved that he suffered an accident that arose out of and in the course of his employment but failed to prove that his current condition of ill-being was causally related to the work accident, because "the surveillance video does not depict the same version of the accident that Petitioner told his treating doctors and the Section 12 examiner."

I disagree with the Majority's conclusion. The day after the accident, Petitioner informed the company physician, Dr. Knapp, that the boxes of product struck the forklift and shook it. Petitioner informed Dr. Gornet four days after the accident that the boxes fell, suddenly jarring him and the forklift. The video itself shows the boxes striking the forklift and Petitioner moving to the right and then back to a neutral position. The top of the forklift appears to jerk. The video, in my view, corroborates Petitioner's initial description of the accident to the medical providers.

The Majority also disregards facts relating to Petitioner's pre-accident and post-accident condition. Petitioner had worked for Respondent for several years without incident. Petitioner admitted to all his doctors that he had a pre-existing low back issue, but at the time of the accident, Petitioner had been working full duty and had not received any medical treatment for his low back since 2001. Moreover, there is pathology evident on the MRI performed shortly after the accident as well as a positive post-accident discogram.

While it is accurate that Petitioner took off a few days before his accident to move his belongings into his daughter's house, the Majority suggests that any low back complaints were causally related to the move rather than the work accident. In so concluding, a notation in the company physician's initial treatment note is cited suggesting that Petitioner had been moving in the days before the accident. However, this note is not contained in the history portion of the note suggesting that the information was not obtained from the Petitioner and rendering its source questionable. Indeed, Petitioner testified that his employer provided this information to the doctor when making the appointment. Petitioner admitted that he had planned to help with this move but had been unable to assist due to his mother's hospitalization. Instead of moving his belongings, he spent each day off with her as she recuperated in the hospital. Petitioner's daughter confirmed in her testimony that she and her husband had assumed responsibility for moving Petitioner's belongings in order to allow him time with his mother.

With respect to the medical opinions, Respondent's §12 examiner, Dr. VanFleet, believed that Petitioner had exaggerated both the impact of the accident and his symptoms. The doctor reviewed the video and photos and determined that the impact was insufficient to cause Petitioner's complaints. Dr. VanFleet believed that Petitioner might have aggravated his pre-existing low back condition during the move to his daughter's or by sitting in the hospital with his mother. Given the testimony of Petitioner's daughter that Petitioner was not involved in the move, and the uncertain source of the company physician's notation that Petitioner had been moving, Dr. VanFleet's opinion that anything other than the forklift incident caused his low back condition is speculative. Like the Arbitrator, I find Dr. VanFleet's conclusions unpersuasive.

There is no evidence of any accident other than the March 5, 2019 work accident; there is no evidence that Petitioner lifted anything involved in a move or injured himself while visiting his mother; however, there is evidence of a post-accident annular tear. The Arbitrator's determination of Petitioner's credibility is most convincing, and one with which I agree. The Arbitrator was in the best position to judge the credibility of the witnesses in this case, and I would affirm his Decision. Therefore, I respectfully dissent.

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

20IWCC0632

PARSON, MARDIS
Employee/Petitioner

Case# **19WC010090**

THE DELIVERY NETWORK
Employer/Respondent

On 2/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY& CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0358 QUINN JOHNSTON HENDERSON ET AL
CHRISTOPHER S CRAWFORD
227 N E JEFFERSON ST
PEORIA, IL 61602

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STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mardis Parson
Employee/Petitioner

v.

The Delivery Network
Employer/Respondent

Case # 19 WC 10090

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on December 4, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, March 5, 2019, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $52,964.34; the average weekly wage was $1,018.54.

On the date of accident, Petitioner was 48 years of age, single with 0 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $22,407.99 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $22,407.99.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services for medical treatment provided to Petitioner, as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the disc replacement surgery as recommended by Dr. Matthew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $679.03 per week for 39 2/7 weeks commencing March 5, 2019, through December 4, 2019, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

February 3, 2020
Date

FEB 4 - 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on March 5, 2019. According to the Application, "Product fell over and hit forklift" and Petitioner sustained an injury to the "Back/Body as a Whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a forklift driver. At the time of the accident, Petitioner had worked for Respondent for approximately 10 years and had previously worked for Respondent in the 1990s. Petitioner and Respondent agreed that on March 5, 2019, Petitioner was involved in an incident while driving a forklift. However, Respondent's counsel disputed accident on the basis that the incident may have been orchestrated by Petitioner.

Counsel for both Petitioner and Respondent tendered into evidence a video of the accident of March 5, 2019 (Petitioner's Exhibit 14; Respondent's Exhibit 5). The Arbitrator was not able to open the video tendered by Petitioner's counsel; however, he was able to watch the video tendered by Respondent's counsel. The Arbitrator watched the video several times. Petitioner was observed operating a forklift moving some white boxes which Petitioner testified contained pulp, each of which weighed approximately 300 pounds. The forklift stops adjacent to a stack of the boxes and backs up. As the forklift is backing up, it comes in contact with a stack of the boxes and three of them fall striking the left side of the forklift. At that time, Petitioner is observed moving to the right side of the cab. It is difficult to determine if Petitioner's movement to the right side of the cab was because of the impact of the boxes or a voluntary act on the part of Petitioner.

After the boxes struck the forklift, Petitioner moved the forklift forward, straightened it up, then went backward and exited it on the right side. Petitioner then walked to the left side of the forklift to look at the side that was struck by the boxes. At that time, Petitioner walked in a normal manner and did not touch or stretch his lower back.

Prior to the accident of March 5, 2019, Petitioner requested time off of work so that he could assist his daughter and son-in-law to move his belongings to their home. However, Petitioner testified he did not participate in that activity because his mother was assaulted at work and had been admitted to Alton Memorial Hospital. Petitioner stated he was at the hospital visiting his mother and he did not participate in moving his belongings.

Alexandria Ybarra, Petitioner's daughter, testified at trial. Ybarra testified that on February 27/28, 2019, she and her husband moved Petitioner's belongings into their home. She stated her father was with her grandmother at that time because her grandmother was in the hospital after having been assaulted at work. She said her grandmother was in her 60s and worked at the mental hospital in Alton. On cross-examination, Ybarra stated her father received the call about her grandmother being injured at about the time they were going to start the move.

Petitioner testified he had some prior low back problems, but nothing which had recently prevented him from working. Petitioner stated he was not subject to any work restrictions and the last time he received any treatment for low back symptoms was sometime in 2001. No medical records regarding Petitioner's prior medical treatment for low back symptoms were tendered into evidence at trial.

Petitioner testified his back complaints worsened after the accident. He reported the accident to Respondent the following day and Respondent sent Petitioner to Gateway Regional Occupational Health Services where he was evaluated by Dr. Christopher Knapp. At trial, Petitioner stated he was sent to Dr. Knapp by Steve Workman, Respondent's general manager. Petitioner said he was in the room at the time Workman made the telephone call scheduling the appointment and heard Workman say Petitioner had injured himself moving over the weekend.

Dr. Knapp saw Petitioner on March 6, 2019. Petitioner advised Dr. Knapp of the accident that occurred the day before and that when boxes of product fell, they struck the side of the forklift and "shook the machine." Petitioner informed Dr. Knapp he had a prior history of a herniated disc, but his back had been hurting since the time of the accident. Dr. Knapp's record noted Petitioner had been off the preceding five days moving his household goods, but nothing about Petitioner visiting his mother in the hospital (Petitioner's Exhibit 3).

Dr. Knapp apparently reviewed a picture of the product that fell and came into contact with the forklift. He opined that "There is no physical causation that I can see that would attribute his level of pain and disability to the mishap at work." Dr. Knapp attributed Petitioner's symptoms to Petitioner's time off work for "personal reasons" and Petitioner's pre-existing back condition which was aggravated by non-occupational activities over the preceding weekend (Petitioner's Exhibit 3).

Petitioner subsequently sought medical treatment from Dr. Michael Adams, his family physician, on March 8, 2019. According to Dr. Adams' records, Petitioner's low back pain symptoms started on March 5. On examination, Petitioner had a good range of motion and straight leg raising was negative bilaterally; however, Dr. Adams noted a little bit of spasm in the lumbar musculature. Dr. Adams prescribed medication and ordered physical therapy (Petitioner's Exhibit 4).

On March 9, 2019, Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon. At that time, Petitioner complained of low back pain on both sides, both buttocks/hips and down both legs. Petitioner informed Dr. Gornet of the accident of March 5, 2019, and his current problems, at least in their level of severity, began at that time. He also informed Dr. Gornet of his prior low back pain and injury that occurred in 2001, but he had been working full duty without restrictions. Dr. Gornet opined the accident could have injured a disc or aggravated an underlying condition. Dr. Gornet prescribed medication, ordered physical therapy and an MRI scan (Petitioner's Exhibit 6).

The MRI was performed on March 9, 2019. According to the radiologist, there was a central annular tear at the apex of a broad based protrusion at L5-S1 (Petitioner's Exhibit 7).

Dr. Gornet saw Petitioner on April 5, 2019, and reviewed the MRI of March 9, 2019. He opined the MRI revealed structural disc pathology at L4-L5 and subtle disc pathology at L3-L4. Dr. Gornet also reviewed an MRI of January 30, 2001, and opined it revealed no evidence of an annular tear,

herniation or pathology. He opined there was an interval change based upon his comparison of the two MRIs. He opined Petitioner remain disabled and recommended Petitioner undergo injections at L4-L5 and L3-L4. Depending upon his response to the injections, Dr. Gornet indicated he would perform a discogram at L3-L4 and, if it was negative, do disc replacement at L4-L5 (Petitioner's Exhibit 6).

Petitioner was seen by Dr. Helen Blake, a pain management physician. Dr. Blake administered epidural steroid injections at L4-L5 and L5-S1 on May 14, and May 28, 2019, respectively (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on July 8, 2019. At that time, Petitioner advised the injections helped him, but had affected his ability to walk and sleep. Dr. Gornet recommended Petitioner continue to lose weight and noted he would obtain a CT discogram and MRI spectroscopy. Petitioner also had some complaints of neck pain which Petitioner related to the accident, but Dr. Gornet opined this was not part of his original problem (Petitioner's Exhibit 6).

On July 24, 2019, Dr. Gornet performed a CT discogram at L3-L4 and L4-L5. The L3-L4 disc was not provocative, but the L4-L5 disc was provocative with an annular tear (Petitioner's Exhibits 9 and 10).

At the direction of Respondent, Petitioner was examined by Dr. Timothy VanFleet, an orthopedic surgeon, on August 20, 2019. In connection with his examination of Petitioner, Dr. VanFleet reviewed medical records and the video of the accident provided to him by Respondent. According to Dr. VanFleet's report, Petitioner informed him that when the boxes fell striking the forklift, the forklift was knocked across the pavement. When Dr. VanFleet reviewed the video, he noted there appeared to be no movement whatsoever of the forklift. Dr. VanFleet also noted that in "information provided" to him, Petitioner was off work for several days prior to the accident because he was moving to his daughter's house. However, Petitioner's daughter (who was present during the examination) advised that Petitioner did not move any of his belongings because he was at the hospital visiting his mother (Respondent's Exhibit 1).

When examined by Dr. VanFleet, Petitioner complained of low back pain with occasional leg pain. On examination, Dr. VanFleet noted Petitioner had an antalgic gait favoring the right leg, but the remainder of his findings on examination were normal. Dr. VanFleet reviewed the MRI of March 9, 2019, and opined it revealed facet tropism at L4-L5 and L5-S1. Dr. VanFleet's diagnosis was obesity, lumbar degenerative disc disease and facet tropism. He opined the conditions were not work-related because the mechanism of injury he observed in the video would not cause or aggravate Petitioner's back pain. He attributed Petitioner's conditions to a pre-existing condition which was aggravated during his time off prior to the accident (Respondent's Exhibit 1).

Petitioner was again seen by Dr. Gornet on August 29, 2019, and Dr. Gornet noted the findings of the CT discogram. Dr. Gornet informed Petitioner he had a structural problem in his back and his options were either a fusion or one level disc replacement. He noted Petitioner had some prior structural issues in his back in 2001, but Petitioner had been working and doing well up until the accident (Petitioner's Exhibit 6).

Dr. Gornet last saw Petitioner on November 14, 2019. At that time, he reviewed Dr. VanFleet's report of August 20, 2019. He noted Dr. VanFleet opined Petitioner's condition was not work-related, but again referenced the fact Petitioner was not having significant problems and was working prior to the accident. He opined Petitioner remained temporarily totally disabled (Petitioner's Exhibit 6).

Dr. Gornet was deposed on November 12, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified the impact of the boxes striking the forklift caused a "sudden jarring" which could cause an injury to a disc. He stated the accident could have injured Petitioner's disc or aggravated an underlying condition. Dr. Gornet acknowledged Petitioner had a pre-existing low back problem, but Petitioner had been working and had not received any treatment for his low back. Dr. Gornet reaffirmed his opinion Petitioner should undergo disc replacement surgery (Petitioner's Exhibit 15; pp 10-16).

On cross-examination, Dr. Gornet stated he was not aware of the fact Petitioner had assisted his daughter in an apartment move shortly before the accident. He also agreed lifting furniture could cause a disc injury (Petitioner's Exhibit 15; p 22).

Dr. VanFleet was deposed on November 27, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. VanFleet's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. VanFleet testified there was not a causal relationship between Petitioner's condition and the accident of March 5, 2019. Further, he testified Petitioner had no positive findings on examination and exhibited symptom magnification. He also stated Petitioner being at the hospital, spending a lot of time sitting and sleeping on a couch could have contributed to his symptoms of increased pain (Respondent's Exhibit 4; pp 21-22).

Steve Workman, Respondent's general manager, was present during the trial and heard the testimony of both Ybarra and Petitioner. Workman was called by Petitioner's counsel to testify. He acknowledged Petitioner reported the accident to him the day after it occurred and directed him to go to "Gateway Hospital". However, he denied having any conversations with Dr. Knapp whatsoever.

Workman stated he knew Petitioner had taken off work shortly before the accident and the fact Petitioner was going to move his belongings because Petitioner had discussed it with him. In regard to the testimony of Ybarra and Petitioner in which they both stated Petitioner had not participated in the move because he was visiting his mother in the hospital, Workman stated he had no reason to doubt it. Further, he had no knowledge of Petitioner receiving any treatment for back problems from 2012 (when Workman believed he began working with Petitioner) until after the accident of March 5, 2019.

Conclusions of Law

In regard to disputed issue (C) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of his employment by Respondent on March 5, 2019.

In support of this conclusion the Arbitrator also following:

There was a video of the accident of March 5, 2019, which was received into evidence at trial. It clearly revealed Petitioner was driving a forklift which ran into a stack of boxes which caused them to fall and come into contact with the forklift. The suggestion by Respondent that Petitioner orchestrated this accident is simply not credible.

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of March 5, 2019.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testified he had a prior low back condition for which he last sought medical treatment in 2001 and was able to work without restrictions until subsequent to the accident of March 5, 2019. Petitioner's testimony was unrebutted.

As noted herein, the Arbitrator watched a video of the accident several times and it was difficult to determine if Petitioner's movement to the right at the time the boxes struck the forklift was because of the impact of the boxes or a voluntary act on the part of Petitioner. However, given the fact that the boxes apparently weighed 300 pounds each, the Arbitrator finds the impact of them striking the forklift could have caused a jarring effect on the forklift and Petitioner.

Dr. Knapp's record noted Petitioner informed him of the history of the accident of March 5, 2019. Dr. Knapp referred to the fact Petitioner was off the preceding five days moving household goods; however, it was not clear if this was information provided to him by Petitioner or from another source.

Both Petitioner and his daughter testified Petitioner did not participate in Petitioner's move to his daughter's home shortly before the accident of March 5, 2019, because Petitioner was visiting his mother in the hospital.

Steve Workman, Respondent's general manager, testified Petitioner had informed him he needed time off shortly before the accident to move his belongings and he denied having any contact at all with Dr. Knapp. However, when Workman testified, he stated he had no reason to doubt the testimony of Ybarra and Petitioner that Petitioner did not participate in the move because of him visiting his mother in the hospital.

Petitioner subsequently gave a consistent history of how the accident occurred to Dr. Adams and Dr. Gornet. Further, he informed Dr. Gornet he had a pre-existing back condition and received treatment in 2001.

There was an inconsistency in regard to the circumstances of the accident noted in Dr. VanFleet's report, namely, that when the boxes struck the forklift, they caused some side movement of the forklift. Based upon his watching the video, Dr. VanFleet opined the accident would not have caused an aggravation of Petitioner's low back pain. He attributed Petitioner's condition to a pre-existing condition which was aggravated during Petitioner's time off prior to the accident.

When he was deposed, Dr. VanFleet suggested that Petitioner's visiting the hospital and sitting for long hours and sleeping on a couch could have contributed to his low back condition. Dr. VanFleet, in effect, opined that Petitioner's activity at the hospital was more traumatic than the accident of March 5, 2019.

Dr. Gornet testified the accident of March 5, 2019, could have caused a disc injury or aggravated an underlying condition.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Gornet be more persuasive than that of Dr. VanFleet in regard to causality.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, disc replacement surgery as recommended by Dr. Gornet.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 39 2/7 weeks, commencing March 5, 2019, through December 4, 2019.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been under active medical treatment and authorized to be off work during the aforestated period of time.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRENDA BURNETT,

Petitioner,

20 IWCC0633

vs. NO: 17 WC 2548

WINDMILL NURSING PAVILLION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of notice, employment relationship, average weekly wage, accident, causal connection, temporary total disability, medical expenses, prospective medical care, and the statute of limitations, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes made below.

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issues of accident and causal connection, denies Petitioner's Motion to Submit Fresh Evidence, and dismisses the law firm of Dworkin and Maciariello's Petition for Attorney Fees.

I. Accident

The Arbitrator ruled that Petitioner failed to prove that she sustained a compensable accident on December 12, 2016. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the

accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Illinois courts considering whether an injury "arose out of" the course of employment have determined that "[t]here are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed." *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31. "'Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public.'" *Id.* (quoting *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27.

After the Arbitrator rendered a Decision in this case and after the parties submitted their arguments to the Commission, the Illinois Supreme Court issued an opinion in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828. In that case, our supreme court reversed the Commission's determination that the claimant, a restaurant employee whose knee "popped" after kneeling to look for carrots at work, failed to show that his injury arose out of his employment. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, ¶ 2. The court found that the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. *Id.* ¶ 47. The court also observed that "that an employee who sustains an injury while rendering reasonably needed assistance to a coworker in furtherance of the employer's business is considered to have suffered an injury arising out of and in the course of employment when the act performed is within the reasonable contemplation of what the employee may do in the service of the employer." *Id.* ¶ 48; see also *id.* ¶ 52.

The *McAllister* court further ruled that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister*, 2020 IL 124828, ¶ 64. Thus, "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

Accordingly, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, one issue is whether Petitioner's walking, as she ultimately alleged was the cause of her injury and that her doctor later opined was a cause of her foot condition, is a risk distinctly associated with her employment. Specifically, the issue is whether walking is an act that Petitioner might reasonably be expected to perform incident to her assigned duties. Petitioner testified that her job duties included: caring for the residents, changing the residents, taking residents to the washroom, making beds, tidying rooms, serving meals and feeding residents, and obtaining laundry and taking it to the laundry. She also stated that she worked seven and one-half hour shifts and would occasionally work through her half-hour break. She further testified that she would be on her feet from the time she arrived through the time she left. She stated that on the accident date, she went to the laundry to get a bedsheet and began having a cramp in her foot as she walked back to her unit. Given that transporting laundry was one of her job duties, walking to the laundry might reasonably be expected to be incident to her job duties.

However, Petitioner's testimony at the hearing that she felt a cramp at work is directly contradicted by months of treatment records submitted into evidence. For example, Petitioner's initial treatment record of December 13, 2016 makes no reference to a work injury, lists the mechanism of injury as "None," and the foot swelling was noted as "Occurred at home." The December 21, 2016 record makes no reference to a work injury and notes that Petitioner "is unsure how she injured teh [sic] area." In the record for January 12, 2017, Petitioner "relate[d] that pain began December 13th, occurred after period of prolonged walking," but there is again no mention of work. It was not until March 6, 2017 that Dr. Tomasz Szmyd of the European Foot & Ankle Clinic wrote a note (which looks more like a prescription or work note than an office SOAP note) stating in part: "This condition resulted from [a] period of extensive walking at work with severe pain and swelling in December 2016."

Given the evidence as a whole, the Commission determines that Petitioner's testimony is not credible and concludes that her injury did not occur in the course of her employment.

II. Causal Connection

Given that the Commission affirms the Arbitrator's ruling that there was no accident in this case, the issue of causal connection is moot. However, alternatively, the Commission also finds ample basis to affirm the Arbitrator's ruling regarding the lack of a causal connection in this case. As the Arbitrator noted, Dr. Szmyd's causation opinion provides no basis or details in support of his conclusion. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003). "An expert opinion is only as valid as the reasons for the opinion." *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998). Thus, the Commission finds no basis on which to find Dr. Szmyd's opinion persuasive.

The Commission also notes the gap between Petitioner's reporting of a work accident to her treating physicians and her alleged incident at work. Thus, the Commission finds that the record supports finding a lack of causal connection. Moreover, Petitioner provided no testimony regarding her current condition of ill-being. Accordingly, the Commission concludes that Petitioner failed to prove a causal connection between the alleged accident and her current condition of ill-being.

III. Petitioner's Motion to Present Fresh Evidence

On January 13, 2020, Petitioner filed a Motion to Submit Fresh Evidence before the Commission on review, asserting that she was denied her right to a proper defense during the arbitration hearing. On February 21, 2020, Petitioner's motion was continued for consideration with Petitioner's Petition for Review. On July 30, 2020, Commissioner Barbara N. Flores entered an Order and Rule to Show Cause, which required Petitioner to file any evidence in support of her Motion to Submit Fresh Evidence on or before August 24, 2020. No such evidence was submitted.

Section 19(e) of the Act provides in part that: "[i]n all cases in which the hearing before the arbitrator is held after December 18, 1989, no additional evidence shall be introduced by the parties before the Commission on review of the decision of the Arbitrator." 820 ILCS 305/19(e) (West 2016). Petitioner has offered no argument as to why the plain language of the Act is not controlling in this matter. Thus, the Commission concludes that it is bound by the plain language of the Act to deny Petitioner's motion.

IV. Petition for Attorney Fees

The law firm of Dworkin and Maciariello filed a Petition for Attorney Fees through attorney Patrick Shifley on November 13, 2019, stating in part that the firm represented Petitioner through August 6, 2019. The Petition was continued until final disposition and a hearing on fees. The July 30, 2020 Order and Rule to Show Cause required attorney Patrick Shifley to file his evidence in support of the petition with the Commission on or before August 10, 2020. No such evidence was submitted, and the Commission has determined that no benefits are to be awarded in this case. Accordingly, the petition is dismissed as moot.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove that she sustained a compensable accident on December 12, 2016.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove that her current condition of ill-being is causally connected to the accident alleged in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 10, 2019 is hereby affirmed and adopted with the changes stated herein.

20IWCC0633

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion to Submit Fresh Evidence is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the law firm of Dworkin and Maciariello's Petition for Attorney Fees is dismissed.

DATED: OCT 27 2020
o: 10/22/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

20IWCC0633

BURNETT, BRENDA
Employee/Petitioner

Case# **17WC002548**

WINDMILL NURSING PAVILLION
Employer/Respondent

On 7/10/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
SUSAN E WALSH
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20 IWCC0633

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) & 8(A)

Brenda Burnett
Employee/Petitioner

v.

Windmill Nursing Pavilion
Employer/Respondent

Case # **17** WC **02548**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Kurt Carlson, Arbitrator of the Commission, in the city of **Chicago**, on **April 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0633

FINDINGS

On the date of accident, **December 12, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**20,030.40**; the average weekly wage was $382.50.

On the date of accident, Petitioner was **51** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**n/a** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent has no liability to pay reasonable and necessary medical services pursuant to Section 8(a) of the Act.

No accident occurred arising out of and in course of Petitioner's employment with Respondent.

No temporary total disability benefits are owed as provided in Section 8(b) of the Act.

Respondent shall authorize no further left foot care at the direction of Dr. Szmyd (DPM) of European Foot & Ankle Clinic.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

07-09-19
Date

JUL 10 2019

STATE OF ILLINOIS)
)
COUNTY OF COOK)

20 IWCC0633

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brenda Burnett,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 17 WC 002548**
	)	
Windmill Nursing Pavilion,	)	
	)	
Respondent.	)	

DECISION OF ARBITRATOR

Regarding the disputed threshold issues of notice, accident, causal connection, temporary total disability ("TTD") benefits, medical bills and additional medical treatment, after observing the witness and reviewing the evidence, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury on December 12, 2016. Therefore, all remaining issues are moot. The Arbitrator's decision is based upon the following evidence adduced at trial:

Accident:

Petitioner, a fifty-one (51) year old certified nursing assistant ("CNA"), testified that she felt a cramp in her left foot on December 12, 2016 *while walking*. (*Emphasis added).* The Application for Adjustment of Claim, in which Petitioner authored, reflects the same history as her testimony. (RX #1) At some point, Petitioner reported the alleged accident to Michelle Lyons ("Lyons"), the Dean of Nurses; however, it was unclear from the testimony when she spoke to Lyons.

Medical History:

Petitioner presented to Ingalls Memorial Hospital on December 13, 2016 complaining of left foot pain and swelling for one day. *She denied any injury. The onset was gradual. The mechanism of injury was listed as "none." And "it occurred at home,"* She had full range of motion. The diagnosis was left foot sprain. She was placed in an Ace wrap and referred to another care provider. (PX #1)

On December 21, 2016, Petitioner returned to Ingalls Memorial and reported that she had not experienced improvement in her left foot pain and had an additional complaint of left ankle pain. She was able to bear weight; however, it caused pain. "*She was unsure how she injured the area.*" and "*Occurred at Home.*" X-rays of the left foot and ankle were negative. The diagnosis was pain in the left ankle and joints of the left foot. She requested more time off work. (PX # 1)

A causal connection statement from Dr. Tomas Szymd was incorrectly placed in the Ingalls Memorial records. (PX #1) Additionally, medical bills from unrelated lumbar spine claim were also included in the Ingalls records. (PX #1)

Petitioner was initially evaluated by Dr. Tomas Szymd (DPM) on January 12, 2017. (PX #2) She complained of severe pain and swelling in the left foot which began on December 13, 2016 following a period prolonged walking. X-rays revealed a questionable hairline fracture of the 3rd metatarsal of the left foot. She was placed in a CAM walker. She was advised to limit weight-bearing on the left. The doctor recommended an MRI. (PX #2)

Petitioner filed an application of adjustment of claim with The Illinois Workers' Compensation Commission on January 25, 2017. (ARB EX #3) She was pro-se.

Petitioner retuned to Dr. Szymd on January 30, 2017. She reported that her symptoms remained the same. The assessment was rule out 2nd/3rd metatarsal fractures in

left foot and metatarsalgia/contusion of left foot. She was advised to remain off work. (PX #2)

An MRI of the left foot performed on February 16, 2017 revealed mild soft tissue edema within the dorsal aspect of the left forefoot. The findings were compatible with a non-displaced non-articular stress fracture of the proximal metathesis of the second metatarsal of the left foot. There was evidence of some periosteal activity. Inflammation along the circumference of the proximal second metatarsal was noted. Metatarsals three and four of the left foot appeared to be intact and unremarkable. There were no fractures or interosseous lesions. There was hallux valgus deformity of the first ray of the left foot with evidence of degenerative osteoarthropathy of the first metatarsophalangeal joint. (PX #2)

On February 27, 2017, Dr. Szymd made a diagnosis of stress fracture of 2nd metatarsal of left foot. She was told to continue wearing her ambulatory cast and to remain off work. (PX #2)

In a note dated March 6, 2017, Dr. Szymd (DPM) continued to authorize Petitioner off work. For the first time, he opined that her stress fracture was due to "excessive walking" at work. (PX #2) The Arbitrator notes that this prescription slip is not contained in Dr. Szymd's subpoenaed records, instead it was included in the Ingall's Memorial Hospital records. (PX #1) The medical treatment facilities are unrelated. Further, the Arbitrator notes that the detailed billing ledger for the European Foot & Ankle Clinic shows that Petitioner visited Dr. Szymd that day, but no examination was rendered. (PX #2)

On March 13, 2017, Petitioner reported that the pain and swelling in her left foot continued to diminish. At worst, her pain was 2/10. The diagnosis was healing fracture of 2nd metatarsal of the left foot. She was advised to remain off work. (PX #2)

On April 17, 2017, Petitioner reported no pain or swelling and much improvement. *X-rays revealed a healed fracture of the second metatarsal. She was released to full-duty work.* (PX #2)

Petitioner was re-evaluated by Dr. Szymd on June 6, 2017. The doctor noted that she continued to progress well with diminishing pain and edema to the fracture site and increased callus formation at the 2nd metatarsal which was a sign of proper healing. (PX #1)

Petitioner returned to Dr. Szymd on August 17, 2017 and complained of increased swelling and pain to the midfoot and ankle area. Repeat x-rays revealed no signs of acute fracture of the left foot or ankle and healed fracture of the 2nd metatarsal. The diagnosis was post-traumatic capsulitis on the left and sinus tarsi syndrome on the left. She received an injection. (PX #2)

On September 7, 2017, Dr. Szymd made the same diagnosis and recommended conservative treatment. (PX #2)

On September 21, 2017, *Dr. Szymd reported that an EMG was negative for any nerve pathology in the left leg.* The doctor noted that the stress fracture to the second metatarsal had healed. The diagnosis was post-traumatic capsulitis on the left and sinus tarsi syndrome. (PX #2)

On October 16, 2017, Dr. Szymd added neuritis on the left to his diagnosis. She received a second injection to each anatomical location of the nerve of the left foot. (PX #2)

On November 20, 2017, Dr. Szymd made the same diagnosis of post-traumatic capsulitis on the left, sinus tarsi syndrome on the left and neuritis on the left. The doctor reported that he would consider a nerve biopsy on the left. (PX #2)

Petitioner underwent a left lower extremity nerve biopsy on January 22, 2018. The results were borderline low intra-epidermal nerve fiber density and mild morphologic degenerative changes among the intra-epidermal nerve fibers. The diagnosis was post-traumatic capsulitis on the left; sinus tarsi syndrome; and left neuritis. (PX #2)

As of February 22, 2018, Petitioner was status-post nerve biopsy of the left leg. She underwent a punch biopsy of the left calf which revealed that intra-epidermal nerve fiber density was borderline low and there were mild morphologic degenerative changes among intra-epidermal nerve fibers. The diagnosis remained the same. (PX #2)

Petitioner retuned to Dr. Tomas Szymd (DPM) on July 26, 2018 who continued to make the same diagnosis. (PX #2)

Notice:

The Arbitrator finds that Petitioner gave Respondent proper notice under Section 6 of the Illinois Workers' Compensation Act ("the Act"). 820 ILCS 305. Section 6(c) of the Act states in relevant part "[n]otice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6c. Petitioner's initial application of claim was filed on January 25, 2017, which on the 44th day. (ARB EX #3) It is more likely than not that Petitioner filed her claim after some discussion of its merits with her employer and/or claims adjuster and being dissatisfied with the progress of those talks.

Accident:

Finding that Petitioner had fulfilled the notice requirements under Section 6(c) of the Act, the Arbitrator nevertheless finds that Petitioner failed to prove that she sustained a compensable accident on December 12, 2016.

A. Failure to contemporaneously report work injury to treating physicians:

As further evidence that Petitioner did not sustain a work accident, during her initial visit with Ingalls on December 13, 2016, s*he denied any injury. The mechanism of injury was listed as "none" and "Occurred at Home."* (PX #1) When Petitioner returned to Ingalls on December 21, 2016, she admitted that "*she was unsure how she injured the area*" and "*Occurred at Home."* (PX #1) Despite treating with Dr. Szymd since January 12, 2017, the doctor provided no opinion regarding causation until March 6, 2017 and on that instance, it appears that Petitioner visited him for the sole purpose of obtaining the causal connection statement. Finally, it is unclear how statement found its way in the Ingall's Memorial Hospital records. (PX #1)

B. No increased risk:

It is well settled law in Illinois that an employee's injury is compensable under the Act only if it arises out of and occurs in the course of his employment. *Caterpillar Tractor Company v. Industrial Commission*, 129 Ill.2d 52, 57, 541 N.E.2d 665 (1989). Both elements must be present at the time of the claimant's injury in order to justify compensation under the Act. *Id.* Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have occurred in the course of

employment. *Potenzo v. Illinois Workers' Compensation Commission*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523 (1st Dist. 2007).

At issue in this matter is whether the injury arose out of Petitioner's employment. "Arising out of" employment refers to the origin or cause of a claimant's injury. *Id.* For an injury to "arise out of" the employment, its origin must be in some risk connected with or incidental to the employment so as to create a causal connection between the employment and the accidental injury. *Id.* A risk is incidental to a claimant's employment when the risk belongs to or is connected with the fulfillment of the claimant's duties of employment. *Knox County YMCA v. Industrial Commission*, 311 Ill. App. 3d 880, 884, 725 N.E.2d 759 (3rd Dist. 2000). There are three types of risk which an employee might be exposed to, namely (a) risks distinctly associated with the employment; (b) risks which are personal to the employee; and (c) neutral risks which have no particular employment or personal characteristics. *Potenzo*, 378 Ill. App. 3d at 116.

Petitioner testified that she injured her left foot "while walking." This is a neutral risk. Whether a neutral risk injury arises out of a claimant's employment depends on whether the claimant was exposed to a risk greater than that to which the general public is exposed. Summarizing Illinois law on the compensability of falls while walking or traversing stairs, in *Illinois Consolidated Telephone Company v. Industrial Commission*, 314 Ill. App. 3d 347, 352, 732 N.E.2d 49 (5th Dist. 2000), Justice Rakowski, in a concurring opinion, stated as follows: [t]hus, because the general public and employees alike are equally exposed to the risks of walking and traversing stairs, injuries from these acts generally do not arise out of employment.

Petitioner testified that she felt a cramp in her foot while walking. The Arbitrator is willing to find compensability using the quantitative risk analysis, but not when the initial medical records state that it "occurred at home." (PX #1) Therefore, all benefits are denied.

Causal Connection

Assuming Petitioner met her burden of proof on the issues of notice and accident, the Arbitrator finds that Petitioner failed to prove that there is a causal connection between the work incident and her condition of ill-being. The Arbitrator further states while Petitioner's overuse theory would have been viable under a quantitative risk analysis, Dr. Szymd provided no basis or details regarding the basis of his causation opinion. Also, the histories given by the Petitioner revealed that no clear-cut injury occurred. Therefore, all benefits are denied.

TTD:

Having found that the Petitioner failed to prove that she sustained a compensable accident on December 12, 2016, the Arbitrator finds that Petitioner is not entitled to TTD benefits.

Medical Bills:

Having found that Petitioner failed to prove that he sustained a compensable accident under the Act, the Arbitrator denies all medical bills.

Conclusion

For these reasons, the Arbitrator finds that Petitioner failed to prove that she sustained a compensable accident on December 12, 2016. Therefore, compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Cortez,

Petitioner,

20IWCC0634

vs.

NO: 17 WC 21365

Paramount Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 28, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

20IWCC0634

No bond for removal of this cause to the Circuit Court is required as no award for payment has been entered. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 27 2020
o: 9/17/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

20IWCC0634

CORTEZ, JOSE
Employee/Petitioner

Case# **17WC021365**

PARAMOUNT STAFFING
Employer/Respondent

On 4/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
DANA DJOKIC
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

4866 KNELL O'CONNOR DANIELWICZ
RODNEY W PHILLIPE
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

20 IWCC0634

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSE CORTEZ
Employee/Petitioner

Case # 17 WC 021365

v.

PARAMOUNT STAFFING
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **August 6, 2019 and September 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

20IWCC0634

FINDINGS

On the date of accident, **6/28/2017**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$23,732.28**; the average weekly wage was **$456.39**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Claim for compensation denied. Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on June 28, 2017.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 23, 2020
Date

APR 28 2020

ed

FINDINGS OF FACT

Petitioner testified via a Spanish/English interpreter.

Petitioner was employed by Respondent, a staffing agency, for about 3 years prior to the claimed accident date of June 28, 2017. He was assigned to work at OPTO International, working Monday through Friday, 2:30pm to 11:30pm. Petitioner worked 8 or 10 hour days and worked on Saturdays. Petitioner was a helper in an area where wood was cut and furniture was packaged.

Petitioner testified that June 28, 2017 was a Wednesday. He started work at the usual time of 2:30pm. Petitioner testified that he was carrying a 4'by8', ¾ inch sheet of plywood to the cut machine and he injured his left shoulder. This occurred between 3:00 and 3:30pm. He was carrying the sheet with his "left hand towards like downwards and the right hand up carrying it." The sheet was leaned on his left shoulder. There was no equipment to assist in moving the plywood sheet, so Petitioner had to carry it. As he was carrying the board, he felt pain in his left shoulder, arm, upper back and neck. Petitioner testified that after he felt the pain, he dropped the board and some co-workers noticed the noise. Petitioner testified that a few minutes later he told his boss, Alex Puntos, that he hurt his shoulder carrying wood and he had pain on the neck, shoulder and back. Petitioner had to walk 25 meters to find Puntos. Puntos gave him pills for pain (Tylenol) and sent Petitioner home after the pain did not go away. Petitioner testified that Puntos told him to go home to rest. Puntos did not ask Petitioner to fill out a report or say that he was preparing one.

Petitioner testified that at home he had a lot of pain in the shoulder, back and neck and he was not able to move a lot. On the date of accident, Petitioner was not sent for medical treatment by Respondent. He did not seek treatment on his own. He took Tylenol.

Petitioner testified that he returned to work the next day and told Puntos that he still had pain. Puntos gave Petitioner Tylenol and sent him home. Puntos did not send Petitioner to the doctor. Petitioner did not seek medical treatment on his own. Petitioner again went in to work on the next day, June 30, 2017. He did not work a full day because of pain. Puntos sent Petitioner home again. Petitioner testified that he worked full days

after the accident, but his physical activities were limited. He was given these work assignments by Alex Puntos. Petitioner testified that during this time, he told Puntos that he had pain and could not move his arm. He was never sent to a physician by Respondent.

Petitioner testified that he was laid off from the OPTO job a few days later, due to lack of work. He does not work for Respondent now. He was not offered any other jobs by Respondent.

Petitioner signed the Application for Adjustment of Claim on July 24, 2017. (PX 1) Petitioner began treatment with Dr. Ravi Barnabas at Rand Medical Center on July 25, 2017 (27 days after the accident). Petitioner was referred to Dr. Barnabas by his attorney.

At the first visit, Dr. Barnabas charted that Petitioner worked for a staffing agency and on June 28, 2017 was at OPTO International in Wooddale assembling furniture. At 3:30 a.m. while he was cutting wood, [Petitioner] suddenly felt his left shoulder pop and had intense pain in his neck which went down the shoulder. He immediately reported it to Alejandro who is his supervisor who then called the staffing agency human resources and talked to Eva. The patient was then sent home. The patient complained of pain in the neck area, which radiated down the left shoulder. He also noted tingling and numbness, and that the pain was progressively getting worse. He has been taking OTC Advil, which doesn't help. He has been told that until he feels better he can't come back, so he has not been working since that day. Dr. Barnabas noted that Petitioner never had an injury like that before. Dr. Barnabas diagnosed a work-related injury causing cervicalgia, cervical strain/sprain, cervical radiculitis, left shoulder impingement, left shoulder tendinitis, and left shoulder rotator cuff involvement. He prescribed Naprosyn and cyclobenzaprine. He prescribed physical therapy. He recommended a TENS unit for increasing blood flow to the area, reducing spasm, reducing pain, and increasing range of motion and strength. Therapy at Rand Medical Center was very accessible to Petitioner, so he wanted to attend there. Dr. Barnabas placed Petitioner off work. (PX 6)

Petitioner followed up with Dr. Barnabas on September 12, 2017. Dr. Barnabas noted that Petitioner had done eight weeks of physical therapy and was still having pain in his neck and left shoulder. Range of motion in the neck and left shoulder was still painful and left shoulder palpation was still tender over the

supraspinatus and infraspinatus. Dr. Barnabas assessed left shoulder impingement, cervicalgia, cervical strain/sprain, and left shoulder strain. He recommended an MRI of the shoulder and neck and a hold on therapy, since Petitioner was not responding as well as he should. (PX 6)

Petitioner had MRIs of the left shoulder and neck done on September 12, 2017 at Advantage MRI Logan Square, as ordered by Dr. Barnabas. The MRI of the left shoulder showed a type II downsloping acromion with impingement of the supraspinatus muscle belly, and fluid within the subacromial subdeltoid bursa. The MRI of the cervical spine showed multi-level mild spondylitis changes from C4-C7 and multi-level annular bulging impinging the ventral thecal sac causing a varying degree of neural foraminal stenosis from C4-C7. (PX 9)

Petitioner saw Dr. Krishna Chunduri of Advanced Spine & Pain Specialists for the first time on September 27, 2017. Dr. Chunduri noted that Petitioner presented with complaints of pain in his left shoulder and neck area due to a work injury that occurred on June 28, 2017. The chart note reflects that Petitioner told Dr. Chunduri that he was at work where he assembled furniture, and, at 3:30 in the morning, was cutting wood and suddenly felt his left shoulder pop and had intense pain that radiated up into his neck. Petitioner stated he had told his supervisor, who then sent him home. It was also noted that Petitioner was told he could not come back to work until he felt better. Dr. Chunduri reviewed the MRI of the cervical spine and noted diffuse spondylitic changes with facet hypertrophy, annular bulging from C4 through C7, and mild to moderate foraminal stenosis. The left shoulder MRI showed AC joint hypertrophy with impingement of the supraspinatus tendon. He diagnosed left shoulder pain with supraspinatus tendinopathy, cervical spondylosis, and cervicalgia. He opined that the main source of the ongoing pain was likely the left shoulder, rather than the neck. Dr. Chunduri recommended a left shoulder cortisone steroid injection, which was provided in the office. (PX2)

Dr. Chunduri next saw Petitioner on October 11, 2017 and noted that the shoulder injection provided excellent relief of pain that became only intermittent only with activity. Petitioner rated his pain at 2-3/10. Dr. Chunduri made the same diagnosis and wrote that it was the result of Petitioner's work injury. He

recommended that Petitioner restart physical therapy and continue with a non-steroidal anti-inflammatory medication. (PX 2)

On October 17, 2017, Petitioner saw Dr. Barnabas, who noted Petitioner still had pain in his neck but was getting therapy. He recommended that Petitioner complete 12 more weeks of therapy. He also noted that Petitioner had one injection. Petitioner was to follow up with Dr. Chunduri. (PX 6)

Dr. Chunduri next saw Petitioner on October 24, 2017 and noted that Petitioner reported that his left shoulder was not painful without any movement, but when trying to lift anything overhead, he felt a sharp pain. Dr. Chunduri noted that Petitioner's neck symptoms had resolved, but the left shoulder pain continued despite the injection. He referred Petitioner for an orthopedic consultation. (PX 2)

Petitioner saw Dr. Chandrasekhar Sompalli, of Elite Orthopedic and Sports Medicine, for the first time on October 31, 2017. Dr. Sompalli noted that Petitioner injured his [left] shoulder at work where he assembled furniture. The stated history is that Petitioner was cutting wood at 3:30 a.m. and suddenly felt a pop in his shoulder and intense pain. Petitioner had three months of therapy which did not help too much, and he had one injection which only helped for three days. The pain in the shoulder radiated down the arm making it difficult to reach up above shoulder level without pain. After an examination, Dr. Sompalli's assessment was impingement syndrome and bursitis. He recommended one more month of physical therapy and opined that if Petitioner continued to have pain after that, he will have failed conservative measures and would need a shoulder scope, subacromial decompression, and debridement. He placed Petitioner off work. (PX 4)

On November 7, 2017, Petitioner saw Dr. Barnabas, who noted that Petitioner had been seeing Dr. Sompalli and that Dr. Sompalli had recommended physical therapy. Accordingly, Dr. Barnabas prescribed physical therapy. (PX 6)

Dr. Sompalli's January 26, 2018, visit note documents that Petitioner had left shoulder pain, rated 8/10, that started at work. Dr. Sompalli noted that Petitioner did not have prior problems with his shoulder and never saw a physician. He noted that Petitioner had worked for five years and that plywood he lifted weighed 20 to 30 pounds. Dr. Sompalli noted that Petitioner lifted the plywood from the bottom up and his left arm went

underneath it and lifted the plywood above overhead and he cut it with a saw. "He was doing this in this particular day and he suddenly developed pain in his left shoulder. His pain did not occur while he was off work and it occurred during work." Dr. Sompalli diagnosed chronic left shoulder traumatic impingement syndrome with bursitis. He kept Petitioner off work. (PX 4)

On March 6, 2018, Petitioner saw Dr. Barnabas, who noted that he was waiting on notes from Dr. Sompalli who was recommending left shoulder surgery because of no relief. (PX 6)

On February 23, 2018, Dr. Sompalli noted that Petitioner continued to have pain, rated 8/10. Dr. Sompalli explained to Petitioner that he would need a shoulder scope, subacromial decompression and possibly a distal clavicle resection. (PX 4)

Petitioner saw Dr. Barnabas on April 10, 2018. Dr. Barnabas noted that he was trying to get the notes from Dr. Sompalli. He noted that [left shoulder] range of motion was very painful and getting worse. (PX 6)

Petitioner also saw Dr. Chunduri on April 10, 2018. Dr. Chunduri noted that Petitioner had seen Dr. Sompalli for an orthopedic evaluation and that surgery had been recommended. Petitioner still had left shoulder pain, but only mild left neck pain. The neck was not the primary source of pain. He advised Petitioner to follow up only if the neck symptoms persisted and to follow up on surgery. (PX 2)

On June 22, 2018, Dr. Sompalli charted that Petitioner had no improvement in his left shoulder traumatic impingement bursitis, rated 10/10. He noted there was more stiffness. Dr. Sompalli assessed severe adhesive capsulitis and was of the opinion Petitioner needed left shoulder aggressive active and passive range of motion and a left shoulder scope manipulation, debridement of adhesions and subacromial decompression. He kept Petitioner off work. (PX 4)

On August 18, 2018, Dr. Sompalli's visit note provides that Petitioner presented for evaluation of left shoulder pain secondary to work injury on June 28, 2017. He noted a history of Petitioner having been employed by Paramount Staffing for five years and assigned to Opto to assemble furniture. He noted that Petitioner told him he frequently cut pieces of wood lifting from the bottom up with the left arm going underneath, and lifting overhead to cut [the wood] with a saw that stands vertically. Dr. Sompalli noted that

Petitioner told him that on June 28, 2017, while cutting wood that weighted 20 to 30 pounds, Petitioner felt a popping and tearing sensation in the left shoulder with pain. Dr. Sompalli's assessment was "left shoulder adhesive capsulitis, impigement [sic], bursitis, pain secondary to work injury on 6/28/17." (PX 4) He again recommended a left shoulder subacromial decompression, distal clavicle resection, debridement, and manipulation. He ordered an MRI arthrogram with contrast of the left shoulder and kept Petitioner off work. (PX 4)

On September 7, 2018, Petitioner had a CT arthrogram and MR arthrogram, in addition to a three dimensional CT scan and MRI scan, as ordered by Dr. Sompalli. These diagnostic tests revealed a very subtle irregularity in the posterior labrum which was probably a small tear, per the radiologist. (PX 3)

On September 26, 2018, Dr. Sompalli's visit note states that he had reviewed the diagnostic tests. His assessment was a left shoulder SLAP tear. He opined that Petitioner had failed conservative treatment, physical therapy, anti-inflammatories, and a cortisone injection, and developed adhesive capsulitis of the left shoulder. He again recommended surgery and kept Petitioner off work. (PX 4)

On November 9, 2018, Dr. Sompalli's visit note provides that Petitioner is a diabetic controlled with insulin and monitored by his PCP. He noted that Petitioner told him he was pain-free in the left shoulder with full range of motion and no limitation to his activities prior to the work injury of June 28, 2017. Dr. Sompalli again noted no improvement with conservative treatment and again recommended surgery. He kept Petitioner off work. (PX 4)

On December 21, 2018, Dr. Sompalli's visit note provides that Petitioner completed four months of physical therapy and was continuing a home exercise plan but still did not have pain relief or improvement of his left shoulder range of motion. Dr. Sompalli noted that Petitioner had a Section 12 exam done on November 4 [sic], 2018. He cited to the examiner's opinion that Petitioner required a shoulder manipulation for adhesive capsulitis and that it was reasonable to perform a shoulder arthroscopy at that time. The examiner, however, did not see an indication for a distal clavicle excision (resection). It is noted that Dr. Sompalli re-submitted a request for surgery authorization. He kept Petitioner off work. (PX4).

On February 1, 2019, Dr. Sompalli's visit note provides that Petitioner still complained of pain in his left shoulder and associated numbness and tingling in his left arm, rated 4/10. He reported his pain was worse at night and he started to have pain in his right shoulder from compensating due to left shoulder pain. Dr. Sompalli again recommended surgery and kept Petitioner off work. (PX 4)

On April 5, 2019, Dr. Sompalli's visit note provides that Petitioner still complained of left shoulder pain and associated numbness and tingling in his left arm radiating up to the neck area, rated 7/10. Dr. Sompalli noted that Petitioner had difficulty with any movement above chest level, reaching behind the back and with activities of daily living such as showering, dressing, grooming, and routine house chores. He noted a complaint of right shoulder pain from compensating due to left shoulder pain. Dr. Sompalli noted that Petitioner was taking Aleve with no pain relief because he could not take Tramadol due to vomiting after he took it. Dr. Sompalli's diagnosis was a left shoulder SLAP tear due to work-related incident on June 28, 2017 and he again recommended surgery. (PX 4)

On July 5, 2019, Dr. Sompalli's visit note provides that Petitioner rated his left shoulder pain at 7/10 with the same symptoms as in previous visits. Rest and no use of the left arm provided minimal relief. He reiterated that prior to the work injury of June 28, 2017, Petitioner advised he was pain free in the left shoulder with full range of motion and no limitation to his activities. On page 3 (of 4) of this visit note, Dr. Sompalli added a "Notice of Importance" that read:

> It was mistakenly noted that the accident occurred at or about 3:30 a.m. via initial intake and review of dictated notes. Patient verbalized accident occurred at or about 3:30 p.m. as there is no 3rd shift work in the company.

The diagnosis was: Adhesive capsulitis, left shoulder; Superior glenoid labrum lesion of Shoulder; and impingement syndrome left shoulder. The recommendations were: home exercise program, surgery with left shoulder manipulation under anesthesia, arthroscopy with SAD and possible debridement of DCR (subacromial decompression, distal clavicle resection). Petitioner was kept off work. (PX 4)

Petitioner testified that his shoulder had pain and was "getting frozen." He can lift his left arm actively only to the shoulder plane. He recently had seen Dr. Markarian and surgery was scheduled with Dr. Markarian for August 22, 2019.

Petitioner wants the surgery to alleviate his pain and get function back in his arm. He wants to be able to return to work. He has stopped doing things that he did before the accident. Driving is a problem. It is difficult to take a shower. He can't carry garbage, can't move a curtain and has difficulty carrying his kids. He does the HEP that he learned in therapy. He has not returned to work anywhere. He has had no subsequent injuries to his shoulder. He has received no TTD since going off work. None of his medical bills have been paid.

Petitioner testified that he never told any medical provider that he was hut at 3:30 in the morning on June 28, 2017.

In his original testimony on August 6, 2019, Petitioner stated he told his supervisor Alex Puntos that he was injured and then went home. On September 16, 2019, when the trial resumed, Petitioner claimed he also reported his accident/injury to Eva Andujar, Respondent's on-site manager, before he went home on the date of accident. On re-direct, Petitioner said he first told Alex, who said I'm going to send you home; but before that, go and tell Eva, that I was to tell Eva that Alex was sending me home because I was in pain. He testified that he so advised Eva.

On cross examination, Petitioner was asked if he reported to Dr. Barnabas that he was injured while cutting wood. Petitioner testified that Dr. Barnabas' records were incorrect and he had told Dr. Barnabas that he was carrying wood to cut it. Petitioner further testified that Dr. Barnabas referred him to Dr. Chunduri and Dr. Chunduri referred him to Dr. Sompali. We do not know how Petitioner got to Dr. Makarian and it was never disclosed whether the scheduled August 22, 2017 surgery took place.

On cross examination Petitioner denied giving a history of being injured cutting wood. He told Dr. Barnabas, Dr. Sompalli and Dr. Chunduri that he was injured carrying wood, not cutting wood. He denied telling Dr. Barnabas and Dr. Chunduri that he has not worked since the date of accident. Dr. Barnabas' records

were incorrect. In denying telling Dr. Chunduri that he had not worked since the date of accident, Petitioner claimed "...nor did they ever ask me if I was still working." Petitioner claimed that he told his doctors that he has not worked since being fired.

Petitioner was asked about his work schedule since the date of accident of June 28, 2017. On cross examination Petitioner was shown a copy of Respondent's Exhibit 8 which demonstrated he worked 32 hours during the June 28, 2017 week; the following week, which included 4th of July holiday, he worked 24 hours; and the week after that he worked 40 hours, plus 5.25 hours of overtime. Petitioner testified that he was working some form of light duty during this period.

Petitioner testified that Respondent called him and fired him because work was down. He denied being fired because he took excessive breaks on July 11, 2017. Petitioner denied that he was offered alternative work by Respondent on Monday, July 17, 2017.

Respondent presented the testimony of Alejandro (Alex) Puntos via Evidence Deposition. The deposition took place on August 30, 2019. (RX 16) Puntos testified that he is employed by OPTO as a supervisor in the wood shop and has had that position for 14 years. He works the 8:00am to 4:30pm shift. He was Petitioner's supervisor in 2017. Petitioner was a helper on the 2nd shift. He would not be working at 3:00am.

OPTO has an accident report form that is available in the washrooms, kitchen and at Puntos' desk. If Puntos is advised of an accident, he fills out one of the reports and copies are given to OPTO's HR department and the Paramount supervisor. Puntos would have filled out a report if Petitioner reported an injury. There was no report regarding Petitioner. Petitioner did not report an injury to Puntos on June 28, 2017. If he had, Puntos would have checked with the other workers and documented it. Petitioner never reported an injury to Puntos. Puntos did not send Petitioner home early. During the time period of June 28, 2017 to July 14, 2017, Puntos did not give Petitioner light duty work. Petitioner worked his regular job duties during that time. Petitioner was terminated for taking too many breaks. There are carts and forklifts to carry wood. A co-worker would be available to help move a 4 x 8 plywood sheet. Employees are not prohibited from moving plywood sheets by

themselves. Tylenol is available for employees. Puntos did not recall giving Petitioner Tylenol in June of 2017. Puntos testified that he never sent Petitioner home because he had pain complaints in June of 2017. If anyone told Puntos that Petitioner had been injured, he would have prepared a report. (RX 16)

Respondent presented the testimony of Chad Niec, its VP of Risk Management. He has been so employed for nine years. In 2017, Respondent's accident reporting procedure was that the line employee reports the injury to his supervisor and the client. Respondent's on-site supervisor calls Niec and emails him. Accident reports are then completed

Niec testified that he did not receive an accident report for Jose Cortez on June 28, 2017. The first notice that Respondent company had of Petitioner's alleged accident/injury was receipt of the Application for Adjustment of Claim. Mr. Niec testified about the business records received in this matter including, July 28, 2017 emails to and from Paramount on-site manager, Eva Andujar. (RX 7, p 10)

Mr. Niec testified that the first notice Paramount received of the alleged June 28, 2017 accident/injury of Petitioner was on July 28, 2017 as follows:

> Answer: So the email from July 28th reads: "Hello, Eva, here is the document that we received for a work comp claim for this employee. It seems he used his CAT time on that day, 6-28-2017, but then was caught stealing time shortly after that and was cancelled from OPTO. He never mentioned an injury at any time and had already lawyered up, so I need - - so I will need you to provide Chad additional information that will be helpful for the case."
>
> Answer: This one also was dated July 28, 2017: "Just to clarify that we don't have an injury report because he never reported an injury. He just took the day off because they were offered CAT time."
>
> Question: And the next entry, who is the author of that?
>
> Answer: This is from Eva Andujar, who was the onsite supervisor; and she replies: "that's correct. He never reported an injury to anyone. From looking at the notes, he would have had some sort of work restrictions, but came to work like normal." And she goes on to say: "When I ended his assignment, he did disclose to me that he was going to lawyer up and retaliate..."

(09/16/19 T. pgs. 35-37; RX7, pp 10-12)

Niec further testified regarding the circumstances around Petitioner's termination from the OPTO assignment for taking excessive breaks. This was considered stealing time and OPTO requested that Petitioner not return.

Niec testified that after Petitioner's assignment at OPTO was ended, Respondent offered him another assignment on July 17, 2019, but he refused additional work.

Niec testified that all light duty requests for duty accommodations are approved by him. At no time did he receive a request for light duty or accommodation for Petitioner after June 28, 2017, or any other time. The fact that Petitioner never requested accommodation or light duty request was confirmed by Andujar's email. (RX 7, p10) Niec further testified that he had reviewed the payroll history report for Petitioner (RX 8) and in reviewing that document, he noted that Petitioner worked his regular schedule the week of June 28, 2017 (alleged accident date). Further, he also worked his regular schedule the following week, minus the 4th of July holiday; and the week after that he worked 40 hours plus 5.25 hours of overtime. Mr. Niec testified that there was no PTO or vacation reflected in any of those weeks and they all appear to be regular work hours and further there was no request for accommodation or light duty at any time in that time period.

Niec testified that CAT time "is like sick time, vacation time, things of that nature." Neither Party provided proof as to what CAT is an acronym for (Compensated Alternative Time?), or as to why Petitioner received CAT time on June 28, 2017 (per Andujar's email).

Finally, Mr. Niec testified that the first report of injury regarding Jose Cortez (RX 9, p 14) was completed by Paramount on-site manager Eva Andujar. Andujar reported that Petitioner did not report any accident or injury on June 28, 2017 or otherwise. The report from Andujar states: "Claimant alleges to have injured his upper back and left shoulder but did not report any incident (this information was taken from the application for adjustment he signed on 7/24/17) and received from his attorney." (RX 9, pp 15 and 16)

Neither Party presented the testimony of Andujar and neither Party presented daily work time information for Petitioner from June 28, 2017 through July 11, 2017, both of which would probably have been helpful to the finder of fact.

Petitioner underwent an IME examination by Dr. David Zoellick on November 5, 2018. An interpreter was used. Petitioner is right handed and an insulin dependent diabetic.

In the history Dr. Zoellick notes that Petitioner reported that he was walking and carrying a ¾ inch piece of plywood when he felt a stabbing sensation in the middle and back of his left shoulder. He heard a pop in the shoulder and started having pain. Dr. Zoellick reviewed the medical records including MRIs, radiology reports, and recommendations from Dr. Chunduri and Dr. Sompali.

In reviewing the radiology reports Dr. Zoellick reported: re the cervical spine alignment is normal and minimal anterior inferior spurring; X Ray of the left shoulder which revealed overall alignment is normal no evidence of fracture, type 1 acromion. Dr. Zoellick found that if there were any neck problems they had been resolved and with regard to the cervical spine there are minimal findings. The MRI scan of the cervical spine demonstrated age appropriate degenerative changes without any significant disc herniation. The MRI arthrogram of the left shoulder demonstrated very mild supraspinatus tendinopathy and probably a small posterior labral tear, but no full thickness rotator cuff tear. Dr. Zoellick noted that there were non-organic findings on the exam. Petitioner had decreased sensation in the entire left upper extremity compared with the right. When grip strength was tested, he had very minimal readings on the measuring device on the left hand, which appeared to be effort related. Dr. Zoellick reported that Petitioner's subjective complaints outweigh the objective findings.

Dr. Zoellick noted a small posterior labral tear seen on the arthrogram and reported that Petitioner has developed adhesive capsulitis of the left shoulder. The adhesive capsulitis could be related indirectly to the injury. Petitioner's complaints are related to the left shoulder and the adhesive capsulitis is the biggest problem. Any complaints regarding the cervical spine are due to age appropriate degenerative changes and not related to any alleged work injury. The main procedure which needs to be performed is the shoulder manipulation to

regain range of motion. Arthroscopy would also be indicated to evaluate the possible posterior labral tear. It should be noted this is a small labral tear which is something that the majority of patients can live with. At most he may need a slight debridement if it is in fact a tear. Dr. Zoellick opined that with the alleged injury it is unlikely that the Petitioner would have been able to continue to perform his full work duties from June 28, 2017 until July 11, 2017. (RX 10)

Respondent made an objection to admission of Petitioner's medical exhibits and any causation opinions contain therein. The improper causation opinion evidence is found specifically at Respondent's Exhibit 14, pages 79, 82, 91, 94, and 95. Petitioner proved compliance with Section 16, so his medical exhibits were admitted. Responded submitted as Exhibit 14 pages 96-98 the email chain showing a history of Respondent's efforts to obtain the depositions of Petitioner's treating physicians. Counsel for Petitioner was not willing to schedule those depositions due to cost concerns and was not willing to allow Respondent's counsel to contact those physicians directly to schedule said depositions. Respondent claimed that the lack of depositions deprived it of an opportunity to depose the treating physicians about the inconsistent accident reporting information provided by Petitioner. Further, the record shows that Dr. Barnabas was the original treating and referring physician. Respondents submitted as Exhibits 11 and 12 the 7th Circuit and US District Court cases in which Dr. Barnabas plead guilty in a medical billing fraud conspiracy case. Said information would have been used for collateral impeachment in the event Respondents would have been permitted to complete Dr. Barnabas' deposition. Exhibits 11 and 12 were admitted and it was noted that it's been over 10 years.

Respondent did not submit any evidence of an attempt to obtain a Dedimus so that the testimony of the doctors could be obtained.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)).

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

As to Issue C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? And Issue F. Is Petitioner's current condition of ill-being causally related to the injury?, the Arbitrator finds:

Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on June 28, 2017.

Petitioner did not provide credible corroborating evidence to support his testimony regarding accident.

At the first hearing, Petitioner testified that he reported the accident to Alex Puntos on June 28, 2017. Puntos gave him Tylenol and, as he still had pain, Puntos sent him home. At the second hearing, Petitioner testified that Puntos instructed him to advise the Respondent's on-site representative that he was being sent home, and he did so. Neither Party called the on-site representative and Petitioner bears the burden of proof on all disputed issues.

Petitioner said that he was sent home on June 29, 2017 because of his pain and did not work a full day on June 30, 2017 because of pain. Petitioner testified that thereafter he worked full days, but at a reduced capacity. No daily work time information regarding Petitioner on the date of accident was submitted. Puntos testified that Petitioner did not report any injury to him and, if he did so, there would have been a report generated. Puntos testified that Petitioner did not get sent home early on the date of accident and Petitioner

worked his regular work duties until he was fired for taking excessive breaks. Petitioner denied being fired for taking excessive breaks. Puntos' testimony is supported by the testimony of Niec and RX 5, 6, 7 and 8. The Arbitrator believes Puntos' testimony that Petitioner did not report any injury to him and that he would have prepared a report if Petitioner or anyone else had told him of Petitioner's alleged injury. Petitioner did not provide corroborating evidence for his testimony.

Petitioner did not seek medical treatment for his alleged injury until 27 days after the accident. This does not support his claim. The histories initially noted by the treating physicians document an injury that occurred while sawing (and at 3:30 in the morning!), along with Petitioner not working since the date of accident, all of which are not consistent with Petitioner's testimony and the other evidence adduced.

Petitioner's testimony is found to be not credible. The Arbitrator finds that he did not sustain any accidental injuries while working for Respondent on June 28, 2017.

As there was no work related accident, there can be no causal connection. Accordingly, the Arbitrator finds that Petitioner failed to prove a causal connection between the alleged work injury and his current condition of ill-being regarding his left shoulder.

The claim for compensation is, therefore, denied.

As to Issue E. Was timely notice of the accident given to Respondent?, the Arbitrator finds:

Respondent's dispute regarding notice is disingenuous. The testimony of Niec, RX 5, 7 and 9 all demonstrate that Respondent had notice of the accident well within the 45 day time period prescribed by Section 6 of the Act.

Petitioner gave timely notice of the accident to Respondent.

As to Issue J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?, Issue K. Is Petitioner entitled to any prospective medical care? Issue L. What temporary benefits are in dispute? Issue M. Should penalties or fees be imposed upon Respondent?, the Arbitrator finds:

As the Arbitrator has found that Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on June 28, 2017, the Arbitrator needs not decide these issues.

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
KANKAKEE)		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARL RANDLE,

Petitioner,

vs.

CITY OF KANKAKEE,

Respondent.

20IWCC0635

NO: 17 WC 35764

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed pursuant to Section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and prospective care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 10, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

20IWCC0635

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 27 2020
0: 10/22/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

20IWCC0635

RANDLE, CARL
Employee/Petitioner

Case# **17WC035764**

CITY OF KANKAKEE
Employer/Respondent

On 4/10/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2333 WOODRUFF JOHNSON & EVANS
LEANDRO ALHAMBRA
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0507 RUSIN & MACIOROWSKI LTD
NICOLE Z BRESLAU
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

20IWCC0635

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Carl Randle
Employee/Petitioner

Case # **17** WC **35764**

v.

City of Kankakee
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Kankakee**, on **February 15, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

20IWCC0635

On the date of accident alleged, **August 22, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the alleged accident.

In the year preceding the injury, the average weekly wage was $**1,160.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

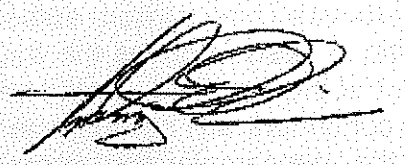
As the Arbitrator has concluded that Petitioner failed to meet his burden of proof in establishing an accident that arose out of and in the course of his employment for Respondent, Petitioner's claim for compensation is denied.

No benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Arbitrator Anthony C. Erbacci

April 4, 2019
Date

APR 10 2019

FACTS:

Petitioner testified that he worked for the City of Kankakee on the alleged date of injury, August 22, 2017, as a lab analyst/industrial field sampler. He has worked for the City since 1986, approximately 31 years in the position of lab analyst/industrial field sampler. He is a full time employee, working approximately 40 hours per week.

In his capacity as a lab analyst/industrial field sampler, Petitioner's duties include collecting waste water samples from various sites in Kankakee and Manteno. The collections are done both manually and with an autosampler machine. With respect to manual collections, Petitioner has handmade equipment consisting of the handle of a shovel approximately 12 to 18 inches long with a fishing string attached. At the end of the fishing string is an 18 ounce container which is lowered to collect a sample. The sample is then placed in a water bottle.

With respect to autosampler collections, autosamplers are 28 inches tall and 19 inches in diameter. They are cylinder shaped containers. Autosamplers are generally installed in "sample houses" or manholes. Petitioner testified that the autosamplers weigh 32 pounds when empty and 40-53 pounds when full. They hold 2.5 gallons of water when full.

On a typical day, Petitioner arrives at the main lab site in Kankakee around 7:00 a.m. Sample bottles are already in his van when he arrives, having been loaded the day before. Petitioner gets in his van and heads out to collect his first round of samples which he then returns to the lab around 9:00 a.m. Petitioner gives the samples to the lab, gathers his other equipment and begins his work with the autosamplers.

On Mondays, the autosamplers are installed. Petitioner will proceed to various sites to deliver and install the autosamplers. The Petitioner installs two to four autosamplers on Monday. They are loaded into and out of his van manually. When arriving at the various locations, Petitioner unloads the autosamplers and takes them to a "sample house," which is a small building where waste water is collected.

To set the autosampler, Petitioner generally has to move a manhole cover in order to place the autosamplers. To do this, Petitioner utilizes a manhole hook. Petitioner allegedly has two such hooks he can use to move the manhole covers. Depending on whether the manhole is made of cast iron or heavy rubber, will determine the tool Petitioner will use. With respect to both the cast iron and rubber manholes, Petitioner uses a "crow bar like" tool, the difference between the tool is that the hook for the rubber covers weighs less than that for the cast iron covers. He testified that the cast iron manholes weigh 249 pounds. He did not know the weight of the rubber manhole covers. The hook he utilizes to move the manhole covers weighs five to eight pounds. Petitioner does not have to remove manhole covers when working in sample houses.

Once Petitioner removes the manhole covers, he then retrieves samples from autosamplers on Tuesday, Wednesday, and Thursday. On Thursdays, the Petitioner also removes the autosamplers. He does this using a bracket like tool to lift the autosampler out of the manhole. Petitioner then puts the empty autosamplers in his van and loads them up. The containers are not full when removed, accordingly they do not carry extra weight. Petitioner cleans the autosampler containers and stores them. Some autosamplers are stored on ground level and some on shelves. Petitioner has to lift the

autosamplers stored on shelves which Petitioner estimated can be up to four feet. Petitioner does not work with autosamplers on Fridays.

A video of Petitioner utilizing a manhole hook to remove a cast iron manhole cover was entered into evidence as Respondent's Exhibit Number 3. Petitioner testified at the time of trial that he appears in the video and that the video accurately depicted his job duties with respect to removing and replacing manhole covers.

Following lunch, Petitioner would then go and do "grab and spots." These would consist of non-autosampler sample collections and site checks. Some of these checks are in manholes some are located in sample houses. Those that are located in sample houses are not covered and do not require him to move a manhole. He then uses the fishing pole like tool to lower a collection cup into the sample site and collect liquid. Aside from what was described above, Petitioner also occasionally has to do some shoveling in the winter as needed to access sites. He also generally washes his truck on Fridays.

Petitioner reviewed Respondent's Trial Exhibit 2, which was the "Average Lifting/Pulling" document prepared by Alan Toronjo, Respondent's trial witness. Petitioner testified that this document was accurate in its entirety. More specifically, Petitioner confirmed that his job required him to pull open an average of 14 manholes per day or 70 per week. Petitioner testified that he was required to lift an average of 3 autosamplers per day or 12 per week. Petitioner confirmed that he worked with autosamplers four out of the five workdays per week, consistent with his earlier trial testimony. Petitioner also confirmed that of the manholes he lifts, approximately 5 of those, or 35%, are a lighter, rubber material that weigh considerably less than a normal manhole.

With respect to his medical treatment, Petitioner admitted that he had been re-diagnosed with bilateral carpal tunnel syndrome by Dr. Patel on March 15, 2017, prior to the alleged date of injury in this case. Further, he had been referred to Dr. Muhammad, his treating physician in this matter, for treatment and possible surgery. Petitioner could not offer any explanation as to why he had not presented to Dr. Muhammad as ordered in March of 2017. Petitioner testified that he had not returned for any additional treatment since his last visit with Dr. Muhammad on September 26, 2017, but that he still wishes to undergo the recommended surgery.

Alan Toronjo testified on behalf of the Respondent. Mr. Toronjo testified that he has worked for the City of Kankakee for 15 years. His current title is industrial coordinator. His responsibilities include monitoring waste water, discharges, and monitoring for local limits and compliance with EPA regulations. He oversees a team including three lab analysts and one lab analyst/industrial field sampler. Prior to his promotion to industrial coordinator, Mr. Toronjo had worked as a lead lab analyst and before that as a regular lab analyst.

Mr. Toronjo knows Petitioner and has worked with him in the past. Their relationship is strictly professional. Mr. Toronjo testified that Petitioner was a good and dedicated worker. In his capacity as Petitioner's supervisor, Mr. Toronjo interacted with Petitioner at least once per day.

Further, Mr. Toronjo is very familiar with the role of lab analyst/industrial field specialist. He filled in and worked in that position for the entire month of December 2018. Prior to that and since he has assumed his role, he has served in that capacity a few times per months for several years. Accordingly, he is well-versed and familiar with the requirement of the position.

Mr. Toronjo testified regarding Respondent's Trial Exhibit Number 1, the job description for the position of lab analyst. Mr. Toronjo testified that this was the current and only description for this position. He confirmed that it was generally accurate as to the duties and physical exertion required in the role of lab analyst. He acknowledged that it did not contain a complete listing of the materials that the Petitioner was required to use in his capacity as a lab analyst/industrial field sampler. This is consistent with Petitioner's testimony. Mr. Toronjo testified that he believed that the classification of the position as medium physical demand level, including 20-50 pounds of exertional force was accurate as to what Petitioner's job required.

Mr. Toronjo testified that with respect to Respondent's Exhibit Number 2, he prepared that document at the request of the prior HR representative for the City in anticipation of this litigation. Mr. Toronjo prepared the document based on his own knowledge and experience of the role of Industrial Field Sampler/Lab Analyst. Mr. Toronjo also reviewed copies of Petitioner's chain of custody logs to come up with the percentages contained in Respondent's Exhibit Number 2. The Arbitrator notes that Petitioner himself testified that Respondent's Exhibit Number 2 was accurate. The Chain of Custody Logs were entered into evidence as Respondent's Exhibit Number 4.

Mr. Toronjo testified roughly consistently with Petitioner as to Petitioner's daily job duties. Mr. Toronjo provided more specific testimony with respect to the dimensions and weight of the two autosampler models. Petitioner only testified as to the approximate dimensions of one of the models.

Mr. Toronjo testified that the cast iron manhole covers could weigh over 200 pounds, and estimated that the rubber manhole covers weighed less than 50 pounds. Mr. Toronjo was unsure of any precise weights for the manhole covers and could only estimate. The hook tool utilized to move the manhole covers weighs less than three pounds. The Field Sampler/Lab Analyst is provider with a manhole hook tool which is used to help move the manhole covers specifically to offset the force required for that task. Mr. Toronjo testified that it was his belief that the exertional force required to move the manhole cover was consistent with a medium demand job.

All of these job activities are conducted over a general geographic radius of three to five miles from the main lab site in Kankakee. The exception is a site in Manteno which is approximately 12 to 14 miles from the lab.

Throughout the day, Mr. Toronjo estimated that travel time to visit the various sites would encompass 10 to 15 minutes between locations, or one to two hours of travel time total throughout the day. Petitioner also has a one hour lunch break. Petitioner would also spend one to one and a half hours at the lab. In total, three to four and a half hours out of each day was spent on break, at lunch, or at the lab, not out collecting samples or otherwise doing lifting activities.

Petitioner treated for his alleged injuries in this matter with Dr. Kermit Muhammad of OAK Orthopedics. Dr. Muhammad saw Mr. Randall on two occasions.

First, on August 29, 2017, Petitioner presented to Dr. Muhammad on a referral from Dr. Patel. At the time of the first visit, Petitioner indicated that he had been previously diagnosed with carpal tunnel syndrome in 2006, although he had not sought any treatment for that condition other than utilizing wrist braces. Dr. Muhammad's notes are devoid of complaints in March of 2017, which led Dr. Patel to refer Petitioner to Dr. Muhammad for the first time.

Petitioner complained of a recent increase in his symptoms which he attributed to his work duties. He reported complaints of numbness and tingling in his bilateral hands with weakness and swelling. A physical examination was performed which revealed tenderness to palpation of the palms, positive Tinel's signs and some decreased strength consistent with nerve compression. Following the examination, Dr. Muhammad opined that Petitioner had a clinical presentation of carpal tunnel syndrome and cubital tunnel syndrome on the left. Dr. Muhammad felt that surgery would be an appropriate option. However, prior to proceeding with same, he ordered an EMG to assess Petitioner and confirm the diagnoses.

On September 25, 2017, Petitioner underwent an EMG at OAK Orthopedics. Petitioner then followed up with Dr. Muhammad on September 26, 2017. At that time, Dr. Muhammad reviewed the EMG which was reported to reveal the diagnosis of bilateral carpal tunnel syndrome. There was no diagnosis of cubital tunnel syndrome noted. Petitioner's physical examination findings were unchanged on his second visit and Dr. Muhammad continued to recommend that Petitioner undergo a left carpal tunnel release and a left ulnar nerve entrapment release. Dr. Muhammad did not make any recommendation for surgery on the right hand.

On June 13, 2018, Dr. Muhammad authored a narrative report in connection with this case. In preparation of that report, Dr. Muhammad reviewed his prior chart notes, a job description for a lab analyst, and five photographs that purport to show Petitioner's job duties.

Dr. Muhammad stated that is was his opinion that Petitioner's job duties "without a doubt" had aggravated this pre-existing carpal tunnel condition and, therefore, the need for the recommended surgery was also causally related to this aggravation. Dr. Muhammad testified that the need for the left ulnar nerve surgery was also causally related to his work duties.

On cross-examination at his deposition, Dr. Muhammad confirmed that the Petitioner had been diagnosed with carpal tunnel as early as 2006 and that his alleged work accident did not cause the carpal tunnel syndrome. Dr. Muhammad confirmed that carpal tunnel syndrome can arise idiopathically and that most cases of carpal tunnel syndrome do generate idiopathically. Further, Dr. Muhammad testified that there are comorbidities which can make the development of carpal tunnel syndrome more likely. Dr. Muhammad conceded that Petitioner has both hypertension and was obese, both of which are comorbidities which could cause or contribute to the development or progression of carpal tunnel syndrome.

Dr. Muhammad confirmed his opinion that Petitioner's carpal tunnel syndrome was due to repetitive activities. When asked to define repetitive activity in the terms of a carpal tunnel diagnosis, Dr. Muhammad declined to do so stating that "it would be difficult to quantify."

Dr. Muhammad confirmed that the job description lists that Petitioner is required to work with materials weighing between 20-50 pounds. He opined that that was sufficiently heavy, coupled with the lifting, pushing, and pulling activities to aggravate the pre-existing condition. Dr. Muhammad confirmed that he has not seen Petitioner since September 26, 2017, over one year ago. He had no opinion as to Petitioner's current condition.

Dr. Muhammad also did not indicate the need for force in causing carpal tunnel syndrome, but indicated that positional movements could contribute to carpal tunnel syndrome. In this case, Dr.

Muhammad indicated flexion and extension type movements of the wrist and elbow were at play in aggravating Petitioner's pre-existing carpal tunnel syndrome.

When questioned about Petitioner's job description, Dr. Muhammad indicated that the lifting, pushing, and pulling activities Petitioner performed would have been those which he considered to be the primary causative factors for the carpal tunnel aggravation. However, Dr. Muhammad admitted on cross and later on re-cross examination that he did not know how often Petitioner performed any of those specific activities. Dr. Muhammad specifically testified that he did not know how often Petitioner performed any lift, push, or pull activities. Further, he testified that he did not know within the range of weights indicated on the job description, i.e. 20-50 pounds, or how often Petitioner was lifting anything of any particular weight. Dr. Muhammad did not review any additional materials in preparation of his report, including the job video which Dr. Sagerman did review.

On August 2, 2018, Dr. Scott Sagerman, a board certified orthopedic surgeon with a certificate for added qualification in surgery of the hand, examined Petitioner at the request of Respondent. Dr. Sagerman noted on that date, that Petitioner complained of numbness, stiffness, and swelling, which got worse over time. Petitioner reported the matter was a work injury on August of 2017, when he started having pain in his left elbow and the numbness increased. Petitioner had received a steroid injection and a splint as well as pain medication. Petitioner reported to Dr. Sagerman that his job involved obtaining field samples at factories including heavy lifting greater than 50 pounds and that he was not currently working.

Dr. Sagerman testified consistently with his report as to his physical examination findings. On physical examination, Petitioner complained of paresthesias in all five fingers of both hands. Otherwise, there were no objective findings with respect to carpal tunnel syndrome. With respect to the cubital tunnel condition, both elbows showed mild flexion contractures.

Additionally, Dr. Sagerman reviewed medical records, a written job description, and a video demonstration of Petitioner's work activities. Following his review of these materials and examination of Petitioner, Dr. Sagerman noted that based upon his review of the materials, he did not believe that Petitioner's work activities were sufficiently forceful or repetitive to contribute to the development of carpal tunnel syndrome. Dr. Sagerman testified that Petitioner's work activities were not sufficiently forceful or repetitive to have contributed to the development of carpal tunnel syndrome. He did not feel that Petitioner's condition was work-related. Dr. Sagerman further noted that while the cubital tunnel syndrome had been definitely confirmed, any treatment for same would also be unrelated to the work accident for the reasons stated above.

Dr. Sagerman opined that Petitioner's treatment to date had been reasonable and necessary, as was the recommended future surgery. However, none of the medical treatment rendered or recommended was causally related to the Petitioner's work accident of August 22, 2017.

With respect to his understanding of the job duties, Dr. Sagerman testified that in advance of the examination, he received a cover letter which contained more specific details regarding Petitioner's job duties. More specifically, the cover letter outlined the information contained in Respondent's Exhibit 2, the "Average Lifting/Pulling Manholes per Week for Dedicated Industrial Sampler/Lab Analyst" document that both Petitioner and Mr. Toronjo testified was an accurate depiction during the course of the trial. Dr. Sagerman testified that he took this information into consideration in rendering his opinions in this case, including that the frequency of activity outlined in

that document would not be repetitive or forceful enough to have caused Petitioner's alleged carpal or cubital tunnel syndromes.

Dr. Sagerman went on to testify that he later received additional materials, namely a narrative report of Dr. Muhammad dated June 13, 2018. Dr. Sagerman authored an addendum report on August 27, 2018. Dr. Sagerman testified that he continued to opine that Petitioner's work duties did not cause or contribute to the Petitioner's diagnoses of carpal or cubital tunnel syndrome.

Dr. Sagerman testified that Petitioner's description of his job, indicating heavy lifting over 50 pounds. Petitioner's description of his job was inconsistent with the written job description provided to Dr. Sagerman, which indicated Petitioner was required to lift 20-50 pounds. Dr. Sagerman relied on the written job description. When questioned more closely regarding the specifics of the job description, Dr. Sagerman indicated that the job description documented needing to push and pull, but gave no indication of the amount of force required for the activities.

With respect to the job video, Dr. Sagerman testified he did not know if Petitioner was the individual featured in the video. However, Petitioner testified at trial that he is the individual featured in that video, accordingly there is no dispute on this point. Dr. Sagerman confirmed the contents of the video and acknowledged that the video did not indicate the weight of the manhole the video showed. Dr. Sagerman did not know the grip force required. He did not have videos of any other activities that Petitioner might perform while on the job.

Finally, Dr. Sagerman testified that while repetitive forceful lifting, grasping, and gripping activities can accelerate or aggravate carpal tunnel and cubital tunnel syndrome, in his opinion to a reasonable degree of medical and orthopedic surgery, this did not occur in this case based on his review of the materials.

Dr. Sagerman testified that Petitioner had not reached maximum medical improvement as related to his personal conditions of carpal and possible cubital tunnel syndrome. However, the need for further treatment was not casually related to Petitioner's work. Further Petitioner did not require any restrictions and could return to work at his regular job duties and work full duty until surgery was performed.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

Based upon the trial testimony and the testimony of the record, the Arbitrator concludes that Petitioner has failed to meet his burden of proof in establishing an accident that arose out of and in the course of his employment for Respondent. In so holding, the Arbitrator finds the opinions of the Respondent's examining physician, Dr. Scott Sagerman, to be more credible and persuasive than those of the treating physician, Dr. Kermit Muhammad. The Arbitrator adopts the opinions of Dr. Sagerman in rendering his decision in this matter.

The Arbitrator notes that there is no real dispute as to Petitioner's job duties in this matter. Petitioner was a long term employee of Respondent. Both Petitioner and Respondent's witness, Mr. Toronjo, testified consistently as to Petitioner's job duties. There is also no dispute that Petitioner has not alleged an acute accident in this case, rather he has alleged that his symptoms arose as a result of repetitive trauma. Accordingly, the Arbitrator must decide whether Petitioner's job duties were sufficiently repetitive and forceful to have caused Petitioner's carpal tunnel syndrome. To do so, the Arbitrator must examine the medical opinions rendered in this matter.

Petitioner treated with Dr. Kermit Muhammad. Dr. Muhammad saw Petitioner on two occasions and reviewed an EMG before recommending surgery. Dr. Muhammad has not seen Petitioner since September 2017, nearly 18 months before the trial of this case. In rendering his opinions, Dr. Muhammad reviewed a copy of the job description entered into evidence as Respondent's Exhibit 1. He also reviewed a series of photographs taken of the Petitioner. Dr. Muhammad did not review the job video or Respondent's Exhibit 2, the "Average lifting/pulling manholes per week for dedicated industrial field sampler/lab analyst" document, both of which were reviewed by Respondent's examining physician, Dr. Sagerman.

During his evidence deposition, Dr. Muhammad testified that he did not know how often Petitioner performed any lift, push, or pull activities. Further, Dr. Muhammad testified that he did not know within the range of weights indicated on the job description, i.e. 20-50 pounds, how often Petitioner was lifting anything of any particular weight. Nonetheless, Dr. Muhammad testified that a causal relationship existed in this case.

In contrast, Dr. Sagerman reviewed medical records, a written job description, and a video demonstration of the Petitioner's work activities. Dr. Sagerman was also privy to the information contained in the "Average Lifting/Pulling Manholes per Week for Dedicated Industrial Sampler/Lab Analyst" document and testified that he took all of this information into consideration in rendering his opinions in this case. Based on his review of this information, Dr. Sagerman testified that the frequency of activity in Petitioner's job would not be repetitive or forceful enough to have caused Petitioner's carpal tunnel syndrome.

Dr. Sagerman was apprised of the information contained in Respondent's Exhibit 2, the "Average Lifting/Pulling Manholes per Weeks for Dedicated Industrial Field Sampler/Lab Analyst." Petitioner himself testified at trial that the information Dr. Sagerman possessed in rendering his opinions was accurate. More specifically, Petitioner testified that Respondent's Exhibit 2 was accurate with respect to the frequency of lifting manhole covers and autosamplers. Dr. Sagerman was provided this information and relied upon it in rendering his opinions. Specifically, Dr. Sagerman opined that Petitioner's position was not sufficiently repetitive to have caused petitioner's conditions in this case.

The Arbitrator also notes that the testimony at trial further supported Dr. Sagerman's position by documenting the various activities petitioner did throughout his work day. These activities include a substantial amount of the day that was spent traveling between collection sites, totaling an hour and a half to two hours according to Mr. Toronjo. When coupled with his hour long lunch break and work in the lab, nearly 3-4 hours, or almost half of petitioner's day was taken up with break/travel time where he was not doing any lifting activities whatsoever. The Arbitrator finds this significant in supporting Dr. Sagerman's opinions that the job was not repetitive in nature and supportive of a lack of causation.

In contrast, Dr. Muhammad testified that he did not know how often the Petitioner performed any lift, push, or pull activities during his work day. Accordingly, Dr. Sagerman had superior information as to the specifics of Petitioner's job duties, rendering his opinions that same lacked the frequency to have caused or contributed to the development of carpal tunnel syndrome greater weight than those of Dr. Muhammad.

The Arbitrator acknowledges that the job description submitted into evidence as Respondent's Exhibit Number 1 is not a complete listing of all the tasks Petitioner is required to do in his role as an industrial field sampler/lab technician. Both Petitioner and Mr. Toronjo testified as much. If Dr. Sagerman had relied upon that job description alone, his opinions may not merit as much weight and consideration. This is not the case.

The Arbitrator notes that Respondent's Exhibits 2 and 3 supplement the job description to provide a more complete picture of Petitioner's job duties. Further, Dr. Sagerman reviewed all three of the aforementioned trial exhibits, whereas Dr. Muhammad only reviewed Exhibit one. Therefore, if any doctor's opinions are weakened by any information lacking in the job description it would be the opinions of Dr. Muhammad who did not have the benefit of any additional information, i.e. Respondent's Exhibits 2 and 3, to supplement his understanding as did Dr. Sagerman. The Arbitrator cannot find that the physician who reviewed fewer materials had a better informed opinion than the physician who reviewed more.

Further, there is no doubt that carpal tunnel syndrome can arise idiopathically. Both Dr. Muhammad and Dr. Sagerman acknowledge as much. Further, Dr. Muhammad testified that most cases of carpal tunnel syndrome do generate idiopathically. Dr. Muhammad also testified that there are comorbidities which can make the idiopathic development of carpal tunnel syndrome more likely. Dr. Muhammad conceded that Petitioner did have both hypertension and was obese. These conditions are both comorbidities which could cause or contribute to the development or progression of carpal tunnel syndrome. Accordingly, it is clear that Petitioner's job for Respondent is not the only possible cause for his alleged work related injury, given these comorbidities.

Based on a review of the evidence in the record it is clear that Dr. Sagerman was in a superior position of knowledge to Dr. Muhammad with respect to the Petitioner's job duties. Dr. Sagerman reviewed all of the same documents as Dr. Muhammad, including the same job description. However, unlike Dr. Muhammad who simply reviewed static photos which don't fully portray Petitioner's job duties, Dr. Sagerman reviewed the job video featuring Petitioner. Petitioner testified to the accuracy of that video. Dr. Sagerman also crucially was aware of the information contained in Respondent's Exhibit 2, which Petitioner testified was accurate. That information was critical in formulating Dr. Sagerman's opinions.

The Petitioner was only seen by Dr. Muhammad on two occasions, nearly 18 months ago. This limited treatment does not lend Dr. Muhammad an advantage over the examining physician.

The evidence at trial clearly supports Dr. Sagerman's superior knowledge as to Petitioner's job duties. This superior knowledge lends Dr. Sagerman's opinions greater credibility in this matter. The Arbitrator accordingly adopts the opinions of Dr. Sagerman and holds that Petitioner's job duties were not sufficiently repetitive or forceful so as to have caused or contributed to carpal or cubital tunnel

syndrome, and that Petitioner did not sustain an accident which arose out of and in the course of his employment with Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

As stated above, the Arbitrator adopts the opinions of Respondent's examining physician, Dr. Scott Sagerman. In doing so, the Arbitrator has found that Petitioner has failed to meet his burden of proof in establishing an accident that arose out of and in the course of his employment for Respondent.

Because Petitioner has failed to prove that he sustained an accident which arose out of and in the course of his employment, the Arbitrator similarly finds that Petitioner has failed to prove that his current condition of ill-being is causally related to the Petitioner's alleged injury.

The Arbitrator notes that even if Petitioner had met his burden of proof with respect to accident, the nearly 18 month delay between his last medical treatment and the time of trial would also speak against a causal relationship between the alleged injury and the current condition of ill-being. However, since the Arbitrator has concluded that there was no accident, this point is moot.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the opinions Dr. Scott Sagerman and finds that the medical treatment rendered to date, consisting of two office visits with Dr. Kermit Muhammad and an EMG was reasonable and necessary medical treatment. However, the Arbitrator finds that said treatment was not related to the alleged injury.

Accordingly, the Arbitrator holds that Respondent is not responsible for the payment of any of said charges associated with that treatment and declines to award payment of same.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator adopts the opinions of Dr. Scott Sagerman and finds that the surgery recommended by Dr. Muhammad, while reasonable and necessary, is not causally related to the alleged injury. Accordingly, the Arbitrator declines to award same.

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aaron Ramirez,

Petitioner,

vs. NO: 13 WC 18990

City of Chicago,

20IWCC0636

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission notes that in her order at page 2 of the Form decision, the Arbitrator neglected to specify the appropriate TTD and PPD rates -- specifically $880.91 (2/3[$1,321.36]) and $712.55 (maximum rate for date of injury of 5/30/13), respectively. The decision is hereby corrected to reflect as much.

In addition, the Commission notes that the Arbitrator's finding that Petitioner sustained accidental injuries arising out of and in the course of his employment on the date in question due to an employment-related risk is further supported by the recent Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848 (filed September 24, 2020).

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/8/18 is affirmed and adopted with changes as stated herein.

20IWCC0636

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $880.91 per week for a period of 18-6/7 weeks, from 5/31/13 through 10/9/13, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary medical expenses in the amount of $1,773.00, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 10.75 weeks, as provided in §8(e)12 of the Act, for the reason the injuries sustained caused the permanent partial loss of use of 5% of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including liens asserted by First Recovery Group (PX5) and Blue Cross/Blue Shield (PX5) in the amount of $17,853.33; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers, and lienholders (including First Recovery Group and Blue Cross/Blue Shield), of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 28 2020
o: 9/1/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAMIREZ, AARON
Employee/Petitioner

Case# **13WC018990**

CITY OF CHICAGO
Employer/Respondent

20IWCC0636

On 6/8/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1

0222 GOLDBERG WEISMAN & CAIRO LTD
KITRA K KILLEN
ONE E WACKER DR SUITE 3800
CHICAGO, IL 60601

1

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20 IWCC0636

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Aaron Ramirez
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **18990**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **5/16/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **5/30/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**68,710.95**; the average weekly wage was $**1,321.36**.

On the date of accident, Petitioner was **64** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has in part*** paid appropriate charges for all reasonable and necessary medical services. RX 2.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**17,853.33** under Section 8(j) of the Act.

ORDER

Petitioner was temporarily totally disabled from May 31, 2013 through October 9, 2013, a period of 18 6/7 weeks.

The Arbitrator awards Petitioner the reasonable and necessary medical expenses of $1,773.00 associated with the Emergency Room care rendered on May 30, 2013 (PX 4), subject to the fee schedule. The Arbitrator also awards Petitioner the paid medical expenses associated with the liens asserted by First Recovery Group (PX 5) and Blue Cross/Blue Shield (PX 5), subject to the fee schedule and with Respondent receiving Section 8(j) credit in the amount of $17,853.33 per the parties' stipulation. Arb Exh 1. Respondent shall hold Petitioner harmless against any claims made by Blue Cross/Blue Shield in connection with the group medical payments it made on Petitioner's behalf (PX 5).

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 5% loss of use of the left leg, equivalent to 10.75 weeks of benefits under Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

20IWCC0636

Molly C Mason

Signature of Arbitrator

6/8/18
Date

JUN 8 - 2018

Aaron Ramirez v. City of Chicago
13 WC 18990

20 IWCC0636

Summary of Disputed Issues

Petitioner, a laborer who performed garbage collection, claims a left knee injury of May 30, 2013. A left knee MRI performed on July 13, 2013, showed a meniscal tear but a subsequent arthroscopic surgery did not reveal any meniscal pathology. Following a course of therapy, Petitioner resumed full duty on October 10, 2013. He retired in 2016 or 2017. The disputed issues include accident, causal connection, medical expenses, temporary total disability and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he began working for Respondent about 12 or 13 years before his May 30, 2013 accident. As of the accident, he worked as a laborer. He rode on the back of a garbage truck and emptied trash cans in alleys.

Petitioner testified that, immediately before the accident, he descended from the back of the truck, went to grab a "cart," or garbage can, began pulling the cart and experienced an abrupt onset of left knee pain. His knee felt torn. The pain was such that he fell to the ground and began rolling around. The driver and another laborer came to his aid. They got him to his feet and helped him sit on the back of the truck.

Petitioner testified the cart he pulled was full of yard waste. It was springtime. Under cross-examination, he clarified that the alley was unpaved and had a "rocky" surface.

Petitioner testified an ambulance came to the scene, after a ward supervisor called "911." Paramedics took him to the Emergency Room at Advocate Illinois Masonic Medical Center. The Chicago Fire Department run sheet reflects that Petitioner "was pulling a cart when he felt pain behind his knee and then was unable to stand on leg." The paramedics noted that Petitioner "has never had this happen before." PX 1, p. 7 of 50.

Petitioner testified he underwent X-rays at the hospital and was then given a knee immobilizer and crutches.

The Emergency Room triage notes reflect that, at 6:40 that morning, Petitioner's left knee gave way "with immediate pain in both sides of his knee" when he stepped backwards while pulling a garbage cart. The notes also reflect that Petitioner "felt a pop while moving a cart" and was unable to extend his left leg due to pain. Hospital personnel noted that Petitioner denied any past history of knee pain or knee injuries. PX 1, p. 21 of 50.

On left knee examination, the Emergency Room physician, Dr. Julie Varga, noted tenderness and swelling along the medial joint line, a decreased range of motion and no laxity. PX 1, p. 22 of 50. She ordered left knee X-rays which showed small osteophytes along the posterior patella and the medial tibial spine with no fracture or subluxation. PX 1, p. 32 of 50. She diagnosed an "acute knee injury, r/o internal derangement, suspect medial meniscus injury." She placed Petitioner in an immobilizer,

provided him with crutches and directed him to follow up with MercyWorks through his workplace. PX 1, p. 22 of 50.

Petitioner went to MercyWorks the following day, May 31, 2013, and saw a physician's assistant and Dr. Hartsock. The history reflects that, the previous day, Petitioner "was pulling cart towards truck when L knee 'gave out," causing him to fall onto the ground. Petitioner complained of 5/10 left knee pain, for which he had taken Aleve. Dr. Hartsock described Petitioner's gait as antalgic. He noted that Petitioner was unable to squat. On left knee examination, he noted medial joint line pain and tenderness to palpation. He prescribed Naproxen, provided Petitioner with a hinged knee wrap and released him to seated work. He directed Petitioner to return to MercyWorks on June 3, 2013. PX 2.

Petitioner returned to MercyWorks on June 3, 2013 and again saw Dr. Hartsock. The doctor noted Petitioner was still unable to bear weight on his left leg. On re-examination, he again noted a restricted range of left knee motion. He prescribed physical therapy and continued the Naproxen. He again restricted Petitioner to seated work. PX 2.

Petitioner underwent an initial physical therapy evaluation at U.S. HealthWorks on June 4, 2013. The evaluating therapist noted the following history:

> "64 yo male. Pulling heavy cart @ work, knee twisted, he fell on his side, couldn't stand, twisted again trying to pull into vehicle; noticed tightness in the area of the injury the day before."

The therapist also noted that Petitioner had briefly experienced left knee pain two months earlier, after falling off a truck. She indicated this pain "resolved spontaneously in a couple days." PX 2.

Petitioner continued attending therapy thereafter.

On June 11, 2013, Petitioner filed an Application for Adjustment of Claim alleging a left leg/knee injury of May 30, 2013. Arb Exh 2. [The Arbitrator amended the date of birth reflected on this document to 12/29/48 based on Petitioner's testimony as to his correct age.]

On June 13, 2013, Petitioner returned to MercyWorks and again saw Dr. Hartsock. The doctor noted some improvement secondary to therapy but indicated Petitioner was still experiencing knee instability and pain in the posterior joint radiating into the gastrocnemius muscle. He described McMurray's testing as positive. He directed Petitioner to continue therapy and home exercises. He released Petitioner to light duty with no bending, stooping or squatting. PX 2.

On June 20, 2013, Dr. Hartsock noted that Petitioner was still experiencing episodic instability and pain in his left calf and knee. He prescribed additional therapy and imposed restrictions of no lifting over 10 pounds and no climbing stairs or ladders. He indicated Petitioner was not able to climb, balance or operate machinery. PX 2.

Petitioner testified that, during this time period, he received a "denial/recoupment letter" from Ed Burke directing him to return to work. He consulted Dr. Nam, an orthopedic surgeon, on July 8, 2013, with the doctor recording the following history:

> "Patient presents my clinic with acute onset of left knee pain which he

states occurred at work on 5/30/2013. He was pulling a cart full of dirt approx. 150 pounds when he felt a sharp pain in his left knee. He says his left knee gave out on him. He was unable to bear weight. Developed swelling in his knee. He went to the Emergency Room on that date and had X-rays."

Dr. Nam noted Petitioner was limping. On left knee examination, he noted a trace effusion, a range of motion from 0 to 135 degrees, tenderness of the medial and lateral joint lines and positive McMurray's testing. He took Petitioner off work and prescribed a left knee MRI to check for meniscal tearing. PX 3.

The left knee MRI, performed on July 13, 2013, showed a posterior root avulsion tear of the posterior horn of the medial meniscus, increased intrasubstance signal of the posterior horn of the medial and lateral menisci, suggesting underlying mycoid degeneration, moderate to advanced patellofemoral cartilage loss and osteoarthritis and mild medial compartment osteoarthritis. PX 3.

On July 18, 2013, Dr. Nam reviewed the MRI results with Petitioner and discussed treatment options. He advised Petitioner that surgery to address the meniscal tear would not necessarily eliminate his pain, given the arthritis. He indicated Petitioner opted to undergo surgery. PX 3.

Dr. Nam operated on Petitioner's left knee on August 6, 2013, performing an arthroscopic chondroplasty of the lateral tibial plateau and medial femoral condyle and an extensive synovectomy of the medial patellofemoral and lateral joint lines. In his operative report, he described the medial meniscus as intact. PX 3.

At the first post-operative visit, on August 12, 2013, Dr. Nam reviewed his operative findings with Petitioner and prescribed physical therapy. He directed Petitioner to remain off work. PX 3. Petitioner testified he began participating in physical therapy at Advocate Illinois Masonic Hospital at this point.

On September 9, 2013, Dr. Nam noted that Petitioner felt "pretty good" but was still experiencing "some pain at times." He recommended additional therapy and directed Petitioner to return in one month. PX 3.

On October 7, 2013, Dr. Nam described Petitioner as "doing well" and "asymptomatic." He noted that Petitioner wanted to resume full duty the following Monday. He released Petitioner from care on a PRN basis. PX 3.

Petitioner testified he resumed his regular full-time job on October 10, 2013. He denied working between May 31 and October 9, 2013. Respondent did not offer him light duty during this period.

Petitioner testified he has not undergone any additional left knee care since October 7, 2013. He has not reinjured his left knee since that date.

Under cross-examination, Petitioner denied experiencing left knee pain or any left knee injury before the May 30, 2013 accident. Petitioner identified his signature at the bottom of RX 1, a report concerning this accident. Petitioner testified his superintendent, "Tony K.", completed this report. The report contains the following description of the accident:

> "While working in the alley and pulling a cart, Mr. Ramirez's left leg gave out from under him, causing him to fall to the ground. The pain in his leg, according to Mr. Ramirez, was very intense and [he] was unable to put weight on it without experiencing pain."

Petitioner testified that "Tony K." met him at a Dunkin Donuts store near his house for the purpose of completing the report. The alley where the accident occurred was not paved. The surface was composed of rocks. A member of the general public could have walked down the alley but the alley was not "through" for driving purposes because there was a house at the end of it. It was a "back down" alley. Petitioner testified he had to get a doctor of his own after he received the denial letter from Burke. His HMO referred him to Dr. Nam. Dr. Nam showed him his MRI images and told him the "white stuff" on the MRI was a tear. Dr. Nam gave him the choice of undergoing injections or surgery. He opted to undergo surgery. He does not know whether the surgery confirmed the diagnosis. In early October 2013, he resumed his regular full-time duties. He continued performing those duties until he retired. He retired about two years ago, in 2016 or 2017. He was "forced out" but the retirement was not injury-related. He continued wearing a brace on his knee until he retired. He is not currently undergoing any left knee care.

On redirect, Petitioner agreed with the description set forth in the accident report (RX 1), i.e., that he experienced an abrupt onset of intense pain that prevented him from being able to put weight on his left leg.

No witnesses testified on behalf of Respondent. Respondent offered into evidence the accident report signed by supervisor Anthony LaPash (RX 1) and a print-out of the medical payments it made to U.S. Healthworks and Wellington Radiology (RX 2). The Arbitrator notes that LaPash identified two witnesses to Petitioner's accident, noted that Petitioner was "pulling a cart" at the time of the accident and checked a box indicating he was "satisfied that the injury . . . was received in the course of [Petitioner's] employment." LaPash also indicated that no further investigation of the accident was warranted.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in his favor, credibility-wise. Petitioner's testimony as to an abrupt onset of disabling left knee pain while pulling a cart at work is corroborated by his medical records.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on May 30, 2013 arising out of and in the course of his employment?

The Arbitrator finds that Petitioner sustained an accident on May 30, 2013 arising out of and in the course of his employment. In so finding, the Arbitrator relies primarily on Petitioner's credible description of the accident. Petitioner testified he was performing a work-related task, i.e., pulling a garbage cart toward his assigned truck, when he felt a painful, tearing sensation in his left knee and fell to the ground. Petitioner testified the truck's driver and a fellow laborer came to his aid, helping him get to his feet and move over to the truck. Respondent did not call any witness to refute Petitioner's

testimony. RX 1, a report concerning the accident, is consistent with Petitioner's testimony in that it reflects Petitioner was working and pulling a cart when he experienced intense left leg pain. While RX 1 reflects Petitioner's left leg "gave out," there is no indication that the giving way was due to an idiopathic condition. Rather, it was the work-related effort and resulting pain that rendered Petitioner "unable to stand on" the leg. On direct examination, Petitioner testified the cart was full of yard waste (Dr. Nam described it as being "full of dirt" and weighing 150 pounds, PX 3). Under cross-examination, Petitioner indicated the surface he was pulling the cart across was rocky rather than smooth. The risk Petitioner faced was employment-related. A member of the general public would not be required to pull a heavy cart across a rocky alley surface.

Did Petitioner establish causal connection? Is Petitioner entitled to reasonable and necessary medical expenses?

The Arbitrator finds that Petitioner established causation, via a "chain of events" theory, as to a traumatic left knee injury superimposed on a previously largely asymptomatic left knee degenerative condition. The Arbitrator further finds that Petitioner established causation as to the need for the medical treatment he underwent following the accident, as well as to his current post-operative left knee condition. In so finding, the Arbitrator relies on the following: 1) the June 4, 2013 therapy note, which reflects that, prior to the accident, Petitioner experienced only one episode of transient left knee pain, after falling off a truck; 2) the fact Petitioner was able to perform a physical job for Respondent prior to the accident; 3) Petitioner's credible testimony that he experienced an abrupt onset of left knee pain while pulling a cart across a rocky surface on May 30, 2013; 4) the paramedic run sheet and Emergency Room records, which corroborate Petitioner's testimony as to a sudden onset of pain secondary to pulling a cart; and 5) Petitioner's credible denial of any post-accident left knee reinjuries.

The Arbitrator finds it reasonable for Dr. Nam to have operated on Petitioner's left knee, given Petitioner's persistent symptoms and the fact that the MRI showed a meniscal tear. The Arbitrator recognizes that, when Dr. Nam actually visualized the knee, during surgery, he noted no meniscal pathology. The Arbitrator also recognizes that Dr. Nam documented degenerative changes and a very large plica in his operative report. Regardless, there is no evidence that Petitioner required left knee treatment, let alone surgery, prior to the work accident. The Arbitrator views the accident as creating symptoms which were compatible with a meniscal tear and which required an arthroscopy.

Petitioner claims a $1,773.00 bill from Advocate Illinois Masonic Medical Center, for Emergency Room services provided on May 30, 2013, along with a $4,208.69 lien from First Recovery Group (for payments made to Advocate Illinois Masonic Medical Center, Dr. Nam and other providers – PX 5) and a $17,853.33 lien from Blue Cross/Blue Shield (for payments made to the City of Chicago [ambulance charges] and Advocate Illinois Masonic Medical Center). At the hearing, the parties stipulated Respondent is entitled to Section 8(j) credit in the amount of $17,853.33. Arb Exh 1.

The Arbitrator has previously found that Petitioner established causation, as well as reasonableness and necessity, as to the medical treatment he underwent following the work accident. The surgery performed by Dr. Nam, along with the post-operative therapy, resulted in improvement sufficient to allow Petitioner to resume full duty. Respondent did not offer any Section 12 examination report or other evidence challenging the need for the care Petitioner underwent.

The Arbitrator awards Petitioner the claimed Emergency Room bill of $1,773.00, subject to the fee schedule. The Arbitrator also awards Petitioner the expenses associated with the two liens, per the fee schedule, with Respondent receiving a stipulated Section 8(j) credit in the amount of $17,853.33.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from May 31, 2013 (the day after the accident) through October 9, 2013 (the day before Petitioner resumed full duty), a period of 18 6/7 weeks. Respondent disputes this claim, based on its accident and causal connection defenses. Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. The Arbitrator finds that Petitioner's causally related left knee condition stabilized as of October 7, 2013, the date Dr. Nam released him from care on a PRN basis and indicated he could return to work "the following Monday." Dr. Nam continuously kept Petitioner off work after July 8, 2013. Prior to that date, physicians affiliated with MercyWorks released Petitioner to work subject to various restrictions but Petitioner credibly testified Respondent did not offer him work within those restrictions.

The Arbitrator finds that Petitioner was temporarily totally disabled from May 31, 2013 through October 9, 2013, a period of 18 6/7 weeks. The parties stipulated that Respondent paid no temporary total disability benefits in this case. Arb Exh 1.

What is the nature and extent of the injury?

Because the accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing nature and extent. That section sets forth five factors to be considered in determining permanency, with no single factor to be assigned more weight than any other. The Arbitrator views the first factor, any AMA Guides impairment rating, as not relevant since neither party offered such a rating into evidence. The Arbitrator assigns some weight to the second and third factors, i.e., Petitioner's occupation and age at the time of injury. Petitioner was able to resume full duty as a laborer following the accident, although he testified he continued to wear a brace on his left knee until he retired. Petitioner was 64, and thus near typical retirement age, when the accident took place. He retired several years after the accident and testified to having difficulty performing activities, such as riding a bicycle, that a retiree might enjoy. As for the fourth factor, future earning capacity, the Arbitrator notes Petitioner claimed no diminution of wages secondary to the accident. With respect to the fifth factor, evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Nam's operative findings and the fact the doctor described Petitioner as doing well as of the last office visit on October 7, 2013. Dr. Nam released Petitioner to full duty on that date, at Petitioner's request. There is no evidence indicating he directed Petitioner to wear a knee brace while working but Petitioner credibly testified he took this precaution.

The Arbitrator, having considered the foregoing along with Petitioner's credible testimony that he experiences left knee pain and instability when attempting to run or bike, finds that Petitioner is permanently partially disabled to the extent of 5% loss of use of the left leg, equivalent to 10.75 weeks of benefits under Section 8(e) of the Act.

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☒ Affirm	☐ Rate Adjustment Fund (§8(g))
COUNTY OF ADAMS	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Powell,

Petitioner,

vs. NO: 15 WC 29725

Manchester Tank & Equipment Co., 20IWCC0637

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of reinstatement of claim, and being advised of the facts and law, affirms the Arbitrator's decision to grant Petitioner's Motion to Reinstate. As the Arbitrator did not issue a written decision, there is no Decision of the Arbitrator to affirm and adopt. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Facts

On September 14, 2015, Petitioner filed an Application for Adjustment of Claim alleging he sustained injuries due to an accident arising out of and in the course of his employment with Respondent on April 8, 2015. The case proceeded to hearing pursuant to Petitioner's 19(b) Petition before then-Arbitrator McCarthy1 on June 1, 2016. After considering the evidence, the Arbitrator found in favor of Petitioner and awarded benefits including medical expenses and temporary total disability benefits. On April 7, 2017, the Commission affirmed and modified the Decision of the Arbitrator. The Commission also remanded the case to the Arbitrator.

On December 5, 2018, this case appeared on the Quincy status call. As Petitioner failed to appear, Arbitrator Pulia dismissed the case pursuant to Section 9020.60(2)(D) of the IWCC Administrative Rules. The Commission issued a Notice of Case Dismissal on December 11, 2018. On December 18, 2018, Petitioner filed a Motion to Reinstate, but failed to attach a Notice of

1 Douglas McCarthy is currently a Commissioner at the Illinois Workers' Compensation Commission.

20IWCC0637

Motion as required by Section 9020.90(b) of the IWCC Administrative Rules. On February 1, 2019, Petitioner filed a Notice of Motion with the original Motion to Reinstate attached. The motion was set to be heard on March 6, 2019. It is undisputed that Petitioner did not appear on that date. Petitioner then refiled the notice and motion on May 15, 2019, and set the matter to be heard on June 5, 2019. Respondent filed its Objection to Motion to Reinstate the morning of the hearing.

On June 5, 2019, Arbitrator Pulia conducted a hearing on the record regarding Petitioner's pending Motion to Reinstate. Counsel for Petitioner, Mr. Gerald Napleton, as well as Counsel for Respondent, Mr. Matthew Brewer, were present. In relevant part, Mr. Napleton stated:

> "A motion was filed on December 18, 2018. The matter was not motioned up until February but we'd ask Your Honor to reinstate the claim as a result of several factors, one being the fact that the attorney that was initially handling this matter, John Mitchell, did have to go on medical leave, we had to close our Peoria office and move all the files from Peoria to Chicago. John Mitchell's medical leave and the closing of the Peoria office resulted in a lot of confusion and some docketing errors but we believe we've remedied these errors and we're here to ask Your Honor to reinstate the case as a result of the fact that there's no prejudice to [R]espondent, TTD has been paid up until last month and that the remedial nature of the Act should be construed in favor of reinstating the case in favor of [P]etitioner."

(June 5, 2019, Tr. at 3-4). Mr. Brewer stated Respondent's objection due to Petitioner's failure to comply with the applicable rules when filing its December 2018 motion.

After considering the evidence, Arbitrator Pulia granted Petitioner's motion. In reaching this decision, the Arbitrator noted that despite the deficiencies in the initial December 2018 motion, Petitioner's second filing in February 2019 was timely and complied with the applicable rules. The Arbitrator stated:

> "Although all the rules were not exactly adhered to in this matter I do have some discretion whether or not this case should be reinstated. This case has never been dismissed at any time prior and the parties have prior to this point seemed to have been working cohesively with respect to this matter. I feel that the biggest fault with this reinstatement, they actually did get the reinstatement filed timely in February; however, no one appeared in March here on that motion; however, as I stated, nobody came to me on either side of this motion for any type of on-the-record statement to be made. I am going to reinstate the matter at this time because I do feel that the prejudice to the petitioner would outweigh a dismissal at this point; however, this will be the one and only Motion to Reinstate on this matter."

(June 5, 2019, Tr. at 7-8). Although the Arbitrator did not issue a written decision or separate order, Arbitrator Pulia marked that the Motion to Reinstate was granted on the May 2019 Notice of Motion.

Conclusions of Law

After reviewing the record and evidence, the Commission agrees with Arbitrator Pulia's decision to grant Petitioner's Motion to Reinstate. Pursuant to Section 9020.90(c) of the IWCC Administrative Rules, "The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by the Petitioner, the objections of the Respondent, and the precedents set forth in Commission decisions." The Commission finds the Arbitrator correctly applied this standard.

A claimant seeking reinstatement of his claim bears the burden of alleging and proving facts that justify reinstatement. *Bromberg v. Industrial Comm'n*, 97 Ill. 2d 395, 400 (1983). The Commission notes that the dismissal of this case occurred during the first status call that occurred after the case reached "redline" status. As seen by the procedural history of the claim, Petitioner has diligently pursued his claim for three years. While it is unfortunate that no one was present at the December 2018 status call, the Commission finds that extenuating circumstances led to the missed status call and subsequent case dismissal. Counsel for Petitioner readily acknowledged the internal difficulties the law firm faced due to the health condition of the attorney that previously handled this matter. The Commission finds that any deficiencies with the December 2018 Motion to Reinstate were cured by the still timely filing of the February 2019 Notice of Motion and attached Motion. There is no evidence Respondent suffered any prejudice due to Petitioner's initial failure to comply with the Administrative Rules. In fact, Respondent continued to provide benefits to Petitioner until just one month prior to the June 2019 hearing on reinstatement. The Commission further finds that Petitioner has been actively undergoing treatment relating to his work accident and would be clearly prejudiced by the dismissal of his case. Based on the totality of circumstances, including the timely filing of Petitioner's February 1, 2019, Notice of Motion and Motion, the Commission finds Petitioner met his burden of showing reinstatement of the case is justified.

For the foregoing reasons, the Commission affirms the June 5, 2019, decision of Arbitrator Pulia to grant Petitioner's Motion to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of Arbitrator Pulia to grant Petitioner's Motion to Reinstate, is hereby affirmed.

20 IWCC0637

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 28 2020

o: 9/1/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD RAMOS,

Petitioner,

vs. NO: 19 WC 17412

WILLIAMSON COUNTY SHERIFF'S DEPARTMENT, 20IWCC0638

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 18, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

20IWCC0638

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 28 2020
o- 9/1/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

RAMOS, RONALD
Employee/Petitioner

Case# **19WC017412**

18WC032679

WILLIAMSON COUNTY SHERIFF DEPT
Employer/Respondent

20IWCC0638

On 2/18/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0000 INMAN & FITZGIBBONS LTD
MICHAEL BANTZ
300 N NEISL ST SUITE 350
CHAMPAIGN, IL 61820

20IWCC0638

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ronald Ramos
Employee/Petitioner

Case # 19 WC 17412

v.

Consolidated cases: 18 WC 32679

Williamson County Sheriff Department
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 16, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, April 22, 2019, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, Petitioner earned $68,955.68; the average weekly wage was $1,326.07.

On the date of accident, Petitioner was 49 years of age, married with 1 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, all compensation benefits are awarded in case 18 WC 32679.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

February 14, 2020
Date

FEB 18 2020

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment by Respondent. In case 18 WC 32679, the Application alleged that on September 13, 2018, Petitioner was "In pursuit of suspect" and he sustained an injury to his "Back/neck/right foot/body as a whole" (Arbitrator's Exhibit 2). In case 19 WC 17412, the Application alleged that on April 22, 2019, Petitioner sustained an "Aggravation of prior injury" and injured/reinjured his "Back/right leg/body as a whole" (Arbitrator's Exhibit 3). Respondent stipulated Petitioner sustained a work-related accident in case 18 WC 32679, but disputed accident in case 19 WC 17412. Respondent disputed causal relationship in both cases (Arbitrator's Exhibit 1).

The cases were consolidated for trial and heard in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits for 57 3/7 weeks, commencing September 14, 2018, through October 8, 2018; October 10, 2018, through April 21, 2019; and April 23, 2019, through October 24, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Deputy Sheriff and also had concurrent employment as a security guard at the Williamson County Airport. Previously, there was a dispute as to whether the additional income from Petitioner's concurrent employment was to be included in Petitioner's average weekly wage. This dispute was resolved and Petitioner and Respondent stipulated to Petitioner's average weekly wage (Arbitrator's Exhibit 1).

On September 13, 2018, at approximately 3:00 a.m., Petitioner was running in high grass while pursuing a suspect. Petitioner had his firearm muzzle pointed because the suspect had a history of resisting arrest and possessing mobile meth labs. At that time, Petitioner stepped into a depression in the ground and sustained a twisting injury to his low back. Petitioner was able to locate the suspect and take him into custody.

Scott McCabe, Petitioner's supervisor and Chief Deputy, was deposed on October 29, 2019, and his deposition testimony was received into evidence at trial. McCabe confirmed that Petitioner reported the accident to him shortly after it occurred. He also went to the area where Petitioner sustained the accident and confirmed there was a depression in the ground which was covered by tall grass which reached slightly above his knee (Respondent's Exhibit 2; pp 9-10).

At trial, Petitioner testified he had some prior low back symptoms for which he sought medical treatment and lost time from work. Petitioner stated this occurred in 2017 and was caused by him driving a truck.

In July, 2017, Petitioner sought treatment for low back symptoms from Dr. Douglas Brown, his family physician, and Dr. Angela Baxter, a chiropractor. Treatment records of Dr. Brown and Dr. Baxter were received into evidence at trial.

Dr. Brown diagnosed Petitioner with degenerative disc disease and loss of disc height at L5-S1. He prescribed medication and referred Petitioner to Dr. Baxter (Respondent's Exhibit 6).

Dr. Baxter also diagnosed Petitioner with degenerative disc disease as well as cervicalgia. Dr. Baxter treated Petitioner with chiropractic manipulation, muscle stimulation and exercise from July 18, through September 18, 2017 (Respondent's Exhibit 7).

Following the accident of September 13, 2018, Petitioner sought medical treatment at SIH Urgent Care/Work Care (hereinafter referred to as "SIH") on September 13, 2018. At that time, Petitioner advised he stepped into a hole and "jarred" his back. Petitioner complained of mid/low back pain primarily on the right. X-rays of the thoracic and lumbar spine were taken which revealed mild degenerative changes. Petitioner was diagnosed with a muscle strain. He was directed to apply heat and take over-the-counter medication as needed (Petitioner's Exhibit 3).

Petitioner returned to SIH on September 18, 2018, and the diagnosis remained the same, but Petitioner was put on restricted duty and physical therapy was ordered. Petitioner was subsequently seen at SIH on September 25, and October 2, 2018. Petitioner remained on restricted duty and an MRI scan was ordered. When Petitioner was last seen at SIH on October 10, 2018, the MRI had not been performed because it had not yet been approved by Respondent (Petitioner's Exhibit 3).

On October 15, 2018, Petitioner was seen by Dr. Brown. At that time, Petitioner informed Dr. Brown he had stepped into a hole and experienced a flare up of his back symptoms. Dr. Brown diagnosed Petitioner with chronic low back pain and authorized Petitioner to be off work (Petitioner's Exhibit 4).

On October 19, 2018, Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon. Petitioner advised Dr. Gornet of the accident of September 13, 2018, as well as the prior symptoms he experienced in 2017. Petitioner complained of low back pain in both sides, right more than left, and neck pain which went into his right trapezius. Dr. Gornet opined the accident sustained by Petitioner on September 13, 2018, could aggravate an underlying asymptomatic condition or cause a disc injury. He noted Petitioner may have injured L5-S1 and C5-C6. He ordered physical therapy and an MRI scan of the lumbar spine (Petitioner's Exhibit 6).

The MRI of Petitioner's lumbar spine was performed on October 19, 2018. According to the radiologist, the MRI revealed a circumferential disc bulge at L5-S1, likely an annular tear and left paracentral protrusion as well as a circumferential disc bulge at L4-L5 (Petitioner's Exhibit 7).

Dr. Gornet saw Petitioner on November 29, 2018, and reviewed the MRI scan. His reading of the MRI was consistent with that of the radiologist. Dr. Gornet diagnosed Petitioner with discogenic pain at L5-S1 and facet pain at L4-L5 and L5-S1. He referred Petitioner to Dr. Helen Blake, a pain management physician, for epidural steroid injections, medial branch blocks and facet rhizotomies (Petitioner's Exhibit 6).

Dr. Blake saw Petitioner from December 18, 2018, through January 29, 2019. She administered a series of epidural injections, medial branch blocks and radiofrequency ablations during that time (Petitioner's Exhibit 8).

When Petitioner was subsequently seen by Dr. Gornet on January 7, 2019, an MRI was performed on his cervical spine. According to the radiologist, the MRI revealed a circumferential disc bulge at C5-C6 and foraminal protrusions at C3-C4 and C4-C5 (Petitioner's Exhibit 7).

On January 7, 2019, Dr. Gornet evaluated Petitioner and reviewed the MRI that was performed that same day. Dr. Gornet's interpretation of the MRI was consistent with that of the radiologist. In regard to Petitioner's low back, Dr. Gornet's diagnosis remained the same and he opined Petitioner might need a fusion at L5-S1 and potential disc replacement at L4-L5. However, he noted Petitioner continued to be overweight and would have to reduce his weight to 275 to 300 pounds (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Daniel Kitchens, a neurosurgeon, on February 8, 2019. In connection with his examination of Petitioner, Dr. Kitchens reviewed medical records and diagnostic studies (excluding the MRIs of Petitioner's lumbar and cervical spine) provided to him by Respondent. Petitioner informed Dr. Kitchens of the accident of September 13, 2018, as well has his prior low back symptoms of 2017. Petitioner complained of low back pain/stiffness and stiffness in the right side of his neck (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Kitchens' diagnosis was a lumbar strain, but he deferred any further diagnoses until he reviewed the MRI of the lumbar spine. Dr. Kitchens also opined the treatment Petitioner had received to date was reasonable and necessary to diagnose and treat Petitioner's work-related injuries (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Gornet again saw Petitioner on March 21, 2019. At that time, Petitioner advised that the treatment provided by Dr. Blake had only provided him with temporary relief. Dr. Gornet opined further conservative care was not indicated, but that Petitioner needed to lose weight before proceeding with any further diagnostic testing or treatment for his low back. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 6).

Dr. Kitchens reviewed the MRI scans of Petitioner's lumbar and cervical spine and prepared a supplemental report dated April 12, 2019. In regard to the MRI of Petitioner's lumbar spine, Dr. Kitchens opined it revealed degenerative changes at L3-L4, L4-L5 and L5-S1. In regard to the MRI of Petitioner's cervical spine, Dr. Kitchens opined it revealed degenerative changes at multiple levels of the cervical spine. Dr. Kitchens diagnosed Petitioner with degenerative disc disease of the lumbar and cervical spine which was not caused, aggravated or accelerated by the accident of September 13, 2018, Petitioner was at MMI and could return to work without restrictions. Dr. Kitchens reaffirmed his opinion that the treatment provided to Petitioner for the lumbar strain was reasonable and necessary, but that the injections performed by Dr. Blake were not related to the muscular strain of the lumbar spine and were related to treatment for the pre-existing degenerative disc disease (Respondent's Exhibit 1; Deposition Exhibit 3).

When Petitioner returned to work on April 22, 2019, he was assigned patrol duty. Petitioner was required to drive a car for approximately 100 miles over unpaved/rough country roads. Because of this, Petitioner experienced right sided low back pain. Petitioner reported this to Respondent and went to the ER of Herrin Hospital. In the ER, it was noted Petitioner had pain in the lumbar paraspinal area. He was given medication and discharged (Petitioner's Exhibit 10).

Dr. Gornet saw Petitioner on May 16, 2019, and reviewed Dr. Kitchens' reports. Dr. Gornet noted he never opined the accident caused the degenerative changes, but that the accident "changed" Petitioner's back and neck conditions. Dr. Gornet also noted Dr. Kitchens did not provide any explanation as to why Petitioner's symptoms increased in severity subsequent to the accident of September 13, 2018. Dr. Gornet noted Petitioner had continued to lose weight, but was not at MMI and remain disabled from work (Petitioner's Exhibit 6).

Dr. Kitchens was deposed on June 12, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kitchens' testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Kitchens testified Petitioner had cervical and lumbar degenerative disc disease which was not caused, aggravated or accelerated by the accident of September 13, 2018. He also testified the injections administered by Dr. Blake were not related to the lumbar strain, but to the pre-existing degenerative disc disease (Respondent's Exhibit 1; pp 12-16).

On cross-examination, Dr. Kitchens acknowledged Petitioner was working full duty without restrictions at the time he sustained the accident of September 13, 2018. Dr. Kitchens also acknowledged that in his initial report, he noted that all of the treatment provided to Petitioner was reasonable and necessary and related to the work injury. When questioned about his subsequent opinion that the injections performed by Dr. Blake were not related to the accident, he attempted to explain that they were not for the lumbar strain, but for the pre-existing degenerative disc disease even though this was not specifically stated in his initial report (Respondent's Exhibit 1; pp 25, 35-38).

Dr. Gornet saw Petitioner on July 15, 2019. At that time, Petitioner continued to have low back and neck pain. Petitioner continued to lose weight. Dr. Gornet opined Petitioner remained temporarily totally disabled (Petitioner's Exhibit 6).

Dr. Gornet was deposed on September 16, 2019. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified that Petitioner's current symptoms were not caused by degenerative disc disease because Petitioner was not having severe disabling pain prior to the September, 2018 accident and the MRIs of the lumbar and cervical spine revealed objective evidence of disc pathology (Petitioner's Exhibit 11; pp 19-22).

In regard to the accident of April 22, 2019, Dr. Gornet testified it had the potential to aggravate his underlying condition and increase his pain. However, he reaffirmed his opinion that Petitioner's condition remained causally related to the accident of September 13, 2018 (Petitioner's Exhibit 11; pp 24-25).

Dr. Gornet was also questioned about Petitioner's ongoing efforts to lose weight. He testified if Petitioner did not lose the weight, possible treatment by a weight loss specialist would be indicated and causally related to the accident of September 13, 2018 (Petitioner's Exhibit 11; pp 25-26).

Dr. Gornet saw Petitioner on October 14, 2019, and Petitioner had reduced his weight to 320 pounds. Dr. Gornet opined it would be appropriate to proceed with cervical disc replacement surgery at C3-C4, C4-C5 and C5-C6. He also released Petitioner to return to work with a 20 pound lifting restriction, no repetitive bending/lifting, no overhead work and the ability to alternate between standing/sitting (Petitioner's Exhibit 6).

Dr. Gornet last saw Petitioner on January 6, 2020, and Petitioner weighed 314 pounds. Petitioner continued to work within the restrictions Dr. Gornet previously imposed. Dr. Gornet renewed his recommendation Petitioner undergo cervical disc replacement surgery (Petitioner's Exhibit 6).

At trial, Petitioner testified he returned to work on light duty on October 14, 2019. He stated he has continued to lose weight by adhering to a low carbohydrate diet and by walking and riding a stationary bike. He continues to experience pain and wants further treatment.

Petitioner was cross-examined at length about the fact his wife and son live in Florida. Petitioner stated his wife and son live in Florida because his son has special medical needs and other family members also reside in Florida. Petitioner agreed that he has made several trips to/from Florida to visit his family.

Conclusion of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a work-related accident on April 22, 2019, but his current condition of ill-being is related to the accident Petitioner sustained on September 13, 2018.

In support of this conclusion the Arbitrator notes the following:

Petitioner's primary treating physician, Dr. Gornet, opined the accident of April 22, 2019, could have aggravated Petitioner's underlying condition, but Petitioner's condition was related to the accident of September 13, 2018.

In regard to disputed issues (J), (K) and (L) the Arbitrator makes no conclusions of law because these issues are rendered moot as a result of the Arbitrator's conclusion of law in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☒ Reverse Causal connection Regarding Cervical spine	☐ Second Injury Fund (§8(e)18)
WILLIAMSON	☐ Modify	☐ PTD/Fatal denied
		☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD RAMOS,

Petitioner,

vs. NO: 18 WC 32679

WILLIAMSON COUNTY SHERIFF DEPARTMENT,

Respondent.

20IWCC0639

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical care, and §8(j) credit, and being advised of the facts and law, reverses in part, the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On the date of accident, September 13, 2018, Petitioner responded to a call regarding a suspect who was hiding in a garage at a residence. Petitioner stated that while searching for the suspect, Petitioner had his firearm drawn. Petitioner testified that he had first-hand knowledge of dealing with that suspect who was known to have mobile meth labs on him which can be deadly. Petitioner testified the suspect was also known to resist arrest and fight police officers. As he was walking through some high grass, he stepped. He recalled he kept himself from falling by freezing and he did not know if he twisted or jerked. He stated his main concern was to get his finger off the trigger where the muzzle was pointed because the gun was in his hand. Petitioner testified that as a result, he injured the lower right side of his back. (T.22-23)

Petitioner testified that he had experienced prior low back problems, but nothing before this accident had prevented him from performing full unrestricted duty. Petitioner testified in 2017

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he had missed some time from work because of his low back. Petitioner testified that he had been given a Dodge Ram truck at that time and it drove like a tank. As a result, he started experiencing a lot of pain and discomfort. Petitioner sent an e-mail to the Sheriff requesting another vehicle. Since that time, he testified, he had no issues with his back until the September 2018 accident.

Petitioner testified that after the September 13, 2018 accident, he sought medical care immediately at Work Care. An x-ray examination of his thoracic and lumbar spine revealed scattered mild degenerative disease throughout the thoracic spine with no acute compression fracture and scattered mild degenerative disease of the lumbosacral spine with significant narrowing of the lumbosacral junction. Petitioner was diagnosed with a muscle strain, fascia and tendon strains of the lower back, and a strain of the muscle and tendon of the back wall of the thorax. Petitioner next sought treatment from his Primary Care Physician, Dr. Brown, who restricted Petitioner from work and prescribed a course of physical therapy at Work Care (Rehab Unlimited). Petitioner completed 2-3 weeks of physical therapy which, according to Petitioner, did not help his condition.

Petitioner testified that he experienced pain on his right side and this prevented him from certain mobility. He also experienced tingling on the right side of his leg. Petitioner testified that after the accident he did not continue working. He received his regular paycheck in the form of PEDA benefits. Petitioner indicated it was equivalent to Workers' Compensation for someone who had the contract with the union. (T.27)

Petitioner next sought treatment with Dr. Gornet, who was recommended by Officer Tony Kendrick. Petitioner testified that his attorney had nothing to do with Petitioner seeing Dr. Gornet. Dr. Gornet recommended an MRI scan and further physical therapy, but the physical therapy did not help. Petitioner received steroid injections which helped for about 2 weeks. He testified the pain had started to subside to where he could do some activities, but he was unable to do other activities without experiencing severe pain.

Petitioner had read the deposition and statement of Deputy Scott McCabe. Petitioner indicated that from that report, apparently Officer McCabe thought Petitioner was going to retire. Petitioner testified that he was not planning to retire because of insurance and personal reasons. He stated he was looking forward to returning to full duty and trying to get well. Petitioner testified that was the purpose of seeking medical care.

Petitioner agreed Dr. Gornet had advised him he needed to lose weight. In response, Petitioner stated he maintained a low carb diet and he walked when applicable and he was able to, or he rode a stationary bike. Petitioner testified that when he first saw Dr. Gornet he had weighed in the 370 pound range, but he had peaked out at about 384 pounds after the 2018-2019 holidays. After, he lost weight and, at his last visit, he weighed 314 pounds. He still continues to lose weight and he does feel better because of the weight loss. He testified that his low back pain did not just magically go away because he lost weight.

On cross examination, Petitioner stated he would agree if the medical records of Dr. Gornet show he did not report any cervical complaints until October 19, 2018.

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The Work Care Occupational Health record notes a history of accident that at about 3:00 a.m. Petitioner was working as a sheriff and as he was responding to a call, he stepped in a hole and 'jarred' his back. Petitioner continued to search for a suspect who was eventually apprehended and brought to jail. Petitioner reported that he had some pain when getting in and out of his car, he experienced a pinching feeling and it also felt like his back locked up. Petitioner was diagnosed with a low back and thoracic strain. The x-ray exam of the thoracic spine showed scattered mild degenerative disc disease with no acute compression fractures. The x-ray of the lumbar spine showed scattered mild degenerative disc disease lumbar spine with significant narrowing LS junction. Pain was noted in the mid-low back right region. (PX 3)

Dr. Gornet saw Petitioner on October 19, 2018 and his initial spine exam showed low back pain right greater than left, right thigh to knee. Petitioner complained of neck pain and headaches to the right trapezius. It was noted current problems to the level of severity began September 13, 2018. A similar history of accident was noted. Petitioner was off work per his primary care physician and an MRI was denied. At this time Petitioner complained he had constant symptoms, worse with prolonged sitting, standing, bending, lifting, as well as right leg and foot pain. Dr. Gornet's findings noted the lumbar films revealed loss of disc height at L5-S1, subtle translation L4 on S1 and no instability. The cervical spine films revealed no evidence of narrowing, loss of disc height C5-6, stable with flexion/extension. (PX 6)

Dr. Gornet stated the sudden jarring could have easily aggravated an underlying asymptomatic condition or caused a disc condition. Patient may have aggravated L5-S1 or C5-6. He prescribed a lumbar MRI scan and restricted Petitioner from returning to work. Dr. Gornet believed his current symptoms were causally connected to the work injury.

Dr. Kitchens, Respondent's Section 12 examiner, testified Petitioner reported a history of when looking for a suspect, he walked into tall grass and stepped in a hole with his right foot. He did not fall to the ground. Dr. Kitchens examined Petitioner and noted normal cranial nerve function and good strength of the extremities. Sensation was intact and reflexes were normal; gait was steady and Petitioner demonstrated good range of motion of the lumbar spine. Petitioner reported discomfort with flexion and extension of the lumbar spine. He noted no pain in the legs with straight leg raise, but some back pain was noted. (RX 1)

Dr. Kitchens authored an addendum IME report on April 12, 2019 after a review of the MRI films. He viewed the cervical (January 7, 2019) and lumbar (October 19, 2018) MRI films as well as notes from Dr. Brown from the July 17, 2017, visit. Dr. Kitchens diagnosed Petitioner's condition as cervical and lumbar degenerative disc disease. Dr. Kitchens opined that the work injury of September 13, 2018, did not cause, aggravate, or accelerate Petitioner's pre-existing condition of his cervical or lumbar degenerative disc disease. His further diagnosis was lumbar strain related to the work incident. At the time of his addendum report he opined that Petitioner was at maximum medical improvement (MMI) from the lumbar strain. He opined the medical treatment to that point had been reasonable and necessary and related to the work incident, for the lumbar strain. He stated the injections were related to his pre-existing degenerative disc disease and thus not reasonable or necessary. He indicated the treatment from Dr. Blake was related to the strain and work accident. In his opinion, Petitioner did not require restrictions for the lumbar strain and, if there were restrictions, those were not related to the September 13, 2018, accident.

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The Commission notes that Dr. Gornet and Dr. Kitchens disagree as to presence of lumbar protrusions from the accident. Dr. Gornet believed the lumbar protrusions and annular tears were causally related to the work accident and Dr. Kitchens believed those findings were pre-existing and related to the long standing lumbar degenerative disc disease.

The Commission notes that Petitioner testified he jarred his back when he stepped in the hole and Dr. Gornet opined that mechanism supported his opinion for a causal relationship between his condition and the accident and the need for lumbar surgery. Dr. Kitchens did not believe the history was of a significant mechanism and Petitioner suffered a lumbar strain. Dr. Kitchens found no causal relationship between the accident and his cervical condition. Dr. Kitchens indicated a lumbar strain type injury recovery was within 6-8 weeks and Petitioner's ongoing issues thereafter were related to the underlying pre-existing lumbar degenerative disc disease. Petitioner had a pre-existing lumbar condition in 2017 but experienced no significant symptoms until this accident. Petitioner's lumbar condition has remained symptomatic since the September 13, 2018, accident.

The Commission finds the evidence and testimony support a finding of a causal relationship between Petitioner's lumbar condition and need for ongoing treatment, specifically the surgery recommended by Dr. Gornet. Dr. Gornet's opinions are more persuasive and supported by the evidence regarding the lumbar condition. Respondent's argument that Petitioner drove to Florida does not alter Petitioner's ongoing documented lumbar condition and need for further treatment. Also, the Commission notes there is no evidence of a recommendation for lumbar spine surgery before the September 13, 2018, accident. The only evidence regarding this was Deputy McCabe's statement Petitioner planned to have surgery after Petitioner's retirement, which was an unknown time. The Commission affords this little weight. The consistent medical records and testimony of Petitioner and Dr. Gornet support a finding of causal connection between the work accident and Petitioner's lumbar spine condition. The Commission notes that while Petitioner's weight loss has been a factor before proceeding for surgery, the Commission finds any potential bariatric surgery is not reasonable and necessary or causally related to the injury and, therefore, denied.

Regarding the cervical spine condition, the Commission notes and finds significant the lack of cervical complaints in the initial treating records. There were no cervical complaints documented in the most contemporaneous medical records at or around the date of accident. In fact, the first complaints did not appear until about one month later. After that time, diagnostic tests were performed but the medical records show limited cervical treatment thereafter. The Commission finds of great significance, Petitioner did <u>not</u> testify of any cervical complaints at hearing. Here, Dr. Gornet's opinion of a causal relationship is less impressive considering the medical records and Petitioner's lack of testimony as to cervical issues. The Commission finds Petitioner has failed to prove his cervical condition was caused, aggravated or accelerated by the work-related accident.

The Commission, herein, affirms the decision finding Petitioner met his burden of proving the prospective medical care as recommended by Dr. Gornet, specifically lumbar fusion at L5-S1, is reasonable and necessary to cure the effects of the work-related injury. The Commission reverses the award of prospective medical care regarding Petitioner's cervical condition as the Commission

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finds the cervical condition is not causally related to the accident.

The Commission further finds Respondent is entitled to a credit under §8(j) of the Act in the amount of $21,213.41, for medical bills paid.

The Commission, herein, affirms and adopts the decision that Petitioner is entitled to 56-3/7 weeks of temporary total disability at $884.05 per week, for the periods of September 14, 2018 through October 8, 2018, October 10, 2018 through April 21, 2018, and April 23, 2019 through October 13, 2019, as awarded by the Arbitrator. Respondent is entitled to credit in the amount of $26,278.59 for benefits paid on account of said accidental injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 18, 2020 is hereby affirmed in part and reversed in part, finding Petitioner's cervical spine condition is not causally related to his work injury sustained September 13, 2018, and, denying medical expenses and prospective medical care regarding the cervical spine. Any potential bariatric surgery, likewise, is not reasonable, necessary or causally related and, therefore, any medical expenses relating to bariatric surgery are herein denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $884.05 per week for a period of 56-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit for benefits paid of $26,278.59.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the amounts for unpaid causally related, reasonable and necessary medical expenses under §8(a) of the Act, and pursuant to the medical fee schedule under §8.2 of the Act, regarding Petitioner's lumbar spine condition only, as evidenced in PX 1. The medical expenses and prospective medical care regarding the cervical spine and any potential bariatric treatment or surgery are denied. Respondent shall receive credit in the amount of $21,213.41 under Section 8(j) of the Act for all medical expenses paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical treatment for the causally related condition of the lumbar spine, including the lumbar surgery, as recommended by Dr. Gornet.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 28 2020
o-9/1/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

RAMOS, RONALD
Employee/Petitioner

Case# **18WC032679**

19WC017412

WILLIAMSON COUNTY SHERIFF DEPT
Employer/Respondent

20IWCC0639

On 2/18/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0000 INMAN & FITZGIBBONS LTD
MICHAEL BANTZ
301 N NEIL ST SUITE 350
CHAMPAIGN, IL 61820

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STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ronald Ramos
Employee/Petitioner

v.

Williamson County Sheriff Department
Employer/Respondent

Case # 18 WC 32679

Consolidated cases: 19 WC 17412

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 16, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, September 13, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $68,955.68; the average weekly wage was $1,326.07.

On the date of accident, Petitioner was 49 years of age, married with 1 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $26,278.59 for other benefits, for a total credit of $26,278.59.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the cervical and lumbar surgeries recommended by Dr. Matthew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $884.05 per week for 56 3/7 weeks commencing September 14, 2018, through October 8, 2018; October 10, 2018, through April 21, 2019; and April 23, 2019, through October 13, 2019, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

February 14, 2020
Date

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment by Respondent. In case 18 WC 32679, the Application alleged that on September 13, 2018, Petitioner was "In pursuit of suspect" and he sustained an injury to his "Back/neck/right foot/body as a whole" (Arbitrator's Exhibit 2). In case 19 WC 17412, the Application alleged that on April 22, 2019, Petitioner sustained an "Aggravation of prior injury" and injured/reinjured his "Back/right leg/body as a whole" (Arbitrator's Exhibit 3). Respondent stipulated Petitioner sustained a work-related accident in case 18 WC 32679, but disputed accident in case 19 WC 17412. Respondent disputed causal relationship in both cases (Arbitrator's Exhibit 1).

The cases were consolidated for trial and heard in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits for 57 3/7 weeks, commencing September 14, 2018, through October 8, 2018; October 10, 2018, through April 21, 2019; and April 23, 2019, through October 24, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Deputy Sheriff and also had concurrent employment as a security guard at the Williamson County Airport. Previously, there was a dispute as to whether the additional income from Petitioner's concurrent employment was to be included in Petitioner's average weekly wage. This dispute was resolved and Petitioner and Respondent stipulated to Petitioner's average weekly wage (Arbitrator's Exhibit 1).

On September 13, 2018, at approximately 3:00 a.m., Petitioner was running in high grass while pursuing a suspect. Petitioner had his firearm muzzle pointed because the suspect had a history of resisting arrest and possessing mobile meth labs. At that time, Petitioner stepped into a depression in the ground and sustained a twisting injury to his low back. Petitioner was able to locate the suspect and take him into custody.

Scott McCabe, Petitioner's supervisor and Chief Deputy, was deposed on October 29, 2019, and his deposition testimony was received into evidence at trial. McCabe confirmed that Petitioner reported the accident to him shortly after it occurred. He also went to the area where Petitioner sustained the accident and confirmed there was a depression in the ground which was covered by tall grass which reached slightly above his knee (Respondent's Exhibit 2; pp 9-10).

At trial, Petitioner testified he had some prior low back symptoms for which he sought medical treatment and lost time from work. Petitioner stated this occurred in 2017 and was caused by him driving a truck.

In July, 2017, Petitioner sought treatment for low back symptoms from Dr. Douglas Brown, his family physician, and Dr. Angela Baxter, a chiropractor. Treatment records of Dr. Brown and Dr. Baxter were received into evidence at trial.

Dr. Brown diagnosed Petitioner with degenerative disc disease and loss of disc height at L5-S1. He prescribed medication and referred Petitioner to Dr. Baxter (Respondent's Exhibit 6).

Dr. Baxter also diagnosed Petitioner with degenerative disc disease as well as cervicalgia. Dr. Baxter treated Petitioner with chiropractic manipulation, muscle stimulation and exercise from July 18, through September 18, 2017 (Respondent's Exhibit 7).

Following the accident of September 13, 2018, Petitioner sought medical treatment at SIH Urgent Care/Work Care (hereinafter referred to as "SIH") on September 13, 2018. At that time, Petitioner advised he stepped into a hole and "jarred" his back. Petitioner complained of mid/low back pain primarily on the right. X-rays of the thoracic and lumbar spine were taken which revealed mild degenerative changes. Petitioner was diagnosed with a muscle strain. He was directed to apply heat and take over-the-counter medication as needed (Petitioner's Exhibit 3).

Petitioner returned to SIH on September 18, 2018, and the diagnosis remained the same, but Petitioner was put on restricted duty and physical therapy was ordered. Petitioner was subsequently seen at SIH on September 25, and October 2, 2018. Petitioner remained on restricted duty and an MRI scan was ordered. When Petitioner was last seen at SIH on October 10, 2018, the MRI had not been performed because it had not yet been approved by Respondent (Petitioner's Exhibit 3).

On October 15, 2018, Petitioner was seen by Dr. Brown. At that time, Petitioner informed Dr. Brown he had stepped into a hole and experienced a flare up of his back symptoms. Dr. Brown diagnosed Petitioner with chronic low back pain and authorized Petitioner to be off work (Petitioner's Exhibit 4).

On October 19, 2018, Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon. Petitioner advised Dr. Gornet of the accident of September 13, 2018, as well as the prior symptoms he experienced in 2017. Petitioner complained of low back pain in both sides, right more than left, and neck pain which went into his right trapezius. Dr. Gornet opined the accident sustained by Petitioner on September 13, 2018, could aggravate an underlying asymptomatic condition or cause a disc injury. He noted Petitioner may have injured L5-S1 and C5-C6. He ordered physical therapy and an MRI scan of the lumbar spine (Petitioner's Exhibit 6).

The MRI of Petitioner's lumbar spine was performed on October 19, 2018. According to the radiologist, the MRI revealed a circumferential disc bulge at L5-S1, likely an annular tear and left paracentral protrusion as well as a circumferential disc bulge at L4-L5 (Petitioner's Exhibit 7).

Dr. Gornet saw Petitioner on November 29, 2018, and reviewed the MRI scan. His reading of the MRI was consistent with that of the radiologist. Dr. Gornet diagnosed Petitioner with discogenic pain at L5-S1 and facet pain at L4-L5 and L5-S1. He referred Petitioner to Dr. Helen Blake, a pain management physician, for epidural steroid injections, medial branch blocks and facet rhizotomies (Petitioner's Exhibit 6).

Dr. Blake saw Petitioner from December 18, 2018, through January 29, 2019. She administered a series of epidural injections, medial branch blocks and radiofrequency ablations during that time (Petitioner's Exhibit 8).

When Petitioner was subsequently seen by Dr. Gornet on January 7, 2019, an MRI was performed on his cervical spine. According to the radiologist, the MRI revealed a circumferential disc bulge at C5-C6 and foraminal protrusions at C3-C4 and C4-C5 (Petitioner's Exhibit 7).

On January 7, 2019, Dr. Gornet evaluated Petitioner and reviewed the MRI that was performed that same day. Dr. Gornet's interpretation of the MRI was consistent with that of the radiologist. In regard to Petitioner's low back, Dr. Gornet's diagnosis remained the same and he opined Petitioner might need a fusion at L5-S1 and potential disc replacement at L4-L5. However, he noted Petitioner continued to be overweight and would have to reduce his weight to 275 to 300 pounds (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Daniel Kitchens, a neurosurgeon, on February 8, 2019. In connection with his examination of Petitioner, Dr. Kitchens reviewed medical records and diagnostic studies (excluding the MRIs of Petitioner's lumbar and cervical spine) provided to him by Respondent. Petitioner informed Dr. Kitchens of the accident of September 13, 2018, as well has his prior low back symptoms of 2017. Petitioner complained of low back pain/stiffness and stiffness in the right side of his neck (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Kitchens' diagnosis was a lumbar strain, but he deferred any further diagnoses until he reviewed the MRI of the lumbar spine. Dr. Kitchens also opined the treatment Petitioner had received to date was reasonable and necessary to diagnose and treat Petitioner's work-related injuries (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Gornet again saw Petitioner on March 21, 2019. At that time, Petitioner advised that the treatment provided by Dr. Blake had only provided him with temporary relief. Dr. Gornet opined further conservative care was not indicated, but that Petitioner needed to lose weight before proceeding with any further diagnostic testing or treatment for his low back. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 6).

Dr. Kitchens reviewed the MRI scans of Petitioner's lumbar and cervical spine and prepared a supplemental report dated April 12, 2019. In regard to the MRI of Petitioner's lumbar spine, Dr. Kitchens opined it revealed degenerative changes at L3-L4, L4-L5 and L5-S1. In regard to the MRI of Petitioner's cervical spine, Dr. Kitchens opined it revealed degenerative changes at multiple levels of the cervical spine. Dr. Kitchens diagnosed Petitioner with degenerative disc disease of the lumbar and cervical spine which was not caused, aggravated or accelerated by the accident of September 13, 2018, Petitioner was at MMI and could return to work without restrictions. Dr. Kitchens reaffirmed his opinion that the treatment provided to Petitioner for the lumbar strain was reasonable and necessary, but that the injections performed by Dr. Blake were not related to the muscular strain of the lumbar spine and were related to treatment for the pre-existing degenerative disc disease (Respondent's Exhibit 1; Deposition Exhibit 3).

When Petitioner returned to work on April 22, 2019, he was assigned patrol duty. Petitioner was required to drive a car for approximately 100 miles over unpaved/rough country roads. Because of this, Petitioner experienced right sided low back pain. Petitioner reported this to Respondent and went to the ER of Herrin Hospital. In the ER, it was noted Petitioner had pain in the lumbar paraspinal area. He was given medication and discharged (Petitioner's Exhibit 10).

Dr. Gornet saw Petitioner on May 16, 2019, and reviewed Dr. Kitchens' reports. Dr. Gornet noted he never opined the accident caused the degenerative changes, but that the accident "changed" Petitioner's back and neck conditions. Dr. Gornet also noted Dr. Kitchens did not provide any explanation as to why Petitioner's symptoms increased in severity subsequent to the accident of September 13, 2018. Dr. Gornet noted Petitioner had continued to lose weight, but was not at MMI and remain disabled from work (Petitioner's Exhibit 6).

Dr. Kitchens was deposed on June 12, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kitchens' testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Kitchens testified Petitioner had cervical and lumbar degenerative disc disease which was not caused, aggravated or accelerated by the accident of September 13, 2018. He also testified the injections administered by Dr. Blake were not related to the lumbar strain, but to the pre-existing degenerative disc disease (Respondent's Exhibit 1; pp 12-16).

On cross-examination, Dr. Kitchens acknowledged Petitioner was working full duty without restrictions at the time he sustained the accident of September 13, 2018. Dr. Kitchens also acknowledged that in his initial report, he noted that all of the treatment provided to Petitioner was reasonable and necessary and related to the work injury. When questioned about his subsequent opinion that the injections performed by Dr. Blake were not related to the accident, he attempted to explain that they were not for the lumbar strain, but for the pre-existing degenerative disc disease even though this was not specifically stated in his initial report (Respondent's Exhibit 1; pp 25, 35-38).

Dr. Gornet saw Petitioner on July 15, 2019. At that time, Petitioner continued to have low back and neck pain. Petitioner continued to lose weight. Dr. Gornet opined Petitioner remained temporarily totally disabled (Petitioner's Exhibit 6).

Dr. Gornet was deposed on September 16, 2019. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified that Petitioner's current symptoms were not caused by degenerative disc disease because Petitioner was not having severe disabling pain prior to the September, 2018 accident and the MRIs of the lumbar and cervical spine revealed objective evidence of disc pathology (Petitioner's Exhibit 11; pp 19-22).

In regard to the accident of April 22, 2019, Dr. Gornet testified it had the potential to aggravate his underlying condition and increase his pain. However, he reaffirmed his opinion that Petitioner's condition remained causally related to the accident of September 13, 2018 (Petitioner's Exhibit 11; pp 24-25).

Dr. Gornet was also questioned about Petitioner's ongoing efforts to lose weight. He testified if Petitioner did not lose the weight, possible treatment by a weight loss specialist would be indicated and causally related to the accident of September 13, 2018 (Petitioner's Exhibit 11; pp 25-26).

Dr. Gornet saw Petitioner on October 14, 2019, and Petitioner had reduced his weight to 320 pounds. Dr. Gornet opined it would be appropriate to proceed with cervical disc replacement surgery at C3-C4, C4-C5 and C5-C6. He also released Petitioner to return to work with a 20 pound lifting restriction, no repetitive bending/lifting, no overhead work and the ability to alternate between standing/sitting (Petitioner's Exhibit 6).

Dr. Gornet last saw Petitioner on January 6, 2020, and Petitioner weighed 314 pounds. Petitioner continued to work within the restrictions Dr. Gornet previously imposed. Dr. Gornet renewed his recommendation Petitioner undergo cervical disc replacement surgery (Petitioner's Exhibit 6).

At trial, Petitioner testified he returned to work on light duty on October 14, 2019. He stated he has continued to lose weight by adhering to a low carbohydrate diet and by walking and riding a stationary bike. He continues to experience pain and wants further treatment.

Petitioner was cross-examined at length about the fact his wife and son live in Florida. Petitioner stated his wife and son live in Florida because his son has special medical needs and other family members also reside in Florida. Petitioner agreed that he has made several trips to/from Florida to visit his family.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of September 13, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on September 13, 2018.

Petitioner had low back and neck symptoms which required medical treatment in 2017; however, the last time he had any medical treatment for same was on September 18, 2017, approximately one year prior to the accident of September 13, 2018.

Petitioner was working full duty without restrictions and was not experiencing any disabling pain prior to the accident of September 13, 2018.

Petitioner's primary treating physician, Dr. Gornet, has opined Petitioner had sustained disc injuries in both the lumbar and cervical spine, which have been confirmed by MRI studies, and Dr. Gornet opined they are related to the accident of September 13, 2018,

Respondent's Section 12 examiner, Dr. Kitchens, opined Petitioner's current condition is related to pre-existing degenerative disc disease, but he does not explain why Petitioner had no severe disabling pain/symptoms until after the accident of September 13, 2018.

Further, Dr. Kitchens attempted to rescind his initial opinion that all of the medical treatment provided to Petitioner to date was reasonable and necessary. He then attempted to change that opinion by excluding the injections administered by Dr. Blake.

Based on the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Kitchens in regard to causality.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the cervical and lumbar spine surgeries recommended by Dr. Gornet.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 56 3/7 weeks, commencing September 14, 2018, through October 8, 2018; October 10, 2018, through April 21, 2019; and April 23, 2019, through October 13, 2019.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work during the aforestated periods of time.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diana Velazquez,
Petitioner,

vs.

No: 17 WC 21165

20IWCC0640

State of Illinois,
Chicago Read Mental Health Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and duration of temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the §19(b) Decision of the Arbitrator filed April 17, 2019 is hereby affirmed and adopted.

IT IF FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

20IWCC0640

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: OCT 28 2020

mp/dk
o-10/22/20
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

VELASQUEZ, DIANA Case# **17WC021165**

Employee/Petitioner

ST OF IL-REDD MENTAL HEALTH CENTER

Employer/Respondent

20IWCC0640

On 4/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4564 ARGIONIS & ASSOCIATES LLC
DANA BRISBON
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

6153 ASSISTANT ATTORNEY GENERAL
ALYSSA SILVESTRI
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 17 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0640

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

DIANA VELAZQUEZ
Employee/Petitioner

v.

STATE OF ILLINOIS / REED MENTAL HEALTH CENTER
Employer/Respondent

Case # **17** WC **21165**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **May 23, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$51,571.75**; the average weekly wage was **$991.76**.

On the date of accident, Petitioner was **28** years of age, ***married*** with **2** dependent children.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$661.17 per week** for **15 weeks**, commencing **June 21, 2018 through October 3, 2018**, as provided in Section 8(b) of the Act.

Penalties and attorney's fees are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 12, 2019
Date

APR 17 2019

20IWCC0640

STATEMENT OF FACTS

This matter was previously heard by the Arbitrator on 6/20/18 pursuant to Section 19(b). At that time, the Arbitrator found that the Petitioner's right neck, shoulder and arm injuries were causally related to the 5/23/17 accident. TTD benefits were awarded from 5/1/18 through 6/20/18 and Respondent was to authorize an EMG/NCV test prescribed by Dr. Giannoulias and a follow up visit. (Px9).

The Arbitrator previously found that the Petitioner was working security for Respondent's mental health facility in May 2017 when she was injured trying to stop a mental patient from attacking a doctor. During the struggle she lost her balance and fell on her knees and hands. She got up and fell again backwards and tried to break her fall with right hand. The third time she fell, she indicated it was onto bolted together wooden chairs, and her chest and arm area hit the chairs. Petitioner's prior testimony indicated she had been treating with Dr. Giannoulias when the Respondent authorized no further treatment, and he had continued her off work as of 5/8/18. Petitioner testified she also was not receiving weekly benefits at the time of the last hearing. (Px9). A work note from 5/8/18 indicates the Petitioner can work light duty with no climbing, lifting or use of the hands. (Px6; Px8). The Petitioner's unrebutted testimony at that time was that the Respondent had not accommodated her restrictions.

Petitioner testified that after the hearing her attorney advised her to wait for the Arbitrator's decision and then a 30-day potential appeal period after the decision was received. She still had not received any TTD benefits as of her receipt of the decision but testified she started to receive them again a month or two after the decision. She then went back to Dr. Giannoulias, who referred her to pain specialist Dr. Glaser.

The Respondent submitted evidence indicating the Petitioner was paid TTD from 10/4/18 through 1/31/19. It also indicated the award was paid on 9/17/18. (Rx1).

A 6/21/18 document titled "Notice of FMLA Ineligibility" indicates the Petitioner was not eligible for FMLA leave because she had not worked at least 1250 hours during the prior 12-month period. (Px8).

There appears to be a 9/10/18 work note from Dr. Giannoulias indicating Petitioner can work light duty with no climbing, lifting or use of the hands. (Px8).

Based on the records in evidence, Petitioner saw Dr. Glaser on 9/26/18, however the report notes Petitioner's right neck/upper back and right shoulder/shoulder blade/arm/hand pain had not changed since her visit of 8/3/18 with pain ranging from 5/10 to 9/10. As far as work status, the doctor issued a form which checked the "other" box and states "current not working." He recommended and performed a right C6/7 epidural injection on 10/2/18 for treatment of radicular pain. (Px4; Px8). A CMS work status form on this date indicates Petitioner should be off work and estimated return to work on 11/1/18. (Px8).

On 10/23/18, Petitioner reported to Dr. Giannoulias that the epidural "did help her for a little bit indicating that this is a neurologic problem, but she is continuing to complain of arm pain, armpit pain, hand pain, hand swelling and discoloration and muscle spasm." The doctor did not see any objective shoulder problems on exam. His assessment was of persistent right shoulder and arm pain and he prescribed an EMG and right shoulder MRI arthrogram. He indicated Petitioner could perform light duty with no lifting, climbing or use of hands. (Px8). A separate form that appears to be dated either 10/23/18 or 10/25/18 indicates he held Petitioner off work completely. (Px8).

Petitioner returned to Dr. Glaser on 11/14/18, reporting no change in her right neck/upper back condition with the epidural, but that the frequency of the pain had decreased. A second statement indicates she initially had 40% relief, but only 20% relief long term. She reported pain ranging from 5/10 to 9/10. He indicated she was to remain off work. Dr. Glaser stated that they discussed treatment of the radicular pain and that: "I suspect she will need separate treatment for her neuropathic pain." He indicated she remained off work "while under treatment." (Px4).

On 11/21/18, Dr. Giannoulias obtained a right shoulder MR arthrogram which noted contrast in the glenohumeral joint space and subscapularis recess, but there was no rotator cuff, ligamentous or labral injury identified. (Px8). At Petitioner's 12/4/18 follow-up, Dr. Giannoulias noted no evidence of an intraarticular pathology or rotator cuff tear in the shoulder. Based on improvement with epidural, he opined that the trauma was related to her neck and he advised her to continue with pain management and to follow up with him as needed. He restricted the Petitioner to sedentary duty and indicated Petitioner's ability to return to work otherwise would be determined "per neck doctor." The Arbitrator notes that two separate CMS "Authorization for Disability Leave and Return to Work", and the other one just indicates that return to work is "tbd." A specific work note from his own office indicates Dr. Giannoulias restricted Petitioner to no climbing, overhead work or push/pulling. (Px8). A second epidural was performed on 12/18/18 at C6/7. (Px4).

Petitioner testified that there is a gap of about 7 months of TTD going back to prior to the last hearing date, and after the decision restarted benefits instead of also paying the back TTD. She testified the decision award was paid and she currently receives TTD bimonthly, but the period from 5/1/18 to around July 2018 was not paid. Petitioner testified she has continued to provide her off work notes to Respondent and remains off work.

On cross-examination, Petitioner testified she is aware of the prior decision and the fact she received an award it on or about 7/25/18. Petitioner testified she underwent an EMG test in August 2018 and assumed the report should be in her records, though she had not reviewed her records so could not say. The Arbitrator notes that the records in evidence do not contain an EMG report or reference any EMG findings.

She testified that the only times she was not treating after the accident was when her attorney advised her that she needed written approval to do so. She believed that Dr. Phillips in April 2018 indicated she needed no further cervical treatment but that he advised her to continue treatment for the shoulder. She agreed that in May 2018 Dr. Giannoulias prescribed no further treatment for the shoulder. She did not treat between 5/8/18 and 6/20/18 because Respondent was not authorizing it.

She was advised that Px8 contained a 6/20/18 CMS 95 form completed by Dr. Giannoulias. Petitioner testified a Form 95 is what Respondent's HR department asks for to hold her work position open while on leave, separate from the doctor's typical work notes, and that she has had that filled these out on several occasions since May 2018 by Dr. Giannoulias. He asks how she is doing, sometimes provides an injection but mainly advises her to continue to treat with pain management. Petitioner advised that her most recent treatment has been with Dr. Glaser and that she turns his notes in to the Respondent. Petitioner testified she last received an off work note a week or two prior to the hearing date and believed it should be included in the submitted records, though she reiterated she hadn't reviewed the records herself.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has previously determined that the Petitioner's right neck, shoulder and arm symptoms are related to the 5/23/17 accident. Nothing has occurred which would disrupt that causal connection based on the evidence reviewed. The Petitioner's condition remains connected to the work accident.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner claims entitlement to TTD from 6/21/18 to 10/3/18.

Respondent has submitted evidence that the Respondent paid TTD to Petitioner from 10/4/18 through 1/31/18. The Arbitrator notes that based on this documentation the Petitioner's next check would issue on or about the hearing date.

It appears that authorization from Respondent for treatment, understandably, was not forthcoming pending receipt of the prior arbitration decision. The parties should have communicated at that point with regard to a) whether the Respondent would authorize the awarded prospective medical treatment and b) whether Respondent was going to appeal the award. No real evidence was presented as to whether this did or did not occur, just that the Petitioner was waiting for 30 additional days for appeal time to run per her attorney's advice.

It is unclear exactly why the Respondent did not pay benefits right after the decision became final but then started paying benefits again in October 2018. The progress of this case seems somewhat odd to the Arbitrator. The order entered in the prior 19(b) hearing specified that the award of prospective medical was an EMG test and follow up with Dr. Giannoulias. While the Petitioner testified she believed she had an EMG in August 2018, there is no record of this, and there is a subsequent report of Dr. Giannoulias which again prescribed this test, so it appears most likely that it was never performed. It is unclear why.

Given the circumstances of the accident and the Petitioner's unabated complaints, the Arbitrator gives the Petitioner the benefit of the doubt, as the Respondent did not present evidence which rebutted the Petitioner's testimony that there was no light duty available to her, did not present any Section 12 opinion disputing the off work status and Petitioner has continued to treat. The Arbitrator finds the Petitioner is entitled to TTD from 6/21/18 through 10/3/18.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner is not entitled to penalties and attorney's fees under the Act pursuant to Sections 16, 19(k) and 19(l).

As noted above, the prior award of the Arbitrator was for an EMG test and follow up with Dr. Giannoulias. It appears that this did not take place. There is no evidence that the Respondent failed to authorize this testing.

The actions of both parties are questionable to some degree in the mind of the Arbitrator, at least based on the evidence presented. The Petitioner did not attempt to get treatment or to determine whether treatment would be authorized based on the prior award for 30 days after the decision was received. The specifically awarded EMG apparently has still not taken place. The Respondent did not initially pay TTD following the award, but then did

pick up benefits again in October 2018. The Arbitrator ultimately sees no specific unreasonable conduct by the Respondent in light of these findings.

The Arbitrator also notes with interest that this case is now almost two years post-accident and no true diagnosis has been made to explain Petitioner's symptoms. On 9/26/17, Dr. Giannoulias opined that Petitioner's symptoms were related to her neck and that the shoulder did not appear to be of major concern. (Px9). Dr. Phillips opined following review of the cervical MRI that Petitioner's presentation was of primarily shoulder pain and he saw no competent cause for cervical radiculopathy and he did not think the Petitioner sustained a cervical injury. It was shortly after that point that the EMG was ordered by Dr. Giannoulias on 5/1/18 if symptoms persisted, and then on 5/8/18 opined that the failure of relief with a shoulder injection indicated Petitioner's symptoms were not due to her shoulder. Inexplicably, the EMG was not performed, and the Petitioner instead has been receiving cervical epidural injections from Dr. Glaser. This was despite the Arbitrator noting in the prior decision that Dr. Phillips and Dr. Giannoulias were disagreeing on the anatomic cause of the Petitioner's symptoms.

On 10/23/18, Petitioner apparently reported to Dr. Giannoulias that the epidural "did help her for a little bit", which led him to believe Petitioner's problem was neurologic, as she continued to complain of arm pain, armpit pain, hand pain, hand swelling and discoloration and muscle spasm." However, Petitioner apparently reported to no change with the epidural to Dr. Glaser on 11/14/18. Even this is unclear, however, as he noted she indicated the frequency of the pain had decreased. There then is a second statement in Glaser's records indicating Petitioner initially had 40% relief, but only 20% relief long term, with ongoing pain at a 5/10 to 9/10. He indicated she was to remain off work and performed a second epidural on 12/18/18 at C6/7. A shoulder MRI arthrogram on 11/21/18 indicated to Dr. Giannoulias no intraarticular pathology or rotator cuff, ligamentous or labral injury. Dr. Giannoulias then advised Petitioner to return to a neck physician. In the Arbitrator's mind, the Petitioner's condition is becoming questionable given that Dr. Phillips had already indicated no cervical problems. The parties have not put medical expenses at issue in this hearing, and while the Arbitrator is not saying that the epidural injections were unreasonable, it certainly seems that the logical process would have been to first obtain the EMG testing to attempt to determine if there is any radiculopathy versus peripheral neuropathy or negative findings. Dr. Glaser is not a neck physician, he is a pain management physician, and further treatment with Dr. Glaser without a cervical evaluation by an orthopedic surgeon or neurosurgeon at this point appears to the Arbitrator to be an unreasonable path going forward. It makes no sense that the Petitioner is treating with pain management with cervical epidurals when there has been no definitive cervical diagnosis made since Dr. Phillips indicated the Petitioner's symptoms were not related to the neck.

For all of these reasons, penalties and attorney fees are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIN MEARS-ATTIG,

Petitioner,

vs.

NO: 19 WC 11776

STATE OF ILLINOIS,
MENARDS CORRECTIONAL CENTER,

20IWCC0641

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

20IWCC0641

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013).*

DATED: OCT 28 2020
o-10/6/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MEARS-ATTIG, ERIN
Employee/Petitioner

Case# **19WC011776**

STATE OF IL/MENARD C C
Employer/Respondent

20IWCC0641

On 3/13/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305 / 14

MAR 13 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0641

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Erin Mears-Attig
Employee/Petitioner

v.

State of IL/Menard C.C.
Employer/Respondent

Case # 19 WC 11776

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 15, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On May 3, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, Petitioner earned $44,139.41; the average weekly wage was $848.83.

On the date of accident, Petitioner was 46 years of age, single with 2 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

March 10, 2020
Date

MAR 13 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on May 3, 2018. According to the Application, Petitioner "Tripped down stairs" and sustained injuries to multiple areas of the anatomy including both shoulders/arms, back, neck, right foot/shin and the body as a whole (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as an RN. There was no dispute Petitioner fell down a flight of stairs on May 3, 2018, but Respondent disputed liability on the basis Petitioner was simply going down a flight of stairs and was not subject to a greater risk of injury than the public at large.

At trial, Petitioner testified she was walking down a flight of stairs and she had some papers and a pen in her hand. Petitioner stated she was not reading and walking at the same time. Petitioner testified she slipped on something, but was not certain what it was.

The accident was reported to Respondent the same day it occurred. Petitioner completed and signed an Incident Report and a Notice of Injury form on May 3, 2018.

In the Incident Report, Petitioner noted she was walking down stairs and her right foot got caught on the stairs which caused her to trip. Petitioner grabbed both handrails and, in doing so, she strained both shoulders, her neck and back and her right foot/shin (Petitioner's Exhibit 10).

In the Notice of Injury form, Petitioner wrote she was "reading TB tests" while walking down the stairs and caught her toe/front of foot/shin on the stairs. Petitioner indicated she injured both shoulders/forearms, back, neck and her right foot/shin (Petitioner's Exhibit 10).

In the Supervisor's Report of Injury, completed by R. Skidmore, the accident was described as having occurred when Petitioner was walking down stairs and her foot got caught on a step which caused her to fall forward. When Petitioner fell forward, she injured both shoulders/forearms, back, neck and right foot/shin (Petitioner's Exhibit 10).

Petitioner was initially evaluated by M. Zimmer, a Nurse Practitioner, employed by Respondent, on May 3, 2018. According to NP Zimmer's report, Petitioner started to fall down stairs, caught herself on the rails, hyperextended both shoulders/arms and hurt her right foot. NP Zimmer opined Petitioner should follow up with her primary care physician if the conditions worsened (Petitioner's Exhibit 10).

Petitioner was subsequently seen by Dr. Jennifer Rose, her family physician, on May 7, 2018. Petitioner informed Dr. Rose she sustained an injury on May 3, 2018, while coming down stairs and that she caught her right toe on the stair and was able to catch herself, but wrenched her shoulders when she did so. Petitioner's primary complaint was pain in the neck and both shoulders. Dr. Rose prescribed medication and ordered physical therapy (Petitioner's Exhibit 3).

Petitioner received physical therapy from May 29, 2018, through July 3, 2018. In the physical therapy record of May 29, 2018, it was noted Petitioner injured herself when she slipped while going down stairs at work because "...food had been dropped on the stairs" (Petitioner's Exhibit 5).

Dr. Rose referred Petitioner to Dr. Jeffery Jones, an orthopedic surgeon. Dr. Jones first saw Petitioner on August 17, 2018. According to his record of that date, Petitioner complained of pain referable to the cervical spine which was "chronic non-traumatic." There was no reference to Petitioner's work-related accident of May 3, 2018 (Petitioner's Exhibit 6).

Petitioner was subsequently seen by Dr. John Davis, an orthopedic surgeon associated with Dr. Jones, on September 19, 2018. In Dr. Davis' record of that date, it was noted Petitioner sustained an accident on May 3, 2018, when Petitioner caught herself falling down stairs and had persistent pain in the neck and bilateral shoulders thereafter (Petitioner's Exhibit 6).

Dr. Jones and Dr. Davis treated Petitioner for her neck and bilateral shoulder symptoms through March 11, 2019. They prescribed medication and administered cortisone and epidural steroid injections (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on December 14, 2018. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records provided to him by Respondent. According to Dr. Chabot's report, Petitioner informed him that on May 3, 2018, she was coming down stairs, slipped on the stairs and grabbed hold of a rail to prevent her falling, but jarred herself. Dr. Chabot opined Petitioner had sustained neck and shoulder strains as a result of the accident, but also noted Petitioner had a prior history of chronic complaints referable to the cervical spine. Dr. Chabot also opined Petitioner exhibited signs of symptom magnification (Respondent's Exhibit 3).

Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon, on April 17, 2019. When seen by Dr. Gornet, Petitioner advised that on May 3, 2018, she was walking down some stairs and there was a slippery substance on the stairs which caused her foot to slip suddenly and she grabbed both handrails. When seen by Dr. Gornet, Petitioner complained of pain referable to the neck and both shoulders, more right than left (Petitioner's Exhibit 8).

Dr. Gornet ordered additional diagnostic studies in regard to Petitioner's right shoulder and cervical spine. However, the diagnostic studies were not performed. Dr. Gornet last saw Petitioner on November 14, 2019, and he reviewed Dr. Chabot's report at that time. He noted Petitioner had minimal to no symptoms and authorized her to return to work without restrictions (Petitioner's Exhibit 8).

At trial, Petitioner testified she no longer works for Respondent. Petitioner still works as an RN, but her current job does not require her to lift patients. Petitioner complained of pain and a diminished range of motion in her neck and both shoulders. Petitioner has experienced sleep disruption and continues to take a muscle relaxer on an as needed basis.

Conclusion of Law

In regard to disputed issue (C) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not sustain an accidental injury arising out of and in the course of her employment by Respondent on May 3, 2018.

In support of this conclusion the Arbitrator notes the following:

At trial, Petitioner testified she was not reading and walking at the same time when she sustained the accident; however, in the Notice of Injury, which Petitioner completed and signed, she wrote she was "reading TB tests."

At trial, Petitioner testified she slipped on something on the stairs, but did not know what it was; however, the physical therapy record of May 29, 2018, stated Petitioner slipped on the stairs because food had been dropped on the step.

In the Incident Report and Notice of Injury form, Petitioner indicated her right foot got caught on the stairs while she was walking. Petitioner did provide a similar history to Dr. Rose and Dr. Davis.

When Petitioner was seen by Dr. Chabot, the history she provided was that she slipped on the stairs and grabbed the rail.

When Petitioner was seen by Dr. Gornet, she advised she fell because of a slippery substance on the steps.

Based upon the preceding, the Arbitrator notes there are inconsistencies in the various histories of the accident provided by Petitioner to Respondent and the various medical providers.

While there is no question Petitioner sustained a fall on the stairs on May 3, 2018, it is not clear what caused Petitioner to sustain the fall.

The act of Petitioner walking down a flight of stairs and sustaining a fall because of a reason which cannot be determined presents a situation in which Petitioner was not subjected to a risk of injury greater than that of the general public. An accidental injury sustained under these circumstances is not compensable. *Caterpillar Tractor Co. v. Industrial Commission*, 541 N.E.2d 665 (Ill. 1989).

In regard to disputed issues (F), (J) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (C).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Welch,

Petitioner,

20IWCC0642

vs. NO: 17WC 034537

Repair Masters Construction,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

20IWCC0642

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 29 2020
o090120
MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

WELCH, ROBERT
Employee/Petitioner

Case# **17WC034537**

REPAIR MASTERS CONSTRUCTION
Employer/Respondent

20IWCC0642

On 9/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0265 HEYL ROYSTER VOELKER & ALLEN
DAN SIMMONS
PO BOX 9678
SPRINGFIELD, IL 62791

20 IWCC0642

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ROBERT WELCH,
Employee/Petitioner

v.

REPAIR MASTERS CONSTRUCTION,
Employer/Respondent

Case # **17** WC **34537**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **7/31/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **8/23/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

In the year preceding the injury, Petitioner earned $**5,831.00**; the average weekly wage was $**680.00**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/23/17. Petitioner's claim for compensation is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/14/19
Date

ICArbDec19(b)

SEP 4 - 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 57 year old lead man/carpenter, alleges he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/23/17. Petitioner alleges an injury to his low back.

On 8/23/17 petitioner testified that he and his fellow workers brought some walls in to set up. They first got the 8 foot wall set. Next, they were going to the set the back wall which was larger. They picked up the wall and began to walk with it to set it up. Petitioner stated that he did not see the edge of the concrete slab and stepped off it, 14-18 inches down. Petitioner testified that when he stepped off the edge he went down to his knees. When he was able to get up he felt a little pain in his back and groin area. Petitioner testified that his foreman was working with him.

Petitioner presented to the emergency room at Memorial Hospital at 11:23 am. He complained of right flank and abdomen pain for the past 40 minutes. Petitioner underwent an ultrasound of his gallbladder. The history was right-sided flank pain, nausea and vomiting. The gallbladder was well distended. There was a minimal amount of sludge in the gallbladder neck. Otherwise, it was a normal gallbladder and common bile duct. Petitioner also underwent CT of the abdomen/pelvis with and without contrast. The indication was right sided flank pain since the morning. He denied nausea, vomiting and hematuria. It was noted that petitioner had a history of kidney stones requiring surgery. The results were no acute findings to explain the patient's symptoms. It also revealed mild diverticulosis, mild diffuse fatty infiltration of the liver, and multilevel spondylosis of the thoracolumbar spine. Petitioner was told to follow-up with Dr. Zachary Sims, his PCP regarding his back pain, and given back exercises.

After he was released from the hospital he still had pain. He testified that while talking with his supervisor Andy Schwartz, about his back, Schwartz told him that he gets treatment from a chiropractor on occasion. Petitioner decided he would take that advice and seek some chiropractic treatment.

On 8/25/17 petitioner presented to Dr. Peter Curtis, a chiropractor, with complaints of right SI/right groin pain related to rolling his ankle after stepping down off of a step. He stated that he nearly fell, but caught himself. He reported pain into his right thigh. He also reported difficulty standing straight. He reported that he had low back pain immediately after the accident. He reported that he could not work. He reported problems with dressing, standing, walking, kneeling, and bending since the incident. Dr. Curtis diagnosed a sprain of the ligaments of the lumbar spine, radiculopathy of the lumbar region, and segmental and somatic dysfunction of the lumbar, pelvic and sacral regions. Petitioner underwent additional chiropractic treatment on 8/28/17, 8/30/17, 9/6/17, and 9/8/17. On each visit Dr. Curtis noted

that petitioner responded favorably to treatment and was progressing as expected. On 9/11/17 petitioner stated that he was making good progress until 9/10/17. He denied doing anything that would have caused a flare up but presented with increased low back pain, right groin pain and right leg pain.

On 8/31/17 the Illinois Form 45: Employer's First Report of Injury was completed. The injury was identified as occurring in 8/16/17 at 10:00 am. The injury was a herniated disc to the right lower back. It was noted that the injury occurred setting garage walls. It further noted that petitioner slipped off slab and dropped down about 8" carrying a garage wall. This form is unsigned and there was no evidence offered as to who completed it.

On 9/14/17 petitioner followed-up with his PCP, Dr. Zachary Sims for unrelated conditions. Petitioner reported no new trauma and made no mention of any low back, right leg or groin problems.

On 9/27/17 petitioner presented to physician's assistant Becky Jo Hanna for complaints of acute back pain for the past 6 weeks. He gave a history of lifting a heavy wall and had severe back pain. He also reported pain down his right leg. He reported that he had chiropractic treatment but did not improve. Petitioner reported that despite his pain he has continued to work and does a labor type job which includes lifting, laying floors, etc. He also stated that respondent referred him to MOHA, and MOHA referred him to Dr. Narla, and he will see him on 10/18/17. He stated that his current regimen of Norco 7.5 mg three times a day was not controlling his pain. He noted that he was taking it 5-6 times a day. He complained of radiating pain bilaterally down his legs to his proximal thighs.

On 9/27/17 petitioner presented to the emergency room at St. John's Hospital for a chief complaint of back pain with an onset 2 weeks prior to arrival. He complained of severe lower back pain which was aggravated by movement. He described the pain as radiating to his right groin and front of his right leg. He also complained of weakness and a sensation of his right leg being "dead". He stated that he may have injured his back in the past but does not recall the inciting incident. He reported his back pain began to flare up that morning and became severe. He had an MRI of his lumbar spine. The impression was multilevel degenerative disc disease and facet arthropathy with stenoses. An MRI of the thoracic spine showed no definite evidence of acute traumatic injury, fracture or ligamentous disruption in the thoracic spine. There were disc bulges at T9-T10, T10-T11, and T11-T12 resulting in multilevel mild central canal narrowing and neural foraminal narrowing. Petitioner was taken off work until 10/3/17.

On 10/4/17 petitioner presented to Midwest Occupational Health Associates (MOHA). He reported that on 8/16/17 he was carrying a wall with another employee. As he was placing this wall on a ledge, walking sideways, he accidentally stepped of the ledge. He continued to hold the wall to avoid injuring

his colleague. He the stepped down onto the right side, holding the wall, leaning toward the right. He reported that the wall was 15-20' long and 8' high. He stated that it was a premanufactured wall which weighed approximately 225 pounds with 2 individuals carrying the wall. He reported that as soon as the accident happened he experienced pain in the low back and pain that shot down to his right anterior thigh. He reported that he had treatment but the pain was not relieved for long. He complained of ongoing symptoms. Petitioner reported that he was sent to MOHA by the respondent. Michelle Smart, APN-CNP, examined petitioner, reviewed the diagnostic test results, and assessed thoracolumbar pain with radicular symptoms in the right lower extremity. Petitioner was referred to Dr. Narla. Smart told petitioner that since he had a chronic pain contract with Dr. Sims he would need to see him for any narcotics. Smart gave petitioner restrictions for no lifting, pushing/pulling over 20 pounds; no repetitive waist bending; and sit down/stand up as needed.

On 10/9/17 petitioner returned to the emergency room at St. John's Hospital with a complaint of lower back pain with an onset still present since his last visit. He stated that his pain was sharp and radiated around his right hip into his right groin and down his right leg. He denied any recent injury. He reported intermittent right leg numbness since he hurt his back. Petitioner was authorized off work until 10/12/17. Petitioner requested oral pain medication instead of an injection. He was diagnosed with chronic low back pain with right-sided sciatica.

On 10/9/17 Jill Todd, Claims Assistant, completed the First Report of Illness or Injury for petitioner's claim. The date of injury was identified as 10:00 am on 8/16/17. The injury was a strain of the lower back area. It was noted that "the employee has right lower back herniated disc".

On 10/12/17 Dr. Sims drafted an off work excuse for petitioner without any accompanying examination.

On 10/17/17 petitioner again returned to the emergency room at St. John's Hospital with increased back pain for the past three days. He reported that he had been experiencing persistent back pain since his accident on 8/16/17, but fell again on Saturday morning while he was fishing. He noted that he slipped on some moss and hit his back on a set of nearby steps. He stated that the pain began in his mid-thoracic region but was greatest in the lower back, radiating down his right lower extremity. He also reported numbness and tingling in the right lower extremity that was no worse than baseline. He stated that he was supposed to see his neurologist the next day but was not able to get a call back from his PCP for the referral that was needed. Petitioner underwent a CT scan of the thoracic and lumbar spines. The thoracic scan showed no evidence of an acute thoracic fracture or dislocation. The lumbar scan showed no evidence of any acute lumbar spine fracture or focal bone destructive lesion, and advanced chronic

degenerative disc disease/spondylosis at T12-L1 and L1-S2, as well as L5-S1. These findings were similar to the MRI performed 9/27/17. Petitioner stated that he was out of pain medication.

On 10/18/17 petitioner presented to Dr. Rachel Rahman for back pain. He reported that he injured himself at work a couple months ago while he and a co-worker were carrying a 16 foot wall, stepped off a slab, his knee went out and he went down to the ground on one knee while holding the wall and felt immediate pain in his back. Dr. Rahman noted that petitioner's Norco was increased to 10mg 3x a day until he could be evaluated by Dr. Narla.

On 10/19/17 petitioner returned to MOHA. Petitioner reported that he was not working because respondent could not accommodate his restrictions. He stated that he was aggravated with his current back condition. A slight limp on the right was noted. Following an examination petitioner was assessed with thoracolumbar pain and radicular pain to the right thigh. Petitioner was told they would try and get him an appointment with Dr. Narla. Petitioner was prescribed physical therapy. His restrictions remained unchanged.

On 11/2/17 petitioner did not show for his appointment with MOHA.

On 11/6/17 petitioner returned to Dr. Sims. Dr. Sims prescribed Hydrocodone-Acetaminophen 10-325 mg and told him it had to last one month. He was there for a medical follow-up. He reported that he lost his wife the prior month. He rated his back pain at a 7/10. Petitioner had a controlled substance agreement for pain medication. The accident history was the same as was documented on 10/18/17.

On 11/7/17 petitioner returned to MOHA for reevaluation of his low back pain and radiculopathy into the lumbar region. He reported that his condition was unchanged. He rated his pain at a 7/10. It was noted that the MRI showed degenerative disc disease and a disc protrusion touching the nerve root but not impinging upon the nerve root. He reported that he missed his prior appointment because he was sick and had just buried his wife on 10/27/17. Following his examination petitioner was assessed with low back pain and lumbar radiculopathy. His restrictions were continued. They indicated that they would continue to try and get authorization for therapy and a visit to Dr. Narla. Petitioner's further visits with MOHA were cancelled due to the insurance company not authorizing any further appointments.

On 11/15/17 petitioner presented to the emergency room at St. John's Hospital complaining of increased lower back pain, and 3 days of new onset of fecal incontinence and tingling in his perineum. He underwent a repeat CT scan of the lumbar spine that was unchanged from a month ago. They had no explanation for fecal incontinence based on the CT findings, although canal foraminal stenosis are more completely assessed by an MRI. Degenerative disc disease was most pronounced at the L1-L2 level,

with moderate to severe left-sided foraminal stenosis and lateral recess narrowing. Petitioner was neurologically intact as it related to both lower extremities. Rectal tone was normal. He did not meet the criteria for cauda equina syndrome.

On 11/16/17 petitioner followed-up with Dr. Wendi Wills El-Amin. Petitioner complained of pain in his back shooting down his right leg. He reported that he was at St. John's emergency room the night before, and they felt the concern for cauda equina was minimal as he had normal rectal tone. Petitioner denied loss of bowel overnight, however, the past 3 nights prior he had loss of bowel during the night. He stated that he had not established care with an orthopedist, and that he needed a referral to Prairie Spine and Pain Institute, per his attorney, because they work with them.

On 11/16/17 petitioner presented to the emergency room at Memorial Hospital at about 11:00 am. He stated that his PCP told him to go to the emergency room to a have an MRI done. Petitioner complained of severe right low back pain that radiated to his groin and down his right leg. He reported that over the last 3 days he had urinary hesitancy and bowel incontinence. He gave a history of injuring himself at work on 8/23/17, and that is when his pain started, and had been constant and gotten worse ever since. He rated his pain at a 10/10. He reported that he woke three times during the week with loss of bowel control. It was noted that petitioner had a history of bulging discs on MRI dated 9/23/17. A new MRI of the lumbar spine revealed stable multilevel spondyloarthropathy most pronounce at L2-L3 where a disc bulge with rim osteophytes causing mild spinal canal stenosis that may contact the ventral nerve roots of the cauda equina, and cause moderate left and mild right neural foraminal stenosis in association with facet hypertrophy and ligamentum flavum thickening. Petitioner was diagnosed with lumbar radiculopathy and told to follow up with Dr. Christopher Graves and Zachary Sims.

On 11/27/17 petitioner followed-up with Dr. Sims. He requested a referral to Prairie Spine and Pain Clinic to see Dr. Kube for low back pain status post injury, and right knee pain. The accident history of an accident on 9/27/17 remained unchanged.

On 12/7/17 petitioner presented to Lori Welke, Physician's Assistant, at Prairie Spine and Pain Institute (PSPI). He gave a history of putting up a 16' garage wall and falling 12-18" holding onto the wall, and falling to his knees. He reported that this happened on 8/23/17. He complained of back pain, as well as leg pain, weakness and numbness. He reported that he was out of Norco. He denied any back pain or problems prior to the incident. He reported loss of bowel control at least 6 times since the incident. Dr. Kube saw petitioner and sent him to hospital for postvoid bladder ultrasound. He also noted that petitioner did not have rectal tone as expected. Dr. Kube gave him 90 pills of Norco.

On 12/12/17 petitioner returned to Dr. Kube. His right lower extremity examination was consistent with an L2 or L3 radiculopathy. He noted that the petitioner had a pretty significant finding at the L1-L2 disc with a significant amount of marrow change there. He believed that this was likely where a lot of his problem could be emanating from. He also noted that there was some stenosis, but not severe stenosis at any of the upper lumbar levels that was very specific to singular level. Dr. Kube wanted to get a motion analysis, and put petitioner in a brace. He also wanted a nerve study. Petitioner's post void bladder test was normal. He ordered physical therapy and restricted petitioner to sedentary activity. On 12/21/17 petitioner presented to Dr. Kube for a Norco refill. He also stated that the brace was worsening his condition. Dr. Kube noted that the vertebral motion analysis was normal except for reduced disk height at L1-L2.

On 1/4/18 petitioner underwent an EMG of his lower extremities performed by Dr. Trudeau on the referral of Dr. Kube and Dr. Sims. He reported that he injured his low back on 8/23/17 and since that time has had severe back and right lower extremity pain, paresthesias, weakness, and difficulty getting through even just minimal daily activities. He reported that he cannot work for respondent because they don't permit restrictions. The interpretation was right L2 radiculopathy, moderately severe; right S1 root irritation, relatively mild, and no evidence of other radiculopathy, lumbar plexopathy, entrapment neuropathy, or mononeuritis multiplex.

On 1/11/18 petitioner returned to Welke complaining of a lot of pain. He stated that his current pain medication was not cutting it. Welke prescribed Tramadol in addition to a refill of 120 Norco. On 1/16/17 Dr. Kube reviewed the EMG with petitioner and told him that the L1-L2 seemed the most severe and was most consistent with his examination. He recommended and ESI at L2. He continued petitioner in therapy.

On 1/17/18 petitioner presented to Dr. Supriya Gupta for a pre-operative examination.

On 2/1/18 petitioner told Welke that he was scheduled for the ESI, but had to reschedule. He still complained of a significant amount of pain and constant leg radiculopathy. He needed refills of the Tramadol (120) and Norco (120) and Welke gave him them.

On 2/12/18 petitioner underwent transforaminal lumbar epidural steroid injections at L1-L2 and L2-L3. These injections were performed by Dr. Kube. Petitioner reported that after the numbing medication wore off his pain returned to 6/10, but was better than before the injections. He stated that he still had to take pain medication. Petitioner followed-up with Dr. Kube on 2/20/18. Dr. Kube recommended a decompression and fusion. Dr. Kube prescribed another 120 Norco. On 3/8/18, 4/9/18 petitioner's

Norco, Tramadol and cyclobenzaprine were refilled. Dr. Kube took him off work. On 5/4/18 petitioner called for a refill of his medications. On 5/8/18 Dr. Kube examined petitioner and refilled them. His recommendations remained the same. There was some discussion about petitioner's small ice slip and if this was an intervening injury that changed his condition. Dr. Kube ordered a new MRI to make sure. He continued petitioner off work.

On 5/18/18 petitioner underwent an MRI of the lumbar spine. The impression was multilevel degenerative changes in the lower thoracic and lumbar spine contributing to varying degrees of spinal canal and foraminal stenosis. Dr. Kube reviewed the results on 5/24/18 with petitioner. He was of the opinion that petitioner's primary issue was the original injury, and that was the need for his surgery. Dr. Kube prescribed Vistaril so as not to raise the dosage of his current medications. He continued petitioner off work pending surgery.

Petitioner followed-up with Dr. Kube on 6/5/18, 7/3/18, 7/20/18, 8/3/18, 9/4/18, and 10/4/18 for medication refills. Dr. Kube continued him off work pending surgery.

On 10/18/18 the evidence deposition of Dr. Kube, an orthopedic surgeon, was taken on behalf of the petitioner. He testified that he was recommending a fusion at L1-L2. Dr. Kube opined that based upon the history of the accident that petitioner provided, and the contemporaneous onset of symptoms that he described, and the continuation of those symptoms since then, the aggravated stenosis at L1-L2 causing an L2 radiculopathy, and the back pain associated at L1-L2 would be causally related to the event, as would the surgical treatment he was recommending. He was further of the opinion that the incident would also be related to his need for medical treatment. Dr. Kube opined that the treatment he provided petitioner to date was reasonable and necessary for his condition of ill-being in his lumbar spine.

On cross examination Dr. Kube opined that he was operating based upon the symptomatology that petitioner had at L1-L2 and not the fact that he has preexisting degenerative disc disease at that level. He further opined that although petitioner has degenerative disc disease at other lumbar disc levels they were not aggravated by this incident.

Petitioner testified that he wants to undergo the surgery recommended by Dr. Kube. Currently, petitioner can't sit for too long or walk far because that hurts his back. He can only pick up a ½ gallon of milk. He testified that his groin pain had subsided. Petitioner reiterated that he got hurt on 8/23/17, and did not go to the emergency room on 8/16/17 or hurt himself that day.

On cross examination petitioner testified that in October of 2017 he went fishing and was sitting on a cooler. When he got up he slipped on some moss and landed on his buttock on the concrete. He testified that he went to the hospital, had a 2nd MRI and it was the same.

B. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner alleges he sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent on 8/23/17 while carrying a prefabricated wall. He testified at trial that he stepped off the edge of a concrete slab while carrying the wall with co-workers, fell 14-18 inches down, and went down to his knees. He testified that he experienced a little pain in his back and groin area. Petitioner testified that his foreman was working with him. However, there is no credible evidence in the record to support a finding that he reported the incident to his foreman or anyone else on that date.

Petitioner presented to the emergency room at Memorial Hospital at 11:23 am on 8/23/17. He complained of right flank and abdomen pain for the past 40 minutes. He also reported a history of nausea and vomiting. His gallbladder was well distended. It was noted that petitioner had a history of kidney stones requiring surgery. An ultrasound of the gallbladder showed minimal sludge in the gallbladder neck. A CT of the abdomen/pelvis showed no acute findings to explain the petitioner's symptoms, but did show mild diverticulitis, mild diffuse fatty infiltration of the liver, and multilevel spondylosis of the thoracolumbar spine. The arbitrator finds it significant that petitioner gave no history of any injury to his low back that allegedly happened that same morning while working, just prior to his visit to the emergency room.

Petitioner testified that he still had pain after he left the hospital. He also testified that he spoke with Andy Schwartz, his supervisor, about his back and Schwartz told him that when he has back pain he gets treatment from a chiropractor. The arbitrator finds the credible record contained no evidence to support a finding that petitioner provided Schwartz with a history of his alleged injury at work on 8/23/17. Also, petitioner did not provide any testimony as to when he had this conversation with Schwartz.

Petitioner presented to Dr. Curtis, a chiropractor, on 8/25/17. He gave a history of right SI/groin pain after rolling his ankle after stepping down off of a step. He did not give any history of this occurring at work. Additionally, the arbitrator notes that the history petitioner gave Dr. Curtis is inconsistent with his testimony at trial of stepping off a concrete slab and falling 14-18" onto his knees while carrying a wall at work with his coworkers.

The Illinois Form 45 was allegedly completed on 8/31/17, with an accident date identified as occurring on 8/16/17, not 8/23/17. The injury was identified as happening while setting up garage walls. The history was that petitioner slipped off slab and dropped down about 8" while carrying a garage wall. The arbitrator finds it significant that the injury was identified as a herniated disc to the right lower back, despite the fact that there were no credible medical records offered into evidence for the period 8/16/17-8/31/17 that include any diagnostic tests showing a herniated disc, or any doctor diagnosing a herniated disc. Additionally, the arbitrator finds it suspicious that this Form 45 was not signed.

Petitioner's next treatment was not until 9/14/17. On that date petitioner presented to Dr. Sims, his PCP for an unrelated condition. Petitioner made no mention of any work related injury, and also had no complaints related to his low back.

On 9/27/17 presented to physician's assistant Hanna with complaints of acute back pain for 6 weeks following the lifting of a heavy wall. The arbitrator finds 6 weeks prior to this visit would put the alleged injury on or about 8/16/17. Either before or after he presented to Hanna on 9/27/17 petitioner also presented to the emergency room with a chief complaint of back pain with an onset 2 weeks prior to arrival. The arbitrator finds this would put the onset of his back pain on or about 9/13/17. The arbitrator finds it significant that petitioner again failed to provide any history of an injury at work, and that within the same day petitioner provided two entirely different onset of symptom dates. Petitioner also reported to the emergency room that he may have injured his back in the past but did not recall the inciting incident.

Petitioner's next treatment date was 10/4/17. On that date he reported that his injury occurred on 8/16/17 while carrying a wall with another employee. The arbitrator finds it significant that it was noted at this visit that petitioner had a chronic pain contract with Dr. Sims, from which the arbitrator reasonably infers that the petitioner had a preexisting issue with narcotics. However, no credible evidence was offered that showed the preexisting condition for which petitioner was taking narcotics.

On 10/9/17 the First Report of Illness or Injury was completed by Todd, the Claims Assistant. The date of injury was again identified as 8/16/17, not 8/23/17.

On 10/17/17 petitioner returned to the emergency room with increased back pain for the past three days. He reported pain since his accident on 8/16/17, not 8/23/17. He also reported that three days prior he slipped and fell on some moss while fishing and struck his back on a set of nearby steps. He reported pain in his midthoracic region, but reported that his pain was greatest in his low back radiating down his right leg.

The next day, 10/18/17, petitioner presented to Dr. Rahman, and gave an accident history similar to the history he testified to at trial.

On 11/16/17 and 11/27/17 petitioner requested a referral to Dr. Kube at Prairie Spine and Pain Clinic, per his attorney, because they work with him. When petitioner did present to Dr. Kube's physician's assistant on 12/7/17 he gave a history of putting up a garage wall and falling 12-18" inches onto his knees on 8/23/17.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent on 8/23/17. In support of this finding the arbitrator relies heavily on the credible evidence most contemporaneous to the alleged injury. Although the petitioner claims he injured himself at work on 8/23/17 there are no accident reports or witness reports that support a finding that he sustained any injury on 8/23/17. In fact, the only accident reports completed identify an injury date of 8/16/17. The arbitrator also finds it very significant that when petitioner presented to the emergency room on the morning of 8/23/17, allegedly right after the incident, there is absolutely no mention of any workplace injury that morning, or a history of any workplace injury at all. In fact, the petitioner only complained of right flank and abdomen pain for the past 40 minutes, with accompanying nausea and vomiting when he presented to the emergency room on 8/23/17. Even when petitioner next sought treatment on 8/25/17 the only history he provided was that he had right S1/right groin pain after he rolled his ankle after stepping down off a step and catching himself. Again, the arbitrator finds it significant that petitioner made no mention that this injury occurred at work, and that this history is inconsistent with the history he gave at the emergency room on 8/23/17. Additionally, when petitioner saw Dr. Sims on 9/27/17 he gave a history of an injury on 8/16/17, not 8/23/17. Then on 9/27/17 he again presented to the emergency room with complaints of back pain with an onset of injury 2 weeks prior, which would have put the onset of his back symptoms as 9/13/17.

Given the absence of any accident history made contemporaneous to the alleged injury, the lack of any accident history and accompanying symptoms reported by the petitioner when he presented to the emergency room less than an hour after the alleged injury; the inconsistent accident histories in the medical records; the inconsistent accident dates in the credible medical records and accident reports; the various "onset of symptoms" dates in the credible medical records; and, the lack of any supervisor/employee witness testimony or reports to corroborate the petitioner's alleged work injury on 8/23/17, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence

that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/23/17.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/23/17, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Honnies,

Petitioner,

20IWCC0643

vs.

NO. 18WC008267

State of Illinois/Graham Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given, the Commission, after considering the issues of accident, medical expenses, causal connection, and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: OCT 30 2020
SJM/sj
o-10/20/2020
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas D. McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HONNIES, SCOTT Case# **18WC008267**

Employee/Petitioner

STATE OF IL/GRAHAM C C **20IWCC0643**

Employer/Respondent

On 2/10/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

0236 ASSISTANT ATTORNEY GENERAL
KAYLA KOYNE
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST, 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
RISK MANAGEMENT SERVICES
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 10 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0643

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Scott Honnies
Employee/Petitioner

v.

State of IL/Graham C.C.
Employer/Respondent

Case # 18 WC 08267

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on December 12, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On January 26, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $74,121.36; the average weekly wage was $1,425.41.

On the date of accident, Petitioner was 45 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $541.79 for other benefits, for a total credit of $541.79.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical bills as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by the providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $950.27 per week for five and one-sevenths weeks (5 1/7) weeks commencing August 15, 2018, through September 19. 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $790.27 per week for 55.375 weeks because the injury sustained caused the 12 1/2% loss of use of the right hand and the 12 1/2% loss of use of the right arm as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

February 6, 2020
Date

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent. The Application alleged a date of accident (manifestation) of January 26, 2018, and that Petitioner sustained "Repetitive trauma" to his "Right wrist/elbow/arm" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in May, 1995, and worked as a Correctional Officer at Graham Correctional Center. Since becoming employed by Respondent, Petitioner worked the day, afternoon and night shifts. Irrespective of which shift Petitioner worked, he testified he spent 85% of his time working in Respondent's housing units.

Petitioner testified at length regarding his job duties, specifically, the repetitive use of his right hand/arm. Petitioner is right hand dominant. Petitioner was in charge of a housing unit which contained 100 inmates and 50 cells. Each housing unit had four wings and Petitioner was required to perform a wing check on each one every 30 minutes. The doors to the cells had to be locked/unlocked on a regular basis during a shift. When Petitioner was on the night shift, this had to be done twice during the shift. When the inmates were fed breakfast, the cell doors had to be unlocked to feed them and locked afterward.

Petitioner testified the keys used to lock/unlock cell doors and padlocks were similar to house keys, but slightly larger. However, the locks on the main doors that were to the control room or wings were opened by Folger Adams keys. Petitioner stated Graham Correctional Center was built in 1979/1980. He stated it was common for the locks to stick when he locked/unlocked them. There were occasions in which the keys would bend and it was possible to break the keys because of the age of the locks. In some of the wings, Petitioner had to lock/unlock chuckholes to feed the inmates and extra force was many times required to lock/unlock them.

Petitioner also used keys to deliver mail to inmates. Petitioner estimated he would lock/unlock 50 to 100 locks per hour. There were also occasions in which Petitioner worked in the segregation unit. In the segregation unit, the inmates were on "lockdown" 24 hours a day. When there was any movement of such an inmate, multiple locks had to be locked/unlocked. This included chuckholes, padlocks and handcuffs.

Petitioner was also required to perform shakedowns of inmates which included going through each inmate's property. This was an extensive search of an inmate's cell and required 30 to 45 minutes.

Petitioner also rapped bars in both the showers and the segregation unit and law library. Petitioner stated that all of the aforementioned activities required the use of both hands/arms, but he used his dominant right hand for most of the activities. Petitioner also testified he worked a significant amount of overtime and it was common for him to work two to three 16 hour days per week over the preceding 17 years.

Petitioner testified that in the course of performing his job duties, he experienced numbness/tingling in his right hand/arm. These symptoms progressed to the point to where his right hand would be numb, tingle, cramp and be painful. Petitioner stated the pain would go up into his right elbow.

Petitioner testified he was 6'1" tall and weighed 230 pounds. Petitioner has not been diagnosed with diabetes, gout or rheumatoid arthritis. Petitioner acknowledged he has hypertension; however, it is controlled with medication. Petitioner also stated he has owned a motorcycle since 2012, but he only put 6,000 miles on it since then. Petitioner stated he only puts about 500 to 600 miles a year on the motorcycle. Petitioner said it was a "Victory" motorcycle and there is very little vibration in the handlebars.

Petitioner initially sought medical treatment from Dr. Josh Billington, his family physician, on January 11, 2018. At that time, Petitioner complained of numbness in his right hand and, when he bent his right hand in certain positions, numbness radiated up his arm and into his first, second and third fingers. Petitioner did not make any reference to his activities at work. Dr. Billington opined Petitioner may have had right hand carpal tunnel syndrome and he ordered EMG/nerve conduction studies of Petitioner's right upper extremity (Petitioner's Exhibit 3).

The EMG/nerve conduction studies were performed on January 26, 2018 (the date of manifestation alleged in the Application). The studies were positive for severe median mononeuropathy at the right wrist and moderate ulnar neuropathy at the right elbow (Petitioner's Exhibit 4).

Petitioner was again seen by Dr. Billington on January 30, 2018. Dr. Billington reviewed the findings of the EMG/nerve conduction studies with Petitioner. Dr. Billington also signed an "Initial Workers' Compensation Medical Report" which noted there was no acute accident, but years of progressing numbness and weakness of the right hand (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Dr. Mark Greatting, an orthopedic surgeon, on May 17, 2018. At that time, Petitioner complained of numbness/tingling in both hands, right more than left. Petitioner advised he been bothered by this for a long time and it was getting progressively worse. Petitioner advised Dr. Greatting he worked as a Correctional Officer for 23 years and his job duties required him to lock/unlock cells, padlocks and chuckholes on a daily basis, that there were 50 cell doors per house, and some of the locks are very difficult to lock/unlock and require a significant amount of force. Dr. Greatting also noted Petitioner was slightly overweight and rode a motorcycle, but only about 2,000 miles a year (Petitioner's Exhibit 5).

Dr. Greatting examined Petitioner and there were positive findings indicative of both right carpal tunnel and cubital tunnel syndrome. Dr. Greatting reviewed the EMG/nerve conduction studies and noted they were positive for severe right carpal tunnel syndrome and moderate right cubital tunnel syndrome. Dr. Greatting recommended Petitioner undergo both carpal tunnel and cubital tunnel surgical release procedures (Petitioner's Exhibit 5).

Dr. Greatting performed surgery on August 21, 2018. The procedure consisted of a surgical release of the ulnar nerve at the right elbow and a surgical release of the median nerve at the

right wrist. Petitioner's recovery from surgery was uneventful and Dr. Greatting authorized Petitioner to return to work without restrictions effective September 20, 2018 (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Anthony Sudekum, a hand surgeon, on June 18, 2018. In connection with his examination of Petitioner, Dr. Sudekum reviewed medical records provided to him by Respondent. Dr. Sudekum agreed Petitioner had right carpal tunnel syndrome based upon his findings on examination and his review of the EMG/nerve conduction studies. However, Dr. Sudekum questioned whether the diagnosis of right cubital tunnel syndrome was appropriate because the medical records did not indicate Petitioner had any right elbow complaints until after Petitioner retained counsel to represent him in his workers' compensation claim. Dr. Sudekum recommended Petitioner undergo another EMG/nerve conduction study in regard to Petitioner's right elbow symptoms. In regard to causality, Dr. Sudekum opined Petitioner's work activities did not cause or aggravate either Petitioner's right carpal tunnel syndrome or right cubital tunnel syndrome. He based this upon Petitioner's job not requiring consistent and strenuous forceful manual activities of frequent impact/vibration to the hands, wrists and upper extremities. Dr. Sudekum also noted there were other contributing factors, including Petitioner's age of over 45 years, obesity, hypertension and motorcycle riding (Respondent's Exhibit 6).

Dr. Sudekum was deposed on March 5, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Sudekum's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Sudekum testified Petitioner's job duties did not cause or aggravate carpal tunnel or cubital tunnel syndrome conditions. Dr. Sudekum agreed Petitioner had right carpal tunnel syndrome and surgery was indicated; however, he stated that further diagnostic studies and conservative treatment was indicated for Petitioner's right elbow condition (Respondent's Exhibit 7; pp 24-28).

Dr. Greatting was deposed on October 22, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Greatting's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to his diagnosis of right carpal tunnel and right cubital tunnel syndrome, Dr. Greatting stated the EMG/nerve conduction studies were objective and consistent with his diagnosis of right carpal tunnel and right cubital tunnel syndrome (Petitioner's Exhibit 7; pp 8-9).

In regard to causality, Dr. Greatting testified Petitioner did not have various comorbidities which can contribute to a compression neuropathy. Specifically, he stated Petitioner did not have gout, rheumatoid arthritis, diabetes, hypothyroidism and Petitioner was not "ancient." However, he did agree Petitioner had hypertension (Petitioner's Exhibit 7; pp 12-13).

Dr. Greatting testified Petitioner had been a Correctional Officer for 23 years and his description of Petitioner's job duties was consistent with what was noted in his medical record. Dr. Greatting testified the work activities did not cause his conditions to develop, but the work activities were a contributing factor which accelerated or aggravated the symptoms. Dr. Greatting further stated he did not believe Petitioner's hypertension or minimal motorcycle riding had anything to do with the development of Petitioner's conditions (Petitioner's Exhibit 7; pp 16-18).

On cross-examination, Dr. Greatting testified that his definition of "aggravation" was increased symptoms while performing the work activities. He agreed this could be temporary, but, in this case, Petitioner's symptoms had been getting worse over time. When interrogated about the specifics of Petitioner's job duties, Dr. Greatting could not testify as to the exact number of the lots Petitioner had to lock/unlock, how many cell doors or chuckholes Petitioner had to lock/unlock, etc. He also conceded Petitioner was mildly or minimally obese (Petitioner's Exhibit 7; pp 19-20, 27-30).

At trial, Petitioner testified that following surgery, his right hand/arm symptoms improved by 70 to 75%. Petitioner stated he still experiences some cramping of his right hand and he uses his left hand more. Petitioner stated he still experiences some numbness/tingling in his right elbow. He acknowledged he was able to return to work to his regular job, but that the pace he performs his work duties at has been slowed.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent that manifested itself on January 26, 2018, and his current condition of ill-being is causally related to his work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding his job duties and the repetitive use of his upper extremities was unrebutted.

Although Petitioner did not advise Dr. Billington of the details of his work activities, Dr. Billington prepared a report which noted Petitioner had experienced years of progressive numbness and weakness of the right hand.

Petitioner's primary treating physician, Dr. Greatting, opined that while Petitioner's work activities did not cause the carpal tunnel or cubital tunnel syndrome conditions, Petitioner's job activities of 23 years accelerated or aggravated the symptoms. Petitioner informed Dr. Greatting he had to lock/unlock cells, padlocks and chuckholes on a daily basis, there were 50 cell doors per house, some of the locks were difficult to lock/unlock and required a significant amount of force.

The only other significant potential contributing factors were Petitioner's hypertension, being slightly overweight and motorcycle riding. However, Petitioner's hypertension was controlled with medication, he was only minimally obese, his motorcycle riding was extremely limited and he rode a motorcycle which produced very little vibration.

Respondent's Section 12 examiner, Dr. Sudekum, opined Petitioner's job did not cause or aggravate Petitioner's right carpal tunnel syndrome or right cubital tunnel syndrome because of the lack of strenuous or forceful manual activity involving frequent impact/vibration. Dr.

Sudekum also referenced other contributing factors of Petitioner's age, obesity, hypertension and motorcycle riding.

The Arbitrator finds Dr. Greatting had sufficient information regarding Petitioner's work activities and the other potential contributing factors for him to opine as to causality.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Greatting to be more persuasive than that of Dr. Sudekum in regard to causality.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that right carpal tunnel surgery was appropriate.

In regard to the right cubital tunnel surgery, this was recommended and performed by Dr. Greatting based on his findings on examination and review of the EMG/nerve conduction studies. The Arbitrator was not persuaded by Dr. Sudekum's opinion that further diagnostic studies were indicated.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of five and one-sevenths (5 1/7) weeks, commencing August 15, 2018, through September 19, 2018.

In support of this conclusion the Arbitrator notes the following:

There was to dispute Petitioner was temporarily totally disabled during the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 12 1/2% loss of use of the right hand and 12 1/2% loss of use of the right arm.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked as a Correctional Officer at the time he sustained the accident and continues to work in that capacity. As noted herein, Petitioner's job duties require the repetitive use of both upper extremities. The Arbitrator gives this factor significant weight.

Petitioner was 45 years old at the time of the accident and 47 years old at the time of trial. Petitioner has approximately 20 years before he will attain normal retirement age and will have to live with the effects of the injury for the remainder of his working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

As a result of the repetitive trauma sustained by Petitioner in connection with his job duties, he was diagnosed with right carpal tunnel and right cubital tunnel syndrome, and surgery was required. In spite of the fact Petitioner's right hand and right elbow symptoms improved following surgery, Petitioner continues to have some right hand and right elbow complaints/symptoms consistent with the injury he sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator